WHAT IS WRONG WITH DECEIT?*

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I. Introduction

It has given me the greatest pleasure to have visited this distinguished University and its Faculty of Law. I am most grateful, and feel myself much honoured, to have been invited here as a Visiting Professor in the Departments of Jurisprudence and of Law. I have gained more than I can say from discussions and arguments with colleagues and students here and in St. Andrew's College where I have been quartered. From overseas one can obtain only a feeble grasp of the magnificence of this city and its harbour and of Australia itself. Experience has surpassed even the high expectations I had formed. This country with its physical splendour, its friendly social environment, and its admirable legal and constitutional traditions has entirely captivated me. Despite the absence of windows in my room on the thirteenth floor, new horizons have been opened to me here; and even my mode of travel to the thirteenth floor has been, in a quite special sense, an elevating experience.

May I thank you, Mr. Dean, and Professors Tay and Johnson, the heads of my two host departments, and through you and them may I thank my colleagues here for the warmth of their hospitality and friendship to me. I have embarked on the preparation of the lecture with a view to paying hereby the tribute of gratitude due to my hosts. But I shall not commit the self-deceit of supposing that it is of sufficient quality properly to repay even in a token way all that I have gained here.

When Abraham Lincoln's wife asked him one Sunday what had been the subject of the sermon he heard that day, he replied, "Sin". When she further pressed him for details of what the preacher had said about sin, the reply came back: "He was against it". My topic for today is, I suppose, a particular branch of sin, namely deceit, and I ought to say that I too am against it (at least, broadly speaking). To the question "What is wrong with deceit?" the summary answer is "Plenty", and perhaps that is all that should or need be said about it. At least, it is a fair preliminary question why a jurisprudent should risk trying the patience of a courteous and learned audience by devoting a whole lecture to it. Let me therefore answer this preliminary question, why a whole lecture on jurisprudence might be one about decit. I do so with a view to establishing the relevance of today's subject to the present state of the art in the discipline which I profess.

The point about the question "What is wrong with deceit" is, of course, that it is an evaluative question, a strongly normative question. I was myself

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particularly agitated into looking at the question by Chapter 3 of *Right and Wrong*[1] by Professor Charles Fried of the Harvard Law School. That book is itself only one among many recent distinguished works in legal and moral philosophy which go beyond the simply analytical and descriptive tasks of philosophy into evaluative questions and attempts to present rationally argued theories of the right, not simply *about* the right. Much other current work has this character, such as that by Ronald Dworkin,[2] by William Lamont,[3] by John Rawls,[4] by Robert Nozick,[5] by Friedrich Hayek,[6] by Jack Smart,[7] by John Finnis[8] and — the list would be too long for me to enumerate in a lecture.

All this theorising is closely related to a widespread current concern with practical reasoning and practical reasonableness. What can count as good reasons for legal or moral or practical decisions? *Can* there be reasoned and rational justifications for such decisions? Here one thinks of work by, for example, Joseph Raz,[9] Samuel Stoljar,[10] Robert Alexy,[11] Joseph Esser,[12] Lyndel Prott,[13] and I have had something to say on these topics myself.[14] One question which seems to me important is a question about consequentialism. Are considerations of the consequences of our rulings and decisions properly admitted as decisive to their justification wholly or in part, or are they to be dismissed as irrelevant, and the rightness of decisions to be judged by their intrinsic properties?

My question for today about deceit is a question which raises one version of that problem. Is deceiving people wrong because in particular and in general it has bad consequences? Or is it just wrong in itself because it is bad in itself? Or is it both? Is it both wrong because of its tendency to do harm *and* because of its own intrinsic nature?

These questions are not irrelevant to lawyers' concerns. For the criminal law and the private law of tort and of equitable estoppel (also indeed common law estoppel) make frauds and deceits and indeed negligent or originally innocent misrepresentations in various ways punishable or civilly remediable. What is the point served by such legal rules and principles? In turn, reflection on the rationale of the law is in my opinion always of great value to wider moral and philosophical debate.

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[1] Charles Fried, *Right and Wrong* (Cambridge, Mass., 1978).
[2] Ronald Dworkin, *Taking Rights Seriously* (Revised ed., London, 1978).
[3] W. D. Lamont, *Law and the Moral Order* (Aberdeen, 1981).
[4] John Rawls, *A Theory of Justice* (Cambridge, Mass., 1971).
[5] Robert Nozick, *Anarchy, State and Utopia* (Oxford, 1974).
[6] F. A. Hayek, *Law, Legislation and Liberty* (3 vols., London, 1973, 1975 and 1977).
[7] J. J. C. Smart, *An Outline of a System of Utilitarian Ethnics* (Parkville, Victoria, 1961); and, with Bernard Williams, *Utilitarianism: for and against* (London, 1973).
[8] John Finnis, *Natural Law and Natural Rights* (Oxford, 1980).
[9] J. Raz, *Practical Reasoning and Norms* (London, 1975).
[10] S. J. Stoljar, *Moral and Legal Reasoning* (London, 1980).
[11] R. Alexy, *Theorie der juristischen Argumentation* (Frankfurt-am-Main, 1978); discussed in MacCormick "Legal Reasoning and Practical Reason", 7 *Midwest Studies in Philosophy* February, 1982, forthcoming).
[12] J. Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (Frankfurt-am-Main, 1972); discussed in Lyndel V. Prott "Updating the Judicial 'Hunch',: Esser's Concept of Judicial Predisposition" 26 *Am. Jo. Comp. Law* (1978) pp. 461-9.
[13] Lyndel V. Prott, *The Latent Power of Culture and the International Judge* (Abingdon, England, 1979).
[14] MacCormick, *Legal Reasoning and Legal Theory* (Oxford, 1978).

