WHEN WE LIE TO THE GOVERNMENT, IT’S A CRIME, BUT WHEN THE GOVERNMENT LIES TO US, IT’S . . . CONSTITUTIONAL?

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I. INTRODUCTION

“Thou shalt not bear false witness against thy neighbor.” 1 To put it another way, don’t lie. Unfortunately, human history is littered with innumerable examples of people who have disregarded that rather simple requirement of honesty. Little kids lie (“I didn’t break the vase, Mommy!”). Corporate executives lie. 2


1 Exodus 20:16

2 See, e.g. Bernard Madoff, former stockbroker currently serving a 150 year federal prison sentence after embezzling between $50 and $70 billion from his clients over a 40 year period- Diana Henriquez, Madoff Is Sentenced to 150 Years for Ponzi Scheme, N.Y. TIMES (June 29, 2009), http://www.nytimes.com/2009/06/30/business/30madoff.html?pagewanted=all; Kenneth Lay, former Enron Chief Executive Officer convicted of securities fraud and wire fraud; died on July 5 2006 before he could be sentenced and his conviction was abated - Tim Reason, Ken Lay’s Record Cleared of Convictions, CFO.COM, (October 17, 2006), http://www.cfo.com/article.cfm/8048902/c_8435337; Jeffrey Skilling, former Enron President convicted of conspiracy, securities fraud, and insider trading; currently serving a 24 year prison sentence- Edward Petrsson, Enron Ex-Chief Skilling Loses Appeal Bid to Overturn Convictions, BLOOMBERG, (April 7, 2011), http://www.bloomberg.com/apps/news?pid=2065101&sid=a_0yuJnZSu5U; Andrew Fastow, former Enron Chief Financial Officer who testified against Lay and Skilling as part of a plea bargain in which he admitted to his role in the Enron scandal; finished serving a 6 year prison sentence- Corporate Convicts: Where are they now?, CNNMONEY, http://money.cnn.com/gallery/2008/fortune/0805/gallery.convicts.fortune/4.html; Dennis Kozlowski, former Tyco International Chief Executive Officer convicted of grand larceny, securities fraud, falsifying business records and conspiracy; currently serving 25 year prison sentence; Philip R., Jennifer Bayot, Ex-Tyco Executives Sentenced to 8 1/3 to 25 Years In Prison, N.Y. TIMES,


4 John Freeman, Ethics Watch: Lawyers and Corporate Disgrace, 14 S. CAROLINA LAWYER 9, 9 (2003). (“The investor losses tied to fraud by Arthur Andersen’s clients are enormous. Three hundred billion dollars is the total loss in market capitalization, i.e., stockholder value, for only the following six fraud-tainted firms: Sunbeam, Waste Management, WorldCom, Qwest, Global Crossing and Enron. These wayward firms have more in common than staggering losses due to financial fraud: They all shared Arthur Andersen as their auditor.”).


6 See, e.g., Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135 (1986) (holding that the deliberate failure of the police to notify criminal detainee of the fact that an attorney had been provided for him did not affect the voluntariness of his confession.).

In this piece, I will first look at several sanctions that result from lying to government officials. I will then briefly discuss several infamous incidents involving some well-known individuals who tried lying to the government. Finally, I will look at a few real life examples showing how and why those sanctions are not always applied in the opposite direction. This is especially the case when the perpetrator is a government official who is telling the lie during the regular course of his duties. This includes how the Constitution is implicated so that some governmental employees do not always face legal sanctions for lying on the job. The end result is now a general distrust of politicians, law enforcement officers, and attorneys, and an all too real cynicism about governmental affairs.

II. WHY LYING IS NOT A GOOD IDEA, AND THE RESULTING PENALTIES

There are different ways in which a party can attempt to thwart a government investigation. They can range from lying to investigators, alteration and destruction of documents, obstructing governmental proceedings, and giving false statements, among others. Below are a few statutory prohibitions against making intentional misrepresentations.

A. Perjury

On a person’s federal income tax return (Form 1040), there is an affirmation directly above the signature line that says the following:

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and accurately list all amounts and sources of income I received during the tax year.

Federal law generally defines perjury as a party giving false statements under oath, as well as giving written documentation under penalty of perjury to a competent tribunal, officer, or person. Thus, out of the gate, the Internal Revenue Service (“IRS”) lets taxpayers know in no uncertain terms that they will suffer recrimination if they intentionally include false and misleading information on their tax returns. Upon a perjury conviction, either in general, or on one’s tax return, the convicted perjurer “shall be fined under this title or imprisoned not more than five years, or both.”

B. False Statements

Federal law also provides sanctions against ones knowingly making statements that are materially false or misleading. Thus, unlike perjury, one does not have to be under oath when one makes false statements. It is enough that one knows of the falsity of an oral or written statement at the time he makes the statement. Upon a conviction for knowingly making false statements, the party “shall be fined under this title, imprisoned not more than five

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12 Id.
years, or if the offense involves international or domestic terrorism, imprisoned not more than eight years, or both.”

C. Destruction of Records

In recent memory, one of the most indelible examples of destroying records in an attempt to hide the truth was that of former “Big Five” accounting firm Arthur Andersen (Andersen), which destroyed nearly two tons of documents relating to its audit and non-audit work of its highest profile client, Enron. Andersen was eventually convicted on one count of obstruction of justice. Andersen’s conviction was eventually overturned on appeal by the U.S. Supreme Court. Unfortunately, however, the collateral damage resulting from Andersen’s conviction ultimately drove the company out of business.

Federal law also has rather stiff sanctions against those individuals that would destroy, or alter, or falsify any and all records connected with a federal investigation:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such

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13 Id.
15 Ainslie, supra note 14, at 107.
matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.19

D. Obstructing Investigations, Civil and Criminal

Federal law also has strong prohibitions against any party who attempts to impede any civil or criminal investigation. Any party who obstructs a civil investigation, upon conviction, is subject to a fine, or five year prison sentence (or eight years if the investigation is connected with international or domestic terrorism), or both.20 Similarly, any party who attempts bribery to obstruct a criminal investigation will be subject to a fine, or five years imprisonment, or both.21 Additionally, any party who wrongfully discloses information regarding a criminal investigation or grand jury proceeding will also be subject to a fine, or five years imprisonment, or both.22 Finally, if a party notifies a customer of a financial institution whose records are being subpoenaed, or notifies any person named in the subpoena that something is coming down the road, that person will be subject to a fine, or one year imprisonment, or both.23

These are just a few of the ways that a party can suffer legal penalties in any attempt to hide, destroy, or otherwise distort the truth in any attempts to subvert the legal process.

