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***1219** THE ETHICS OF LYING IN NEGOTIATIONS [FNd]

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The problem of lying in negotiations is central to the profession of law. We lawyers are generally counted as successful in the degree to which we are effective at producing instrumental results through our strategic speaking. Much of our speaking, perhaps even most, takes place in the arenas of negotiation. That is where we reach almost all of our agreements and settle almost all of our differences. Most lawsuits end in negotiated settlements. Those that do not may nevertheless entail a wide range of negotiations over both the possibility of settlement and the conduct of the litigation. Outside the realm of litigation, many lawyers spend great portions of their time negotiating agreements of one kind or another. And finally, of course, we are constantly involved in diverse negotiations with our clients, our colleagues, our staff and all of those with whom we interact in the course of the day.

If it is true that lawyers succeed in the degree to which they are effective in negotiations, it is equally true that one's effectiveness in negotiations depends in part upon one's willingness to lie. As Professor James J. White has written:

> Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled.
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> Some experienced negotiators will deny the accuracy of this assertion, but they will be wrong. I submit that a careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true position. . . . To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation. [FN1]

In this Article, I will assess the strength of White's claim and then examine the complex and discomforting relationship between our commitments, on the one hand, to effectiveness in negotiations and, on the other, to the possibilities of ethics and

integrity. As I shall explain, the ethics to which I am here referring are not the rules embodied in the lawyers' code of professional self- regulation but, instead, the broader and, I will argue, distinct inquiry into the principles of right or good conduct.

Many lawyers deny White's claim and assert, one way or another, that honesty is the best policy in the specific sense that in the long run it is the most profitable. They argue that lying in negotiations is ineffective. Others acknowledge the truth of White's claim but then argue that lying in negotiations is not a serious problem because those lies are ethically permissible. This, as I understand it, is White's own position. [FN2] I will present a third position by arguing that lying in negotiations is instrumentally effective and that most such lies are ethically impermissible.

I will begin, in Part I, by defining what I mean by "lying." I will then identify the types of lies that are told in negotiations, the effects those lies may have, and the circumstances in which we must decide whether to lie. Then, at the end of Part I, I will offer a simple framework for ethical analysis. In Part II, I will identify and assess the full range of arguments by which we lawyers will be heard to argue that the lies we tell in negotiations are ethically permissible. This taxonomy of distinctions, excuses, and justifications has been drawn from both the oral discourse of practicing lawyers and the academic literatures. [FN3] If I have been successful, this taxonomy will contain all of the arguments to be heard on this subject.

I. LYING IN NEGOTIATIONS: ASPECTS OF THE PROBLEM

A. Lying Defined

For purposes of this Article, "lying" will be defined to include all means by which one might attempt to create in some audience a belief at variance with one's own. These means include intentional communicative acts, concealments and omissions. The exact boundaries of "lying" as defined, is a subject to which we will, in due course, devote a good deal of attention.

It has been suggested that this definition of lying is too broad and that one should, at this early stage of the inquiry, acknowledge a distinction between lying and other lesser deceptions. My reasons for not doing so are three. First, it is perfectly appropriate, at least in American usage, to define lying as I have done. [FN4] Second, as is made clear in the new Oxford English Dictionary, there is a strong measure of euphemism in our habit of reserving "lying" for only the most serious offenses. [FN5] This tendency toward euphemism can bring considerable confusion to the inquiry at hand. Third, the desire to distinguish lying from lesser deceptions rests on the assumption that there is a moral or ethical distinction between these two categories of conduct. Examining such distinctions is one of the major purposes of this Article. Accordingly, for purposes of clarity I will resist the temptation to import as-yet-unexamined ethical distinctions into my definition of the phenomenon to be studied. These distinctions, together with all the excuses and justifications that are sometimes offered, will then be taken up, one at a time, in Part II of this Article.

My definition of lying, it will be noted, does not rely upon the distinction between what is "true" and what is "false." It is drawn instead in terms of "beliefs at variance with one's own." The advantage of this approach is that it permits us to frame our inquiry into the ethics of lying in such a way that we do not become mired in unresolvable and, I think, irrelevant debates over what is true or, worse still, over the nature of truth. I will address, in Part II, the claim that a particular "lie" may be ethically permissible because its subject is one as to which there is no knowable "truth."

B. The Types of Lies That Might Be Told in Negotiations

There are a variety of lies that one might tell in order to secure an advantage in a negotiation. Initially, of course, we might lie about the nature, history, characteristics or value of the property which is the subject of the negotiation, whether it be a lawsuit, an automobile or a piece of land. [FN6] We might also lie about the possible consequences of some decision that might be made by the person with whom we are negotiating. Lies of this kind include false promises, [FN7] false threats, [FN8] and false predictions related to the value of the property which is the subject of the negotiation. We might also lie about our own or our client's opinions, [FN9] characteristics, [FN10] authority, [FN11] interests and priorities, [FN12] reservation price, [FN13] or alternatives to agreement. [FN14] These lies operate to misrepresent our willingness to settle, the price above which we will not buy (or below which we will not sell), our client's insistence on custody, the presence or activities of competing bidders, or our availability and readiness for trial. This category also includes various supposedly white lies and lies to save face.

C. The Effects That Lies May Have

The lies that we tell in the course of negotiations may have a number of different effects on the negotiation, on the parties, and on the larger community. While most of these lies are calculated to disadvantage the other party, there are some that, at least in theory, are not. Those that do not threaten such disadvantage are pure "white" lies. They are said to be harmless, to grease the wheels of discourse, and to increase the likelihood that the parties will move quickly toward a mutually beneficial agreement.

The broader and more important category of lies, though, is comprised of those "distributive" lies by which the liar seeks to capture an advantage over the other party. These include, among others, the lies--like those involving one's reservation price--that Professor White has identified as the measure of a negotiator's effectiveness. [FN15] To illustrate the effect of these lies, let us assume that Mr. Seller is negotiating to sell a factory and that his reservation price is $900,000. Below that price, he is better off keeping the plant. After an extensive search, he has identified one, and only one, prospective purchaser. Her name is Ms. Buyer. Mr. Seller has estimated that her reservation price, the price above which she will not buy, is $1,200,000. Though he has no way of knowing for sure, you and I know that this estimate is exactly right. Mr.

Seller's objective is to sell at the highest possible price, even if it means lying. In the course of several hours of bargaining, Mr. Seller has, through an outright lie about a competing bid, persuaded Ms. Buyer that he will not sell the property for anything less than $1,100,000, a figure that is $200,000 above his actual reservation price. The bargaining continues and eventually they split the difference between Mr. Seller's perceived reservation price ($1,100,000) and Ms. Buyer's actual reservation price ($1,200,000). With a price of $1,150,000, Ms. Buyer is happy because she believes she has captured exactly half of the available surplus. Mr. Seller is ecstatic, believing (correctly) that he has captured $250,000 of the $300,000 surplus and that his "winning margin" of $200,000 is attributable solely to his skills as a liar. Other distributive lies, such as lies about the mileage of a used car, may operate in slightly different ways, sometimes by altering the other party's assessment of its own reservation price. [FN16] What these lies all have in common is that, if they are successful, the liar becomes richer in the degree to which the victim becomes poorer.

Distributive lies are not, however, always successful. There are, in fact, three ways they can misfire and cause injury to the liar. First, distributive lies may fail to deceive, either because they are never believed or because they are believed but then discovered. Lies that fail in this way may cause such damage to the relationship between the negotiators that the intended victim will be unwilling or unable to enter into what would otherwise be a mutually beneficial agreement. [FN17] These lies may also create a short-term shift in bargaining power away from the liar and in favor of the intended victim. [FN18] They may have adverse effects on the liar's credibility and effectiveness both in the remainder of the negotiation at hand and in future negotiations with this and other adversaries. [FN19] They may also provoke defensive or retaliatory lying.

Distributive lies also may cause injury to the liar, and to the liar's victim, when they deceive the victim and thereby block the parties from reaching a beneficial agreement that otherwise would have been available. [FN20] Assume for instance that Ms. Buyer is negotiating over the price of a car and that her reservation price is such that she will not pay more than $10,000. Further, she has estimated that Mr. Seller's reservation price is such that he will not accept less than $8500. Ms. Buyer has, by lying, persuaded Mr. Seller that her reservation price is $9000--$1000 less than her actual reservation price. Her belief is that there is $1500 in surplus to be distributed between the parties, that she will by her lie capture $1000 of that surplus, and that she will then perhaps "split the difference" with regard to the remaining $500. Unfortunately, Ms. Buyer has misjudged Mr. Seller's reservation price. Instead of the $8500 that she had estimated, Mr. Seller's reservation price is actually $9300. There is still a $700 range, $9300 to $10,000, within which an agreement would leave both parties better off than they would be without an agreement. But having committed herself to her false reservation price ($9000), Ms. Buyer may now be unwilling or unable to make an offer higher than that amount. Consequently, the deal may be lost and her all- too-successful distributive lie will have deprived the liar and her victim of $700.

A nominally successful lie can also cause injury to the liar and the victim by causing them to reach an agreement that is less beneficial than it might otherwise have been. This contention requires an understanding of the concept of "integrative" or "win-win" bargaining [FN21]. Integrative bargaining has the effect not of dividing the pie, but of making it larger. A textbook example might involve two brothers who are haggling over an orange. An evenhanded distributive outcome could be reached by cutting the orange through the middle and giving one half to each brother. Further exploration, however, might reveal an opportunity for integrative bargaining. One brother, it turns out, wants to peel the orange and eat the fruit; the other hates eating oranges but needs the rind for garnishing his cake. By discovering this information and dividing the orange differently--all the fruit to one, the entire rind to the other--we can move from a 50-50 outcome to, in this case, a 100-100 result.

Integrative bargaining has several characteristics that bear upon the problem of lying in negotiations. First, opportunities for integrative bargaining are not always present [FN22]--and when they are, we almost never know it. [FN23] Second, even when there are integrative opportunities to expand the pie, the pie will almost always, eventually, need to be divided. That division will be an occasion for distributive, win-lose bargaining. What complicates matters is that, while lying may be the watchword in distributive bargaining, full and truthful disclosure is the key to identifying and exploiting opportunities for integrative bargaining. [FN24] Thus certain kinds of lies, told to secure distributive (pie-splitting) advantages, may make it impossible for the parties to discover and exploit the integrative (pie-expanding) opportunities that may be available. For example, lies about our interest or priorities can simultaneously win the liar a larger share of the pie and blind both parties to those avenues by which the pie might have been expanded. In this way, a successful distributive lie may injure both the liar and his victim by causing them to reach an agreement that is less productive of total profit than might, but for the lie, have been the case.

Lying in negotiations may also cause injuries that are more general and far-reaching than the immediate effects upon the parties to the negotiation. Lies that are discovered may, for instance, cause persons other than the liar to engage in defensive lying either later in that same negotiation or in other negotiations. Such lies can diminish the level of trust and increase the frequency with which additional lies are told. As public trust declines, so does our ability to engage in effective communications and to make and exchange credible commitments, including the promises that underlie contracts. As these capacities decline, so does the efficiency with which we are, all of us, able to conduct our affairs. [FN25] These discovered lies may, in addition, diminish the possibilities of ethical restraint, community and reciprocity. [FN26]

Moreover, lies that are successful and undiscovered may lead to further lies by lowering the liar's barriers against lying [FN27] and by empowering, at least in the mind of the liar, some justification for lying that is, on the merits, insufficient. As those justifications are empowered, the barriers against lying fall still further. [FN28] Otherwise successful lies may also affect the liar's self-image and sense of personal

integrity, [FN29] as well as his trust in others. [FN30] Thus, undiscovered lies, like discovered lies, may have adverse effects on a community's capacity for trust, efficiency, ethics, and reciprocity. [FN31]

In the end, lying in negotiations can produce a wide range of possible effects. While the distribution of these effects is anything but symmetrical, they include both costs and benefits. Two things, though, are clear. The most important is that we cannot say as a general matter that honesty is the best policy for individual negotiators to pursue if by "best" we mean most effective or most profitable. In those bargaining situations which are at least in part distributive, a category which includes virtually all negotiations, lying is a coherent and often effective strategy. In those same circumstances, a policy of never lying may place a negotiator at a systematic and sometimes overwhelming disadvantage. Moreover, there are any number of lies, including those involving reservation prices and opinions, that are both useful and virtually undiscoverable. Accordingly, if the policy we pursue is one of honesty, we must do so for reasons other than profit and effectiveness. The second point is that one who lies in negotiations is in a position to capture almost all of the benefits of lying while suffering only a small portion of the costs and that, in the language of the economists, this state of affairs will lead, almost automatically, to an overproduction of lies.

D. The Circumstances in Which the Negotiator Must Decide Whether to Lie

The circumstances in which we negotiate are highly conducive to lying. The heart of the problem is that, in ways that have just been seen, lying can be highly effective. Lying offers significant distributive advantages to the liar and the incentive to lie is therefore great. Moreover, because we understand that our adversary is under that same incentive to lie, we are highly attentive to the possibility that we are being conned and are predisposed to assume the worst.

This situation is made worse by the importance we assign to these particular distributive advantages. At stake is the distribution of scarce and highly valued resources and opportunities. We are engaged in a negotiation precisely because we care about the distribution of those resources. We care because of our individualistic interests, ambitions, and desires. We may care still more because we are negotiating not just for ourselves but also for others. Those others may include clients, employers, partners, employees, and families. Some of these others may pay our salaries. All share, to some degree, in the results we produce. The presence of these others buttresses our desire to win, strengthens the temptation to lie, and permits us to invoke a series of arguments according to which those lies might be permissible because of our duties to others. The stakes are also raised by the presence of audiences and by the high value we lawyers place on our reputation with those audiences, specifically our reputation for instrumental effectiveness and for a kind of invulnerability to being victimized by other people's lies. [FN32]

If the predicament is difficult because lying is effective and the stakes are high, it

is made still more so by the gross imperfection of our information and the biases that are likely to effect our perception and our judgment. The first problem we face is that we generally do not know whether our adversary is lying to us. Except for those rare occasions when an ace falls from a sleeve and the lie is clearly revealed, we have only intuitions and imperfect judgments on which to rely. [FN33] These estimates are difficult because, even within a single community, the relevant practices of negotiators will vary widely. [FN34] Many will define their objective in such a way that the ethics of lying are irrelevant. [FN35] Others will define their objective in a way that takes account of ethics, [FN36] but will then embrace an extraordinarily wide range of beliefs as to when it is ethically permissible to lie. Most of the time we do not know how our adversary defines her objective and even if we knew she defined it in a way that took account of ethics, we would not know her views on the ethics of lying.

This absence of relevant information is then compounded by the systematic biases that are likely to affect our perceptions and assessments, biases that enhance the probability that we will lie. We are predisposed to believe that our cause is just; [FN37] to assume the worst with regard to our adversary's character, motives and conduct; [FN38] and to accept the sufficiency of the justifications we give ourselves for the lies we tell. [FN39] While this is particularly true in the contentious realm of litigation, it is also likely to be true, in some degree, across the entire range of negotiations. We are predisposed to understate the frequency and overstate the legitimacy of the lies we tell, and to do exactly the opposite with regard to the frequency and legitimacy of our adversary's lies. [FN40]

These circumstances, taken together, have the quality of a prisoners' dilemma problem [FN41] in which the values have been set in such a way that the incentives to "defect," which in this case means to lie, is extraordinarily high. [FN42] The stakes are extremely high, both in terms of what we stand to gain if we decide to lie and in terms of what we stand to lose if our adversary decides to lie. The information on which we must act is not just imperfect but practically nonexistent. And we are prepared, and perhaps under the circumstances obliged, to assume the worst of our adversary. Under conditions like these, only saints and fools can be relied on to tell the truth. It would be remarkable if we did not find ourselves in a vicious downward cycle in which those who tell the truth systematically "learn their lesson" and begin to lie.

E. A Framework for Ethical Analysis

The analysis contained in this Article rests on a series of relatively straightforward propositions about ethics. The simplest and most basic of these propositions is that it is wrong to harm others, through lying as well as other means, unless the harmful behavior can be justified or excused. [FN43] The other propositions concern the relationship between ethics and simple self- interest, between ethics and the law, including the law of professional self- regulation, and between ethics and custom.

The second proposition on which subsequent analysis will rest is that simple self-interest, without more, is insufficient justification for doing harm to others. [FN44] If it were sufficient justification, then theft and assault would be ethically permissible solely on the grounds that the thief or the assailant hoped to derive profit or pleasure from his act. By speaking about simple self-interest, I mean to leave open for further consideration those circumstances in which the justification of self-interest is enriched by some additional argument. Such additional arguments might involve, for instance, the nature of negotiations, [FN45] the nature of our relationship to our adversary, [FN46] our duties to others, [FN47] or the character or conduct of our adversary. [FN48]

By saying that simple self-interest does not make it ethically permissible to lie, I am saying that ethics is different from self-interest and that the former will sometimes require us to sacrifice a measure of the latter. In this respect I part company, as I expect do many of my readers, with those who assert that the pursuit of one's self-interest is the fulfillment of the highest ethical duty. [FN49] I also part company with those who argue that ethics is a matter of identifying and pursuing one's rational or "enlightened" self-interest. [FN50] This point is crucial, for lack of clarity on this matter can lay total waste to the discourse of ethics. [FN51] The news is simple but bad: the pursuit of ethics necessarily entails a willingness to sacrifice a measure of self-interest.

The third proposition on which my analysis will rest is that ethics is different from and more demanding than law, [FN52] including the law of professional self-regulation. This difference can readily be understood because law, unlike ethics, must be implemented from a perspective external to the individual and must deal with all of the problems related to such implementation. Law must, for instance, come to terms with the problem of what can be known about past events or about the motives of a person charged with breaching some legal duty. It must take account of the possibility of error and, because it is invoked after the fact, law must take account of such values as the stability of transactions. It must also take account of the transaction costs associated with doing justice. Accordingly, the law may permit certain deceits that have had little or no effect, [FN53] or that are difficult or impossible to prove. [FN54] The fact that the law permits these deceits is not an authoritative pronouncement that these lies are ethically unobjectionable. It is, instead, an accommodation to those costs and practicalities that bear upon the law but not upon ethics.

Moreover, because they are designed to be implemented after the fact and from a perspective external to the individual, the lawyer's codes of professional self-regulation belong to the realm of law and not of ethics. [FN55] At least for purposes of the distinction that is here being drawn, it is a misnomer for us to refer to these as codes of professional "ethics." We should expect to find ethics, properly defined, to be more demanding than the law, including the law contained in the lawyer's codes of professional responsibility. [FN56]

Finally, if ethics is more demanding than self-interest or the law, it is also more demanding than custom. As we shall see, the fact that everybody behaves in a

particular way is merely relevant to, and not dispositive of our inquiry into what is ethically permissible. In the end, ethics generally demands more from us than simple compliance with the behavioral patterns of our community.