Like my friend and colleague, Professor Tay, I think that no sensible person dare ignore the vast storehouse of practical wisdom secreted within our legal doctrines.[15]

Although my question about deceit is a value question, or a strongly normative one, pursuit of it cannot excuse me — or anyone — from the task of rigorous analysis. The newer developments in normative jurisprudence should not be seen as substituting for but as adding to the tasks of patient and rigorous analysis which took the centre of the jurisprudential stage in previous decades. If, for example, one wants to go in for the argument that lying and deceit are wrong because of their own intrinsic nature, one needs to say a good deal about what that intrinsic nature is — one needs to do some careful analysis.

Charles Fried, in fact, as one of the contemporary proponents of out and out anti-utilitarianism or anti-consequentialism argues that in its essential nature, subject to a very few exceptions (here he departs from his leading exemplars Kant and Augustine), lying is always categorically wrong.[16] To be lied to is to have one's rights as a rational agent violated. For one's capability of pursuing a rational life-plan is thereby as plainly impaired as if a secret neuro-surgical operation had tampered with one's brain, implanting therein the causes of false belief. Of course, he does not deny that lying can also have all sorts of bad consequences, and that these matter. Rather, his point is that always even apart from its consequences lying is a categorical wrong and an invasion of rights. Hence even good consequences would not justify it.

Unhappily, Fried's theory is vitiated by weakness and insufficiency of analysis. He quite rightly says that lying is the knowing issuance of false assertions to an addressee or audience.[17] But what he has to say on the crucial point about the nature of assertions is most unsatisfactory. "Any assertion", he says, "may be analyzed into a *statement* X (e.g. 'it is raining outside my window now') together with an assertion that X is true".[18] What it would mean for a statement X to be true Fried explains, Tarski-like, by saying "A statement is true when the world is the way the statement says it is".[19]

In addition to the oddity of defining assertions in terms of further assertions about their truth, Fried commits himself to the currently popular fallacy that a speech act such as asserting is necessarily an "institution" or "practice" defined and regulated by what we lawyers might call primary

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[15] See Alice Erh-Soon Tay, "The Sense of Justice in the Common Law" in *Justice* (ed. E. Kamenka and A. E. S. Tay, London, 1979) 79-96.

[16] Fried, *op. cit.* 54-78; at 69-78 on "justified lies", and therein a critique of Kant and St. Augustine.

[17] On reflection, Fried as summarised here by me is not "quite right". See D. S. Mannison, "Lying and Lies" 47 *Australasian Journal of Philosophy* 132-144 (1969) at 135-7; as Mannison shows, it is not a necessary condition of lying that one's assertion *be* false; it is enough that one believe it so, or even have no serious belief in its truth. See also Mannison at 132-4 for important illustrations of ways in which one can speak deceitfully or misleadingly, with intent to mislead, even though not actually lying.

[18] *Op. cit.* 55.

[19] *Op. cit.* 62.

and secondary rules.[20] This strikes me as nonsense. I am of the view, rather like that of H. P. Grice,[21] that we do not need to presuppose such rules or conventions as preconditions of relatively simple speech acts like asserting (or, therefore, lying). Provided there are linguistic conventions under which words and other symbols have meaning, what we do with them depends on the intentions we have and reveal in using these words or symbols communicatively.

The first part of my paper, the analytical part, will analyse the business of asserting in those terms. I shall also support my analysis by reference to the law.

II. The Analytical Part

Deceit in and of itself need not be a matter of words or even of symbols. One person can deceive another simply by laying false clues. During the second world war the British High Command sought to deceive the German High Command into expecting an invasion of Europe from the South in 1944, by planting bogus documents on the body of a drowned army officer whose body was caused to be washed ashore on to German-held territory. One can, as the British in this case did, deliberately act with a view to causing people to form false opinions, using means calculated and intended to have that effect. To do so is to deceive. Whether or not one does wrong in such cases depends upon the relationships between the parties. No one thinks it was wrong for the British to resort to the helps and stratagems of war in 1944. Flapping white sheets in your neighbour's garden in the hope he will think the garden is haunted seems a different case, however. In this case one may well be abusing one's neighbour's attitude of trust and credulity, and either acting against the spirit of courteous mutual regard proper to neighbourly relationships, or failing to do one's part in building such a relationship.