III. THE GOVERNMENT DOES NOT LIKE IT WHEN SOMEONE LIES TO IT

I will briefly discuss a few of a great many people who tried to lie to the government and got caught. As this very brief list includes sports figures, business people, celebrities, and even

19 Id.
21 Id. at §1505(a).
22 Id. at §1505(b)(1).
23 Id. at §151010(b)(2).
presidents, it would tend to support the proposition that no one is above the law.

A. Bill Clinton

Can anyone ever forget his grand jury testimony saying “it depends on what the meaning on the word is”?

The 42nd President of the United States (1993-2001) was hit with two articles of impeachment for lying about his extramarital affairs. The two counts were for perjury and obstruction of justice. Clinton was then brought to trial before the U.S. Senate, where a 2/3 majority vote favoring conviction would have resulted in his removal from office. However, Clinton was acquitted on the perjury charge by a count of 55-45 (55 for acquittal, 45 for conviction) and was acquitted on the obstruction charge by a 50-50 deadlock. Although Clinton was able to avoid conviction, he still suffered some legal recrimination. His Arkansas law license suspended for five years, was cited for contempt of court, and had to pay a $25,000 court fine. I am not making any moral judgments about his politics or his ethics; I am merely stating some well-known facts.

B. Richard Nixon

The 37th President of the United States (1969-1974) has gone down in history as the ringleader of the Watergate scandal. Watergate refers to the name of a Washington, D.C. hotel where several individuals were arrested attempting to break into the offices of the Democratic National Committee (DNC). The DNC

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25 See supra text accompanying note 7.
27 U.S. CONST, art. I § 3, cl.6.
28 Id.
30 Dean, supra note 3, at 609.
offices were located in the Watergate Hotel. As the facts eventually turned out, the break-in had been authorized by Nixon and key members of his inner circle. Pursuant to House Resolution 803, the House Judiciary Committee prepared three Articles of Impeachment which upon conviction would have resulted in Nixon’s removal from office (he resigned before being tried in the Senate). Nixon was charged with obstruction of justice, violating the constitutional rights of citizens, and failing to produce documents subpoenaed by the House Judiciary Committee.

The fallout from Watergate resulted in Nixon’s resignation from office during his second term, the loss of his law license, and his identification as an unindicted co-conspirator in the Watergate affairs. Love him or hate him, one almost indelible impression of Nixon is as one of history’s all time liars. Again, I make no moral judgments about his politics or his ethics; I am again merely stating the facts (exhaustively discussed in other forums). Many point to his (in)famous speech (among other misdeeds) in which he proclaimed himself not to be a “crook” as evidence he was just that:

Let me just say this, and I want to say this to the television audience: I made my mistakes, but in all my years of public life, I have never profited, never profited from public service – I have earned every cent. And in all of my years of public life I have never obstructed justice. And I think, too, that I can say that in my years of public life, that I welcome this kind of examination, because people have got to know if their president is a crook. Well, I am not a crook. I have earned everything I have got.31

C. Martha Stewart

Martha Stewart is well known as a talk show host and business entrepreneur. Unfortunately, she is also well known for her conviction for obstruction of justice relating to her actions regarding her selling her ImClone Systems, Inc. (“ImClone”) stock.\(^\text{32}\) She had been indicted for securities fraud as well, but the court granted a judgment of acquittal on that specific charge.

ImClone is a pharmaceutical company that, at the time, had developed a cancer drug called Erbitux\(^\text{33}\), and the corporation was awaiting word as to whether the Food & Drug Administration (“FDA”) would approve the drug. “On December 25, 2001, ImClone management learned that the FDA had rejected ImClone’s application to approve Erbitux.”\(^\text{34}\) This in turn led ImClone’s Chief Executive Officer, Sam Waksal, to sell his shares.\(^\text{35}\) It turned out that Waksal and Stewart were friends and that Merrill Lynch stockbroker, Peter Bocanovic, was the broker for both parties.\(^\text{36}\) Bocanovic subsequently notified Stewart that the price of ImClone stock was going to fall, and that Waksal was selling his shares.\(^\text{37}\) On December 27, 2001, Stewart sold her 3,928 shares\(^\text{38}\) and was able to avoid a loss of approximately $45,000,\(^\text{39}\) a de minimis amount for someone whose net worth at the time was rumored to be several hundred million dollars.

Stewart claimed to federal investigators that she and Bocanovic had a standing order to sell the ImClone shares once the price fell below $60 per share.\(^\text{40}\) Stewart was indicted on charges of conspiracy, making false statements to government officials,


\(^{33}\) Id. at 609.

\(^{34}\) Id.; See also, U.S. v. Stewart, 305 F. Supp. 2d 368, 370 (S.D.N.Y. 2004).

\(^{35}\) See Stewart, 305 F. Supp. 2d at 370.

\(^{36}\) Id.

\(^{37}\) See Id.

\(^{38}\) See Id.


\(^{40}\) See Stewart, 305 F. Supp. 2d at 371.
obstruction of an agency proceeding and securities fraud. She was convicted in a jury trial of making false statements to federal investigators, conspiracy, and obstruction of an agency proceeding.

On the most serious charge (securities fraud), however, the court granted Stewart’s motion for acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. This rule mandates that a court enter a judgment to acquit a defendant on any charge for which the evidence cannot support a conviction. The court was already convinced that the prosecution could not prove Stewart guilty of intentional fraud beyond a reasonable doubt. “Here, the evidence and inferences the Government present[ed were ] simply too weak to support a finding beyond a reasonable doubt of criminal intent.”

D. Wesley Snipes

Wesley Snipes is a well-known actor who had starring roles in several large budget films such as (“Major League,” “Jungle Fever,” “White Men Can’t Jump,” “U.S. Marshals,” “New Jack City,” and “Passenger 57,” among others). He is also currently well known for his troubles with the IRS and his conviction and current incarceration (as of this writing) for willful failure to file tax returns. From 1999 to 2004, Snipes had earned over thirty seven million dollars of gross income. However, he never filed federal tax returns for any of those years. In addition, he had filed an amended return for calendar year 1997, for which he claimed a refund of over seven million dollars of taxes he erroneously paid.