The balance of this Article contains what I believe to be a comprehensive taxonomy of the distinctions, excuses, and justifications by which lawyers assert the ethical permissibility of the lies they tell in negotiations. Each of these distinctions, excuses, and justifications will then be assessed according to this framework of ethical inquiry.

II. DISTINCTIONS, EXCUSES, AND JUSTIFICATIONS

There are a great number of arguments that are offered in support of the claim that the lies we tell are not ethically reprehensible. First, we sometimes argue that what we did was not a lie because, for instance, we did not mean to mislead or because we were merely putting matters in their best light. [FN57] Second, we may admit that we have lied but then assert that the lie we told was of a kind that is ethically permissible. [FN58] Here, for instance, we may claim that the lie was permissible because it was legal, [FN59] because it was on some subject as to which it is permissible to lie, [FN60] or because it had little or no harmful effect. [FN61] We may also admit lying but then claim that the lie was permissible because of the circumstances in which it was told. These claims include, among others, arguments concerning the nature of negotiations, [FN62] the rules of the game, [FN63] the adversary system, [FN64] and the bad conduct or incompetence of our adversary. [FN65] Next, there are a series of arguments purporting to justify lies on the basis of some duty--usually loyalty, zeal, or the protection of confidences--that we owe to our client. [FN66] Finally, we will sometimes claim that the lies we tell in negotiations are warranted by the good consequences, justice sometimes among them, that the lies are said to produce. [FN67]

These are the kinds of distinctions, excuses and justifications that I mean to identify and to examine. The list is long but finite. [FN68] An overview can perhaps best be secured through an examination of the table of contents to this Article. The list itself has been collected from the academic literatures on legal ethics and negotiations and, perhaps in even larger measure, from the oral discourse of practicing lawyers. That system of oral arguments is rich, stable, and far more fully elaborated than its academic counterpart. I take this to be testimony to the importance of ethics and negotiations in the lives of practitioners, and to our urgently felt need to make this problem go away.

A. "I Didn't Lie."

In this section, we will take up a series of statements by which lawyers sometimes assert that whatever they did was not a lie. These claims are of at least five kinds: (1) "I didn't lie because I didn't engage in the requisite act or omission"; (2) "I didn't mean to do anything that can be described as lying"; (3) "I didn't lie because what I said was, in some way, literally true"; (4) "I can't have lied because I was speaking on

some subject about which there is no 'truth'"; and (5) "I didn't lie, I merely put matters in their best light."

1. "I Didn't Engage in the Requisite Act or Omission."

Statements of this kind carry one of two possible meanings. First, the speaker may be asserting that he did not engage in any act or omission that might in any way help to create or maintain a belief at variance with his own. Second, he may be acknowledging that he engaged in some act or omission that could have created a belief at variance with his own but that his act or omission was not a lie. If it is the second of these two statements that he is making, then he will, if pressed, explain his position by invoking some other argument which he will claim warrants the conclusion that what he did was ethically permissible.

In Part I above, however, I was careful to define lying to include all acts or omissions taken in the expectation that they might create or maintain a belief at variance with our own. I was equally careful to separate our definition of lying from our specification of those lies that might be ethically permissible. Within this analytical structure, the first version of this claim, "I didn't do anything," constitutes the statement that the speaker has not lied and, if the denial is warranted, that what he has done shall be taken not to violate the ethical rule against lying. The second claim, "What I did wasn't a lie," invokes precisely that definition of lying that has, for the sake of clarity, been expressly rejected. Translating that second statement into the terms of analysis adopted in this Article, the speaker acknowledges having lied and then, for some specifiable reason, asserts that the lie was ethically permissible. That may be so, but under the definition that has been adopted, we will reject the defense that "there was no lie" and take up, elsewhere in this taxonomy, the speaker's claim that the lie was, for some reason, ethically permissible. [FN69]

2. "I Didn't Have the Requisite Intent."

The second distinction sometimes asserted is "I did nothing unethical because I had no intention of lying." If what the speaker means to say is that she had no intention of doing anything that might create or maintain a belief at variance with her own, then the claim seems sufficient. Ethics is, in my understanding, concerned with the choices we make and not with the effects we unintentionally produce.

The speaker might, however, be admitting that she meant to create a belief at variance with her own and claiming, instead, that her intended deception was ethically permissible and therefore not a "lie." The reader will note that the speaker is using "lie" to mean only those intentional deceits that are ethically impermissible, a definition which was considered and rejected in section I.A above. This, then, is not an assertion about the absence of intent but about the ethical sufficiency of some unspecified justification. As such, this argument fails as a denial of intent. The speaker is, of course, free to specify and defend her claim of justification. That claim of justification,

whatever it is, will be considered elsewhere in this taxonomy.

3. "My Statement Was Literally True."

The claim "I didn't lie because my statement was, in some way, literally true" usually rests on the presence of some textual qualifier. An advertisement, for instance, gives strong impressions concerning the performance of a car while the small message at the bottom of the screen announces, not very loudly, that the car we are watching has been specially modified. Or the real estate agent explains that the house she is selling is "pretty much" the same as the one that sold last week for $180,000. Or that the foundation is in good shape "for its age."

These arguments seem reasonably persuasive, but only when the qualifiers are in plain view and the speaker makes no effort to suppress them or to promote the situation's potential for deception. If the qualifiers are hidden or suppressed, then the statement is meant to deceive and the argument about its "literal" meaning is insufficient to remove the statement from the category of lies. [FN70]

4. "I Was Speaking on a Subject About Which There Is No Truth."

The next distinction to be considered is the assertion that "I cannot have lied because my subject was one about which there is no 'truth.'" The problem with this assertion is that our definition of lying has been drawn not in terms of saying things that are not true, but rather in terms of saying things that are contrary to our belief. As this term has been defined, it is a lie when, contrary to our own belief, we assert that a car we have driven for five years is "swell" or that a particular price is "unacceptable." Moreover, the claim that "there is no truth" or "no one really knows the truth" is usually made about subjects with respect to which we otherwise live our lives as if there were a truth. One ought to be at least a little skeptical when, at the very moment someone stands to gain from lying, they depart from these customary assumptions and announce that there is no truth. [FN71]

5. "I Was Merely Putting Matters in the Best Light."

"Putting matters in the best light" is the particular kind of strategic speaking that many refer to as "lawyering." I will consider these practices first in connection with facts and then in connection with the meaning of texts. As to practices related to the facts, I will begin by distinguishing four different versions of "telling the truth." The last two of these versions are examples of putting matters in the best light. They may also be instances of lying.

The first of these four versions involves telling "the whole truth and nothing but the truth." Though this is what we commonly demand of witnesses, it is a standard which, if taken literally, cannot be achieved. No "telling" can capture the "whole truth." By simple necessity, we always fall short of this standard. The best that we can do will be less than, and other than, the whole truth. The second version accommodates this

necessity and simply aims to do the best that can be done. This might be described as "telling the truth as we know it and can render it." This is what we normally have in mind when we speak of telling the truth and, as we shall see, it is the standard from which we routinely depart when we "put matters in the best light."

The third and fourth versions of "telling the truth" are, then, those in which we "put matters in the best light." These present difficult problems related to lying. In the third form, we tell the truth as we know it, but in order to secure some advantage we tell it selectively in order to produce some result at variance with our own beliefs. Here we regard ourselves as being at liberty to pick and choose, to include and exclude, to move pieces into and out of the foreground in order to give form and content to the picture we present. We take various strands of the truth and weave them into a tapestry that may look quite different from "the truth as we know it." In this way we present "the truth as we would like it to be," our creative liberties being limited only by our unwillingness to use in our assemblage pieces that we would not, according to our normal meaning of the word, regard as true. The parts are true but, in some measure, the whole is not.

The fourth version involves a still more radical departure from the truth. It is, nevertheless, a position that for many of us is the very definition of "lawyering." In this version of putting matters in their best light, we construct a larger picture that departs from the truth and, in so doing, we even use pieces that are not, by the standards of conventional discourse, true. The boundaries within which we operate are purely practical. We will tell the story that best serves our purposes without saying anything that is either implausible or falsifiable. The reason for not crossing those lines may have less to do with ethics or with truth than it has to do with the dramatic loss of effectiveness that is entailed when one is caught crossing those lines.

Unlike the first and second versions of "truth-telling," the third and fourth versions involve putting the matters at hand in the best light. They involve attempts to create in some audience a belief that differs from our own and thus they are lies. Justified perhaps, but lies all the same. The third and fourth versions differ from one another in degree. One is more cynical and more corrupt than the other. There may be circumstances in which one is ethically permissible and the other is not. That, though, would be a difference in terms of which lies are justified, not in terms of which practices are lies.

Apart from matters of fact, the other arena in which we lawyers "put matters in the best light" is in our arguments about the meaning of legal texts and, through those texts, the content of the law. What makes this claim interesting is the strong likelihood that there is no such thing as the one true meaning of a text, even a legal text. Whatever the academics may say, the practitioners know that, within a range, legal texts are indeterminate in ways that it is their job to understand and exploit. At the same time, lawyers are predisposed to argue as if texts had only one true meaning and, as luck would have it, that meaning supported their client's position. [FN72] The ethics of

this situation may become problematic in one of two ways. On the one hand, a lawyer may actually hold a belief concerning the meaning of a text and speak for the purpose of creating a belief at variance with his own. On the other, he may overstate the claim that some particular text means what he says it means and nothing else. Even if these are lies, they are likely to be small, both in compass and in consequence, because the entire text is available to the person, usually the judge, to whom those lies are directed and that person is well- positioned to decide for herself what is meant by the text in question.

Whatever the problems with textual interpretations, the situation with regard to facts seems reasonably clear. When we claim to be putting facts in their best light and we mean by that something more creative than simply laying on the table "the facts as we know them" (that would be the second version of truth-telling), we are telling lies. They may be only moderate departures from the truth, and we may eventually conclude that they are ethically permissible. But their permissibility must arise from something other than the assertion that "we didn't lie, we merely put matters in the best light."

B. "I Lied, if You Insist on Calling It That, but It Was an Omission of a Kind That Is Presumed to Be Ethically Permissible."

Here the question is whether there is certain conduct that may fall within our definition of lying, but that is not, as may be the case with other "lies," presumed to be ethically impermissible. If the speaker is right, then the conduct in question is permissible simply on the basis of the showing that it falls within this category and it does not require further excuse or justification.

At least as to one small category of conduct, this argument seems persuasive. That category is comprised of certain omissions as to which it is undeniably true that the speaker is leaving out information for the purpose of maintaining a belief at variance with his own and that he is doing it in the usually accurate expectation that he will be enriched by his advantage. What distinguishes the omissions in this category as ethically permissible is found in the speaker's relationship to the information being withheld. If that information has been properly obtained and if it is not the subject of some ethical duty of disclosure, then it may be ethically permissible to withhold it. Within the terms of analysis that have here been established, the speaker is acknowledging, albeit grudgingly, that he has lied. It is his assertion, however, that his lie is of a kind that does not give rise to the general presumption of ethical impermissibility. The kind of lie he has in mind are those lies of omission in which the liar's relationship to the omitted information is such that, as a matter of ethics and not just of law, there is no general obligation of disclosure. This argument may rest on an ethical right, perhaps akin to a property right in the information. Or, if we are determined to find some reason that is less conclusory, and perhaps less question-begging, we might regard it as resting on the claim that everybody does it, an assertion that, even if true, may not be fully sufficient.

C. "I Lied but It Was Legal."

This is the claim that "I may have lied but it was ethically permissible because it was not legally forbidden." But the logic of this claim fails if, as has previously been argued, ethics is different from, and more demanding than, law. I have already argued that such differences exist and that they arise from the fact that law must deal with certain problems of knowledge, implementation, transaction costs and the social stability that ethics need not take into account. Further, I have argued that for these purposes the lawyer's code of professional responsibility is a code of law not ethics. If this is so, it is no more persuasive to say that something is ethically permissible because it is not forbidden by that code than to say that it is ethically permissible because it is not forbidden by law.

D. "I Lied but It Was on an Ethically Permissible Subject."

Those who make this argument admit that they were seeking to create a belief at variance with their own. They claim, however, that there are certain subjects as to which, simply by virtue of the subject, it is ethically permissible to lie. Some will assert, for instance, that it is permissible to lie about the value of a property which is the subject of a transaction. [FN73] Others will say that it is permissible to lie about the law or about the strength of a cause of action. [FN74] More generally, some will say that it is ethically permissible to lie about those subjects about which their adversary could have or should have known the truth. [FN75] Finally, some will assert that it is permissible to lie about such "soft" subjects as their opinions [FN76] or about those matters that are "internal" to the negotiation, these being subjects like their interests and priorities, [FN77] authority, intentions, [FN78] and, ultimately, their reservation price.

The difficulty with all these excuses is that they rely upon distinctions that make no difference. A lie about a negotiator's authority is told with the same purpose and with the same effect as a lie about the true mileage of a used car. The speaker's hope is that, by creating some belief at variance with her own, she will get a better deal than she could have gotten without having created that belief. The advantages she may hope to secure through these lies are every bit as tangible, every bit as great, and every bit as illegitimate as those she might hope to secure through lies on other subjects. So is the damage that will be caused.

If there is, particularly for lawyers, a surface plausibility to this claim that it is ethically permissible to lie about certain subjects, that plausibility probably presents itself because the law draws many of these same distinctions. But the law must attend, in ways that ethics need not, to such matters as the costs of administration, the problems of proof and our shared interest in the finality of transactions. It is in the nature of law that it will not, indeed cannot, undertake to prohibit all forms of bad conduct. In any event, the fact that some of these lies will not support a suit for civil remedies, standing alone, is no indication that we regard these lies as ethically

permissible. It may, for instance, be the law that there is no cause of action available to someone who is the victim of a lie about such matters as the value of a lawsuit, their adversary's reservation price, or the agent's opinion about the house. [FN79] The absence of such a cause of action does not, in any respect, blunt the otherwise certain conclusion that such lies are ethically unjustified.

E. "I Lied but It Had Little or No Effect."

Next, there are three categories of lies that might be said to be permissible because they are likely to have, or in retrospect appear to have had, little or no effect. These include white lies, puffing and other small lies, and lies that failed.

1. White Lies

White lies are admitted to be lies but are said to be excused because they are both innocent and harmless. [FN80] Their purpose, it is said, is only to smooth the seas, to grease the wheels of discourse and commerce, perhaps to create the illusion of relationship where none really exists, and, in these ways, to enhance the possibility of agreement. We might say that it is nice to see someone again or that we have heard good things about the work they have been doing. We might feign friendship or interest. These lies are said to have no distributive effect as between the parties and, at least sometimes, to enhance the welfare of both parties by facilitating an agreement that might leave both parties better off than they would otherwise have been.

In certain circumstances, this all seems perfectly persuasive. In others, however, it does not. First, white lies seem ethically impermissible where they are either intended or likely to produce a distributive effect between the parties. Second, they seem impermissible where the liar feigns a relationship and where that relationship matters to the party who has been deceived. Thus it is one thing to feign respect for another lawyer in order to facilitate a settlement that clearly benefits both parties and another to suggest, however indirectly, that you admire your young adversary's professionalism and that your uptown firm is always looking for the right kind of young lawyers coming out of the government. [FN81]

In the degree to which the substitution of "I can't" for "I don't want to" is sometimes a white lie, it is one that warrants particular attention. It may be a benign, even merciful, way of declining a social invitation. But in a slightly different setting, this supposedly white lie becomes the classic example of a strategic lie that has powerful distributive consequences in a negotiation. Assume, for instance, that Mr. Seller offered to sell his car for $7000 and that Ms. Buyer, whose true reservation price is $9000, says, "I cannot accept that offer." What is true, of course, is that she will not accept the offer, even though she could. For all its similarities to the polite lie told in turning down a social invitation, this is not a white lie. Rather, it is a lie told in the hope that it may secure a distributive advantage over the victim. What Ms. Buyer wants Mr. Seller to believe is that she cannot accept his offer because it is above her reservation price and

he might as well get used to the idea. If white lies are harmless and therefore ethically permissible, this speech act cannot come within the category of white lies.

2. Puffing and Small Lies

Once again, as in the case of white lies, we admit having lied but claim that the lie was permissible because it is of a kind that is likely to have little or no effect. The implicit claim is that only serious lies are ethically impermissible. This argument gains strength, at least among lawyers, by its relationship to the law of contract. Indeed, its proponents will often invoke the standards by which the law distinguishes those lies that are significant and actionable from those that are not. Thus "puffing" [FN82] and "immaterial" [FN83] misrepresentations are said to be permissible even when larger lies are not.

The first difficulty with this position is that we do not, as a general matter, regard otherwise bad acts to be ethically permissible simply because their effects are small. No one, for instance, will claim that the size of the transgression makes it right or ethical to engage in minor assault or in the theft of small objects. Insofar as the law draws distinctions like these, it is fair to assume that those distinctions do not reflect our approval of small transgressions. These distinctions are, instead, the law's accommodation to such practical concerns as problems of proof and the costs of doing justice. These concerns bear upon questions of law but not upon questions of ethics.

3. Lies That Failed

Here, for a third time, we admit the lie but claim that it is permissible. This time our claim rests on the assertion that our lie was never believed, that it was believed but then discovered, or that it had no effect on the outcome. [FN84] This argument succeeds only if intent has nothing to do with ethics. The problem it confronts is that intent is not just relevant but crucial to the task of making ethical judgments. The speaker in this case meant to deceive and to secure the advantages of that deceit. He did not mean to fail. To claim that ineffective lies are ethically permissible is no more persuasive than it would be to say that there is nothing wrong with trying to kill your neighbor so long as you do not succeed.

F. "I Lied but It Was Justified by the Very Nature of Negotiations."

This section deals with two related claims, both of which assert that lying is permissible because of the particular nature of negotiations. The first is the argument that lying is ethically permissible because it is either necessary or useful in negotiations. The second is the argument that lying in negotiations is ethically permissible because it is within "the rules of the game."

1. "Lying Is Necessary or Useful in Negotiations."

Lying in negotiations is sometimes said to be ethically permissible either, first, because it is an indispensable feature of the process of reaching negotiated agreements or, second, because a particular party to a negotiation may find that lying is necessary to the promotion and protection of its interests. [FN85] This second claim may, in turn, take two forms. Under one, the party may assert that he would be ruined if he were required to negotiate without lying; under the other, he will simply assert that negotiators who lie may end up richer than those who do not.

The first of these claims, that negotiated agreements generally cannot be achieved unless the parties to the negotiation are permitted to lie, is clearly wrong. [FN86] It may be true that a particular buyer will not agree to buy a particular car unless the seller lies about the condition of the car. It may also be true that he might be willing to buy it but not at a price that would be acceptable to the seller. If these are the circumstances, however, then the agreement that is lost is one that ought not be reached. Otherwise, except in the case of true white lies, all the lies that are told in the course of negotiations serve not only to shift wealth from the victim to the liar but also to diminish the likelihood that a negotiated agreement that ought to be reached will, in fact, be achieved.

