

Taking Bullshit Seriously

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Workshop

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Author's Note to Workshop Participants: This is a small excerpt from a larger work-in-progress. You have here the beginning of the beginning of one segment. I decided to circulate only this much, with some indications of the additional sections in this segment, because I am most interested in your feedback on this part of the project. I hope I have supplied sufficient grist for the mill. I wanted to make it as feasible as possible for everybody to read this text and to provide common ground for our discussion of it.

Summary:

Traditionally, the law has concerned itself harms that arise from a specific kind of misrepresentation: lying. But, relatively recent structural changes in markets, marketing, and financial institutions have made it easy, and perhaps inviting, to cause those same harms via another kind of misrepresentation, bullshitting. Legal safeguards against lying are ill suited to protect potential victims of bullshit, mostly because they were developed with lying, rather than bullshitting, in mind. These safeguards are meant to focus people on truth-telling. But because truth-telling is neither a necessary nor sufficient condition for the prevention of bullshitting, promoting the telling of truths does not necessarily minimize bullshit. Indeed, the best bullshitter may be the one who never tells a lie. To reduce bullshit, we need to focus on its essence, what distinguishes it from other forms of misrepresentation. Then we can consider how best to prevent injury-causing bullshit. Apart from after-the-fact sanctioning, the law discourages lying by requiring disclosure and reporting. For the sake of argument, I grant the efficacy of these measures. But, perversely, disclosure and reporting can be coopted by bullshitters. To forestall bullshitting, the law should promote loyalty rather than - or at least in addition to - truthfulness. Conveniently, the law already includes a device for creating and bolstering

loyalty between private parties, fiduciary duty. Strengthened and extended, fiduciary duty would be ideally fit for preventing just the sort of bullshit likely to fly in our current social circumstances.

1. Introduction

The general idea of misrepresentation as wrong-doing underlies a variety of legal causes of actions, crimes, and regulatory prohibitions. The common law allows actions for negligent deceit, fraud, and negligent misrepresentation. Contracts can be voided if they rest on deception. Securities regulations mandate disclosure of information and penalize misrepresentation of facts.

And yet, the law seems oddly unconcerned with a type of misrepresentation that the philosopher, Harry G. Frankfurt has provisionally analyzed and identified as a pervasive and distinct kind of misrepresentation: bullshit.¹

I don't think the reason the law's failure to provide redress for harms caused by bullshit can or should be attributed to the fact that bullshit can never be a serious enough kind of

misrepresentation to merit legal concern. Not all bullshit rises to this level, but in certain typical circumstances, bullshitting poses serious risk of injuries that have been traditionally regarded as legally cognizable. Indeed in certain typical settings, bullshitting will be the best way for people to gain advantage without regard for the likely harm to other people's physical, financial, or emotional integrity. It is in these settings that law has a role to play. But law cannot be effective against bullshitting unless we understand what bullshitting is and we consider when people are likely to wield it in ways that endanger the wellbeing of others.

Somewhat paradoxically, it is precisely because bullshitting differs from lying that the law often does not recognize it as giving rise to liability for injuries it causes. Whether common or statutory, the law has traditionally focused on lies and liars (deliberate or careless) rather than on bullshit and bullshitters. Furthermore, the common law has disfavored monetary for tangible injuries even in tort actions for deceit pure and simple. Courts have advanced a number of familiar justifications for a narrow legal focus on straight up lying,

¹ Harry G. Frankfurt, *On Bullshit* (2005).

including caveat emptor; the lack of an affirmative obligation to disclose the lies of others so long as one does not oneself outright lie; fear of large damage awards; distrust of plaintiffs' attorneys, especially those who litigate class actions, etc.

Regardless of the validity of these justifications for limiting legal liability related to lies, lying, and liars, they rather miss the point for those harmed by bullshit, bullshitting, and bullshitters. Because bullshitting is an activity distinct in kind from lying, its legal status and treatment should be evaluated independently of the law's approach to of lying.

2. Bullshit versus bullshitting

Above I mentioned Harry Frankfurt's philosophical discussion of bullshit. I am indebted to Frankfurt's work and endorse much of what he has to say about what makes bullshit what it is. But because his own sketch of the structure of the concept 'bullshit' ends up making the purveyor's attitude toward his own communicative activity definitive of bullshit as opposed to other misrepresentations, I think it better to talk of

bullshitting than of bullshit. This shift from noun to participle also emphasizes that, like lying, bullshitting is an activity, one that requires an active doer, so to speak. In other words, bullshit does not just happen.

3. Truth-value versus truth and falsity

In "On Bullshit", Frankfurt nicely distinguishes bullshitting from lying. Frankfurt's central observation is that the bullshitter, unlike the liar - or the truth-teller, for that matter- is fundamentally unconcerned with truth-value. To the extent a proposition asserts a factual claim that proposition has a truth-value: if the factual claim is correct the truth value of the proposition is TRUE; if the factual claim is incorrect the truth-value is FALSE. As is commonly recognized, whether a statement or proposition is true or false is a different matter than whether the person who makes it is a liar or a truth-teller. A liar can mistakenly voice a true proposition; he may be a very confused liar. The same goes for a truth-teller: one can inadvertently speak the truth. What distinguishes the liar from the truth-teller is that the liar is attempting to assert a proposition whose truth-value is FALSE,

whereas the truth-teller is attempting to assert a proposition whose truth value is TRUE. The difference between the two communicators comes from a difference in their intentional stance toward the truth-values of their respective assertions. One person aims to assert falsehoods, the other to assert truths. But the liar and the truth-teller share a common meta-attitude: they *care* about the truth-values of their assertions. Indeed, without a significant dose of luck, neither one can succeed in their respective aims unless they pay attention to the truth-value of their assertions, and design their assertions with the desired value in mind.