41 Stewart, 323 F Supp. 2d at 609.
42 Id. at 610.
43 Id.
44 Fed. R. Crim. P. 29(a).
45 Stewart, 305 F. Supp. 2d 377-78.
47 Id. at 859.
48 Id.
49 Id. at 860.
and an amended return for calendar year 1996, where he claimed a refund of approximately four million dollars of taxes that he allegedly paid in error.\(^{50}\)

After the IRS launched a criminal investigation into Snipes’s tax filings (or lack thereof), Snipes, along with two co-defendants, was charged with various crimes connected with a fraudulent tax scheme.\(^{51}\) The alleged crimes ranged from conspiracy to defraud the IRS,\(^{52}\) filing a false refund claim,\(^{53}\) and several counts of willful failure to file his tax returns.\(^{54}\) On February 1, 2008, Snipes was convicted on three counts of willful failure to file his returns.\(^{55}\) He was acquitted, however, of the conspiracy and false claim charges.\(^{56}\) Snipes received a three year prison sentence,\(^{57}\) and his conviction and sentencing were upheld on appeal on July 16, 2010.\(^{58}\)

**E. Marion Jones**

Marion Jones was an Olympic medal winning track star who had won three gold medals and five bronze medals at the 2000 Olympics. Now, she is also known for being an admitted steroid user after having lied about having never used steroids for years, along with her prison sentence for having lied about it. “After long denying that she had ever used performance enhancing drugs, Jones admitted in federal court that she used the designer drug steroid ‘the clear’ from September 2000 to July 2001. She began serving a six-month prison sentence last month for lying to

\(^{50}\) *Id.* at 861 n.3.

\(^{51}\) *Id.* at 860.

\(^{52}\) *Id.* at 860-61.

\(^{53}\) *Id.*

\(^{54}\) *Id.*

\(^{55}\) *Id.* at 863.

\(^{56}\) *Id.*

\(^{57}\) *Id.*

\(^{58}\) *Id.* at 873.
investigators about doping and her role in a check fraud scam.”^59 Not only did Jones have to forfeit her medals, but Jones’ Olympic teammates had to relinquish their medals as well.^60

These are only a few high profile individuals who suffered some stiff sanctions as a result of lying to the government. If we accept the proposition that no one is above the law, do we have a reasonable expectation that government agents will be honest with us? And more importantly would we, the voting public, have any legal recourse against government agents when they lie to us? Unfortunately, not always.

IV. POLITICAL AND ADMINISTRATIVE “MISSTATEMENTS”: ARE GOVERNMENT AGENTS HELD TO THE SAME STANDARDS WHEN THEY LIE TO US?

One would hope so. However, this is not always the case. This is especially true in political campaigns. Assume we have candidate X, a current member of the legislature of State Blue, who is running for the governorship of State Blue against incumbent governor/candidate Y. Candidate X’s platform centers on the fact that property taxes have tripled during the time Governor Y has been in office. Candidate X promises that if he is elected, the first thing he will do is reduce property taxes. Naturally, the property owners who have been getting killed by high property taxes would most likely vote for Candidate X. As a result, Candidate X wins the election and now becomes the next governor of State Blue.

Once Governor X is now in office, he now has to honor his campaign promise to reduce property taxes. In balancing State Blue’s budget, Governor X realizes that he has to keep things

^60 Id.
revenue neutral and at the same time be able to implement his tax cut. What does it mean to be revenue neutral? It means that the governmental body must bring in the same amount of money every year in spite of any changes in the tax laws.

Putting some hypothetical numbers to this, we will assume that last year under the former Governor Y, State Blue amassed six hundred million dollars of property tax revenues when the property tax rate was six percent. This year, the new Governor X’s budget includes a 2 percent decrease in property taxes to four percent. This results in State Blue generating four hundred million dollars of property tax revenues this year, a shortfall of two hundred million from last year.

How does Governor X resolve his two hundred million budget gap? Unfortunately, when he ran on his campaign platform of reducing property taxes, he usually did not mention in great detail how he would be able to put his tax cut plan into place. In order for the new governor to balance his budget and have his tax cut, he might need to do some rather distasteful things. Governor X may have to raise the income tax. He may have increase sales taxes. He may have to raise the fees for parking meters and driver’s license renewals. On the flip side, Governor X may have to reduce expenses by cutting State Blue’s spending. He may need to lay off police officers, firefighters, hospital staff, teachers, librarians, sanitation workers, and so on. Or, Governor X may have to do a little of both: raise taxes and fees along with imposing deep cuts and layoffs. This now puts Governor X’s supporters (and everyone else) in the unfortunately ironic position of paying more for less. If Governor X does in fact honor his campaign promise and reduce property taxes, why would the voting public be disillusioned by him? Because he did not tell the full story about how he was going to reduce property taxes until after he won the election. This in turn leaves the voting public with the sense that they have been taken (yet again) by still another politician’s bait and switch. The end result is whatever benefits the voting public might have received from the property tax cut is outweighed by whatever they lost in the form of budget cuts and increased taxes and fees elsewhere. Unfortunately, while my little example here is
a hypothetical, there are many other examples where a politician’s statements were not exactly the whole unvarnished truth.

V. THE CONSTITUTIONALITY OF THE POLITICAL LIE

In my view, one very important reason why many people (and I include myself here) severely distrust politicians is that politicians routinely distort the record of their opponents. The campaign rhetoric seems to say to the voting public: “Vote for me . . . not so much because I’m so wonderful, but because my opponent is terrible! And here is my opponent’s record on the issues, which proves why my opponent is so pitiful!” The accuracy of one candidate’s allegation of a political opponent’s record really does not make a difference. Thus, as long as Candidate #1 shows that he is the lesser of two evils compared to Candidate #2, Candidate #1 should win the election. And he wouldn’t let a little thing like honesty get in the way of winning either. I guess that all is fair in love, war, and politics.

A. Rickert v. Public Disclosure Commission

In the State of Washington, it is perfectly legal for an individual running for public office to lie about a political opponent during a campaign. In Rickert, the plaintiff, Marilou Rickert, ran for election to the Washington State Senate against incumbent Tim Sheldon in 2002. During the campaign, Rickert’s campaign distributed brochures alleging that Sheldon “voted to close a facility for the developmentally challenged in his district.” At the time, the State of Washington had a statute prohibiting any political candidate from sponsoring, with actual malice, any political advertising that contained a false statement of

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62 Id. at 846.
63 Id.
64 WASH. REV. CODE § 42.17.530 (1)(a) (2010).
material fact about a candidate for public office.\textsuperscript{65} The statute, however, did not apply to any candidate who made false statements about himself.\textsuperscript{66} The statute defined actual malice as acting “with knowledge of falsity or reckless disregard as to truth or falsity.”\textsuperscript{67} Actual malice is the standard that the U.S. Supreme Court established whenever the plaintiff in a defamation lawsuit is in fact a public figure.\textsuperscript{68}

In response to Rickert’s allegation, Sheldon lodged a complaint with the state’s Public Disclosure Commission (PDC).\textsuperscript{69} The PDC was the administrative agency responsible for investigating and redressing allegations of false political statements.\textsuperscript{70} The PDC held a hearing to determine the truthfulness of Rickert’s statements and determined that two of the statements were indeed false.\textsuperscript{71} The PDC determined that Rickert’s allegation that Sheldon voted to close a facility for the developmentally challenged was false, and that Rickert’s statement that the facility in question was for the developmentally challenged was also false.\textsuperscript{72} As a result, the PDC determined that Rickert had violated the false campaign statements statute, and fined her $1000.\textsuperscript{73} Rickert appealed her conviction all the way up to the Washington Supreme Court.\textsuperscript{74}