Telling lies, the instance of deceit on which I shall concentrate in this talk, is one special case of deceit. It has this in common with other cases of wrongful deceit. Successful lying always presupposes some "neighbourly" relationship (in the lawyer's sense)[22] between the liar and the person deceived. To understand the abuse of relationship involved, we need to examine the ingredients of a successful lie. I shall suggest there are eight, the first seven of which are also essential to truthful communication.

The first ingredient is that something must be said or (as lawyers usefully put it) "represented" by one person to another. For example: "Jones is a creditworthy person whose assets far exceed his liabilities". To

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[20] *Op. cit.*, 56-8. On "primary and secondary rules", see H. L. A. Hart, *The Concept of Law* (Oxford, 1961), chapter 5 and cf. MacCormick, *H. L. A. Hart* (London, 1981) chapter 9. For the relevance of these concepts to the analysis of "speech acts", see MacCormick, "Voluntary obligations and Normative Powers", *Aristotelian Society Suppl. Vol.* 46 (1972), 59-78, and contrast J. Searle, *Speech Acts* (Cambridge, 1969) 33-72.

[21] See H. P. Grice, "Meaning" 66 *Philosophical Review* (1957) 337-8; also P. F. Strawson, "Intention and Convention in Speech Acts", 73 *Philosophical Review* (1964) 439-60, to which I am even more indebted than to Grice's piece.

[22] In the sense, that is, of Lord Atkin's "neighbour principle", *Donoghue* v. *Stevenson* [1932] A.C. 562 at 580; 1932 S.C. (H.L.) 31 at 44.

"say" or to "represent" is to utter or otherwise signify a proposition on a matter of fact, a proposition capable of being true or false. (That such propositions can be formulated linguistically depends on linguistic conventions, of course.)

The second ingredient is that what is said or represented must be said seriously, not manifestly in jest or by way of a lawyer's or a philosopher's example, or in some other way unseriously. This conception of saying something seriously is explicable only by reference to the speaker's intention, in a quite complex way. That is, in saying that *p* he must intend his addressee to recognize that this utterance of *p* is intended to be recognized as a genuine representation of the fact of the matter as the speaker believes it to obtain, or knows it. Of course, an asserter sometimes does not believe in (or know) what he says; he can be lying. But he must intend the addressee to suppose that he means to be taken seriously, and to be revealing a patent intention to be taken seriously.

The third ingredient is that the addressee must actually recognize that the speaker's utterance of his proposition (or his gesture, or whatever) is intended seriously, and openly so intended.

Let me pause here and remark that, once one has these three ingredients established, one has a clear case of the making of an assertion. Given the utterance of a proposition, the speaker's (complex) intention to be taken seriously, and the hearer's recognition of the utterance as a seriously intended representation, the speaker has succeeded in making an assertion to that addressee.

Still, that is not enough to establish success in lying[23] (or, indeed, in honest and truthful communication). For a lie to come off, one must not merely succeed in making something one's addressee recognizes as an assertion. That assertion must be itself taken seriously, and believed. I need now to add, therefore, a fourth and a fifth ingredients.

The fourth is that the addressee, as well as recognizing that the utterance is seriously intended, must actually take it seriously: he must suppose that since the speaker says that *p* and means it seriously there is some reason for supposing that *p* is or may be true. But that, of course, is not enough to suit a liar's purposes. If the matter stops here, the addressee may do no more than allow of the possibility of *p* in framing his future calculations and plans, or he can go and check up for himself to see whether or not *p* is the case.

The fifth ingredient is therefore that the addressee must adopt a belief that *p* is true on the authority of the speaker's seriously intended assertion. Only then has the lie been successful. The speaker, knowing that Jones is *not* creditworthy, says to his addressee that Jones *is* creditworthy. He hopes his addressee will take his statement seriously and actually believe it. Only if that happens has his lie been successful. There is an exact symmetry between this case and that of honest and truthful advice etc. Knowing that

[23] I distinguish a "successful" lie, i.e. one which actually deceives the hearer from an "unsuccessful" lie, where the hearer is not deceived. "Lying" is not, while "deceiving" is, a success-word.

Jones is not creditworthy, I tell you that he is not, hoping that you will take me seriously and believe me. My advice will be ineffectual unless you do.

But this brings into focus two crucial further ingredients of deceit. Why should it ever be the case that anyone ever believes what anyone else says? I may indeed recognize that in telling me that Jones is creditworthy you intend me to take seriously, and to believe, your statement. But why on earth shall I do either?

The answer to that is in two parts, being the sixth and seventh ingredients of lying and of truthful communication.