If lying is not essential to the achievement of a negotiated settlement, it may still be necessary or useful to the maximization of a particular negotiator's outcome. Under the more dramatic of these claims, it is asserted that lying is necessary because those who cannot lie are helpless at the hands of their adversaries. This claim usually rests on the assumption that those who cannot lie are compelled to confess their reservation price in the first minutes of the negotiation and thus render themselves helpless to reach an agreement at a better price. Under these circumstances, the entirety of the surplus available for division between the negotiators will always go to the truth-teller's adversary. The first thing to be said about this claim is that, even if it were true, it would not mean that the truth-teller would make no money from the transaction. [FN87] The second is that because an obligation not to lie does not compel the negotiator to disclose her reservation price, the truth-teller may still be perfectly successful at capturing a large share, perhaps even the larger share, of the available surplus.

An obligation not to lie does not entail, without more, an obligation to answer all questions or, more particularly, to blurt out one's reservation price. Nor does it preclude our asking for, or even demanding, an agreement that is far better than one's reservation price. If a negotiator asks, as normally she will not, "What is your reservation price?", even a committed truth-teller has the options of ignoring or evading the question, of declining to answer, of asking "What's yours?" or of stating her present position. Human discourse is far too supple to leave us with only the choice between lies and self-defeating disclosures of the whole truth.

To capture a fair share of the surplus available for division, all that an effective negotiator needs is the ability to take positions and to do so with varying levels of commitment. [FN88] Both of these things can be done within the confines of the truth.

The effective negotiator normally need not lie about his reservation price. Indeed, such lies are normally the mark of an ineffective negotiator. These lies apply only marginally more pressure on one's adversary than a strong demand. At the same time, they create the risk that the liar will place himself in a situation in which he must either give up the opportunity to enter a profitable transaction or accept the tangible costs of admitting that his statement was a lie. [FN89]

There are, all the same, disadvantages associated with an unwillingness to lie in negotiations. Those who do not lie may, in the long run, do less well than those who do. [FN90] This is not a claim of necessity but only of self- interest. As has already been shown, if self-interest were a justification for otherwise unethical behavior, then the scope of ethics would have all but vanished. Accordingly, the claim that lying promotes the interests of the liar is not a justification for lying in negotiations.

2. "Lying Is Within the Rules of the Game."

It is often asserted that lying in negotiations is within "the rules of the game" and therefore ethically permissible. [FN91] For a number of reasons, however, the application of this justification to the ethics of lying in negotiations is highly problematic. In assessing this claim, it is essential that we be clear about the nature of the rules in question and about the reliability of the information that people claim to have concerning the specific provisions of those rules.

First, some rules speak directly to the question of what is ethically permissible. While the golden rule and the ten commandments may be rules of this kind, what we refer to as the rules of the game with regard to lying in negotiations are not. That is not necessarily to say that these rules are not relevant to ethical discourse or that they may not, for some reason that has not yet been specified, distinguish between what is ethically permissible and what is not. In the first instance, though, they are something less than that. They are a description of how people conduct their affairs; of what people believe to be permissible, perhaps even ethically permissible; of how people may believe their adversaries are conducting their affairs; or of what people believe their adversaries believe to be ethically permissible.

Moreover, some rules can be found in a form that is consultable and authoritative. Once again, however, the rules of the game with regard to lying in negotiations are not of this kind. Finally, some rules are sufficiently clear and sufficiently well-understood that we can draw strong inferences concerning our adversaries' beliefs as to those rules. For two quite separate reasons, the rules of the game with regard to lying in negotiations are not of this kind. One reason, of course, is that they do not exist in a consultable and authoritative form and, perhaps as a result just of this, we do not all agree on what they are. Another reason is that the rules with regard to lying in negotiations are quite different from, say, the rules of checkers in that one player cannot tell simply through the course of the play whether she and her adversaries are playing by the same rules. One's conduct with respect to lying in

negotiations is generally invisible.

What follows from all this is that the statement that lying is permitted by the rules of the game may be relevant to an inquiry into the ethics of lying in negotiations but only as a part of some larger argument. The ethical permissibility of lies is not established by the fact that "the rules" may permit them. If, for instance, Ms. Buyer wanted to claim that such lies are ethically permissible, she would have to argue more than simply the fact that they are permitted under the rules. In theory, there appear to be three such further arguments that are open to her.

Under one of these arguments, Ms. Buyer might assert that the rules tell us what is ethically permissible not because that is the nature of these rules but rather because that is the nature of ethics. Let us assume, for instance, that what Ms. Buyer means by "the rules" is a description of how people who negotiate actually behave. She might then assert that custom is the measure of ethics and that, accordingly, those things that people actually do is the proper measure of what is ethically permissible. One problem with this argument is that her evidence as to what people actually do, as to the rules of the game, is likely to be a good deal weaker and less reliable than she might have us believe. The other problem is that, even if her description happens to be exactly right, her argument still relies entirely upon the claim that custom is the full measure of ethics, an understanding of ethics that is impoverished and unacceptably narrow.

The second argument available to Ms. Buyer involves the assertion that the rules of the game are relevant not because they are directly normative but, instead, because of what they tell us about the expectations and the future conduct of the person with whom she is negotiating. Thus Ms. Buyer might argue that lying is ethically permissible because it is permitted by the rules of the game, because we therefore know that Mr. Seller believes such lies to be permissible [FN92] and will tell them if he gets a chance, and because it is ethically permissible to lie to people about whom that is true. There are several reasons that might then be offered for the proposition that it is ethically permissible to lie to people who believe lying to be permissible and who will lie if they get a chance. Perhaps there will be no harm because Mr. Seller will know better than to believe the lie, or no net harm because her lies will simply cancel out his. Perhaps her lies are justified as a matter of self-defense or retaliation, or perhaps he has somehow forfeited his right to honest treatment. Or perhaps lying is necessary or useful to the efficient conduct of negotiations. Or perhaps, finally, her lies are justified because he has consented to them or agreed to play by these particular rules of the game. Most of these arguments are taken up elsewhere and can readily be shown to be wholly unpersuasive. As to those forms of the argument which are uniquely within the province of the rules of the game, Ms. Buyer again faces the problem of persuading us that she really knows the rules according to which people generally behave and, still less likely, that she can sustain the inference that Mr. Seller understands the rules and has chosen to play by them. Her argument about "consent" is, of course, wholly fictitious.

The third argument differs from the second because, instead of resting on an assertion about Mr. Buyer's expectations and future conduct, it rests only on an assertion about his expectations. Here Ms. Buyer asserts that the rules of the game permit lying, that Mr. Seller knows the rules of the game permit lying, and that it is therefore permissible to lie to Mr. Seller even though he may be one of those persons who, perhaps for reasons of ethics, will not lie to his adversary. Under these circumstances, Ms. Buyer might argue that Mr. Seller is on notice as to how others will play the game, that this notice provides him with the opportunity to protect himself from her lies, and that, while he is free to choose to play to a higher set of standards than are to be found in the rules of the game, he is not free unilaterally to change the rules of the game or to require Ms. Buyer to play by the rules he might prefer.

There are, again, several difficulties with this argument. First, Ms. Buyer's argument depends upon two assertions of fact, one concerning the rules of the game and the other concerning Mr. Seller's knowledge of those rules, that will rarely be sustainable. Second, her arguments about the irrelevance of Mr. Seller's probable conduct are unsound when, as is the case with this argument, lying is said to be justified not because the rules of the game actually distinguish what is ethically permissible from what is not but because of what the rules of the game may tell us about a particular adversary's expectations or probable conduct. Third, the substantive justifications for lying under these circumstances are both fewer and weaker than those that were available under the second argument. [FN93]

Having concluded that talk about the rules of the game adds little to the case for the ethical permissibility of lying, it is worth making one further point about this justification. It interacts in a variety of ways with the other distinctions, excuses and justifications that are treated elsewhere in this Article. If, as to some particular adversary, we conclude that certain lies are permissible because they are within the rules of the game, it may also be true that, as to that same adversary, other lies are not permissible. We may, for instance, be quite certain that white lies and puffing are within the rules of the game while being reasonably certain that bald-faced lies like tampering with the odometer are not. In this sense, the rules of the game are likely to be complex in ways that could incorporate a wide range of mixes of the distinctions, excuses and justifications that are the subject of this Article.

G. "I Lied but It Was Justified by the Nature of My Relationship to the Victim"--The Adversary's and Competitor's Excuses

This section deals with the justification for partisanship, and perhaps for lying, that may arise from the fact that, in one degree or another, persons who are negotiating with each other are adversaries. The next section will take up the justifications for partisanship, and potentially for lying, that may arise from the lawyers' relationships with their clients. Taken together, these comprise what is surely the lawyer's favorite bit of moral discourse: the justification by reference to the adversary system. [FN94] This first of these two sections, then, deals with the justifications that may arise by virtue of

the relationship between the parties to the negotiation. The next deals with the justifications that may arise by virtue of the relationship that exists between one of those parties and her lawyer.

The adversary's excuse can be invoked in two distinctly different circumstances: one a three-party form involving two contestants and a judge who may be asked to decide their case, the other involving the more common two- party form in which no judge or other third party plays a part.

In those adversarial situations involving two contestants and a judge, one finds a number of rules that might appear to permit acts or omissions calculated to produce beliefs at variance with those of the speaker. A criminal defendant is, without regard to his actual innocence, entitled to plead "not guilty" and thus to put the state to its proof. In differing degrees, criminal defendants as well as all civil litigants enjoy the right not to volunteer certain information that one might withhold for precisely the purpose of creating or maintaining a belief at variance with one's own. Finally, it is expected that litigants, and their lawyers, may do whatever is in their power to put all relevant matters in the "light" that best serves their interests.

There are three justifications offered for these practices. First, certain of the practices, especially those involving the false "not guilty" plea and the withholding of information, are said to reflect the rights of the participants. [FN95] Second, those strategies of omission and of putting matters in the best light which many of us recognize as the essence of lawyering are said to be justified on the grounds that partisanship of this kind is the best way to find the truth and to do justice. [FN96] Finally, in an argument that is usually invoked to justify the conduct of lawyers, partisan argumentation is said to be permissible because it is the judge's or jury's job, not the lawyers', to decide what is true. [FN97]

It is, of course, the right of all criminal defendants not to stand convicted until the state has, without any help from the defendant, carried its burden of proof. [FN98] Moreover, in all forms of litigation, there is a boundary that separates the information that litigants are obliged to disclose from that information that they are not. [FN99] These are matters of legal right that are bound up with our larger understanding of the nature of justice, the process of adjudication, and the proper allocation of burdens of proof. While these are rules about what may be done as a matter of law, they also come reasonably close to reflecting our understanding of what is, under these particular circumstances, ethically permissible. But if these rights reflect ethical justifications for lying, those justifications are exceedingly narrow, both as to the circumstances in which they apply and as to the "lies" that they may justify. [FN100] At most, they warrant particular kinds of omissions under particular circumstances in which the rules of the game have been carefully and exactly specified and in which one knows to a virtual certainty that both sides are playing by the same rules. [FN101]

In addition to these rights-based arguments, the three-party form of the

adversary's excuse is sometimes said to warrant partisan argumentation on the grounds that such arguments are the best way to find the truth. In theory, this justification may cover a different range of conduct than the rights-based argument. To be more specific, it may warrant conduct that is closer to the realm of affirmative misrepresentation. The difficulty with this claim is that, as David Luban has demonstrated, it is a thoroughly unpersuasive justification for any of the conduct that may come within our definition of lying. [FN102] Whatever may be the virtues or purposes of such conduct, it is not calculated to promote the discovery of the truth.

Within the three-party setting, at least three other arguments can be made on behalf of these potentially problematic practices. All of these arguments are dealt with elsewhere in this taxonomy. The first, and strongest, is the claim that these practices are permitted by the rules of the game. In fact, this is a fairly strong instance of that justification because virtually all the lawyers who participate in litigation understand the rules of the game to permit these practices. The other arguments, that the lawyer is merely putting matters in the best light or that it is not the lawyer's job to make judgments about what is true or false, are considerably weaker.

If one form of the adversary's excuse arises in the highly specified litigation environment involving two contestants and a judge, another form arises outside the context of litigation where we have two parties, not three. [FN103] The justifications for partisanship, and perhaps for lying, that arise from the relationships between the parties in the two-sided, nonlitigation setting are related, but nonetheless distinct, from those that we examined in the three-party setting. In the two-party setting these arguments for the permissibility of lying may invoke the rights of the contestants, the win-lose relationship they have with each other, the lawyer's duties to his client, or the rules of the game.

In the first of these arguments, it may be asserted that a participant in a two-party negotiation is entitled to tell certain lies as a matter of right. But this argument is not as strong as its counterpart in the three-way setting of litigation. The most that can usually be said in support of this claim of right is that the lie in question is not forbidden by law or that it promotes the self-interest of the liar. Ultimately these are not arguments about rights but offers of justification, offers that have been considered elsewhere in this Article and, for the most part, have been found wanting. The justifications that may arise from the lawyer's obligation to her client or from assertions about the rules of the game are also taken up elsewhere. Each in its own way, these too will prove problematic.

That leaves us with the argument that lying is justified because of the competitive, win-lose relationship between the parties. The relationship between two parties engaged in a negotiation is always, to some degree, competitive or adversarial. After all the integrative opportunities have been fully exploited, the parties are engaged in a distributive, win-lose contest over the allocation of the available surplus. They are, at least in a limited sense, each other's enemies. Some will argue that this condition

provides justification for lying.

There are certain circumstances in which lying, like the violence that it imitates, may be justified in dealing with an enemy. There are also, however, important distinctions between different degrees of enmity. Thus the justification of violence requires more than just a competitive relationship with one's victim. It normally requires such further circumstances as will satisfy the conditions of justifiable self-defense. It is not enough to assert that weak form of enmity, call it competition if you like, that is inherent in which one party's gain is another party's loss. The same is true of lying. We may sometimes be justified in lying to an enemy, as when we tell the thief that we are carrying nothing of value. But lying is not warranted by the lesser state of enmity that exists when the most that can be said is that two persons are competitors in the sense that one's gain is the other's loss. The argument that lying is justified because we are competitors is ultimately nothing more than the argument that lying is ethically permissible whenever it is in the self-interest of the liar. That argument has already been found to be unpersuasive.

H. "I Lied but It Was Justified Under the Special Ethics of Lawyering."

In addition to claiming that their lies are permissible because of the adversarial excuse, lawyers also offer a range of other justifications for conduct that is legal but otherwise unethical. Many of these justifications arise from what are said to be the special ethics of lawyering. Specifically, lawyers will argue that they owe special duties to their clients and that those duties render ethically permissible, even mandatory, acts that we would otherwise regard as ethically impermissible. These arguments are said to rest on the duties of loyalty and zealous representation and the duty to preserve a client's confidences. Additionally, lawyers will sometimes argue that, by virtue of their position in the profession, those otherwise impermissible acts in which they may engage are permissible for the lawyer because they are somehow attributable not to the lawyer's own ethical "account" but instead to that of the client or the state.

1. The Lawyer's Special Duties of Loyalty and Zeal

The first of the special duties to their clients that lawyers will invoke are their duties of loyalty and zealous representation. They will assert one or both of these duties and then announce that it is therefore ethically permissible, or even ethically mandatory, for lawyers to tell lies on behalf of their clients. [FN104]

The lawyer's duty of "zealous representation" will occupy a central place in any discussion among lawyers about the ethics of lying in negotiations. It is a prominent part of the lawyer's codes of professional responsibility, [FN105] and it has saturated this nation's legal culture almost as pervasively as has the adversary's excuse. [FN106] It is a duty that is understood to be bounded in the sense that it does not make permissible such conduct as would otherwise have been unlawful. [FN107] Many lawyers will, however, assert that it obliges the lawyer to perform all lawful acts,

including those that the lawyer might otherwise regard as unethical. In this form, the lawyers' duty to their clients entails an affirmative obligation to perform all lawful acts without regard to ethics.

Working in tandem with the duty of zealous representation is the lawyer's duty of loyalty to his client. [FN108] This duty derives from the law of agency and, still more specifically, from the law of fiduciary relations. [FN109] The duty is frequently invoked as if it entailed an absolute obligation to perform all acts, including those that are otherwise unethical, that the client might ask the lawyer to perform or that the lawyer believes might promote the interests of the client.

Lord Brougham set out what has since become "the traditional view of the lawyer's role" [FN110] when he announced that the lawyer's exclusive duty is to his client, that the lawyer must serve his client "by all means and expedients," and that he must do so with no regard to the "hazards," the "costs," the "torments," or the "destruction" which his activities may bring upon others. [FN111] In a contemporary elaboration of this idea, one influential commentator has written, without any of the irony that might be attributed to Brougham, that:

> A lawyer . . . or anyone acting for another . . . is required to treat outsiders as if they were barbarians and enemies. The more good faith and devotion the lawyer owes to his client, the less he owes to others when he is acting for his client. It is as if one man had only so much virtue, and the more he gives to one, the less he has available for anyone else. The upshot is that a man whose business is to act for others finds himself, in his dealings on his client's behalf with others, acting on a lower standard than he would if he were acting for himself, and lower, too, than any standard his client would be willing to act on, lower in fact than anyone on his own. [FN112]

On the question of lying, this commentator declares that a "lawyer is required to be disingenuous." [FN113]

The argument that lawyers are permitted or obliged to lie for their clients typically begins with the assertion that, while there may be a general duty not to lie, there are other special duties that lawyers owe by virtue of their relationships with their clients. Under these special duties a lawyer is ethically permitted, or ethically obliged, to engage in acts that would, in other circumstances, be ethically impermissible. This claim is then supported by any one of a long list of supporting arguments. None of these supporting arguments seems very persuasive.

The first supporting argument is that the permission or duty to lie is inherent in the meaning of "zealous representation." One can, however, be zealous without pursuing one's zeal into the realm of what would otherwise be bad acts. To be zealous is to act out of "enthusiastic and diligent devotion" to one's cause. In customary usage, the meaning of zealous representation does not entail a readiness to do all things for

one's cause including those things that are otherwise wrong. [FN114] Thus if lawyers are under a duty to lie, that duty must arise from something other than, or additional to, their duty of zealous representation. In the end, there is nothing about our owing a duty of zealous representation that suggests that this special duty relieves us of our general duty not to lie. [FN115]

A similar weakness is apparent in the assertion that the permission or duty to lie is inherent in the lawyer's duty of "loyalty." That term describes a condition of affiliation and faithfulness that need not entail a willingness to engage in acts that would otherwise be regarded as impermissible. Because one can be loyal while staying within the limits of law and ethics, loyalty is a distinction that does not, without more, speak to the question of whether one is permitted or obliged to lie. It may, however, be suggested that lawyers do actually owe more than a duty of simple loyalty, that they owe a duty of "perfect" loyalty. But when that term is used in the law, it does not refer to something like the "perfect" soldier who does whatever he is told without regard to the limits of morality. Rather, they are describing the full and perfect avoidance of any form of conflict with their client's interest. The duty of "perfect" loyalty is a duty to avoid a particular kind of bad conduct; it is not a directive to engage in bad acts on our client's behalf.