The Washington Supreme Court, in a 5-4 decision,\textsuperscript{75} declared the statute unconstitutional on First Amendment grounds. The majority took the position that the government itself cannot be

\textsuperscript{65} Rickert, 161 Wash. 2d at 847.
\textsuperscript{66} Id.; WASH. REV. CODE § 42.17.530 (3) (2010).
\textsuperscript{67} Id.; WASH. REV. CODE § 42.17.020(1) (2010).
\textsuperscript{69} Rickert, 161 Wash. 2d at 846.
\textsuperscript{70} Id. at 847.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 845. Justice J Johnson delivered the majority opinion, joined by Justices C. Johnson, Owens, and Sanders. Chief Justice Alexander filed a concurring opinion. Justice Madsen filed a dissenting opinion joined by Justices Chambers, Fairhurst, and Bridge.
the sole arbiter to determine the truth in any political discourse, that the government cannot substitute its own judgment for that of speakers and listeners, and that the statute constitutes impermissible governmental censorship. The majority also noted that any political misstatements or distortions of a candidate’s record is best addressed by the candidate himself. “In a political campaign, a candidate’s factual blunder is unlikely to escape the notice of, and correction by, the erring candidate’s political opponent. The preferred First Amendment remedy of ‘more speech, not enforced silence’ thus has special force.” Additionally, the majority noted that if Senator Sheldon had suffered an injury to his reputation due to Rickert’s false statements, he had the remedy of pursuing a defamation lawsuit.

Finally, the majority noted that the voting public was astute enough on its own not to believe Rickert’s assertions, as Sheldon was reelected in a landslide with 79% of the popular vote.

The dissenting justices disagreed, and quite vehemently at that. Particularly Justice Madsen, as one might expect. Justice Madsen states quite unequivocally that the court’s ruling now gives any Washington (state) politician an open license to lie. “Unfortunately, the majority’s decision is an invitation to lie with impunity.” Similarly, one just cannot have confidence in the integrity of the political process if candidates for political office can tell a deliberate, premeditated falsehood and get away with it. “Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”

I admit that I agree with Justice Madsen on the outcome of this case. In my opinion, most people happen to have an almost ingrained distrust of the political process and of politicians. I

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76 See id.
77 Id. at 855 (quoting Brown v. Hartlage, 456 U.S. 45, 61 (1982)).
78 See id. at 856.
79 See id.
80 Id. at 857.
81 Id. at 858 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
believe that most people do not believe that people go into politics to serve their public constituencies, no matter what they say on the record. I believe that most people who go into “public service” do so with ulterior motives like getting money, power, prestige, advancing their careers, and the like. “The fact is, many of the policy makers and interest groups that populate American politics are not in the business of promoting the public interest. All too often, they are in the business of promoting their own interests, in the form of money, patronage, reelection, or whatever.”

Thus, I do not think I am exaggerating when I suggest that the voting public is reduced to thinking that “my liar is better than your liar” as opposed to believing that a public official really and truly cares about his constituents and the issues that directly affect their lives.

B. **State ex. Rel. Public Disclosure Commission v. 119 Vote No! Committee**

The State of Washington dealt with an earlier version of the same statute in a previous case as well. In *119 Vote No*, the Washington Supreme Court was confronted with a challenge to the statute prohibiting false political statements regarding a candidate or ballot measure with actual malice. The issue in *119 Vote No* dealt with Initiative 119, the proposed Death with Dignity Act, which would allow physician assisted suicides in the state.

The Public Disclosure Commission (PDC) alleged that the 119 Vote No! Committee (the Committee) published political advertising stating their opposition to Initiative 119, which contained false statements in violation of the statute. The

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84 135 Wash. 2d 618 (1998).
85 WASH. REV. CODE § 42.17.530 (1)(a).
86 Pub. Disclosure Comm’n, 135 Wash. 2d at 620.
87 See id. at 620-21.
Committee’s one page leaflet in opposition of Initiative 119 stated the following:

Initiative 119: Vote No! – No special qualifications – your eye doctor could kill you; No rules against coercion – Nothing to prevent selling the idea to the aged, the poor the homeless; No reporting requirements – no records kept; No notification requirements – nobody need tell family members beforehand; No protection for the depressed – No waiting period, no chance to change your mind; Initiative 119 . . . Is a dangerous law – Vote No on Initiative 119.88

As a result of the Committee’s leaflet, supporters of initiative 119 lodged a complaint with the PCB, and the PCB sought to assess the Committee, along with individual defendants, fines up to $10,000, plus costs, attorneys’ fees, and treble damages.89 In the meantime, the American Civil Liberties Union of Washington (ACLU) intervened to challenge the statute’s constitutionality.90 Eventually, the trial court determined that the Committee’s leaflets did not have any false advertising that violated the statute and granted the Committee’s motion to dismiss the PDC’s complaint.91 The ACLU still pursued its claim for a declaratory judgment that the statute was facially invalid,92 and the State filed its own cross motion for a declaratory judgment that the statute was proper.93 The trial court granted the State’s motion, deciding that the statute was constitutional on its face,94 and both parties appealed.95

On appeal to the Washington Supreme Court, the State argued that the statute was necessary to give the voting public

88 Id. at 658, n.1.
89 Id. at 622.
90 Id.
91 Id.
92 Id. at 623.
93 Id.
94 Id.
95 Id.
truthful accurate information,\textsuperscript{96} and can therefore make a well informed decision at the ballot box. The Washington Supreme Court, however, ruled that the statute was unconstitutional as it violated the First Amendment.\textsuperscript{97} The court had several justifications for declaring the statute unconstitutional.