The sixth ingredient follows from the fact that different people have different ranges of information and expertise available to them. Some matters of fact which are important to me (like why my roof is leaking) fall within other people's knowledge or expertise. Whatever they believe in such matters, they have at least better ground for their beliefs than I have for such opinions as I may hold. They have, as against me, the relative authority[24] of superior knowledge, or I think they have. One condition of a hearer taking seriously and deciding to believe what a speaker says to him is that he believes the speaker has this authority of superior knowledge. Let me call this the "authority condition".

The seventh ingredient is that the hearer repose confidence or trust in the speaker. I shall not believe what you tell me — even if you do satisfy the authority condition — unless I believe that you are speaking truthfully to me. As a reasonable person, I shall not believe that you are speaking truthfully unless you have, or I think you have, reasons to tell me the truth.

Not everybody always thinks that or has reason to think it. If the British High Command had sent a message to the German High Command telling them to expect an invasion from the south in 1944, they would not have been taken very seriously. Conversely, remember the difficulty the British had in getting Stalin to believe that Hitler was going to invade Russia in 1941. British intelligence had actually to resort to the expedient of passing their true information through a double agent — for a direct message though honest and truthful would not have been believed. Indeed, it was not believed by its recipient.

The point, then, is that a person's readiness to believe another depends upon his opinion as to the relationship in which he stands with that other. He must regard their relationship as friendly rather than hostile, and as implying some degree of mutual trust and confidence. The liar, to be successful as a deceiver, must therefore act in such a way as to generate or sustain his victim's belief that there is a relationship of real trust between

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[24] By "authority" here, I do not imply any institutionalized normative superiority or power to command or to instruct upon the facts of the matter. But if A has better access to information about x than B, or superior knowledge or experience or practical wisdom about x, then B has reason to attend to A's information or opinion about x (not necessarily to accept such uncritically). This explains both my conception, and the generally used concept, of someone's being "an authority" on matters of fact. It also shows why we are most ready to use that concept in cases where (we suppose) knowledge about x is the fruit of long and complex study and experience; for in such cases B may lack the equipment to check A's information for himself. He has to take it "on authority", or not at all.

them. Again, of course, the same goes for someone who hopes to pass true information or advice to another. Compare the sad case of the boy who cried "Wolf!" too often.

Accordingly, a condition of successful lying — as of successful information-giving or advice in good faith — is that some relationship of trust obtain between the parties. Let me call this the "trust condition".

The seven ingredients which I have here analysed are, as I have stressed, common to both truthful and deceitful assertions or representations. What it comes to is this:

> An assertion is made when a speaker utters a factual proposition to an addressee intending his addressee to recognize his utterance as (intended to be) a serious representation of a fact known to or believed by the speaker, and when the addressee recognizes that such is the speaker's intention.

That draws on my first three ingredients; but for completeness I must here stir in the six and seventh, the authority and trust conditions, since without them a speaker cannot reasonably suppose that his utterance will be taken seriously. Let me add:

> An assertion is made when a speaker utters a factual proposition with the aforementioned complex intention and with the implication that he regards the authority condition and the trust condition as satisfied in this case.

An assertion is made with complete success when the addressee actually takes the utterance seriously and adopts the belief that *p* on the (presumed) authority of the speaker and on the assumption that the trust-condition is satisfied. As this indicates, my fourth and fifth ingredients go not to the making but to the success or completeness of the assertion. As I saw, these are in particular necessary to the success of lying, since only someone who is believed, and thus trusted, succeeds with his lie.

The eighth and final point about lying is that lies are assertions made by a speaker who knows or believes them to be false, made with the intention of deceiving the hearer: that is, of causing him to form a false belief. A lie is successful when it is believed; for then the hearer is deceived.

The idea that serious assertions depend upon the speaker's intention, and the ideas which I called the trust condition and the authority condition are, I claim, essential ideas. I claim that they make my account of these matters preferable to Fried's and that of other fashionable writers on the theory of speech-acts. I also claim that the law gives relevant support to my analysis. So it does.

On intention, let us recall the cases on the difference which separates a salesman's "mere puffs", "his puffing up his goods" from his serious representations of fact and his contractual warranties or undertakings. Recall, for example, *Carlill* v. *the Carbolic Smoke Ball Co.*[25] The Company

[25] [1893] 1 Q.B. 256; of course, the main point of the case was whether a *promise* was made, as distinct from a "mere puff"; see *per* Lindley, L.J., at 263.

advertised its smoke ball as a sovereign remedy for colds and 'flu, having marvellous prophylactic properties. It even advertised a reward for anyone who used the smoke ball as instructed and succeeded in catching influenza. Miss Carlill took them up on this and used the smoke ball but managed to catch influenza nevertheless. The Company then pleaded that its advertisement, like the emanations of the smoke ball, were mere puffs. But the Court held that they must be interpreted as seriously intended representations of fact and contractual offers. Accordingly the plaintiff was entitled to act in reliance on them and to recover the advertised reward.