Even if lies for our clients are not rendered permissible because they are inherent in our duties of loyalty and zealous representation, many in the profession will assert that they are rendered permissible by the legitimate and binding pronouncements of the lawyers' codes of professional responsibility. These codes are, of course, replete with authority for the proposition that lawyers owe duties of loyalty and zealous representation. They do not, however, support the further claim that these duties entail either the permission or the duty to engage in otherwise bad acts. Moreover, even if such language were found in an applicable code of professional responsibility, there is no reason to believe that lawyers' limited power of self-regulation might legitimately include the power to authorize or compel otherwise unethical conduct. Nor is there reason to believe that such a pronouncement on the part of the profession would properly end the inquiry as to the ethics of such conduct. Thus we are still looking for a reason to believe that lawyers' special duties to their clients make it ethically permissible to lie.

The next argument that is usually presented is that lawyers are permitted, and perhaps obliged, to engage in otherwise bad acts on behalf of their clients because a lawyer, in Charles Fried's formulation, is "like a friend" to those clients. [FN116] The argument rests on two analogies: first, that we are permitted to serve our clients as we would serve our friends [FN117] and, second, that we are permitted to serve our friends as we would serve ourselves. [FN118] On these grounds it is argued that it is ethically permissible for lawyers to serve their clients through conduct that, though lawful, would otherwise be unethical. [FN119] Finally, it is asserted that it is not just permissible for a lawyer to engage in this conduct but that she is actually doing what is right, [FN120] a proposition that may be indistinguishable from the assertion that lawyers owe a duty to

serve their clients through conduct that would otherwise be unethical.

The problem with this argument is that it rests, in its entirety, on faulty premises. The truth of the matter is that self-interest is not an ethical justification for otherwise impermissible behavior. If it were, we could dispense with all this talk about clients. It would be permissible for lawyers to lie on behalf of their clients because it was in the lawyer's interest to do so. Indeed if self-interest is a justification for otherwise impermissible behavior, there is hardly any point in spending time talking about ethics at all. It is my assumption, however, that otherwise unethical conduct is not rendered permissible because we are doing it on our own behalf or on behalf of a friend. If this assumption is warranted, then this argument cannot justify otherwise bad acts done on behalf of our clients. Even the proponent of the lawyer-as-friend justification acknowledges these flaws in his argument. When it comes right down to it, he refuses to embrace the assertion that justification for otherwise bad acts can be found in one's own self- interest or in the interests of one's friends. [FN121] As he fears, this is the point at which his entire argument unravels. [FN122] In the end, the string of analogies that constitute the lawyer-as-friend argument cannot support the claim that it is ethically permissible for lawyers to engage in otherwise bad acts on behalf of their clients.

Even less persuasive is Curtis' argument that lawyers' duties to their clients supersede their general duty not to lie because a higher-than-normal duty to one person necessarily entails a lower-than-normal duty to others. [FN123] His explanation is that "[i]t is as if one man had only so much virtue, and the more he gives to one, the less he has available for anyone else." [FN124] Taken on its own terms, this explanation tells us less about the hydraulics of ethics than it tells us about the lawyer's capacity for delusion in the face of what must be a strongly felt need to secure permission to engage in bad acts. Under a generous reformulation of this argument, one could take it to be the assertion that the permission or duty to engage in otherwise bad acts is necessarily inherent in any duty of loyalty or zealous representation, an argument that was considered and rejected earlier in this section.

The additional argument is sometimes made that it may be permissible for lawyers to engage in otherwise bad acts on behalf of their clients because the clients are unable, due to the lawyer's monopoly over certain functions in our society, to perform those bad acts for themselves. In this broad form, this is the "lawyer's access" argument; [FN125] under slightly different circumstances it is the "last lawyer's" argument. [FN126] These arguments seem to gain strength from their proximity to the assertion that a lawyer may sometimes be obliged to represent someone she would rather not represent or to assert a position that she finds repugnant. When it comes to the ethics of lying in negotiations, however, these arguments have extremely limited application. First, outside of the settlement of lawsuits, lawyers engaged in negotiations for their clients are generally not doing something that their clients are barred from doing for themselves. Thus lawyers enjoy no special access from which one might derive a duty to act for the client. Moreover, merely saying that lawyers may sometimes owe a duty to speak for an unpopular cause or to defend the bad acts of their clients is

not, without a great deal more, saying that they are permitted or obliged to engage in their own bad acts in order to promote the interests of their client.

Finally, we arrive at the last of these arguments. This is the claim that the general duty to avoid bad but lawful acts simply does not apply within the province of the profession. Under this theory, for those who are acting as lawyers, there are only the special duties that the lawyer may owe to his client. The profession, under this view, is a special province within which general ethical duties, including the duty not to lie, have no claim upon us except insofar as they have been made a part of the "special" ethics that govern this particular province. This position, usually associated with Emile Durkheim, may be an accurate description of an ethically impoverished profession. [FN127] At the same time, however, it appears to be highly unpersuasive as a matter of normative ethics.

In the end, there is little support to be found for the proposition that lawyers are, by virtue of their relationship with their client, permitted or obliged to lie. That is not to say that lawyers are never justified in lying, only that the justification must come from somewhere other than the simple fact that the lawyer has a client whose interest may be promoted by the lie. This claim is not supported by the lawyer's duties of loyalty and zealous representation, either as those duties are generally understood or as they are embodied in the lawyer's codes of professional responsibility. Neither is it supported by the argument that a lawyer is "like a friend" to her clients or that a higher-than-normal obligation to one person entails a lower-than-normal obligation to another. The proposition is not supported by the arguments that invoke the fact that the lawyer, by virtue of her training and license, can do things that her client cannot nor on the claim that the general duty not to lie does not apply within the special province of the profession.

Further, even if a lawyer's duties to her client carry with them either the permission or the duty to lie, I assume that there is no such permission or duty if our client instructs us not to engage in bad acts. As to those clients who will not so instruct us, I further assume that we are ethically accountable for our decision to represent them. At least in theory if not in practice, there is usually nothing that keeps us from conditioning our offer of representation on their acceptance of our unwillingness to engage in bad acts.

2. The Lawyer's Duty to Preserve Confidences

The duty that lawyers owe to preserve the confidences of their clients may also be said to justify certain of the lies that lawyers tell in the course of negotiations. [FN128] Thus it is commonly asserted that it is sometimes necessary and sometimes ethically permissible to lie in order to protect certain secrets. [FN129]

This claim of justification raises three issues. The first is whether there is a category of confidences that a negotiator is ethically permitted to keep; the second is

whether the telling of lies may be an ethically permissible means of protecting those confidences; and the third is whether a lawyer may sometimes be under an ethical duty to lie for the purpose of preserving client confidences.

The first of these questions, whether there are some secrets that a negotiator ethically may keep, is complicated by the fact that some confidences are worthier than others and that one man's confidence is another man's material omission. A person involved in a real estate negotiation might, for instance, have all sorts of reasons for preserving the secrecy of his identity, the use to which he means to put the land, or other facts that might bear upon the likelihood of agreement or upon the price. Perhaps the buyer is a mobster, a disgraced ex-President, a member of a disfavored racial or ethnic group, or a developer who has become famously rich building skyscrapers on supposedly worthless land. Perhaps he means to build a trailer park, or this is the last parcel needed for a top-dollar development, or he has discovered oil on adjoining land, or he has, by trespass, discovered oil on the land he is trying to buy. Or perhaps he is a seller who must sell now and take whatever he can get, but who is afraid that this information, if known to the prospective buyer, will destroy any prospect of getting a fair price. Some of those seem like good reasons to keep a secret and some do not. Any of this information might, if withheld, have an effect on the outcome of the negotiation, and withholding some of it is clearly illegal. All of this information is valuable in the sense that it may have an effect upon the transaction. Some of it must be disclosed as a matter of law; some of the remainder, I assume, must be disclosed as a matter of ethics; and it is both legally and ethically permissible to keep the balance of the information secret.

But even if we conclude that there are certain secrets that it is wholly permissible to keep, there is still the second question of whether it is ethically permissible to lie for the purpose of protecting such secrets. As to this question, there are a number of propositions that I am prepared to offer and defend. One is that there are some secrets that it is permissible to keep but for which it is not permissible to lie. If this is so, the category of secrets for which we may lie is smaller, perhaps a good deal smaller, than the category of secrets that it is permissible to keep. Another such proposition is that each justification for lying dealt with elsewhere in this taxonomy may be invoked as a justification for a lie to protect a permissible secret. Indeed, it may simply be a matter of definition to say that every permissible lie entails a lie to protect a permissible secret. Moreover, I am able to discern no circumstance in which a lie that is not justified by some claim that appears elsewhere in this taxonomy might nevertheless be justifiable by virtue of the fact that the lie is told in defense of a permissible secret. The final proposition is that even such lies as may be justified by virtue of the secrets they protect are justified only insofar as they are necessary for the protection of those secrets. The difficulty here is that while lies are often useful or convenient in the protection of secrets, they are rarely necessary. [FN130] The negotiator may, for instance, decline to volunteer the information in question. Even if asked, there are all kinds of ways to avoid answering a question without resorting to lies.

The third broad question that is relevant to this argument is whether a lawyer is ever under an ethical duty to lie for the purpose of preserving client confidences. The answer to this question, qualified though it may be, is that if there is a duty to lie for the purpose of protecting secrets, that duty can be no broader than, and is probably a good deal narrower than, the class of circumstances in which it is ethically permissible to tell such lies. Otherwise this is simply a special case of the larger question of whether a lawyer is obliged to engage in what she might regard as bad acts for the sake of her client, a question that has, at least as a general matter, already been answered in the negative.

My conclusions, then, are four. First, there are some secrets that it is permissible to keep. Second, it is sometimes permissible to lie in order to keep a secret. When it is, however, the lie will be warranted by one of the other justifications in this taxonomy and the justification for the lie will not be strengthened by the fact that there is a secret being kept. Third, lawyers are generally obliged to serve their clients through all such acts as are ethically permissible. This duty presumably includes a duty to tell lies in order to protect a client's secrets, but only when such lies are ethically justified on some grounds additional to the presence of a secret. Fourth and finally, for reasons that have been explored in section II.H.1 above, lawyers are generally not under a duty to tell lies that are otherwise ethically impermissible, even if they are representing a client and even if the lie is told for the purpose of protecting a client's secret. In the end, the fact that there is a secret to be kept appears to add nothing to the store of justifications that may make it ethically permissible to lie in negotiations.

3. The Claim That the Lawyer's Bad Acts Are Attributable to Someone Else's Ethical Account

In addition to these arguments based on their duties to their clients, lawyers will sometimes argue that certain of the otherwise unethical conduct in which they may engage is somehow permissible because, even if the act were impermissible, responsibility for that act lies somewhere other than with the lawyer. It is in this way suggested that the bad act is attributable to someone else's ethical account. The someone else is usually either the client or the state.

a. Attributable to the Client

Under this first form of the claim, it is asserted that the lies lawyers might tell for their clients are not their responsibility but are, instead, the responsibility of their clients. This is an extension, indeed quite a sizable extension, of the principle of nonaccountability according to which lawyers are not accountable for the things their clients have done. [FN131] While the principle seems sound, the same cannot be said for that extension of the principle by which we exonerate ourselves for the things that we do in our capacity as lawyers. Professor Fried's argument, for instance, that we may be no more responsible for such lies than the "letter carrier who delivers the falsehood" [FN132] seems totally unpersuasive when it is applied to lies that a lawyer tells in the

course of negotiations. [FN133]

b. Attributable to the State: The Soldier's Excuse

In addition to the letter carrier's excuse, Professor Fried also offers a related argument that might be called the soldier's excuse. In its simplest form, it rests on the claim that lawyers are like soldiers in that they are permitted, perhaps even obliged, to undertake certain acts that would otherwise be regarded as impermissible. The soldier is, for instance, permitted to kill. Fried argues that the killing of the enemy soldier is not a "personal wrong" attributable to the soldier. From the perspective of the individual soldier, this is not a "wrong done by one's person." [FN134] Instead, this act of killing is "wholly institutional," [FN135] and thus attributable to the state. [FN136]

Having established this baseline, Fried then asserts that lawyers, like soldiers, are permitted to engage in certain conduct that would otherwise be impermissible. Lawyers are, for instance, permitted to assert the statute of limitations or the lack of a written memorandum to defeat what they know to be a just claim against their clients. [FN137] The core of this argument is that certain "wrongs" have been expressly approved by the state and, with regard to such wrongs, we will not condemn those who invoke that approval or who engage in the approved activity. [FN138]

Stated in this way, we must still decide what has been approved by the state and what has not. Fried does not, for instance, suggest that the soldier's license is without limit. It would still be a "personal wrong," for instance, for the soldier to abuse prisoners or intentionally to harm civilians. [FN139] So would it be wrong, I assume, for a lawyer to engage in an outright lie to the court. [FN140] Moreover, in deciding what has been approved by the state and what has not, we would have to decide what sort of approval might be sufficient. Is it enough, for instance, that the act has not been prohibited? Or must it be expressly approved? Or perhaps even compelled?

Our concern is with the relatively narrow question of whether lawyers who lie in negotiations on behalf of clients may, on the strength of the soldier's excuse, assert that those lies are ethically permissible. [FN141] The answer to this question appears clearly to be that they cannot. The state has neither compelled nor expressly permitted them to lie. The most that the lawyers can say is that certain lies have not been prohibited. The soldier, however, is acting under the express authority, perhaps even the compulsion, of the state. The negotiator's version of the soldier's excuse is much thinner than that. So much thinner, indeed, that it amounts to nothing more than the assertion that a lawyer, or anyone else for that matter, is ethically permitted to serve his own ends through all acts that are not forbidden as a matter of law, [FN142] an argument that has already been rejected. [FN143]

I. "I Lied but It Was Ethically Permissible Because of the Bad Conduct or the Incompetence of My Adversary."

Lying in negotiation is sometimes justified by reference to the bad conduct of the person with whom the liar is negotiating. The bad conduct that is said to justify lying may have occurred outside of the negotiation (e.g., in a prior negotiation or in the events leading to the lawsuit which the parties may settle through the negotiation) or it may have occurred in the course of the negotiation itself. The bad conduct may or may not have involved lying.

This section will consider those justifications that rest on the adversary's bad conduct as a negotiator. We will then, in a subsequent section, take up the possibility that a lie may be justified by some bad act of the victim that was done outside the negotiation. [FN144]

1. Self-defense and Offsetting Their Lies with Mine

The first claims to be considered are the related assertions that lying in negotiations is warranted either as a means of self-defense [FN145] or as a method of offsetting the effects of our adversaries' lies. [FN146]

In saying that a lie is justified as a matter of self-defense, one might simply mean that it is permissible because it works to protect or promote one's self-interest under conditions of distributive, win-lose competition. Or one might simply mean that, under these competitive conditions, the rules of the game permit a player to protect or promote her self-interest by lying. If this is all that is meant, then these claims of justification have already been considered elsewhere in our taxonomy and they do not, in any event, rest on assertions about our adversary's bad practices.

In this section, however, we are concerned with the stronger claim of self-defense in which an otherwise impermissible lie is justified because it is necessary to protect oneself from the damage that would otherwise be done by the ethically impermissible conduct of one's adversary. For example, one might, in dealing with a potential attacker, lie in order to overstate the strength of one's position and thus deter attack. [FN147] The lesser evil is ethically permissible because it prevents or protects against the greater evil.

But this situation does not arise in negotiations and it is not the situation we generally have in mind when we speak of lying in negotiations as being justified as a matter of self-defense. Instead, if we mean anything stronger than protecting our simple self-interest or playing by the rules of the game, the image behind our speaking is that of a defensive "parry" to an offensive "thrust." Mr. Seller says, contrary to fact, that he has another offer at $2000 and Ms. Buyer "defends" with the lie that she has another seller who stands ready to meet her needs for $1400. Ms. Buyer well might argue that her lie is ethically permissible for the purpose of offsetting his. He lied first, he gained some advantage by his lying, and she is entitled to "lie back" in order to eliminate the stolen advantage.

To illustrate what she is saying, let us assume that Mr. Seller's true reservation price is $1000 and that Ms. Buyer's true reservation price is $3000, that each starts out

with what proves to be an accurate estimate of the other's reservation price, and that each makes an opening offer that conforms exactly to the other's reservation price. Thus Mr. Seller (whose true reservation price is $1000) offers to sell for $3000 and Ms. Buyer (whose true reservation price is $3000) offers to buy for $1000. At this stage, according to the social psychologists, agreement is likely to be reached near the midpoint between these two opening bids, that is to say at about $2000. Now assume, however, that Mr. Seller musters all of his bravado and announces, quite contrary to his own knowledge, that he has another buyer who is offering $2700 and that he will not, under any circumstances, sell to Ms. Buyer for less than that amount. This is the point at which Ms. Buyer asserts she is, as a matter of self-defense against a bad act, justified in "lying back" in order to eliminate the advantage that Mr. Seller would otherwise have improperly secured. Her response is that one of Mr. Seller's competitors has given her a firm offer to sell at $1300 and that she will not, in any circumstances, pay more than that amount. The stolen advantage is thus offset and the equilibrium restored. They are, of course, in a kind of stalemate, but under the circumstances they may still escape that stalemate and reach an agreement, probably at around $2000.

The problem here is that if Ms. Buyer really knows that Mr. Seller was lying about his $2700 offer, then her justification for lying back is weak. First, there will be virtually no effect to offset. A lie like Mr. Seller's will shift the likely point of agreement if, and only if, it is believed. He gains nothing by saying something that is known to be a lie. Moreover, Ms. Buyer has a variety of ways that she can reveal the fact that Mr. Seller's statement has been recognized as a lie. She can announce her knowledge or, if she prefers, she can simply refuse to take Mr. Seller's statement at face value. [FN148] What distinguishes the return lie is that it threatens to do more than simply eliminate the advantage that Mr. Seller had sought to secure. Specifically, it threatens to damage Mr. Seller in precisely the way that he tried, but failed, to injure Ms. Buyer. If there is justification for this possibility that Ms. Buyer is doing otherwise impermissible injury to Mr. Seller, that justification must be found in, for instance, the rules of the game or on notions of punishment, retaliation or his having forfeited his right to honest treatment. This justification is not to be found in the idea that Ms. Buyer is engaged in self-protection or that she is merely offsetting the effects of his lie. Moreover, her argument is made weaker still by the fact that, in the real world, Ms. Buyer will usually not know, but merely suspect or fear, that Mr. Seller was lying about his $2700 offer.