First, the court rejected the state’s claim that it could prohibit false statements of fact in any political literature. “This claim presupposes that the State possesses an independent right to determine truth and falsity in political debate. However, the courts have ‘consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials – and especially one that puts the burden of truth on the speaker.”\textsuperscript{98} As such, the court recognized that the First Amendment makes sure that it is the voting public who ultimately decides what is true or not in any political discourse.\textsuperscript{99} Consequently, the state cannot impose its own will in preventing others from embellishing one’s record, vilifying a political opponent, or even employing false statements.\textsuperscript{100}

Next, the court theorized that whenever someone makes any factual mistakes (or even misrepresentations) the state is not in the best position to notice those misstatements and thus be the sole arbiter as to how the factual misstatements can be corrected. Instead, a political candidate’s factual misstatements will quickly be exposed by his opponent and the opponent’s supporters. “In the political context, a campaign’s factual blunder is most likely noticed and corrected by the campaign’s political opponent, rather than the state.”\textsuperscript{101}

\textsuperscript{96}See id.
\textsuperscript{97}Id. at 632.
\textsuperscript{98}Id. at 624-25.
\textsuperscript{100}Id.
Next, the court took the position that the statute generated an impermissible chilling effect on political speech in that the state will take the position of deciding what the political truth really is. “RCW 42.17.530 coerces silence by force of law and presupposes that the state ‘will separate the truth from the false’ for the citizenry.”102 “At its worst the statute is pure censorship, allowing government to undertake prosecution of citizens, who, in their view, have abused the right of political debate.”103 The court also noted that the statute makes the state overly paternalistic, in that the state presumes that the average voter is not astute enough on his own to decipher the truth, so the state has to step in and figure out the truth for him.104

Although the opinion in 119 Vote No was unanimous in the judgment,105 some of the concurring opinions left no doubt that they believed that the overall opinion gave politicians a blank check to lie during campaign season. For example, Justice Guy’s concurrence stated in no uncertain terms: “Calculated lies are not protected political speech…Intentional, malicious lies do not foster debate; they foster deception and manipulation of the voting public.”106 Justice Talmadge, although concurring, also blasts the possibility that the majority opinion not only opens the door to blatant lying, but also adds on one more factor leading to voter apathy. “The majority is also shockingly oblivious to the increasing nastiness of modern [American] political campaigns. This trend is highlighted by a ‘win at any cost’ attitude involving vilification of opponents and their ideas. This new type of campaign neither illuminates, nor exemplifies the best of our

\[\text{Id. at 627.}\]
\[\text{Id. at 632.}\]
\[\text{Id. at 632-33.}\]
\[\text{Id. at 620, 632, 636, 657. Justice Sanders wrote the majority opinion. Justices Dolliver, Smith, Guy, Durham, Madsen, Alexander, Talmadge, and Johnson concurred in the judgment.}\]
\[\text{Id. at 633.}\]
democratic tradition, and has caused too many of our fellow citizens to turn away from participation in the political process.\textsuperscript{107}

Again, I stand with Justices Guy and Talmadge and share their opinions in the 119 Vote No case. If one is always bombarded with candidates spewing nothing but venom and vitriol at each other, truth be damned, one might think: why bother? One can become convinced, to the point of becoming jaded, that neither candidate is telling the unvarnished truth during the campaign, and that the typical campaign is more of the same: hyperbole and hot air. Consequently, one might be very well reduced to not voting \emph{for} someone as much as voting \emph{against} someone else. This now becomes one’s so-called “informed” choice of options: either vote for the better liar or not vote at all. Even if our ultimate weapon as voters is to vote liars out of office, I believe that this does not necessarily undo the political or legislative damage caused by an elected official who might have “misrepresented” his way into public office.

VI. FURTHER ATTEMPTS TO THWART FALSE POLITICAL SPEECH

A popular joke about politicians describes the following:

A bus load of politicians were [sic] driving down a country road, when the bus ran off the road and crashed into a tree in an old farmer's field. The old farmer, after seeing what happened, went over to investigate. A few days later, the local sheriff came out looking for the missing politicos, saw the crashed bus, and asked the farmer where all the politicians had gone. The farmer said, “I buried ‘em all... out back.” The sheriff then asked, “Were they ALL dead?” The old farmer replied, “Well, some of them said they weren’t, but you know how them politicians lie.”\textsuperscript{108}

\textsuperscript{107} Id. at 636-37.
\textsuperscript{108} A Bus Load of Politicians Crashes, JOKESDIGEST.COM, http://www.jokesdigest
At this point in time, it would be an understatement to say that people are sorely disillusioned with the political process. People do not trust their elected officials. People are largely apathetic when it comes to voting. Negative attack ads are a dime a dozen. Amidst the very loud rhetoric, any serious talk about legitimate issues is rendered almost incidental. Truth and transparency amongst candidates and office holders are practically nonexistent. Consequently, it is very little wonder why the voting public is cynical about the political process.

In response, several other states in addition to Washington have laws on their books that would impose sanctions for false campaign speech. For example, the state of Colorado criminalizes false campaign speech as either a class 1 or a class 2 misdemeanor,\textsuperscript{109} which would subject the offender to a prison sentence or a fine, or both.\textsuperscript{110} In Florida, any political candidate who knowingly makes a false charge against an opponent has committed a third degree felony.\textsuperscript{111} In Minnesota, any party who knowingly participates in false campaign speech will be guilty of a gross misdemeanor.\textsuperscript{112} Tennessee considers false campaign speech to be a Class C misdemeanor,\textsuperscript{113} punishable by 30 days imprisonment, a maximum fine of $50, or both.\textsuperscript{114}

As of this writing, I am not aware of any First Amendment challenges against any of these statutes. There will always be a tension between the state’s interest in the voting public’s having access to accurate information and one’s freedom of speech. No one knows if the United States Supreme Court will again step in to address this particular issue of sanctioning knowingly false political speech. The Court has mentioned that speech is most
protected in the political realm, and that is ultimately the best way for voters to get the best information.\textsuperscript{115}

\textbf{VII. MORE REAL LIFE POLITICAL LIES}

\textbf{A. 2010 Connecticut Senatorial Election}

In the race to replace retiring Connecticut Senator Christopher Dodd, Linda McMahon, the Chief Executive Officer of World Wrestling Entertainment, ran against Richard Blumenthal, who had been the state’s attorney general since 1991. During the course of the campaign, Blumenthal had stated more than once that he had served in Vietnam. There was one slight problem with his representation of his military service: he had never served in Vietnam. “Mr. Blumenthal, a Democrat now running for the United States Senate, never served in Vietnam. He obtained at least five military deferments from 1965 to 1970 and took repeated steps that enabled him to avoid going to war, according to records.”\textsuperscript{116} Blumenthal eventually apologized for misrepresenting his record:

\begin{quote}
At times when I have sought to honor veterans, I have not been as clear or precise as I should have been about my service in the Marine Corps Reserve. I have firmly and clearly expressed regret and taken responsibility for my words. I have made mistakes and I am sorry. I truly regret
\end{quote}

\textsuperscript{115} See, e.g., Brown v. Hartledge, 456 U.S. 45, 53 (1982) (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (concurring) (“Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates personal qualities and their positions on vital public issues before choosing among them on election day.”).

offending anyone. I will always champion the cause of Connecticut’s and our nation’s reserves.117

Blumenthal made his misstatements while he was still Connecticut’s attorney general, the chief law enforcement officer of the state. The state statute for the oath of office for members of the state assembly and executive branch (including the attorney general) states the following:

You do solemnly swear (or affirm as the case may be) that you will support the Constitution of the United States, and the Constitution of the State of Connecticut, so long as you continue to be a citizen thereof, and that you will faithfully discharge, according to law, the duties of the office of...to the best of your abilities; so help you God.118

I would assume that the attorney general’s duties have an implied obligation of good faith, which is defined as honesty in fact.119 What happened as a result of Blumenthal’s getting caught in his lie? Not much, really. Yes, he suffered (some) acute embarrassment for a while, but, ultimately, that did not ruin his campaign, nor did he suffer any legal sanction for it. In November 2010, Blumenthal soundly won the election and he is now the junior senator from the State of Connecticut.