If this reasoning is correct, and it seems so to me, it goes to support of the theory that the illocutionary intentions[26] of a speaker are essential to elucidating the nature of his speech acts. But the law indicates another refinement. A speaker is deemed to have the intentions which a reasonable hearer in the given context would reasonably impute to him. A doctrine of objective intention is as properly applicable to the making of representations as to the making of promissory utterances. This modifies, but does not supplant, my original analysis. For the imputation of objective intentions is justified by the fact that reasonable people who act in this way commonly do have the relevant subjective intention. Therefore they are rightly estopped as against their addressees from denying that they meant to be taken seriously, even if they did hope or intend not to be taken so. If I know, or ought reasonably to know, that my addressee will think I mean to be taken seriously, and he does take me seriously, I should be treated as though I had actually intended to be taken seriously.[27]

So much for the law's support — and improvement — of my line on intention. Now let us note that the law also brings home in various ways the importance of the relationships in which assertions (and therefore verbal deceits) are possible. Of recent years this has come particularly to our attention in the cases, not on deceit, but on negligent mis-statement. Barwick, C.J. expressed the point with great lucidity in *M.L.C. Assurance Co.* v. *Evatt,*[28] a case in which, with respect, the Courts here gave a better view of the law than did the Privy Council on final appeal.

The question agitated in *Evatt's Case* was whether there is ever a duty of care, as distinct from a duty of simple honesty, in the giving of information or advice. Barwick, C.J. concluded that the law does sometimes recognize such a duty:

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[26] That is, the speaker's intention concerning the act he performs *in* saying something ("in saying *p,* I made an assertion) as distinct from the effects he produces *by* so saying, or "perlocutionary" effects ("by asserting that *p,* I caused Smith falsely to believe that *p*"). On these concepts see J. L. Austin, *How to do Things with Words* (Oxford, 1962) and J. Searle *Speech Acts* (Cambridge, 1969); also Grice and Strawson, *op. cit. supra* n. 21. My thesis is that the illocutionary intention essential to asserting is the intention to be recognised as intending to produce a certain "perlocutionary effect" (adoption of a belief) in appropriate circumstances.

[27] See again Lindley, L.J.'s reasoning in *Carlill's Case,* and compare MacCormick, *op. cit. supra* n. 10.

[28] (1968) 122 C.L.R. 556 at 569. See now also *L. Shaddock and Associates Pty. Ltd.* v. *Parramatta City Council* [1981] 55 A.L.J.R. 713, in which the High Court has re-affirmed the principles about liability for negligent misstatement which it enunciated in the *M.L.C. Case;* at 723 Mason, J. explicitly approves and adopts the statement by Barwick, C.J. cited below, n. 29. (I am indebted to Mr. John Atkin for drawing this case to my attention.)

> I am clearly of opinion that a duty of care in utterance can arise out of some relationships, which for want of a mere precisely designated genus can be called "special".[29]

He then proceeded to elucidate with care the circumstances which admit of such a relationship. Let me quote what he said as to the first feature of these cases:

> First of all, I think the circumstances must be such as to have caused the speaker or be calculated to cause a reasonable person in the position of the speaker to realize that he is being trusted by the recipient of the information or advice to give information which the recipient believes the speaker to possess or to which the recipient believes the speaker to have access or to give advice, about a matter upon or in respect of which the recipient believes the speaker to possess a capacity or opportunity for judgment, in either case the subject matter of the information or advice being of a serious or business nature. *It seems to me that it is this element of trust which the one has of the other which is at the heart of the relevant relationship.* I should think that in general this element will arise out of an unequal position of the parties which the recipient reasonably believes to exist. *The recipient will believe that the speaker has superior information, either in hand or at hand with respect to the subject matter or that the speaker has greater capacity or opportunity for judgment than the recipient.* But I do not think it can be said that this must always be so, that inequality in these respects must necessarily in fact be present or be thought to be present if the special relationship is to exist. (Italics added.)[30]

Let me first draw attention to the first italicized passage. Here the learned Chief Justice speaks of an "element of trust". Is this element of trust involved, as I claim, in all serious assertions, advices etc., or am I confusing legal categories in relying on words of Barwick, C.J. concerning the special circumstances of liability for negligent misstatement? The special relationship in negligent misstatement cases is, after all, something which is supposed to distinguish them from those cases where there is only a legal duty to abstain from lying, not a duty actually to take care that one's advice is sound. Yet I am claiming that a relationship of trust is always present whenever assertions are made in seriousness on advice so given.

I do not see here any real difficulty. Recall Barwick, C.J.'s stress on information or advice "of a serious or business nature". There indeed one trusts the speaker not merely to tell the truth as he believes it, but to check his beliefs with some care. The difference between negligence cases and mere deceit cases is surely not that the "trust condition" as I call it is unnecessary in the latter; the difference is as to the degree of trust reposed; I trust many people to be honest, but I do not reasonably trust so many people to take care that they are fully informed in the advice they give me.