2. Punishment, Retaliation, and Teaching Him a Lesson

Apart from the question of lying in self-defense or lying to offset the effects of an adversary's prior lie, the claim might also be made that one person's lie is warranted either as punishment or retaliation for the lies of another. [FN149] But even when the grounds for this argument are strongest, it is still unpersuasive.

Assume that, without provocation, A shoots at B and misses. Then assume that, in the absence of conditions that might warrant a claim of self-defense, B shoots back,

killing A. B may then claim that he was provoked, that he was retaliating or that he was seeking revenge. These claims may be relevant to the question "who started it" or to the matter of mercy and the severity of B's punishment. Even if accepted, however, these claims will not convert B's killing of A into a permissible act, either as a matter of law or as a matter of ethics. The same is true, I submit, with regard to lesser physical assaults and to such nonphysical assaults as lying in negotiation.

Cases involving lying are not particularly strong occasions for retaliation. The person who proposes to retaliate for her adversary's prior lie is rarely certain that her adversary has, in fact, lied. Worse, this uncertainty is usually compounded by conditions that create a high risk of bias and misjudgment. [FN150] As a result, there is a significant risk that the lie told in "retaliation" will, in fact, be the first lie and not the second, that it will cause unwarranted injury to an innocent adversary, and that it will, if discovered, initiate a cycle of retaliatory lying. It is possible that the person who proposes to retaliate knows with certainty that her intended victim is guilty of the earlier lie. But at most that creates a situation comparable to the one in which B shot back at, and killed, A. If the retaliation is nothing more than simple retaliation, if it is not in fact an act of self- defense, then it is ethically impermissible. [FN151]

An angry competitor will sometimes claim that her adversary has engaged in bad conduct and that she is going to "teach him a lesson." Applied to lying, particularly lying in negotiations, this claim is preposterous. Here the "teacher" is doing everything within her power to assure that her "lesson," the retaliatory lie, will remain forever a secret from the "student." And even if our supposed student is guilty of a prior lie and somehow manages to discover the "lesson" he has been taught, he is not likely to regard that lesson as reason to stop lying. Instead, he is likely to regard it as vindication for the suspicions on the basis of which he justified his earlier lie. In the end, this talk of lessons seems nothing more than the claim that retaliation is ethically permissible. That claim, at least in the absence of other justifying circumstances, is unpersuasive.

3. Forfeiting the Right to Honest Treatment, Either by Lying or by Asking an Improper Question

This section has been dealing with varieties of the claim that "I lied but it was justified by my adversary's bad practices as a negotiator." It began with consideration of claims that rest on ideas of self-defense and then took up other claims that rest on notions of permissible retaliation. The last claims to be considered in this section involve the assertion that "my lie was justified because my adversary has forfeited his right to honest treatment." [FN152]

In its usual form, the meaning of this claim is that the speaker's adversary has lied and that liars forfeit their right to honest treatment. If this is so, then there is no obligation to tell the truth to liars and, in order to know that a particular lie is ethically permissible, all we need to know is that the victim is a liar. As do all of the claims found

in this section, this one faces the problems of knowledge, uncertainty and bias. But even if we set those problems aside, this claim also depends upon the untenable assumption that our ethical preference for truth-telling arises entirely from the prospect of reciprocity. In fact, this preference is much more broadly based. It rests, in addition, on our concern for the harm that our own lying may do to innocent victims, to the community, to the possibility of trust, to the efficacy of our society, and ultimately to ourselves. The golden rule is "do unto others as you would have them do unto you;" it is not "do as you believe, or fear, they may be doing to you." We understand that one of the characteristics of ethical conduct is its vulnerability to exploitation through the nonreciprocal conduct of others. The risk that our adversaries will not reciprocate is what makes ethics risky and sometimes costly. It is not a justification for conduct that would otherwise be ethically impermissible. [FN153]

Any thorough treatment of the justifications for lying in negotiations must take account of one particular variation of the claim that the lie was permissible because the victim forfeited her right to honest treatment. This claim of forfeiture rests not on the assertion that the adversary has lied but, instead, on the assertion that she has asked an improper question, that the claimant now has no choice except to lie, and that his lie is therefore ethically permissible. [FN154] Thus, it is frequently asserted that a lie is permissible because the victim has forfeited his right to honest treatment, not through the lies he may have told but rather by virtue of some question he has asked. In the classic example, Ms. Buyer asks Mr. Seller to name his reservation price. [FN155] Mr. Seller rightly perceives that he now has a problem. He may believe that his choices are two. Either he can lie or he can tell the truth. But if he tells the truth, then, at least with regard to this transaction, he is committing a kind of commercial suicide. If, as is likely, he decides to lie, he is likely to tell us that his lie was necessary and that his victim left him no choice and thus has only herself to blame.

At least in some degree, Mr. Seller's dilemma is a false one. The assertion that his choices are either to lie or to reveal his reservation price ignores the suppleness of discourse and the attendant possibility that such questions, if they are actually asked, can be avoided, ignored, misunderstood, rebuked or turned back upon the questioner. If there is doubt on this subject, one need only spend an hour or two watching competent politicians dealing with questions they do not want to answer. While lying may sometimes be the easiest way to deal with such questions without revealing one's reservation price, it rarely, if ever, will be the only way.

There are, without doubt, some questions that we as negotiators do not want to answer. Moreover, some of those questions will seek information which, in the normal course, we owe no obligation to disclose. Such questions are, however, not often asked and, when they are, it will be an extraordinarily rare situation in which lying is the only alternative to volunteering one's reservation price. Should all of those circumstances be met, then lying is probably warranted as a matter of self-defense, because it is within the rules of the game, or because our adversary has forfeited, for purposes of that one question, the right to honest treatment. But in the absence of actual necessity, this

claim of forfeiture appears to carry no weight.

4. "But for My Adversary's Error or Incompetence, My Lie Would Have Caused No Harm."

In this case it is asserted that the lie is ethically permissible not because of the adversaries' bad conduct but because of their failure to protect themselves against the lie. This claim is wholly unsatisfactory. It begins by assuming that our adversaries owe to themselves a duty of vigilance and self- defense. If we then intentionally do injury to them, it is then said that the injury done to them is attributable not to us but, instead, to our victims who, by definition, have failed in their duty of self-defense. Assigning to our victim such a duty of self-protection then releases us from any and all obligations that would otherwise exist not to cause such injuries as come within the scope of the victims' duty of self-protection. [FN156] "Certainly," as David Luban has written, "the fact that a man has a bodyguard in no way excuses you for trying to kill him, particularly if you bend all your ingenuity to avoiding the bodyguard." [FN157]

J. "I Lied but It Was Justified by the Good Consequences It Produced."

The final claim to be considered is that lying in negotiations may be justified because of the good consequences that it may produce. This argument comes in at least three forms.

The strongest of these three forms involves such fact patterns as lying to Genghis Khan in order to save the city, lying in negotiations with terrorists, or lying to the wheat-hording monopolist in order to get a lower price so that one can buy more grain for the starving children. [FN158] The argument is that these lies are ethically permissible because they work to prevent a greater immorality. In this strong form of the claim, we assume, first, that there is a broad, perhaps authoritative, consensus that the intended victim of our lies is trying to do bad things, and second, that the lies we tell are specifically calculated to block the greater evil.

The same argument could be made, though less compellingly, if we were to weaken either of those two conditions. This weaker form of this argument is as strong as it normally gets. "That guy hurt my client and I'm going to make him pay." "She calls herself an industrialist! She's a criminal and I'm going to see that money ends up where it belongs." "I can't believe that my tax dollars are being spent to bring cases like this." In these situations there is less of a consensus that our cause is totally right and that our adversary's is wrong. And the lie that will be told is less likely to block an egregious act than simply to disadvantage our adversary. Not only is the consensus much weaker, but there is a strong possibility that statements of this kind may be, at some level, motivated by self-interest. The problem of immoral means and of taking the law into one's own hands are compounded by the lack of consensus and the probability of bias.

That is not to say, however, that this weaker form of the argument may not provide justification for lying. It seems clear, for instance, that our system of civil litigation is strongly biased in favor of those people who have resources and against those who do not. [FN159] I am not satisfied that those who represent people who lack resources are obliged to conduct themselves in their negotiations as if that bias did not exist. But this slope is as slippery as they get, for others will find "the right" in places that I do not, and the possibility of bias is ever-present.

There is also a third situation in which lies are sometimes said to be justified by the good they may produce. This situation involves no assertion, not even a weak one, concerning the evils of the adversary. The focus, instead, is upon the virtues of those who may benefit from the lies that are told. "I need money for my child's operation and that's all the justification I need." Here, too, the likelihood of bias is strong and the slope is slippery. But, however often this excuse may be abused, there are circumstances of this kind that most of us would regard as sufficient to justify certain lies.

This is one of those sections that permits no clear, single conclusion. The claim that our lies may be warranted because of the good that is to be served is sometimes persuasive and sometimes not, and there is little likelihood that we will agree on exactly where that line is to be drawn. These are difficult questions of degree, and they must be answered under conditions that offer almost unlimited opportunities for biased judgment. Thus, apart from saying that it is ethically permissible to lie to Genghis Khan and others of his ilk, this assessment of the argument from good consequences does not reach a clear conclusion. What we must do in such cases is to be skeptical of the arguments that are offered for these lies, take account of the likelihood of bias, make such judgments as we can, and take responsibility for the choices we make.

III. CONCLUSION

Effectiveness in negotiations is central to the business of lawyering and a willingness to lie is central to one's effectiveness in negotiations. Within a wide range of circumstances, well-told lies are highly effective. Moreover, the temptation to lie is great not just because lies are effective, but also because the world in which most of us live is one that honors instrumental effectiveness above all other things. Most lawyers are paid not for their virtues but for the results they produce. Our clients, our partners and employees, and our families are all counting on us to deliver the goods. Accordingly, and regrettably, lying is not the province of a few "unethical lawyers" who operate on the margins of the profession. It is a permanent feature of advocacy and thus of almost the entire province of law.

Our discomfort with that fact has, I believe, led us to create and embrace a discourse on the ethics of lying that is uncritical, self-justificatory and largely unpersuasive. Our motives in this seem reasonably clear. Put simply, we seek the best of both worlds. On the one hand, we would capture as much of the available surplus as we can. In doing so, we enrich our clients and ourselves. Further, we gain for ourselves

a reputation for personal power and instrumental effectiveness. And we earn the right to say we can never be conned. At the same time, on the other hand, we assert our claims to a reputation for integrity and personal virtue, to the high status of a profession, and to the legitimacy of the system within which we live and work. Even Gorgias, for all his powers of rhetoric, could not convincingly assert both of these claims. Nor can we.

Somehow we must stop kidding ourselves about these matters. We must grant a place to ethics, first in our discourse and then in our actions. There are, I think, several concrete steps that might be taken. First, we might acknowledge that we have a personal stake in the existing discourse concerning the relationship between effectiveness and ethics. As a result of that personal stake, we have shown a strong disposition in favor not just of self- justification but also of the conclusion that there are no hard choices to be made, no price to be paid in the name of ethics. Second, we might admit that, in a wide range of circumstances, lying works. Third, we might become more critical of our self-serving claims about what is not a lie and about what lies are ethically permissible. This involves acknowledging, for instance, that many lies are ethically impermissible even though they effectively serve our interests and those of our clients--and even though they are not forbidden either by law or by our codes of professional self-regulation. It also involves giving up our claim that all our lies are justified by the rules of the game or by our duties to our clients. It entails accepting the proposition that ethics and integrity are things for which a price may have to be paid. Fourth, we might clearly define winning in a way that leaves room for ethics. It might, for instance, be understood not as "getting as much as we can" but as "winning as much as possible without engaging in unacceptable behavior" and "unacceptable behavior" might then be understood to exclude not just those things that are stupid or illegal but also those other things that are unethical. And finally, we might give up our claim that this is all too hard, that we have no choice in these matters and that we are not responsible for the choices we make and the harm we inflict upon others.

Short of all this, we can, even those who disagree with most or all of what I have said, make our own contributions to this continuing conversation. In that way, we can do our best to understand and confront the choices we must make between the harsh individualistic reality of instrumental effectiveness and the elusive possibilities of ethics, integrity, reciprocity, and community.

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dedicated to the memory of Wallis C. Wetlaufer.

FN1. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 Am. B. Found. Res. J. 926, 928.

FN2. White appears to approve a broad range of lies and to condemn only those that are "unfair" or violate "the rules of the game." Id. at 934-35. At the same time, however, his article is concerned more with what ought to be forbidden under the Model Rules of Professional Conduct than with what is ultimately right or ethical. His position is explicitly informed by various prudential considerations that are relevant to what I shall call the law of professional self-regulation. As he clearly understands, and as I shall argue in section I.E. infra, those prudential considerations might cause us to forbid less as a matter of law than we might condemn as a matter of ethics.

FN3. This Article draws on a number of literatures dealing with negotiations and ethics. As to negotiations, the most useful materials come from five areas of study. The earliest studies were written by specialists in labor and diplomatic negotiations and were based on their observations of actual negotiations. See F. Ikle, How Nations Negotiate (1964) (a study of international negotiations); R. Walton & R. McKersie, A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System (1965) (an extraordinarily rich analysis that appears to have been abstracted directly from experience without the mediation of another discipline); I. Zartman & M. Berman, The Practical Negotiator (1982) (generalizations drawn from diplomatic negotiations). Next came the anthropologists with their comparative ethnographies. See P. Gulliver, The Disputing Process: Law in Ten Societies (1978); P. Gulliver, Disputes and Negotiations--A Cross Cultural Perspective (1979). The most recent contributions have come from social psychologists and game theorists. See S. Bacharach & E. Lawler, Bargaining: Power, Tactics, and Outcomes (1981) (social psychology); O. Bartos, Process and Outcome of Negotiations (1974) (game theory); R. Fisher & W. Ury, Getting to Yes (1981) (primarily a popularization of insights drawn from game theory); D. Lax & J. Sebenius, The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain (1986) (applied game theory); D. Pruitt, Negotiation Behavior (1981) (social psychology); H. Raiffa, The Art and Science of Negotiation (1982) (game theory); J. Rubin & B. Brown, The Social Psychology of Bargaining and Negotiation (1975) (social psychology); T. Schelling, The Strategies of Conflict (1963) (important for its influential game theoretic contributions with regard to commitment strategies); Bazerman, Negotiator Judgment: A Critical Look at the Rationality Assumption, 27 Am. Behav. Sci. 211 (1983) (discussing factors influencing negotiations, perceptions, and judgments); Pruitt, Strategic Choice in Negotiation, 27 Am. Behav. Sci. 167 (1983) (social psychology); Rubin, Negotiation: An Introduction to Some Issues and Themes, 27 Am. Behav. Sci. 135 (1983) (social psychology); see also R. Axelrod, The Evolution of Cooperation (1984) (game theory). Furthermore, no statement of the literature relevant to the process of negotiations would be complete without reference to the work of the ethnographic sociologist Erving Goffman. See E. Goffman, Frame Analysis (1974); E. Goffman, Strategies Interaction (1969); E. Goffman, Where the Action Is

(1969); E. Goffman, On Face Work, in Interaction Ritual: Essays on Face to Face Behavior (1967); E. Goffman, The Presentation of Self in Everyday Life (1959); see also P. Ekman, Telling Lies (1985).

There are also materials written by and for lawyers on the subject of negotiations. See G. Bellow & B. Moulton, The Lawyering Process: Negotiation (1981) (readings and materials); R. Haydock, Negotiation Practice (1984); P. Herman, Better Settlements Through Leverage (1965); H. Ross, Settled Out of Court (1980); P. Schrag & M. Meltsner, Public Interest Advocacy: Materials for Clinical Legal Education 231-40 (1974); P. Sperber, Attorney's Practice Guide to Negotiations (1985); R. Wenke, The Art of Negotiation for Lawyers (1985); G. Williams, Legal Negotiation and Settlement (1983); Condlin, "Cases on Both Sides": Patterns of Argument in Legal Dispute-Negotiation, 44 Md. L. Rev. 65 (1985); Eisenberg, Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking, 89 Harv. L. Rev. 637 (1976); Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 UCLA L. Rev. 754 (1984); Menkel-Meadow, Legal Negotiation: A Study of Strategies in Search of a Theory--A Review Essay, 1983 Am. B. Found. Res. J. 905; White, supra note 1.

The literatures that deal with questions directly related to the ethics of lying in negotiations are of three kinds. In one, legal academics are writing about the ethics of the profession; in the second, philosophers and theologians are writing about ethics in general; and, in the third, the students of negotiations--chiefly social psychologists and game theorists--are speaking from their perspectives about the ethics of negotiations.

Specialists in the ethics of the legal profession have written from two perspectives about the ethics of lying. In what is by far the larger of the subliteratures, authors have dealt with the general question of whether lawyers are morally justified in engaging in otherwise unethical acts. See M. Freedman, Lawyers' Ethics in an Adversary System (1975); G. Hazard, Ethics in the Practice of Law (1978); D. Luban, Lawyers and Justice: An Ethical Study (1988); D. Luban, The Good Lawyer: Lawyers' Role and Lawyers' Ethics (D. Luban ed. 1983); Curtis, The Ethics of Advocacy, 4 Stan. L. Rev. 3 (1951); Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 Yale L.J. 1060 (1976); Fuller, The Adversary System, in Talks on American Law (H. Berman ed. 1971); Fuller & Randall, Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159 (1958); Luban, The Lysistratian Prerogative: A Response To Stephen Pepper, 1986 Am. B. Found. Res. J. 637; Pepper, The Lawyers' Amoral Ethical Role: A Defense, A Problem, and Some Possibilities, 1986 Am. B. Found. Res. J. 613; Rhode, Ethical Perspectives on Legal Practice, 37 Stan. L. Rev. 589 (1985); Schwartz, The Zeal of the Civil Advocate, 1983 Am. B. Found. Res. J. 543; Shaffer, The Unique, Novel, and Unsound Adversary Ethic, 41 Vand. L. Rev. 697 (1988); Simon, Ethical Discretion in Lawyering, 101 Harv. L. Rev. 1083 (1988); Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. Rev. 29; Wasserstrom, Lawyers as Professionals: Some Moral Issues, 5 Hum. Rts. 1 (1975).