B. Governor Eliot Spitzer

Spitzer served two terms as the attorney general from the State of New York from 1999 to 2007, and then was elected governor in the November 2006 election. Spitzer served as governor from January 2007 to March 2008. Spitzer’s public reputation was that of a hard-charging, tough as nails, law-and-

118 CONN. GEN STAT., § 1-25 (2011).
119 See e.g., U.C.C. § 1-201(19) (2003).
order individual who had very little tolerance for white collar corruption. One of his most famous political comments was “I am a f[***]ing steamroller and I’ll roll over you or anybody else.”

Democrat Spitzer made the remark to Republican Assemblyman James Tedesco in a private meeting. Unfortunately for Spitzer, his career as a “steamrolling” politician came to an ignominious end when he was discovered to have repeatedly frequented an expensive “escort” service called, “The Emperor’s Club.” “The Emperor’s Club” was in fact a front for an expensive prostitution ring. Spitzer’s dalliances came to the surface as a result of a routine IRS investigation into questionable wire transfers between bank accounts. Ironically, during his time as attorney general, Spitzer prosecuted prostitution rings similar to the very one he regularly patronized. The married Spitzer was identified in the escort service’s records as “Client Number 9.” In disgrace, Spitzer resigned as governor on March 12, 2008.

For all of Spitzer’s embarrassment, he amazingly landed on his feet. Believe it or not, he is not under any threat of criminal indictment as of this writing, and there has not been any talk about him losing his law license. Next, he was able to land an adjunct teaching position at New York’s City College in September 2009.

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121 Id.


125 Id.

He taught a fifteen week Political Science course called “Law and Public Policy.” Additionally, he had his own political talk program on the cable network CNN called “In the Arena,” in which he was the de facto star of the show after the departure of his original co-host, columnist Kathleen Parker. CNN cancelled the show in July 2011 because of low ratings. In light of this, it is not so far-fetched that Spitzer could eventually become a law school professor teaching a course in Legal Ethics. I would ask, however, if a private citizen in Spitzer’s situation would have received similar treatment from law enforcement. I’d seriously doubt it.”

C. Congressman Anthony Weiner

Weiner was a former member of the House of Representatives, representing New York’s Ninth Congressional District from 1999 to 2011. In the spring of 2011, Weiner was caught sending several sexually suggestive pictures of himself (and of a certain body part) to various women all over the country, none of whom were his wife. To make matters worse, Weiner tried to cover up his misdeeds by fabricating a story that someone (perhaps a political adversary) hacked into his personal Twitter account to make it appear as if he himself had sent the “naughty” pictures. “I didn’t send the photograph. My account was apparently hacked or

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somehow people got access to it.”131 Weiner also had the gumption to tell anyone who would listen that he could not say with any exactitude that the body part in question was actually his.132

After several days of denying that he sent the pictures, Weiner held a press conference on June 6, 2011 in which he finally admitted that he sent the pictures of himself.133 After several days of refusing to resign his seat (during which even President Barack Obama said that if it had been him, he would have stepped down immediately134), Weiner finally submitted his official letter of resignation from Congress on June 20, 2011, effective June 21, 2011.135 As of this writing, Weiner is currently seeking therapy.

It may be small consolation in light of his “sexting” misadventures, but I imagine that it will not be long before Weiner experiences a “comeback” similar to Spitzer. He too could get his own talk show, write a best seller, teach a political ethics course, or perhaps guest host an episode of “Saturday Night Live”. In any event, it is only a matter of time before this episode of “Weiner and his . . . well, you know” . . . fades from the public consciousness and we will all be knee deep in the next political scandal du jour.

Of course, there have been many married political figures who have indulged in extramarital affairs since the beginning of time. This is not exactly breaking news. These would include governors, presidents, mayors, congressmen, kings, and the like (John F. Kennedy, Lyndon Johnson, Bill Clinton, Ted Kennedy, Mark Sanford, John Edwards, Arnold Schwarzenegger, Newt Gingrich, and Nelson Rockefeller, to name just a few). One would assume that one of the obligations of any political office holder would be, either expressly or implicitly, to conduct his government business affairs (pardon the pun) with transparent honesty. Naturally, any extra-marital excursion would necessitate lying to one’s spouse about one’s whereabouts (I am not speaking from personal experience). I do not believe that it is outside the realm of possibility to suggest that if a philandering public official cannot be truthful with a spouse, it is probably unlikely to believe that same public official would be any more truthful with his constituents.

VIII. UNTRUSTWORTHY LAW ENFORCEMENT

Another area in which the public trust in government agents is sorely lacking is in law enforcement. The police motto is “to protect and serve.” Unfortunately, however, there are too many lurid stories about police officers who racially profile. There are too many lurid stories about police officers who shoot unarmed, defenseless citizens (in New York, four plainclothes police officers fired forty one shots at Amadou Diallo, an innocent man standing in front of his building, hitting him nineteen times and killing him; in Oakland, a member of the Bay Area Rapid Transit police shot and killed Oscar Grant, also unarmed. Videotape evidence suggests that Grant was on the ground and handcuffed when he was shot.136

There are too many lurid stories about police officers who manufacture probable cause after the fact (police officer caught on tape deliberately knocking a cyclist off his bike and subsequently lying about what happened), and perjure themselves in court (video surveillance tape caught police officers in a testimonial lie.). There are even stories about police officers who lie about quotas for writing traffic tickets. Occasionally, these individuals who commit these wrongful acts are brought to justice. More often than not, they are acquitted of all charges and do not get as much as a slap on the wrist.

I could obviously cite many other examples (and many others have a great job of doing so elsewhere) that would support the proposition that not all law enforcement agents are trustworthy.


I acknowledge that there are many honest law enforcement agents who perform a dangerous, high pressure, and often thankless job. I mention these well-known incidents just to show that this is one more area of public service where situations involving dishonesty are not isolated incidents. This is especially true with the so-called “blue wall of silence.” The “wall” is an unwritten police code that suggests that an officer will never rat on his own – no matter how heinous the act. For these reasons, not surprisingly, there is a sizeable segment of society that justifiably does not trust law enforcement.