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[29] (1968) 122 C.L.R. 556 at 569.
[30] *Id.* 571.

That, as Barwick, C.J. (and also Lord Reid)[31] observed in *Evatt's Case,* is what distinguishes speech in a relatively casual social context and in a serious business context.

May I remind you that just as Barwick, C.J.'s *dicta* highlight what I called the "trust condition", so also they advert to the "authority condition" of assertions — "The recipient will believe that the speaker has superior information either in hand or at hand with respect to the subject matter or that the speaker has greater capacity or opportunity for judgment than the recipient". Again, if we want to treat this as a special condition defining a special relationship for the purposes of erecting a duty or care in negligent misstatement as distinct from the duty not to lie, we shall have to stress that there are degrees of authority. A doctor's advice to me about my health is a different matter from a stranger's advice on the time. If you have a watch on and I do not, you are for me an authority on the question what time it is. I may trust you to tell me the time with care, but I doubt if the matter should be actionable if you carelessly get it wrong. Still, in all supposedly informative assertions the speaker must purport to have some special authority of superior knowledge in the matter at hand. For otherwise they are pointless.

All in all, I think that even this sketchy consideration of the law helps to support the kind of analysis I gave of what is involved in successfully asserting anything or advising someone about anything and therefore also of successfully lying to them. I hope that, in turn, I have made suggestions of some value in highlighting the difference as to *content* and *context* of relationships of trust and *degrees* of authority which may be relevant to distinguishing the legal duty of care in making representations of fact from the legal duty of simple honesty.

Be that as it may, I am still open to the criticism that having undertaken to say what is wrong with deceit I have so far given little more than a recipe for the ingredients of successful lying. What is more, in the present context and before the present audience I had better not try to characterise the published title of the lecture (as distinct from some of the attendant publicity) as a mere puff. If I gave only a recipe for successful lying, I should, *inter alia,* lay myself open to the charge of corrupting the youth, like at least one far more distinguished teacher before me. It would be some, though only small, comfort to think that here, Mr. Dean, unlike in ancient Athens you administer only agreeable poisons in non-fatal doses and do so before rather than after the trial of your apologist.

III. The Evaluative Part

Yet I think my analysis of the ingredients of successful lying has been essential to saying what is wrong with it. To lie is to utter a statement which one openly intends to be taken seriously as actually believed by oneself, and to be believed by the speaker. It is to do so with the contextual implication

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[31] *M.L.C.* v. *Evatt* [1971] A.C. 793 at 810-11; Lord Reid and Lord Morris of Borth-y-Gest expressed a joint dissent in this case; the first published dissenting opinion in a Privy Council case.

that one satisfies the authority condition and the trust condition. It works only if the addressee does accept one's authority and trustworthiness and therefore adopts the relevant belief. Yet one does not, in fact, believe what one says. Hence even an undetected lie is abusive of the trust of one's hearer. In so far as lying always involves disrespect for persons, there is the gist of the disrespect. What is more, since no one can guarantee non-detection of his lies, there is a standing risk of actual harm to one's addressee by his discovery that one has abused his trust. For people set great value on their relationships of friendship, trust and confidence, as Dr. Finnis well points out.[32] This is therefore a real harm to them, harmful in proportion to the subjective value set on the particular relationship. Moreover, it is an intended or foreseen harm, since one cannot lie without first establishing some trust and then consciously betraying it.

These factors are also relevant to a general consequentialist or rule-utilitarian argument. Relationships of friendly trust and confidence are of the greatest value to human beings. By being truthful one gives support to such relationships, and by being a liar one does harm to them, so it is generally beneficial to have and to observe a rule against lying.

Some such generalised view as that seems to me to underlie the relevant branches of law. Certainly, the law is not founded on a simple rigorous moralism which says that lying is simply and categorically wrong, and there is an end on it. The law rather looks on deceit as a wrongful means to certain ends, and punishes those who use this wrongful means when they aim at those defined ends. The ends are, so far as the criminal law is concerned, normally economic gains aimed at by the wrongdoer, gains to be achieved by deceiving or, as we say, defrauding the victim. The gist of criminal fraud in the common law jurisdictions seems to rest upon the wrongdoer's use of false representations against a trusting victim with a view to obtaining some valuable advantage from the victim, transferred by the latter in reliance on the truth of the representations made to him. The punishable character of deceits and frauds is predicated on their being, on the one hand, ways of doing pecuniary injury to the victim by wrongful means and, on the other hand, means of gaining an unjust benefit from him. Admittedly, the Scots common law crime of simple fraud goes somewhat further than this, in that the completed crime does not require success. It is sufficient[33] that the accused has acted deceitfully with the intent either to make some gain from, or to cause some detriment to, the victim.

Still, in all the legal systems known to me, it is the ulterior harm done to the victim by lying, even if not always coupled with an improper gain thereby made by the wrongdoer, which is the test and the gravamen of criminality in deceit or fraud. Although lying is wrongful as a means, it is its intended and foreseen consequences for the victim which are essential to its

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[32] John Finnis, *op. cit. supra.* n. 8. chapter IV.2.A; also chapter VI. 2-4.