The deliberate intentional liar and the deliberate intentional truth-teller lie on opposite ends of a spectrum of attitudes toward truth and falsity, but are actually quite close to each other on a spectrum of attitudes toward truth-value.

4. The bullshitter's intentional stance

"It is just this lack of connection to a concern with truth -- this indifference to how things really are -- that I regard as the essence of bullshit."

--Harry G. Frankfurt, On

Bullshit, 33-34

Frankfurt uses this observation to elaborate both the sense in which a bullshitter is, like the liar, a misrepresenter: but, a misrepresenter with a different aim. In contrast to both the intentional liar and the intentional truth-teller, the bullshitter is indifferent to truth-value, to how his assertions match up with facts. In fact, although he is a misrepresenter, the bullshitter may even use truths to achieve his misrepresentative ends. To appreciate this, one must understand Frankfurt's conception of those ends, particularly as they contrast with the ends of a liar.

What bullshit essentially misrepresents is neither the state of affairs to which it refers nor the beliefs of the speaker concerning that state of affairs.² Those are what lies misrepresent, by virtue of being false. Since bullshit need not be false it differs from lies in its misrepresentational intent. The bullshitter may

² An intentional liar attempts both of these misrepresentations: to assert a false belief and to represent, deceptively, that she herself believe that belief to be true.

not deceive us, or even intend to do so, either about the facts or about what he takes the facts to be. What he does necessarily attempt to deceive us about is his enterprise. His only indispensably distinctive characteristic is that in a certain way he misrepresents what he is up to.³

Bullshitting is cousin to scamming or conning.⁴ Bullshitting is also related to magic shows⁵ and pranks and practical jokes.⁶ None of these are as simple or pointed as telling a lie or stating a truth. They are activities, practices in the richest sense of the word. They can extend over space and time, they are often conducted by people acting in concert or at least in coordination. Almost always they involve more than a single communicative event, a one shot assertion of belief, intended to either true or false. Bullshitting is a practice whereby the

³ Frankfurt, 53-54, footnote added.

⁴ The film "The Sting" for example.

⁵ See New York Times coverage of the conference on cognition and magic.

⁶ E.g. MIT students place a campus cruiser on top of a landmark campus building, complete with parking ticket for parking in an unzoned area.

successful bullshitter affects the conduct and attitudes of his audience so that they do not act toward him or his enterprise as they would if they knew what he was really up to. The bullshitter is trying to get over, and actually may often succeed by telling fewer straight-out lies than somebody who aims to intentionally lie successfully. People may be far better at detecting isolated lies than they are at recognizing complex bullshit.⁷

Because truths and lies per se are immaterial to the point of bullshitting, the bullshitter takes a very different attitude toward truth-value than either the liar or the truth-teller. He just does not care about truth-values; they have no intrinsic significance for him. One cannot shame a bullshitter by calling him a liar nor inspire him by praising his truthfulness. The

⁷ Research in evolutionary psychology and neuroscience suggests that this may be the case, and that a natural adaptive tendency to be able to identify "cheaters" in certain one-shot episodes of cooperative action is distinct from any adaptation for identifying other types of social trouble-makers. See Ermer, E., Guerin, S., Cosmides, L., Tooby, J., & Miller, M. (2006) Theory of mind broad and narrow: Reasoning about social exchange engages ToM areas, precautionary reasoning does not. *Social Neuroscience*, 1 (3-4), 196-219; Cosmides, L. & Tooby, J. (2005).

liar and the truth-teller share closely related attitudes to the significance of truth-values, indeed what they have in common is that their aims necessitate a recognition of the significance of truth-values. The bullshitter, in contrast, sees no special significance in truth-values, TRUE or FALSE. To him, truth-value is of only incidental interest. If the bullshit works better when he tells truths, he will attempt to tell truths; if it works better when he tells lies he will attempt to tell lies. If it works best when he simply ignores the matter of trying to speak truly or falsely, he will say whatever is necessary without a thought for its truth or its falsity.

5. Some examples of bullshit and bullshitting

[In the interest of brevity, I have cut the written elaboration of these from this draft. I am happy to discuss examples in the workshop.]

5.1. Food and advertising: Splenda, Equal; Natural, Artificial

5.2 The current U.S.-Iraq War: The Bush-Cheney-Plame-Libby Affair

Neurocognitive adaptations designed for social exchange. In D. M. Buss (Ed.), *Evolutionary Psychology Handbook*. NY: Wiley.

5.3 Corporate conduct: Enron

Some difficulties with examples:

Ex post, if what the bullshitter has really been up to comes out, one may think the bullshitter was not successful. That is, known examples of bullshitting are usually going ones that have ultimately failed.

Successful bullshitting often obscures multiple things that bullshitters might be up to - once the bullshitting has taken effect, it can be used to misrepresent multiple things.

6. Truthfulness and loyalty compared

7. The law of fiduciary duty as an antidote to legally troubling bullshit

The strict imposition of the duty of loyalty on the fiduciary is designed as a "prophylactic rule intended to remove all incentive to breach - not simply to compensate for damages in the event of a breach." *ABKCO Music, LTD. V. Harrisongs Music, LTD.*, 722 F.2d 988, 996 (1983).

8. Fiduciary duty law distinguished from "scheme liability"

Regardless of the decision in *Stoneridge Investment Partners v. Scientific-Atlanta.*, oral argument in the U.S. Supreme Court

scheduled for October 9, 2007,⁸ fiduciary duty serves independent functions than scheme liability does.

⁸ 549 U.S. ____ (U.S. 06-43 Mar. 26, 2007)