A. The Constitutionality of Police Deception

The stories of police misconduct notwithstanding, there is an undeniable tension between the state’s compelling interest in neutralizing crime and a citizen’s constitutional rights. For example, a citizen is constitutionally protected from unreasonable search and seizure. Next, the state cannot compel a citizen to be a witness against himself. A citizen who is a defendant in a criminal trial has a constitutional right to counsel.

Law enforcement officials conducting criminal investigations, however, have often resorted to trickery and deception to circumvent an individual’s constitutional protections. Amazingly, courts have upheld certain deceptive practices as constitutionally valid. In other words, deceptive police practices have resulted in arrests, not-so voluntary confessions, and subsequent criminal convictions that have withstood constitutional challenges.

For example, in Texas v. Gray, the Texas Appellate Criminal Court upheld a police officer’s pretextual traffic stop as justification for his searching the defendant for drugs. The police officer received a tip from an informant that the defendant was going to transport drugs on a particular night. The police officer

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142 U.S. CONST. amend. IV.
143 U.S. CONST. amend. V.
144 U.S. CONST. amend. VI.
146 Id. at 467.
did not otherwise have probable cause to search for drugs based on the allegedly routine traffic stop. The police officer arrested the defendant for the traffic violation. However, the police officer’s extensive search eventually revealed that the defendant did in fact have drugs on his person.

In *Illinois v. Perkins*, the U.S. Supreme Court held that a defendant’s admissions to a law enforcement officer disguised as a prison inmate did not rise to the level of police coercion procuring an involuntary confession. “Conversations between suspects and undercover agents do not implicate the concerns underlying Miranda. The essential ingredients of a ‘police-dominated atmosphere’ and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate.”

In *U.S. v. Byram*, the court stated that “trickery is not automatically coercion. Indeed, the police commonly engage in such ruses as suggesting to a suspect that a confederate has just confessed or that police have or will secure physical evidence against the suspect. While the line between ruse and coercion is sometimes blurred, confessions procured by deceits have been held voluntary in a number of situations.”

In *Moran v. Burbine*, the defendant had been arrested for burglary and was also a suspect in a murder investigation. Before Burbine had been indicted on either charge, his sister hired an attorney to represent him. When the attorney contacted the police station where Burbine was held, she (the attorney) was unable to contact him, and was notified by the police that Burbine

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147 *Id.* at 468.
148 *Id.*
149 *Id.*
151 *Id.* at 296.
153 *Id.* at 408.
154 *Moran*, 475 U.S. at 412.
155 *Id.* at 416.
156 *Id.* at 416 -17.
would neither be put in a police lineup or questioned that evening.\footnote{Id. at 417.} The attorney was unaware that Burbine was also a murder suspect.\footnote{Id.} The police had never notified Burbine that an attorney had been retained, and they interrogated Burbine that same night.\footnote{Id.} After voluntarily waiving his Miranda rights, Burbine eventually confessed to the murder.\footnote{Id. at 418.}

When Burbine appealed his conviction to the U.S. Supreme Court, the court upheld his conviction on the grounds that Burbine was fully aware of his Miranda rights. The court also noted the fact that the police deliberately misled the attorney about Burbine’s interrogation did not rise to the level of a forced confession:

But whether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent’s election to abandon his rights. Although highly inappropriate, even deliberate deception of an attorney could not possibly affect a suspect’s decision to waive his Miranda rights unless he were at least aware of the incident.\footnote{Id. at 423.}

Undoubtedly, none of the defendants in the above cases would ever be nominated for sainthood. Even with that, the law is supposed to be fair and impartial. However, I think some can also be hard pressed to see the fairness of the legal system when it is a knowing participant in trickery and deception, no matter how noble the motive might be.

\addcontentsline{toc}{section}{Notes}

\footnote{Id. at 417.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id. at 418.}
\footnote{Id. at 423.}
B. False Confessions, Wrongful Convictions, Deceptions, and the Attorneys who Dive Right In

Sadly, there are any number of attorneys in practice who do not let little things like truth and justice get in the way of winning cases. There are many documented cases of prosecuting attorneys who let police officers take the stand knowing that they are about to perjure themselves.\(^{162}\) “Still, police, prosecutors and judges often ignore the practice of false testimony by looking at it as a means of justifying the ends of law enforcement, seeing the fourth amendment as a protection of the guilty and the act of lying to get around it as merely ‘evening the odds’ in the war on drugs.”\(^ {163}\)

This is a horrible perversion of the old adage that “two wrongs don’t make a right.” The line of thinking now becomes while two wrongs do not make a right, two wrongs will surely get you even.

Not only will some attorneys support a witness committing perjury, they will even actively hide the truth to make sure they win their cases.\(^ {164}\) One notorious murder case had a prosecuting attorney prosecute two defendants, who were black, when the district attorney had eyewitness testimony that the assailants were in fact white.\(^ {165}\) The prosecutor never disclosed this exculpatory evidence to the defense.\(^ {166}\) Luckily, the defendants’ convictions were overturned when the exculpatory evidence was discovered later.\(^ {167}\)

Still another notorious case was that of Rolando Cruz, who was convicted and sentenced to death for the rape and murder of a

\(^{163}\) *Id.*
\(^{164}\) *Id.* at 409-10.
\(^{165}\) *Id.*
\(^{166}\) *Id.*
\(^{167}\) *Id.*
ten year old girl.\textsuperscript{168} His conviction had been based on, among other things, the testimony of two police officers who said that Cruz confessed to the crime, but had no videotape or other record of his confession.\textsuperscript{169} Cruz’s conviction was overturned twice during the ten years he was on death row.\textsuperscript{170} Still, the prosecution re-filed the charges against Cruz, even in the face of DNA evidence that exonerated him of the crime.\textsuperscript{171} After ten years on death row, the murder charge against Cruz was finally dropped. Interestingly, three of the prosecuting attorneys and four of the police officers who testified as to Cruz’s alleged confession were themselves subsequently prosecuted for conspiracy to frame Cruz.\textsuperscript{172} All were acquitted.\textsuperscript{173}

Next, there are even situations where an attorney will attempt to rationalize deception as a means to get wanted criminals off the street, and that his heart was actually in the right place. One such case in Colorado involved Mark Paulter, who was a chief district attorney who engaged in a major deception to help trap a vicious killer.\textsuperscript{174} He was at a gruesome murder scene where three women were bludgeoned to death and had their skulls caved in, and a fourth had been raped at the scene.\textsuperscript{175} The man responsible for the carnage was William Neal.\textsuperscript{176} Neal had notified the authorities by phone that he would not surrender without legal representation.\textsuperscript{177} Instead of contacting the public defender’s

\textsuperscript{168} Id. at 403. \textit{See also}, Ken Armstrong and Maurice Possley, \textit{The Verdict: Dishonor}, CHICAGO TRIBUNE, (January 11, 1999), www.chicagotribune.com/news/watchdog/chi-020103trial1,0,479347.story.