[33] See G. H. Gordon, *Criminal Law* (2nd ed., Edinburgh, 1978) 18.02-18.33, esp. at 18.21 on the types of relevant result which must be aimed at (not necessarily achieved) to constitute a case of "simple fraud"; *cf.* B. J. Gill, *The Crime of Fraud, A Comparative Study* (Ph.D. Thesis, Edinburgh University, 1975).

criminality. As Adam Smith[34] and David Hume[35] pointed out 200 years ago, there is a strong rule utilitarian argument for this configuration of the law, peculiarly adapted to commercial as distinct from pastoral or agrarian societies. Market economies involve large scale and impersonal transactions between relative strangers. It is therefore especially important that the law provide some guarantee of, and some incentive to, trustworthiness in commercial dealings. The types of lying and deceit which are punishable under criminal law are best explicable and justifiable by reference to these considerations. The law fosters and supports an extended range of relationships of trust within a market oriented community.[36]

In the private law also, much the same holds. Since it is concerned with compensation for loss suffered, the private law of fraud or of deceit looks necessarily to the adverse consequences for a victim resulting from an act of deceit. If a person suffers reparable loss through another's deceit, that loss has to be compensated. Mere deceit is not of itself an actionable wrong apart from consequential loss. In general consequentialist terms, or rule-utilitarian terms, this also is further justified by the security of commercial and business expectations which it tends to enforce.

Similar consequentialist considerations bulk large in the more recent development which I mentioned before of a civil remedy for negligent as distinct from dishonest mis-statement. But here these considerations cut both ways. On the one hand the judges are (doubtless rightly) apprehensive of the consequences of opening the floodgates to actions for damages for negligent misstatements made in relatively casual social contexts. On the other hand, in what Barwick, C.J. called transactions of a "serious or business nature", it seems both undesirable and unjust that those who rely upon the truth of seriously given advice have no remedy for the loss accruing to them when it turns out that the advice on which they relied was not only false in fact but also negligently given.[37] Consequentialist considerations bulk large in the arguments for and against recognizing tort actions for negligent misstatements, and all the more in attempts to draw the line between actionable and non-actionable types of negligent misstatements. Here, may I submit again that the line drawing should be guided by a reference to the *content* and *context* of trust relationships and *degrees* of authority by way of superior knowledge — not by the kind of status test suggested by the Privy Council in *Evatt*'s *Case*;[38] I am glad that later cases have bypassed that decision.[39]

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[34] Adam Smith, *Lectures on Jurisprudence* (ed. R. L. Meek, P. G. Stein and D. D. Raphael, Oxford, 1978), 472-3, 536-9.

[35] David Hume, *An Enquiry Concerning the Principles of Morals* (ed. Selby-Bigge and Nidditch, Oxford, 1975), section 156.

[36] Compare H. B. Acton, *The Morals of Markets* (London, 1971). Even when one is most inclined to decry markets as encouraging cut-throat competitive individualism, one must remind oneself of the *extended* range of mutual trust which a market both generates and requires. Finnis, *op. cit.* 139-141, reminds us of the Aristotelian point that the relationships of mutual utility involved in business dealings are a kind of friendship, albeit in a weak sense.

[37] See *supra* n. 30 and associated text.

[38] [1971] A.C. 793 at 809.

[39] See, eg., Lawson J.'s decision in *Esso Petroleum Co. Ltd.* v. *Mardon* [1975] 1 Q.B. 819, affirmed [1976] 1 Q.B. 801 (C.A.), and *cf. Capital Motors Ltd.* v. *Beecham* [1975] 1 N.Z.L.R. 576.

One of the more important considerations allowed for in this branch of the law is the fact that when advice or assurances are given to people who believe that the authority conditions and trust conditions are satisfied, they are ready to act in reliance on such advice and assurances. Especially in a modern highly specialised industrial or post-industrial society, we human beings as rational agents are continually having to act in reliance on the truth of information and advice which we cannot directly check. Sometimes an error in information causes physical hurt as in cases like *Clay* v. *A. J. Crump*;[40] sometimes it causes purely economic loss as in *Evatt*'s *Case*.[41] But in all events, if I act in reliance on the fact of some matter being as you stated it to me, and the fact is otherwise, I am apt to suffer harm, sometimes serious harm.

Sometimes damages may be a sufficient compensation for such harm. But not always. Recall cases of proprietary estoppel in equity like *Pascoe* v. *Turner*.[42] Pascoe told Mrs. Turner, who had been for some time his mistress, that he had given his house to her. She then, to his knowledge, spent a quarter of her modest savings doing up the house. Subsequently he revealed that no conveyance of the house to her had ever been executed, and he brought an action to have her evicted from the house which remained legally his. The Court of Appeal in England rejected this as a grossly inequitable proceeding. The court "[took] the view that . . . equity cannot here be satisfied without granting a remedy which assures to the defendant security of tenure, quiet enjoyment and freedom of action in respect of repairs and improvements without interference from the plaintiff".[43] So they ordered Mr. Pascoe to perfect his gift by transferring fee simple ownership of the house to Mrs. Turner.