There is also a much smaller body of literature that deals specifically with the obligations of lawyers with regard to lying in negotiations. Most of the work in this area, however, is directed not toward what I have defined as the question of ethics but instead toward the related question of whether and in what ways the profession ought to attempt to regulate the lies lawyers might tell in the course of negotiations. See Guernsey, Truthfulness in Negotiation, 17 U. Rich. L. Rev. 99 (1982); Hazard, The Lawyer's Obligation To Be Trustworthy When Dealing With Opposing Parties, 33 S.C.L. Rev. 181 (1981); Peters, The Use of Lies in Negotiation, 48 Ohio St. L.J. 1 (1987); Rubin, A Causerie on Lawyers' Ethics in Negotiations, 35 La. L. Rev. 577 (1975); White, supra note 1.

Next, there is a centuries old literature in which students of ethics, mostly philosophers and theologians, have written about the ethics of lying. Here I will content myself with a citation to S. Bok, Lying: Moral Choice in Public and Private Life (1978), and the materials cited in Professor Bok's bibliography.

Finally, certain portions of what have been written on the subject of negotiations (as distinct from the subject of ethics) have an ethical component. Here we see three different phenomena. First, we find a substantial number of writers whose work is clearly motivated by the fundamentally ethical belief that people ought to engage in cooperative behavior or in integrative (win-win) bargaining. Second, there is implicit in much of the literature of game theory the assumption that ethics is not a problem because self-interest is all that matters. This assumption often results in a studied silence on the question of ethics. Third, there are some writers who appear to become uneasy with the ethical implications of what they have said and try to say something, almost anything, about ethics. Sometimes their heart is not in it and other times it seems that there is just not much to be said about ethics from the perspectives from which they are writing. See H. Raiffa, The Art of Science and Negotiation 344-45 (1982); Lewicki, Lying and Deception: A Behavioral Model, in Negotiating in Organizations (M. Bazerman & R. Lewicki eds. 1983).

FN4. The Random House Dictionary defines lie as "(1) a false statement made with deliberate intent to deceive; an intentional untruth; a falsehood. (2) something intended or serving to convey a false impression. . . . (3) an inaccurate or false statement." The Random House Dictionary of the English Language 1109 (2d ed. 1987).

FN5. The Oxford English Dictionary defines lie as "a false statement made with intent to deceive; a criminal falsehood." 8 The Oxford English Dictionary 899 (2d ed. 1989) (emphasis added). It then notes that "[i]n mod[ern] use, the word is normally a violent expression of moral reprobation, which in polite conversation tends to be avoided, the synonyms falsehood and untruth being substituted as relatively euphemistic." Id. at 900 (emphasis added).

FN6. We may lie by understating the mileage of the used car we are trying to sell or by

claiming that it had never been involved in a major accident. We may lie by hiding the crack in the basement wall or by overstating the substantive strength of the lawsuit we are seeking to settle. See White, supra note 1, at 932, 935; Model Rules of Professional Conduct, Rule 4.2 commentary at 89-90 (Discussion Draft 1980) (Chicago: American Bar Association).

As to lies about value, see R. Haydock, Negotiation Practice 211 (1984) (stating that lawyers will exaggerate value of property or injury which is the subject of negotiation); White, supra note 1, at 931-32, 934 ("Everyone expects a lawyer to distort the value of his own case, of his own facts and arguments, and to deprecate those of his opponent.").

Lies about value can also include lies about one's own skill and reputation. It was, for instance, widely reported that one unscrupulous sports agent, in courting college athletes, featured not just a visit to his very impressive office but various interruptions for calls from the likes of "Michael Jackson." When I practiced in Washington, D.C., stories were always being told about ambitious lawyers who instructed their secretaries to call them out of social events and PTA meetings with "calls" from extraordinarily important people.

We may also lie about what "really happened" on the day of the accident, about what we "really said" on that day that our spouse's mother took such offense, or about the "true meaning" of the document believed to be the smoking gun. See White, supra note 1, at 934 (noting that "everyone expects a lawyer" to lie about facts); see also R. Haydock, supra note 6, at 210 (stating that "[i]t may be appropriate for a lawyer to present an exaggerated statement of facts").

FN7. These false promises include lies like, "This stock will be worth $150 in another six months," "This car's a real peach--you'll never regret your decision," and "You are not doing your reputation any good." They may also include, "I just will not accept anything less than two million" or "We should go out for drinks when this is all over--my firm is always in the market for bright, young lawyers."

FN8. Haydock reported that lawyers feel free to make threats they do not intend to carry out. R. Haydock, supra note 6, at 210-11.

FN9. The category of opinions has a well-established propensity to expand. Haydock, for instance, explained that "facts may be divided into past facts, present facts, and future facts . . . with future facts constituting opinions" about which it is permissible to lie. R. Haydock, supra note 6, at 210-11.

FN10. An example is, "He is beyond my control, and determined to take this all the way to the Supreme Court."

FN11. These are statements like, "I appreciate your coming down from $32,000 to

$25,000, but I am not authorized to accept anything more than $20,000." Statements of this kind may be useful in a number of ways, not the least of which is giving the speaker a second bite of the apple. Such claims can be made under circumstances in which the speaker knows them to be true, in which the speaker knows them to be false, or in which they are "true" solely because the agent-negotiator, anticipating the question, instructed his client to set the limit that the negotiator is then free to invoke. See R. Haydock, supra note 6, at 212; White, supra note 1, at 932-34.

FN12. For example, "It has been in the family for four generations and we have no interest in selling," "He insists he wants custody--though I might be able to talk him out of it if you give him the house," and "They will never agree to pay your attorney's fees--it is a matter of principle."

White has noted that:

> "It is a standard negotiating technique in collective bargaining negotiation and in some other multiple-issue negotiations for one side to include a series of demands about which it cares little or not at all. The purpose of including these demands is to increase one's supply of negotiating currency. One hopes to convince the other party that one or more of these false demands is important and thus successfully to trade it for some significant concession. . . . Such behavior is untruthful in the broadest sense; yet at least in collective bargaining negotiation its use is a standard part of the process and is not thought to be inappropriate by any experienced bargainer. White, supra note 1, at 932; see also R. Haydock, supra note 6, at 212 (reporting that lawyers feel free to make false demands and to lie about their client's interests or needs or to lie about their interest in an agreement when their real interest is in delay); D. Lax & J. Sebenius, The Manager as Neogitator: Bargaining for Cooperation and Competitive Gain 140 (1986) (misleading as to priorities, interests); R. Lewicki, Lying and Deception: A Behavior Model, in Negotiating in Organizations 69 (M. Bazerman & R. Lewicki eds. 1983) (stating that advantage in negotiating is gained in part by disguising priorities)."

One of the most troublesome instances of this kind of false statement about one's interest involves false demands for custody made by divorcing fathers to create something with which to bargain over the division of assets.

FN13. A buyer's reservation price is not the price at which the buyer would like to buy but, instead, the price above which she will not buy. In that sense, it is the price at which she is indifferent as between the negotiated agreement and her alternative to negotiated agreement.

FN14. These include false statements about competing bidders and other alternatives. Lies about reservation prices and alternatives to agreement are the lies that White suggested are the measure of a negotiator's effectiveness. See White, supra note 1, at

927-33; see also R. Haydock, supra note 6, at 211-12 ("our negotiation process countenances the misrepresentation of . . . positions."); C. Karrass, Give and Take: The Complete Guide to Negotiating Strategies and Tactics 23 (1974) (noting that "bluffing" is part of negotiating); R. Lewicki, supra note 12, at 69 (discussing lies about "preferred settlement point or resistance point").

It is important to distinguish among one's "reservation price," "best alternative to negotiated agreement," "true settling point," "preferred settlement point or resistance point," and "present position." A "reservation price" is the price beyond which a negotiator will actually refuse to enter an agreement. I say actually in order to distinguish the true reservation price from the price beyond which we may falsely say or suggest that we will refuse to agree. "Best alternative to negotiated agreement" is simply another name for one's reservation price. So, I assume, is "true settling point." One's reservation price is distinguishable from one's "present position" which I understand to be the price beyond which one is, for now, refusing to go. Defined this way, one's present position is not something that can be misstated to an adversary--precisely because it is defined as that position that we are presently communicating to our adversary. We could, however, lie by asserting that our present position represents our reservation price when, in fact, it does not.

FN15. See White, supra note 1.

FN16. Consider, for example, the effect of lying about the future value of the property, a strategy that is calculated to change the other party's reservation price. Other previously catalogued lies operate in various ways to alter perceptions of reservation price. See R. Lewicki, supra note 12, at 74-75 (explaining utility of lying in negotiations in terms of "the balance of perceived accurate information").

FN17. See R. Haydock, supra note 6, at 213 ("Lying may be discovered, resulting in deadlocked negotiations. . . . ").

FN18. See R. Lewicki, supra note 12, at 76-78. Some of that shift in power may be explained in terms of loss of face. E. Goffman, Strategic Interaction 53-58 (1969). Diminished credibility and the diminished capacity to take and defend positions may also play a part.

FN19. S. Bok, Lying: Moral Choices in Public and Private Life 24 (1978) ("if they find out that he has lied, he knows that his credibility and the respect for his word have been damaged"); R. Haydock, supra note 6, at 213 ("Lying may . . . destroy the reputation of attorneys and render them inefficient as negotiators."); I. Zartman & M. Berman, The Pracitcal Negotiator 29 (1982) ("If the negotiator is caught in a bluff it will damage his credibility and impair his credentials. . . . ").

FN20. See I. Zartman & M. Berman, supra note 19, at 153 (bluffing "[may] lead the other side to believe that agreement is impossible and thus break off").

FN21. See D. Lax & J. Sebenius, supra note 12, at 155-57.

FN22. "Win-win" bargaining is possible when (1) the negotiation involves more than one issue and the parties differ with regard to their preference for or valuation of at least one of the issues; (2) the parties differ in their probabilistic assessment of the likelihood of some future event; (3) the parties differ in their prediction of the future value of some variable; or (4) the parties differ in their time preferences with regard to some aspect of payment or performance. See D. Lax & J. Sebenius, supra note 12, at 106. In all of these circumstances, there are limits to the extent to which the pie can be expanded. Integrative bargaining is not possible when none of the exploitable differences are available.

FN23. If we knew that there were opportunities to expand the pie, then the pie would have already been expanded.

FN24. See D. Lax & J. Sebenius, supra note 12, at 30-35.

FN25. See S. Bok, supra note 19, at 26; see also K. Arrow, The Limits of Organization 63-79 (1974); Dasgupta, Trust as a Commodity, in Trust: Making and Breaking Cooperative Relations, 49-72 (D. Gambetta ed. 1988).

FN26. As to the constitutive effect of rhetorical conventions, see Wetlaufer, Rhetoric and Its Denial in Legal Discourse, 76 Va L. Rev. 1545 (1990). As to reciprocity, see, L. Hyde, The Gift: Imagination and the Erotic Life of Property (1979); Ayi Kwei Armah, Two Thousand Seasons, quoted in A. Walker, Living by the Word ii (1988); Nader & Sursock, Anthropology and Justice, in Justice: Views from the Social Sciences (R. Cohen ed. 1986).

FN27. Professor Bok argues that one lie may make others necessary and that "[p] sychological barriers wear down; lies seem more necessary, less reprehensible; the ability to make moral distinctions can coarsen; the liar's perception of his chances of being caught may warp." S. Bok, supra note 19, at 25.

FN28. The collection of excuses that is found in Part II of this Article contains a number of specimens that my grandfather would have called "hum- dingers." What is interesting is that they are hum-dingers that we have come to accept. So far as I can tell, we have come to accept them because they are the excuses that we have offered ourselves for the lies that we have told. Based on the arguments we claim to have found sufficient, we must conclude that we began our consideration of these arguments with an almost overwhelming predisposition to accept them. To the degree we "accept" such excuses, we also accept the legitimacy of all lies that can be brought within their scope. Thus we lie, we offer weak excuses for our lies, we accept our own weak excuses, those weak excuses then become our standard of conduct, and the next unwarranted lie that we might (or in theory might not) tell has already been excused.

FN29. See Plato, Gorgias (W. Hamilton trans. 1985); see also S. Bok, supra note 19, at 26; G. Postema, Self-Image, Integrity, and Professional Responsibility, in The Good Lawyer 292 (19) (discussing honesty and a lawyer's professional self-image); Vickers, Editor's Note, 4 Stan. L. Rev. 355, 356 (1951) (arguing that Curtis, whose position will be considered in section II.H.1 below, overlooked "the duty everyone, including a lawyer, owes to himself to so conduct himself as not to lose his own self-respect").

FN30. Professor Bok has argued, correctly I think, that one effect of a lie is that the liar "certainly looks at those he has lied to with a new caution." S. Bok, supra note 19, at 24. One explanation of this effect may be found in Anna Freud's theory of defense mechanisms and, more specifically, in the mechanisms of rationalization and projection. See A. Freud, The Ego and the Mechanisms of Defense (1946).

FN31. According to Bok, there are:

> many ways in which deception can spread and give rise to practices very damaging to human communities. . . . The veneer of social trust is often thin. As lies spread--by imitation, or in retaliation, or to forestall suspected deception--trust is damaged. Yet trust is a social good to be protected just as much as the air we breathe or the water we drink. When it is damaged, the community as a whole suffers; and when it is destroyed, societies falter and collapse. S. Bok, supra note 19, at 26-27. To the same effect, she said that "trust in some degree of veracity functions as a foundation of relations among human beings; when this trust shatters or wears away, institutions collapse." Id. at 31; accord K. Arrow, supra note 25, at 23 (describing the value of trust in a social system).

FN32. See Rhode, Ethical Perspectives on Legal Practice, 37 Stan. L. Rev. 589, 627-38 (1985) (discussing influence of ambition, patronage, dependence and institutional loyalties on lawyers' ethical judgment); see also J. Rubin & B. Brown, The Social Psychology of Bargaining and Negotiations 43-54 (1975) (noting significance of audiences); J. Dean, Blind Ambition 32-35 (1976) (explaining Dean's first step over the line on behalf of President Nixon); C. Reich, The Sorcerer of Bolinas Reef 19-98 (1976) (discussing influence of institutional loyalty on judgment and perception). Michael Reisman, to whom I am indebted for the citation to Blind Ambition, also quotes Mark Green writing, "One Covington and Burling associate explained that he didn't have to worry about ethical issues because he's the low man on the totem pole . . . [who] works for a great bunch of guys who really know their stuff." W. Reisman & A. Schreiber, Jurisprudence: Understanding and Shaping Law: Cases, Readings, and Commentary 359 (1987).

FN33. As Professor White has explained, "Negotiation is nonpublic behavior. If one negotiator lies to another, only by happenstance will the other discover the lie." White, supra note 1, at 926. To similar effect, Haydock reported:

> The lack of accountability for statements made during negotiations will account

> for questionable ethical conduct. The lack of publicity surrounding negotiation discussions, the unlikelihood that a misrepresentation will be discovered, the lack of opportunity by the other side to investigate the accuracy of a representation, and the fact that an accord is reached, all tempt some negotiators to take advantage of the situation and stretch ethical standards. R. Haydock, supra note 6, at 205.
>
> Furthermore, "[t]he low probability of discovery and punishment means more lawyers will end up violating ethical standards. This reality makes it more difficult for honest lawyers to remain honest, because they will find themselves at significant disadvantages in negotiating against the unethical lawyers." Id. (emphasis added).

FN34. Professor White argues that negotiators play by different rules, including different rules with regard to lying, depending upon the substance of the negotiation (e.g., securities transactions vs. the settlement of lawsuits), the nature of the community (e.g., small and homogeneous vs. large and heterogeneous), and the racial and ethnic group involved. White, supra note 1, at 927-31. More generally, he observed that "[m]ore than almost any other form of lawyer behavior, the process of negotiation is varied; it differs from place to place and from subject matter to subject matter." Id. at 927.

In a similar vein, Professor Hazard argued:

> Lawyers' standards of fairness are necessarily derived from those of society as a whole, and subcultural variations are enormous. At one extreme lies the "rural God-fearing standard," so exacting and tedious that it often excludes the use of lawyers. At the other extreme stands "New York hardball," now played in most larger cities using the wall-to-wall indenture for a playing surface. Between these extremes are regional and local standards and further variations that depend on the business involved, the identity of the participants, and other circumstances.
> G. Hazard, Ethics in the Practice of Law 193 (1978) (citations omitted); see also T. Shaffer, American Legal Ethics 584-645 (1985) (exploring differences in ethical perspectives); I. Zartman & M. Berman, supra note 19, at 224-29 (reflecting the enormous literature on the problems of intercultural negotiations and the wide differences between cultures on matters that are relevant to negotiations).

FN35. For some, winning in negotiation will mean "getting as much as I possibly can, period" or "getting as much as I can within the letter of the law." Neither of these takes account of ethics.

FN36. These negotiators will define winning in some terms like "getting as much as I can without engaging in illegal or unethical behavior." Other negotiators define winning as "getting a fair price" or "getting a fair share of the surplus to be divided." While the

first of these formulations often means nothing more than receiving an "acceptable" price, the second is usually understood to incorporate the discourse of ethics.

FN37. Having spent a great deal of time litigating in the course of 12 years of practice, it has become clear to me that, prior to trial, the two sides' assessments of their respective probabilities of success at trial would almost always total at least 120%.

FN38. Charles Reich has recounted, in The Sorcerer of Bolinas Reef (1976), his experience in a prestigious Washington, D.C., law firm in which the firm's opponents were always perceived as bastards. C. Reich, supra note 32, at 28.

> This is consistent with my personal experience and with the results of a repeat-play prisoners' dilemma game that I use in my negotiations class. See infra note 41. After each round, the players know whether their adversary has cooperated or defected. What is interesting for present purposes is the attribution of motives in cases of defection. The defector will describe his actions as "defensive," i.e., motivated by the actor's belief that his adversary will on that same round defect, while the victim will almost always perceive the other's defection as "offensive," i.e., done in the belief that the victim will cooperate and that the actor can therefore capture a large advantage.

FN39. Bok argued that "[b]ias skews all judgment, but never more so than in the search for good reasons to deceive." S. Bok, supra note 19, at 26. More specifically, in drawing the distinction between the perspective of the liar and that of her victim, she reports that "the harmlessness of lies is notoriously disputable. What the liar perceives as harmless or even beneficial may not be so in the eyes of the deceived." Id. at 60.

FN40. In connection with these biases, the question of motive must at least be raised. On the basis of personal observations, I am persuaded that these biases all serve to take us off the hook with regard to ethics and self-interest. Or perhaps it would be more accurate to say that they remove us from the horns of a dilemma. By concluding that our adversaries are unworthy, we render defensible, even virtuous, the most viciously self-interested conduct in which we might want to engage. By reaching those conclusions about our adversaries, we grant ourselves permission to do those things that we may have wanted to do all along and for which we otherwise lacked permission. We get to resolve the otherwise unresolvable and to claim the rewards both of virtue and of individualistic instrumental effectiveness. The same purposes are presumably served when we accept, uncritically, the unpersuasive arguments that we offer ourselves, and one another, concerning the ethical justification of the lies we tell.