\textsuperscript{169} Id.

\textsuperscript{170} Id.

\textsuperscript{171} Id.

\textsuperscript{172} Id.

\textsuperscript{173} \textit{Id.}; \textit{See also}, Dahn Batchelor, \textit{Justice Was Not only Blind; It Was Stupid Also}, http://dahnbatchelorsopinions.blogspot.com/2011/03/justice-was-not-only-blind-it-was.html.

\textsuperscript{174} In re Paulter, 47 P.3d. 1175 (Colo. 2002).

\textsuperscript{175} Id. at 1176.

\textsuperscript{176} Id. at 1176.

\textsuperscript{177} Id.
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office, Paulter agreed with the police officers at the scene that he would pose as a public defender that would represent Neal.\footnote{\textit{Id.}}

Paulter introduced himself to Neal as “Mark Palmer,” the public defender who would represent him.\footnote{\textit{Id.}} Paulter had phone conversations with Neal that were taped by the police, and Neal eventually turned himself in without incident.\footnote{\textit{Id.}} Paulter’s ruse came to light when the head of the public defender’s office recognized Paulter’s voice on the tape recordings.\footnote{\textit{Id.}} The state review board determined that Paulter violated two sections of the Colorado Rules of Professional Conduct,\footnote{\textit{Id.}} and imposed sanctions against him.\footnote{\textit{Id.}} The Colorado Supreme Court upheld the sanctions against Paulter.\footnote{\textit{Id.}} In doing so, the court let Paulter know in no uncertain terms that attorney honesty is always paramount:

> The jokes, cynicism, and falling public confidence related to lawyers and the legal system may signal that we are not living up to our obligation; but, they certainly do not signal that the obligation itself has eroded. For example, the profession itself is engaging in a nation-wide project designed to emphasize that truthfulness, honesty and candor are the core of the core values of the legal profession. Lawyers themselves are recognizing that the public perception that lawyers twist words to meet their own goals and pay little attention to the truth, strikes at the very heart of the profession – as well as at the heart of the system of justice. Lawyers serve our system of justice, and if lawyers are dishonest, then there is a perception that the system, too, must be dishonest. Certainly, the reality of

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\footnotetext{178} \textit{Id.}
\footnotetext{179} \textit{Id.}
\footnotetext{180} \textit{Id.} at 1178.
\footnotetext{181} \textit{Id.}
\footnotetext{182} \textit{Id.}
\footnotetext{183} \textit{Id.}
\footnotetext{184} \textit{Id.} at 1184.
such behavior must be abjured so that the perception may diminish.\footnote{Id. at 1178-79.}

The State of Colorado dealt with the issue of attorney deception in an earlier case as well.\footnote{Colorado v. Smith, 778 P.2d. 685 (1989).} James Mitchell Smith was suspended from practicing law for two years.\footnote{Id.} Smith had agreed with local law enforcement to become a government informant and clandestinely tape phone conversations with a former client of his (under the premise of purchasing cocaine from the former client), who was a known drug dealer.\footnote{Id. at 686.} Smith agreed to the ruse because he received assurances from the state Attorney General’s office that the subterfuge did not violate the state’s Code of Professional Responsibility.\footnote{Id.} Smith also agreed to the arrangement because he feared that he would be subject to criminal charges for his own drug use.\footnote{Id.}

Thanks to Smith’s cooperation, the former client made incriminating statements, was arrested and eventually pleaded guilty to drug trafficking charges.\footnote{Id.} The court, however, was not impressed with Smith’s contention that he was working in concert with law enforcement:

We do not comment in this opinion what some jurisdictions have expressly recognized as a prosecutorial exception to the general rule that the standards for prohibiting deceit, dishonesty and fraud preclude attorneys from surreptitiously recording communications with clients and others. The respondent, however, was a private attorney, not a prosecuting attorney. We do not agree that the above described policy considerations permit private counsel to

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\begin{itemize}
\item \footnote{Id. at 1178-79.}
\item \footnote{Colorado v. Smith, 778 P.2d. 685 (1989).}
\item \footnote{Id.}
\item \footnote{Id. at 686.}
\item \footnote{Id.}
\item \footnote{Id.}
\item \footnote{Id.}
\item \footnote{Id.}
\item \footnote{Id.}
\end{itemize}
deal dishonestly and deceitfully with clients, former clients, and others.\(^\text{192}\)

Consequently, the court agreed with the recommendation of the Grievance Committee and upheld Smith’s suspension from the practice of law.\(^\text{193}\)

**IX. CONCLUSION**

Theoretically, political office holders, police officers, and attorneys are in fiduciary positions. They are holders of public trust. Political office holders swear to uphold the federal and state constitutions. Police officers are supposed to serve and protect when upholding the law. Attorneys, as officers of the court, are supposed to be zealous advocates for their clients’ positions and pursue justice. In addition to holding the public trust, these public officials are supposed to uphold the truth.

Unfortunately, we have seen all too often that this does not always happen. We have seen too many instances of not only criminal acts, but also attempts to cover up those crimes. Some elected officials do not always follow the law they are supposed to uphold. To add insult to injury, several of these elected officials used to be practicing attorneys and, thus, should have known better. Some police officers frequently break the very same laws they are supposed to enforce. Some attorneys try to bend the rules, not to pursue justice, but to win at all costs – justice be damned. In those situations, truth is not a virtue. Again, this article is not a blanket demonization of all government agents; indeed, there are many government agents who perform their jobs with due diligence and unshakeable integrity. Still, if left unchecked, one bad apple could eventually spoil the whole barrel.

On the other hand, after witnessing so many breaches of honesty and ethics one can easily have the sense that the

\(^{192}\)Id. at 687.  
\(^{193}\)Id. at 688.
relationship between government agents and the people they are
supposed to serve has become “them and us.” “Do as we say,” but
not “do as we do.” Thus, many people tend to believe that the very
government agents who are duty bound to help them will more
likely do them harm instead. It is as if dealing with government
agents is like playing a Las Vegas casino: the game is rigged to
favor the house. Evidently, the government does not work for us
anymore. The worm has turned, and it looks more like we work for
the government. When it comes to the government, whose
operation is financed by the taxpayers, (“we the people”), ¹⁹⁴ lying
is a one way street. We cannot lie to the government. However, as
this piece has shown, the government can lie to us in a zillion
different ways and hide under the Constitution to get away with it.
Thus, it seems that all “we the people” are in relation to the
government is in its way. This means, as I see it, our government
does as it pleases. There is really no such thing as the government
doing “the people’s business,” as politicians like to say.
Consequently, our government is now completely oblivious to the
wishes of the people it allegedly serves.

¹⁹⁴ U.S. CONST. preamble