In a lot of these cases on estoppel and related matters, the problem is not so much whether the original statement of a speaker was honestly made and intended. The problem is that by subsequent action, having changed his mind in a material way, he can in effect give the lie to his earlier statement. His addressee having acted in reliance on an existing and to be continued state of affairs, he proceeds later by unilateral action to change that state of affairs.

We are obviously here in a territory in which the distinctions between representations of fact and representations of intentions, and between these and promises, becomes extremely difficult to draw. Since the old case of *Jorden* v. *Money*,[44] English and Australian law have been saddled with the much challenged thesis[45] that there is a vital distinction between representations of fact and representations of intention. This seems untenable. An assertion by me about my intentions is as much an assertion of fact as one about the weather. If dishonestly made, it is just as much a

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[40] [1964] 1 Q.B. 533; even more pointedly relevant is *Clayton* v. *Woodman and Son Ltd.* [1962] 2 Q.B. 533.

[41] (1968) 122 C.L.R. 556.

[42] [1979] 2 All E.R. 945.

[43] *Id.* 951.

[44] (1854) 5 H.L.C. 184.

[45] For such a challenge, see J. D. Heydon, W.M.C. Gummow and R. P. Austin, *Cases and Materials on Equity and Trusts* (Sydney, 2nd ed., 1982) at 295.

case of deceit. The point is rather that my making an honest statement of present intention does not and should not normally preclude my changing my mind. What makes all the difference is if I have in some way authorised you to act in reliance on my not changing it, and you have so acted; or perhaps even if you have simply so relied, and I have stood by and watched you doing so, without making clear that I do not consider myself committed — see *Crabb* v. *Arun D.C.*[46] The difference which this makes is that we now move into the field of promises. As I have argued in an earlier paper,[47] the making of a statement of intention with the intention that another should rely on one's following out that intention, or in the knowledge that he will so rely, is a central, indeed the central, case of promise making.

What seems to follow from this is that breaking a promise on which someone has relied is a wrong materially similar in kind to deceiving him about some matter of fact on which he is likely to rely in his actings. So I believe. Accordingly, there should not be a problem in principle about remedies here. There is, however, a problem in practice about such promises or representations of intention in law; namely, that they are commonly informally made, falling short of the law's requirements of formality; or made without consideration, which is a problem in systems like those of England and Australia (but unlike that of Scotland) where consideration is a legal requirement for the enforceability of a promise. It seems to me to have been an admirable development in the recent equity cases (for my information on which I am entirely indebted to Mr. Robert Austin) that the judges have restored in effect if not in terminology the old and quite sound conception of equitable fraud.[48] Thus, though informal promises remain unenforceable when purely executory, the matter changes once a person relies on such promises to his detriment and with the knowledge of the promisor. This seems right.

I am in danger of digressing too far into areas of the law where I am a poor swimmer in deep waters. I must conclude.

I have suggested that lying is always wrong as a breach of a relationship of trust, and that there are general consequentialist reasons supporting a general rule against lying. Yet the law while acknowledging lies as in themselves always wrongful means goes further and treats deceit and lying as outside its scope unless further harmful consequences are aimed at by the deceiver, or result to the victum from reliance on false or even carelessly made misrepresentations, or from reliance on continuing intentions of the speaker.

And of course this is sound legal policy. It reminds us that there are degrees of wrongdoing. Some lies actually are trivial lies and more or less trivially wrong. Some are very harmful and thus very wrongful. They are so

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[46] [1976] Ch. 179.

[47] *Op. cit. supra* n. 20; I have since revised that essay under helpful criticism by Robert Austin of Sydney University and Harry Beran of Wollongong University, and hope the revised version will appear as chapter 10 of my *Legal Right and Social Democracy* (Oxford, 1982, forthcoming).

[48] See the *dicta* of Scarman, L.J. in *Crabb v Arun D.C.* [1976] Ch. 179 at 195.

in proportion as our statements are intended to be and are in fact relied upon in practical ways and in practical matters. It is not only by its ulterior consequences that deceit is wrongful; but by its ulterior consequences, especially those in the intention and foresight of the deceiver, shall we judge of its seriousness as a wrong.

I hope I have fortified your belief that there is something wrong with deceit; but also that some such wrongs really are wronger wrongs than others. This seems to me obscured by such recent writing as insists that all wrongs are just simply and categorically wrong and there is an end on it. Out and out pure consequentialism may be an indefensible doctrine. But that is no ground for denying the vital relevance of consequences to our judgments of action. To have regard to the consequences of one's conduct is, to my mind, a condition of sanity.