FN41. The prisoners' dilemma game is a way of expressing and thinking about situations, like negotiations, in which parties must, without the possibility of entering binding agreements, decide whether to act cooperatively or antagonistically with regard to each other. As an example, it might assume that if both parties act cooperatively they will both receive 5 points, if both act antagonistically they will lose 5 points, and if one

party acts antagonistically while the other acts cooperatively then the party acting antagonistically will win 10 points while the party acting cooperatively will lose 10 points. The game can be designed in such a way that truth-telling is the cooperative move and lying is the antagonistic move.

The paradigmatic example involves two prisoners who are being interrogated in separate rooms, knowing that if both lie about their crimes each will be set free, but that if one lies and the other does not, only the liar will be punished. See R. Luce & H. Raiffa, Games and Decisions 94-102 (1957); H. Raiffa, The Art and Science of Negotiation 123-26 (1982); J. Rubin & B. Brown, supra note 32, at 20-25.

FN42. The difficulties of the prisoners' dilemma game are adjustable in a number of ways. One can, of course, set the stakes in ways that will be perceived by the players as either very high or very low. The propensity to defect (e.g., to lie in negotiations or to turn in one's fellow prisoner) varies directly with the stakes of the game. One can also shift the balance of payoffs, vary the amount and reliability of relevant communication that is allowed between the parties, or permit or withhold information about how the other side is actually playing the game. One can also vary the level of certainty that one player has about the identity and characteristics of his adversary, or, to approximately the same effect, vary the level of trust. See J. Rubin & B. Brown, supra note 32, at 22-23 (1975) (listing eight possible variations on the prisoner's dilemma).

FN43. This proposition is central to the history of ethics and of law. To take a single example, the Model Penal Code declares that its first general purpose is "to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens to inflict substantial harm . . . . " Model Penal Code § 1.02(1)(9) (1962). Much of the rest of the Code is then given over to the specification of cognizable harms, justifications, and excuses.

FN44. According to Professor White, "it is in the nature of compliance with ethical norms that one's self-interest is often injured." White, supra note 1, at 937. Haydock argued that lawyers are forbidden by the ethics code from allowing their personal sense of ethics to influence their representation. R. Haydock, supra note 6, at 196. If this were the case, and I think it is not, then, up to the limit of what is prohibited by law, a discussion of legal ethics could involve nothing more than a discussion of the client's self-interest.

FN45. See infra section II.F.

FN46. See infra section II.F.

FN47. See infra section II.F.

FN48. See infra section II.F.

FN49. See B. Mandeville, Private Vices, Public Benefits (M. Goldsmith rev. ed. 1985) (1st ed. 1714) and others who have followed him, including various contemporary libertarians. Of course, even the proponents of strong individualism and minimal states acknowledge that there must be some restraints on selfishness and individual freedom.

FN50. The discourse of "enlightened self-interest" deserves much fuller treatment than can be afforded in this Article. For present purposes, a brief discussion shall suffice. So far as I can tell, those who engage in this discourse are doing one of three things. First, they may be seeking to prove that, if smart enough, we need not make the difficult choice between what is right and what is profitable. If only it were so, but it is not. Second, they may be trying to argue for virtue on a foundation that has been denuded of everything but selfishness. Third, they may be engaged in an underground discourse of ethics in which both the speaker and, to some degree, the audience understand that we are, in fact, being asked to sacrifice a measure of our self-interest for the good of others. If it is an underground discourse, it is one in which both parties presumably understand that such conversations cannot be carried on overtly and must, instead, be conducted within the linguistic code of self-interest.

FN51. The clearest example of the effect that can flow from the attempt to render ethics in the language of self-interest comes from those lawyers who explain that they used to believe in truth-telling but eventually "learned their lesson." What they often mean is that they were one day shocked to discover that telling the truth is not the best policy if by best policy we mean the one that results in the highest individual score.

Rendering ethics into the language of self-interest has some short-term advantages for a speaker who believes that her audience is capable of understanding no other language. It also, however, has the long-term disadvantage of foreshortening the possibility of ethical conduct, of relying upon inherently unpersuasive claims (e.g., we should feed the world as an act of "enlightened self-interest") and of inviting a strongly cynical reaction when the listener discovers the falsehood of the claim. Moreover, to render ethics into the language of self-interest, among other things, reinforces the legitimacy of that language.

FN52. The relationship between law and morals has been explored at great length. For now, it is enough to point out that the pronouncements of law are not the last word on questions of ethics. As Austin wrote, such pronouncements may be "acute" but are nevertheless subject to "the overriding requirement that [in law] a decision be reached, and a relatively black or white decision . . . for the plaintiff or for the defendant." Austin, A Plea for Excuses, in Ordinary Language 51 (V. Chappell ed. 1981).

FN53. See infra section II.E.

FN54. See infra section II.A.

FN55. Those who draft these codes of professional self-regulation confront all of the

problems of knowledge, proof, enforcement, and compliance that are confronted by those who draft the codes of "law." Thus in writing about the legal ethics of lying in negotiation, White rested his argument about how the profession ought to regulate the "ethics" of lawyers' conduct on the quite accurate claim that this kind of regulation must deal with the same practical problems, e.g., compliance and enforcement, that must be taken into account in devising systems of civil law.

What interests me, and what I am denominating the realm of ethics, does not involve the question of how the profession ought to regulate the behavior of lawyers but rather the problems of what is right and how lawyers ought to behave. Problems of compliance and enforcement have no direct bearing upon this discussion. I do not mean by this to demean the discourse of "legal ethics." Rather, I simply mean to say that "legal ethics" is sometimes used to describe the regime of professional self-regulation that is external to and thus supplements the civil law. As such, it is a regulatory regime that bears essentially the same relationship to "ethics" as do the civil and criminal law, so long as we understand "ethics" to be the study not of how people ought to be regulated but of how, apart from the possibility of coercive regulation, they ought to behave.

FN56. Here I take issue with, among others, Haydock who argues that the ethics code actually forbids a lawyer from relying upon his own sense of ethics if to do so might in any way disadvantage his client. Thus he writes, "The Code of Professional Responsibility prohibits attorneys from allowing their personal feelings to adversely influence client interests." R. Haydock, supra note 6, at 196. If this were so, then the codes would require the lawyer to behave as badly as the law permits. These matters are discussed fully at section II.H below.

FN57. See infra section II.A.

FN58. See infra sections II.B through II.J.

FN59. See infra section II.C.

FN60. See infra section II.D.

FN61. See infra section II.E.

FN62. See infra section II.F.

FN63. See infra section II.F.2.

FN64. See infra sections II.G and II.H.

FN65. See infra section II.I.

FN66. See infra section II.H.

FN67. See infra section II.J.

FN68. There is a considerable amount of overlap and interpenetration between the categories in this taxonomy. While these may complicate analysis, they will not, if I am careful, impair the utility of this project.

FN69. It is, of course, customary to draw ethical distinctions between acts and omissions or, more precisely, between certain kinds of acts and certain kinds of omissions. I have, however, defined lying to include all acts and all omissions that are taken in the expectation that they might create or maintain a belief at variance with our own. I will consider, infra section II.B, the claim that, "I may have lied, if you insist on calling it that, but it was an omission of a kind that is not presumed to be ethically impermissible."

FN70. The claim that the statement was literally true also comes in another, more inventive form. Here the speaker admits that the literal text of her statement was false but then asserts that the meaning actually communicated is different from, and more honest than, the literal text. The plaintiff's personal injury lawyer says, "I'm persuaded the jury will give me at least $10 million in damages" but then explains that what was actually communicated, at least to a competent adversary, is the compound disjunctive assertion that "[either] I'm persuaded the jury will give my client $10,000,000 [or I'm lying about what I really think]." The lawyer then explains that ethics is concerned not with what was said but with what was actually communicated, and that what was actually communicated was perfectly true. It is implausible, however, that this speaker did not say what she said precisely because she thought she might manage to deceive, or at least to influence, her adversary. What we have, then, is less the claim that there was no lie than the claim that the lie might fail and that it is ethically permissible, either because it is within the rules of the game (see infra section II.E) or because of the adversary's incompetence (see infra section II.H). Compare, e.g., the real estate agent's assertion that "[either] this basement has never had a water problem [or I'm lying]" and the car buyer's claim that "[either] I can't go any higher than $12,500 [or I'm lying about my reservation price]."

FN71. See supra section II.A.4.

FN72. Wetlaufer, supra note 26.

FN73. The distinction that is here drawn is between the value of the property and, for instance, its history or its tangible characteristics. Thus it might be permissible to lie in the assertion that "this car is easily worth $4000" but not in the assertion that "it has never been in an accident." White asserts that such lies are permissible if they stay within the limits of "puffing." White, supra note 1, at 932. This may be compared with the rule of contract law according to which, for purposes of fraud, a statement of value

is seen to be a statement of opinion. Statements of opinion are noncognizable on the theory that reliance on such statements is unreasonable. See E. Farnsworth, Contracts, § 4.14, at 248-49 (1982); U.C.C. § 2- 313(2) (1989) (an "affirmation merely of the value of the goods" does not create a warranty).

FN74. Compare the rule of law that misrepresentations of law are not cognizable for purposes of fraud because "no reasonable person ought to have relied upon them." S. Williston, The Law of Contracts § 1515B, at 485 (3d ed. 1970) [hereinafter Williston on Contracts].

FN75. Compare the rule of law that a lie is only cognizable for purposes of fraud if the victim's reliance was reasonable. This includes rules concerning the victim's duty to investigate and concerning the reasonableness of relying on the assertion of someone with an adverse interest. According to the Restatement (Second) of Contracts "a recipient's fault in not knowing or discovering the facts before making the contract does not make his reliance unjustified unless it amounts to a failure to act in good faith and in accordance with reasonable standards of conduct." Restatement (Second) of Contracts § 172, at 468-69.

FN76. Haydock suggested that lawyers regard it as permissible to lie about their opinions. R. Haydock, supra note 6, at 211-12. In contract law, a lie about one's opinion is not cognizable for purposes of fraud. The reason that is usually given is that, under normal circumstances, it is not "reasonable" for the other party to rely on such statements. Williston on Contracts, supra note 74, § 1515B, at 485; see E. Farnsworth, supra note 73, §§ 4.11, 4.14, at 236, 247 (no relief for fraudulent statements if a reasonable person would not rely on the statement); U.C.C. § 2.313(2) (1989) (statements of opinion do not create an express warranty). It seems clear this contract rule was adopted, at least in part, because of the problems of proving that a lie was told and of proving that it made a difference.

FN77. White finds unobjectionable, at least in collective bargaining situations, those lies contained in "false demands" made for the purpose of "increas[ing] one's supply of negotiating currency." White, supra note 1, at 932. Others, writing about false demands for custody, find the tactic highly objectionable.

FN78. See E. Farnsworth, supra note 73, § 4.14, at 252 (statements of intentions "often not to be taken seriously," treated under the standards applicable to contracts).

FN79. Problems of proof also arise when it is unclear whether other parties would have believed the statement or whether, if they did, their belief was sufficiently reasonable to warrant the interference of the law.

FN80. Bok argues that "[t]he harmlessness of lies is notoriously disputable. What the liar perceives as harmless or even beneficial may not be so in the eyes of the deceived." S. Bok, supra note 19, at 60. Under the law of contract, lies of this kind

would not be cognizable for purposes of fraud because they would fail to satisfy the requirement of materiality.

FN81. This may be compared, in the law of contracts, to Vokes v. Arthur Murray, Inc., 212 So. 2d 906 (Fla. Dist. Ct. App. 1968).

FN82. Model Rules of Professional Conduct, Rule 4.2 commentary at 89-90 (Discussion Draft 1980) (Chicago: American Bar Association). The comment states:

> A party is permitted to suggest advantages to an opposing party that may be insubstantial from an objective point of view. The precise contours of the legal duties concerning disclosure, representation, puffery, overreaching, and other aspects of honesty in negotiations cannot be concisely stated. . . . It is a lawyer's responsibility to see that negotiations conducted by the lawyer conform to applicable legal standards, whatever they may be. Id.

White sees the comment to Rule 4.2 as permitting statements that are untruthful and as presumably attempting to draw the same line that is drawn in U.C.C. § 2-313 between express warranties and "mere puffing," White, supra note 1, at 928, 932. White described that form of "puffing" which is false but nevertheless permissible as follows:

> [T]he seller of a product has the right to make general statements concerning the value of his product without having the law treat those statements as warranties and without having liability if they turn out to be inaccurate estimates of the value. As the statements descend toward greater and greater particularity, as the ignorance of the person receiving the statements increases, the courts are likely to find them to be not puffing but express warranties. Id. at 932.

Haydock reported that one of the positions most frequently asserted by lawyers is that "[i]t is always improper for a lawyer to make things up but it is proper for a lawyer to exaggerate information within reasonable limits." R. Haydock, supra note 6, at 208.

FN83. The element of materiality in the law of contract fraud is explained in E. Farnsworth, supra note 73, § 4.12, at 242-44.

FN84. This may be compared with the rule of contract law that lies that fail are not cognizable for purposes of fraud. Williston on Contracts, supra note 74, § 1515, at 476.

FN85. Haydock reports that one of the positions most frequently taken by lawyers is that "[i]t is not proper for a negotiator to make up information and then voluntarily disclose it, unless it is necessary to serve the client's interests." R. Haydock, supra note 6, at 208 (emphasis added).

FN86. This conclusion holds true whether one or both of the parties are operating under a "no lies" rule and regardless of the scope of that rule. To take the extreme

case, assume that only one party is under the "no lies" rule and that the rule is understood to mean that the negotiator is obliged to give a full and truthful response to all questions that may be asked. After a while, we might expect the adversary to begin demanding to know the truth-teller's reservation price and announcing that he will not pay a penny more than that price. The truth-teller will, under these circumstances will be seriously disadvantaged. But this situation does not create the risk that there are some agreements that could have been reached will have been lost. Indeed, by eliminating the risk of errors in bluffing, the likelihood of lost agreements has probably gone down.

FN87. That is not the same as saying that the truth-teller will never make any money. In a competitive market, there will be a great many buyers standing ready to buy from a given seller. All may offer her a handsome return on her investment. If the seller is barred from lying about her reservation price, the worst that will happen is that she will be forced to sell at the second best price that is available to her.

FN88. To illustrate what I mean by varying levels of commitment, compare the following statements: "I would like to get $2300"; "I see no reason to accept anything less than $1800"; and "I will not, under any circumstances, accept anything less than $1300."

FN89. If Mr. Seller's reservation price is $1000 and he believes that Ms. Buyer's is $2000, there is nothing to keep Mr. Seller from asking $1900. If he goes further and lies by saying "My reservation price is $1900," then he runs the risk that (a) Ms. Buyer's reservation price may be lower than the $1900 price to which he has now totally committed himself; or (b) Ms. Buyer will be playing the same game and, whatever the truth, will decide she must go below $1900. If Mr. Seller either wants to gamble or somehow knows that Ms. Buyer's reservation price is more than $1900, he may wish to follow Schelling's advice and make the irrational commitment. Schelling, An Essay on Bargaining, in T. Schelling, Strategy of Conflict 22-28 (1963). If Mr. Seller decides he has gotten it wrong, he must choose between walking away from what may be a profitable transaction and finding some way to reduce his offer notwithstanding his absolute commitment to $1900. Raiffa has dealt systematically with this problem of going lower than the price to which a negotiator has committed himself. He suggested that what is needed is some kind of "face saving strategy" that will permit the negotiator to make the move without explicitly admitting that he was lying about never going below $1900. As a general matter, two kinds of strategies are available. In one, we rely upon the fact that our commitment was never absolute. This is the reason why effective negotiators generally avoid an explicit misrepresentation of their reservation price. Such statements lack the opening through which the negotiator may have to wriggle. The other strategy invokes some change in circumstance "justifying" the lower price. See H. Raiffa, supra note 41, at 41 (discussing real estate developer who through "a dream," discovers his conscience and "therefore" decides to sweeten his "final offer" to the owners of half-way house); see also E. Goffman, On Face-Work, in Interaction Ritual: Essays on Fact to Face Behavior 6-7 (1967) (on the importance of saving face); J. Rubin & B. Brown, supra note 32, at 259, 277 (noting bargainers' commitment to

looking good in eyes of their adversaries).

FN90. This is one of the major premises of this paper. See supra section I.C.Lewicki has asserted that "[i]f the negotiator is completely honest and candid, he or she may be vulnerable to exploitation by his or her opponent, become committed to a position that allows no further concessions, or sacrifice gains that might have been successfully derived through less candid approaches." R. Lewicki, supra note 12, at 69.

FN91. Professor White has asked the rhetorical question, "Why is it so clear that one's responsibility for truth ought not be a function of the . . . expectations of the opponent?" White, supra note 1, at 929-30. He further notes that "everyone expects" lawyers to lie about certain subjects and that makes the question of the permissibility of those lies "easy." Id. at 934. Haydock went further and argued that lawyers are obligated not to play by rules that are more ethical than those established by "local custom" and by the "general consensus of propriety among peers." R. Haydock, supra note 6, at 198- 99. These positions seem consistent with the rule of law that a lie is not cognizable for purposes of fraud unless it would have been, under all the circumstances, reasonable for the other person to have relied on the lie.

FN92. Ms. Buyer's belief that these lies are permissible need not rest on a belief that these lies are ethically permissible. She may have no interest at all in ethics. Or she may believe that ethics has nothing to do with one's conduct as a professional or even that she is, as a professional, under an ethical compulsion to lie. All that matters, for purposes of the argument at hand, is that she believes, for whatever reason, that it is permissible for her and for her adversaries to tell these lies in negotiations.

FN93. Professor Bok takes a quite different approach to the rules of the game justification and concludes that it may be regarded as sufficient when the rules in question are "voluntarily and openly undertaken, and terminable at will." S. Bok, supra note 19, at 137.

FN94. Luban reported, quite accurately, that:

> the universal acceptance among lawyers of the Justification by the Adversary System is a startling thing, a marvelous thing, a thing to behold. It can go something like this: one talks with a pragmatic and hard-boiled attorney. At the mention of legal ethics, he smiles sardonically and informs one that it is a joke. One presses the subject and produces examples such as the buried bodies case. The smile fades, the forehead furrows, he retreats into a nearby phonebooth and returns moments later clothed in the Adversary System, trailing clouds of glory. Distant angels sing. The discussion usually gets no further. D. Luban, The Adversary System Excuse, in The Good Lawyer: Lawyers' Role and Lawyers' Ethics 89 (D. Luban ed. 1983).
>
> Luban stated that it is misleading to call this justification an argument, rather, "[i]t is more like a presupposition accepted by all parties before the arguments

begin." Id. If this observation is accurate, it might actually have the effect of strengthening the justification by rendering it as a plausible application of the strong form of the rules of the game justification. Ultimately, however, the authority for this proposition is my own experience and the conversations to which I have been a party--with practitioners, academics, and law students.

FN95. M. Freedman, Lawyer's Ethics in an Adversary System (1975); D. Luban, supra note 94 at 10-12, 97-100.

FN96. Fuller, The Adversary System, in Talks on American Law 44 (1971). Fuller stated that:

> Before a judge can gauge the full force of an argument, it must be presented to him with partisan zeal by one not subject to the restraints of judicial office. The judge cannot know how strong an argument is until he has heard it from the lips of one who has dedicated all the powers of his mind to its formulation. Id. at 35.

That, of course, is the function of the advocate. Fuller and Randall elaborated:

> [A]ny arbiter who attempts to decide a dispute without the aid of partisan advocacy . . . must undertake, not only the role of judge, but that of representative for both of the litigants. Each of these roles must be played to the full without being muted by qualifications derived from the others. When he is developing for each side the most effective statement of its case, the arbiter must put aside his neutrality and permit himself to be moved by a sympathetic identification sufficiently intense to draw from his mind all that it is capable of giving--in analysis, patience and creative power. When he resumes his neutral position, he must be able to view with distrust the fruits of this identification and be ready to reject the products of his own best mental efforts. The difficulties of this undertaking are obvious. If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once.
> Fuller & Randall, Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159, 1160 (1958).

Luban posited the theory that:

> The way to get at the truth [in litigation] is a wholehearted dialectic of assertion and refutation [is] open to a number of objections. First of all, the analogy to Popperian scientific methodology is not a good one. Perhaps science proceeds by advancing conjectures and then trying to refute them, but it does not proceed by advancing conjectures that the scientist knows to be false and then using procedural rules to exclude probative evidence. D. Luban, supra note 94, at 94.

Rhode has argued that there is no proof that partisanship produces proof in the way that is conventionally predicted. More specifically, she pointed to the fact that

various of the assumptions underlying the adversary excuse are not warranted. Resources are not equal, lawyers and clients tamper with evidence, perjury--or something close to it--is common, and crucial evidence never comes to light. Rhode, Ethical Perspectives on Legal Practice, 37 Stan. L. Rev. 589, 595-605 (1985).

FN97. As Johnson said to Boswell, "Sir, you do not know [a cause] to be good or bad till the Judge determines it. . . . An argument which does not convince yourself may convince the Judge to whom you urge it: [a]nd if it does convince him, why then, Sir, you are wrong, and he is right." J. Boswell, The Life of Johnson 47-48 (Hill ed. 1887); see Rhode, supra note 96, at 618-20 (describing and criticizing the lawyer's "epistemological demurrer").

FN98. This argument is strongest when the contestant in question is a criminal defendant. D. Luban, supra note 94, at 91-93 (noting that argument is stronger in its application to criminal defense than elsewhere); Rhode, supra note 96, at 606-07 (arguing that applications of argument outside criminal defense role sometimes strain credulity).

FN99. Though they both separate secrets which may be kept from secrets which may not be kept, this boundary in litigation is different from the boundary to which we referred in section II.B above.

FN100. When a criminal defendant lies, she has committed the further crime of perjury. It would be somewhat more precise--or at least more consistent with my definition of lying--to acknowledge that stance pleading is a lie but that it is expressly authorized by the law. My definition of lying would not, as a general matter, encompass a refusal to testify. My point, then, is that neither of these rights entail the right to tell other lies.

FN101. The situation changes when we move beyond those withholdings that are unequivocally permitted. The Federal Rules of Civil Procedure impose various limitations upon what is discoverable. Lawyers are continually confronted with the decision whether to produce information that is technically discoverable. I assume that a certain number of lawyers withhold this information and justify their decision to do so on the grounds that their adversary would have done--or is doing--the same. This is a rules-of-the-game justification of a much different, and less satisfactory, kind than we are dealing with when we are talking about those withholdings that are, in a fair reading of the official rules, permitted.

FN102. See supra note 94.

FN103. See D. Luban, supra note 94, at 85-87; Rhode, supra note 96, at 599.

FN104. Haydock provides an example of the claim that clients make a difference to the ethics of lying in negotiations. He argued:

> Clients deserve representation which meets their needs and conforms to their expectations. . . . What a client asks or what a situation may require an attorney to do may impinge upon the attorney's personal norms, but a professional may need to adjust his or her ethical perspective or suspend its influence while doing what is appropriate for a client. R. Haydock, supra note 6, at 196-97.

He also reported that one of the positions most frequently taken by lawyers is that "[i]t is not proper for a negotiator to make up information and then voluntarily disclose it [i.e., to lie], unless it is necessary to serve the client's interests." Id. at 208. Another position frequently taken is that "[a] negotiator can only make up information if forced into a situation by the other negotiator where the absence of such information would harm a client's position." Id. Still another such position is that "[l]awyers have to conceal and misrepresent information in order to succeed for their clients." Id. at 209; see also, White, supra note 1, at 931-35 (lawyers lying about cases and the law is close to but separate from arguments resting on the duty to the client).

FN105. Model Rules of Professional Conduct Preamble (1983); Model Code of Professional Responsibility Canon 7 (1980).

FN106. The duty of zealous representation also bears a strong functional relationship to the adversarial excuse. Indeed, this duty may best be understood in relationship to the lawyer's obligation to undertake the representation, in court, of unpopular clients, or to argue, again in court, unpopular positions. In these cases, there is a confluence of the duty of zealous representation, the adversarial excuse, the soldier's excuse, the lawyer's access excuse, and the last lawyer's excuse.

FN107. Thus, the lawyer's obligation is "to represent his client zealously within the bounds of the law." Model Code of Professional Responsibility EC 7- 1 (1980); see Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 Yale L.J. 1060, 1081 (1986).

FN108. This is not a duty formally recited in the codes of professional responsibility. It is, however, commonplace within the oral discourse regarding legal ethics within the profession. Tax lawyers, who spend a great deal of their time in or near fiduciary relationships, seem to be particularly responsive to the assertion that this duty is a cornerstone of legal ethics.

FN109. C. Wolfram, Modern Legal Ethics, § 4.1, at 146 (Practitioner's ed. 1986).

FN110. Fried, supra note 107, at 1060 n.1.

FN111. Luban reported that the statement was not offered for the truth of the matter asserted, but that it was meant as a veiled threat against the King. As such, it was an act of advocacy in which all that mattered was that Brougham be understood to hold this view and, accordingly, stand ready to bring injury upon his King. D. Luban, supra

note 94, at 86.

FN112. Curtis, The Ethics of Advocacy, 4 Stan. L. Rev. 3, 3-23 (1951). The legitimacy and significance of Curtis' position is underscored by the fact that it is excerpted at great length in H. Edwards & J. White, Problems, Readings, and Materials on the Lawyer as Negotiator 373-89 (1977).

FN113. Id. at 378.

FN114. For an interesting exception to this general rule, see the "informal" usage of "zealous witness" that appears in Black's Law Dictionary 1618 (6th Ed. 1990). It remains true, however, that many lawyers have come to believe that the duty of zealous representation does include the duty to engage in what would be otherwise bad acts. Viewed in a certain light, it is problematic to assert that this is not the meaning of "zeal." At least among lawyers, we could say it is the meaning of zeal. This argument may find support in DR 7-101(a) which illustrates the meaning of "zealous" representation by saying "a lawyer shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means permitted by law and the disciplinary rules." Model Code of Professional Responsibility DR 7-101(a) (1980). Though the statement is heavily qualified, it might be read to mean that a lawyer may be obligated to promote all lawful objectives by means including those that are, while lawful, otherwise bad.

FN115. There is another variation of the argument that relies on the statement of the special duty as one of "zealous representation within the limits of the law." Here it is argued that the presence of the phrase "within the limits of the law" demonstrates, at least for purposes of this statement, that the speaker believes "zeal," standing alone, entails a readiness to perform all acts including those that are illegal. If this is the meaning of zeal, then the limiting phrase does not read "within the limits of the law and ethics" means the lawyer's duty of zeal includes a duty to perform otherwise bad but lawful acts. The difficulty with this argument is that "zeal" does not, standing alone, entail a willingness to engage in illegal acts. Moreover, we may fairly assume the author had two purposes, not one, i.e., that he meant to require devotion and to prohibit illegal acts.

FN116. The argument is made in Fried, supra note 107. It is fair to note that Professor Fried, while he embraces and defends this general proposition, seems profoundly ambivalent about the premises of this very argument. Id. at 1065-72. More to the point, he shows a particular reluctance to apply his own argument to matters of lying in negotiation, offering instead what seems to be an uncharacteristically absolutist condemnation of such behavior. Id. at 1085 (citing to Augustine and Kant). Most lawyers who are familiar with Fried's lawyer-as-friend argument apply it to lying no less readily than they apply it to other forms of otherwise unethical behavior.

FN117. Fried argues that it is ethically permissible to act in a way that promotes the

interests of certain others with whom one is in close relationship. Id. at 1066, 1067, 1070. These others ought reasonably be understood to include one's clients. Id. at 1067, 1071-76.

FN118. Fried approves as "perspicacious" Curtis' remark "that a lawyer may be privileged to lie for his client in a way that one might lie to save one's friends or close relatives." Id. at 1066. He goes on to say that "we recognize an authorization" to take the interests of our friends and relatives "more seriously and to give them priority over the interests of the wider collectivity." Id.

Fried then asserts that "[b]efore there is morality there must be the person." Id. at 1068. He goes on to argue that we must be allowed to favor our own interests because:

> [O]ne wishes to develop a conception of a responsible, valuable, and valuing agent, and such an agent must first of all be dear to himself. It is from the kernel of individuality that the other things we value radiate. The Gospel says we must love our neighbors as ourselves, and this implies that any concern for others which is a human concern must presuppose a concern for ourselves. Id. at 1069.

FN119. Id. at 1081, 1083, 1087.

FN120. He argues that "there is a vocation and a satisfaction even in helping Shylock obtain his pound of flesh or in bringing about the acquittal of a guilty man." Id. at 1088. Thus "we do right" when, in this way, we fulfill the office of a lawyer-as-friend. Id. Accordingly, he answers in the affirmative the question with which he began his article: whether it is morally right for a lawyers to place the interests of their clients above what they would otherwise regard to be their moral obligations.

FN121. Fried seems sometimes to suggest that otherwise impermissible conduct can be justified by self-interest and sometimes to suggest that it is not. At one point, for instance, he announces that "[c]onsideration for personal integrity forbids me to lie, cheat, or humiliate, whether in my own interests or those of a friend, so surely they would prohibit such conduct on behalf of a client, one's legal friend." Id. at 1083. He then goes on to say:

> One must not transfer uncritically the whole range of personal moral scruples into the arena of legal friendship. After all, not only would I not lie or steal for myself or my friends, I probably also would not pursue socially noxious schemes, foreclose on widows or orphans, or assist in the avoidance of just punishment. So we must be careful lest the whole argument unravel on us at this point. Id. at 1084.

FN122. Fried is left in an awkward and apparently indefensible position. On the one hand, he argues that a lawyer is permitted to engage in otherwise unethical behavior

because a lawyer is like a friend and one is right in serving one's friends as one might serve oneself. On the other, he concedes that neither self-interest nor friendship warrant conduct that is otherwise ethically impermissible.

FN123. See supra text accompanying notes 111-12 (Curtis' argument). He there asserts that it is the nature of a duty that the more we owe to one person the less we owe to that person's competitors, and that this diminution in the duty to others includes a diminution in such general ethical obligations as the duty not to lie.

FN124. See text accompanying notes 111-12.

FN125. According to Professor Fried, this argument depends on the fact that lawyers are licensed to do certain useful and sometimes necessary things that their clients may not be permitted to do for themselves. He then suggests that "the right of the client to exercise his full measure of autonomy within the law," when combined with the fact that certain of the things a client might like to do can only be done by a lawyer, may impose upon the lawyer the obligation to do certain things he might find distasteful. Fried, supra note 107, at 1083-86. This appears to be the basis of Fried's conclusion that "[t]he obligation of an available lawyer to accept appointment to defend an accused is clear." Id. at 1086.

FN126. According to Fried, the last lawyer's argument begins with the two elements that comprise the lawyer's access argument, namely client's right of autonomy within the law and the lawyer's power to do certain things that a client cannot do for herself. If, in addition, the lawyer is the only one available to serve the client, Fried appears to conclude that the lawyer owes a heavier duty to engage in conduct that she might personally regard as repugnant. Id. at 1086.

FN127. E. Durkheim, Professional Ethics and Civil Morals 5 (1957).

FN128. See Model Rules of Professional Conduct Rule 1.6 (1984); Model Code of Professional Responsibility Canon 4 (1980).

FN129. A common form of this justification is the claim that a lie is justified because our opponent asked an impermissible question. See R. Haydock, supra note 6, at 209; White, supra note 1, at 933 n.20.

FN130. The classic example of a lie that is said to be necessary to the preservation of a confidence involves the circumstance in which, because of the incentives facing the speaker, anything but a denial would be regarded as an admission. Thus, if the buyer is entitled to keep secret the fact that he intends to build a trailer park and the seller--known to be unwilling to sell for such purposes--asks whether the buyer intends to build a trailer park, the buyer must either deny what is true or place himself in a position in which his failure to deny will be taken as an admission.

FN131. See Simon, The Ideology of Advocacy, supra note 3, at 42.

FN132. See Fried, supra note 107, at 1085.

FN133. As a general matter, Fried follows Kant in condemning all lies. Id. at 1085 n.37. The "letter carrier" excuse is clearly seen as a narrow one. Thus, his example involved a lawyer "presenting to the court a statement by another that he knows to be a lie, as when he puts a perjurious client-defendant on the stand." Id. at 1085.

> Whatever may have been Fried's intentions with regard to this argument, the fact remains that lawyers who lie are not like letter carriers who deliver deceitful letters. The letter carrier is presumed not to know that the letter he is carrying contains a deceit. Moreover, the carrier is presumed neither to have suggested the deceit nor to have written the letter.

FN134. Id. at 1084.

FN135. Id. at 1085.

FN136. Fried took pains to point out that, at least in his view, the soldier's excuse is available only where the soldier "is a citizen of a just state, where foreign policy decisions are made in a democratic way . . . . " Id. at 1084. When he drew his analogy between the position of the soldier and that of the lawyer, he similarly limited the availability of this excuse to "wrongs that a reasonably just legal system permits to be worked by its rules . . . . " Id.

FN137. Id. at 1085.

FN138. Professor Fried tried, I think unsuccessfully, to distinguish the excused wrong from the unexcused wrong by asserting that this excuse is only available when the act is "formal" and "legally defined" or when the wrong "does not exist and has no meaning outside the legal framework." Id. at 1084- 85.

FN139. Id. at 1084.

FN140. Id. at 1085.

FN141. Fried dealt with this question differently than do I. So far as I can tell, his position is that lying is different from other kinds of immoral conduct. The suggestion seems to be that it can never be justified. Id. at 1085. He nevertheless drew all kinds of distinctions between those deceptions that are lies and those that are not. This simply removes all the hard ethical questions to the arena of definitions. That is not to say that we would not reach many of the same conclusions.

FN142. I am not yet prepared to exclude the possibility that the soldier's excuse may

have much more specific applications. Thus, it may be that the lies that may be justified by virtue of the three-part adversarial excuse can be explained in terms of the role that the state has expressly assigned to the lawyer in our adversarial system. This application of the excuse is redundant to the justifications that have already been found in the adversarial excuse. The adversarial excuse is not made stronger by the addition of the soldier's excuse.

FN143. See supra section I.A.
FN144. Section II.J involves the claim that "I lied but it was justified by the good that was done by the lie that I told." Doing justice with respect to our adversary's prior bad acts will be one form of such "good" that might be done.

FN145. See S. Bok, supra note 19, at 135, 140-41 (noting position described, not approved).

FN146. Haydock reported that one of the positions most frequently asserted by lawyers is that "[i]f the other negotiator is lying, a lawyer may engage in misrepresentations to counter such lying tactics." R. Haydock, supra note 6, at 209.

FN147. "[T]o mislead one's torturers through every possible stratagem would clearly meet the test of public justification. The victim has no other alternatives to avoid breaking confidences protecting the lives of others. The torturer has no claim to normally honest answers, having stooped to such methods in the first place. It is unlikely that the practice of lying will spread because of the victim's lie under duress. And the victim, finally, is in no position to take into account harm to self or to trust." S. Bok, supra note 19, at 140-41. Ironically, these lies in "self-defense" may, while saving the liar's colleagues, result in longer and harsher torture. Id. at 135 (regarding lies to potential attackers).

FN148. She can reject or ignore Mr. Seller's assertion, assign it no weight, and continue to dance.

FN149. See S. Bok, supra note 19, at 125 (characterizing Nixon's justification of the Ellsberg burglary as retaliation for past treachery).

FN150. S. Bok, supra note 19, at 139-40.

FN151. It is, in theory, possible that lies under these circumstances would be justified not because they are ethically permissible retaliation but because everybody believes them to be ethically permissible retaliation, because everybody behaves according to this belief and thus tells retaliatory lies, and because that pattern of behavior makes lies permissible under the rules-of-the- game justification. See supra section II.F.2.

FN152. See S. Bok, supra note 19, at 125, 136 (identifying the justification, not approving it).

FN153. If everybody believes these lies to be ethically permissible and actually tells lies under these circumstances, that pattern of behavior may be said to warrant a form of the rules-of-the-game justification. See supra section II.F.2.

FN154. See White, supra note 1, at 931-32; see also R. Haydock, supra note 6, at 208 (stating lies are permissible if your adversary forces you into a situation where failure to lie would be disadvantageous). Haydock reported that one of the positions most frequently asserted by lawyers is that "[a] lawyer has no duty to answer a question truthfully if the other negotiator has no right to ask such a question or has no right to such information." Id. at 209.

FN155. She might also ask him whether a particular dollar amount is above his reservation price. This confronts the other negotiator with a diemma not unlike the one that is created by asking a witness whether he is still beating his wife. White, supra note 1, at 933.

FN156. David Luban has identified this argument as one that relies upon an ethical division of labor. The idea underlying arguments relying on ethical divisions of labor is that "behavior that looks wrong from the point of view of ordinary morality is justified by the fact that other social roles exist whose purpose is to counteract the excesses resulting from role-behavior. Zealous adversary advocacy is justified by the fact that the other side is also furnished with a zealous advocate." D. Luban, supra note 94, at 101.

FN157. Id. at 101.

FN158. White, supra note 1, at 927-28.

FN159. See R. Cover, O. Fiss & J. Resnick, Procedure 631-32 (1988); Resnick, Failing Faith: Adjudicatory Procedure in Decline, 53 U. Chi. L. Rev. 494, 513 (1986).