**Philosophy 338**
**Philosophy of Law**
**2017**
**Note Twenty-one**

# THE GOOD OF A LIE FOR THE BETTER

***This is discretionary reading**

## 1. *Semantic coercion*

Some lies, as Plato once said, are noble. Others, we know, are more on the kindly side or merely prudent. "Do you think I'm getting a bit fat, dear?" is a well-known trap in which affirmative answers are usually not well-received. Everyone lies, notwithstanding shrill antagonisms against ever doing so.[1] In political contexts, we find ourselves oddly positioned. Pretty well everyone takes it as given – and not that big a deal – that political parties lie their heads off. But most people by far think that, except for the necessities of national security, governments ought not – emphatically ought not – lie. The oddity is this. Why, if we think that it's more or less acceptable for politicians to lie, would we be so naïve as to think that governments ought not? After all, aren't governments drawn from those lying politicians to whom we've given the electoral nod?[2]

Even in our present-day world of do-what-you-like and go-along-to-get-along, there are two no-fly zones about lying. Science, the enterprise whose reputation is predicated on objective truthfulness, is one of them. The judiciary is another. We rely on judges to be truthful. We expect judges not to lie. In the book's discussion of judicial activism in chapter 8 – see in particular the section entitled "Semantic Coercion – we turned our minds to decisions based on a court's determination of what the wording of some point of material importance must be taken to mean. When everything in common speech and empirical linguistics supports the claim that the word or phrase in question does not indeed carry a certain meaning, we said that the court's determination otherwise was a case of semantic coercion or Humpty-Dumpty semantics, by which expressions are juridically compelled to mean what they manifestly do not. We saw in *Saskatchewan Federation of Labour v. Saskatchewan* (2015) that the Supreme Court constructed a constitutional entitlement for essential service public employees to strike. A good deal of the Court's *ratio* rested on interpreting the right to associate freely (Charter 2(d)) as the right to associate freely on a *picket line*. That, we said, was semantic coercion. The question it raised was whether the harm it does semantically is overridden by other beneficial considerations. Was the lie the Court told a lie for a greater good than the good of semantic accuracy? Of course, lies are usually meant to be deceptive, that is, to engender false belief. On the other hand, some lies are transparent, as in *Saskatchewan.* Their intention was not to induce, belief in something false, but rather its acceptance notwithstanding that it's false.

## 2. *Lying about homicide*

[1] Think here of Kant and Sissela Bok. Immanuel Kant, *Critique of Practical Reasoning* (1788). Sissela Bok, *Lying: Moral Choice in Public and Private Life* (1978).

[2] The reason that it's not that big a deal is when the public "consumes" what politicians say they apply discounting measures, which help decode their falsehoods. It is a rare politician – and a short-lived one – who is a pathological liar.

In that same year in *Carter v. Canada (A.G.)*, the Supreme Court announced that a year thence it would strike down Articles 14 and 241(b) of the Criminal Code against physician-assisted suicide, in the absence of a timely revision of the Code that would recognize the right to assisted suicide of "competent adults who seek such assistance as a result of a grievous and irremediable medical condition that causes enduring and intolerable suffering".[3] The provisions of 14 and 241(b) would remain on the books until February 6th, 2016. Meanwhile, in June 2014 the province's legislature had passed an assisted suicide law that anticipated the federal court's finding in *Carter*, notwithstanding that provinces have no authority to make law in matters of this sort. In due course, an action against the Quebec law was brought to the Quebec Superior Court. The court intervened to block its implementation until such time as the impasse between the federal Parliament and Supreme Court had been resolved. In so doing, it declared that when a provincial statute convenes the Criminal Code of Canada, the statute is *ultra vires* the Constitution, and therefore a legal nullity.

The Quebec government, in particular its Health Minister Gaétan Barrette, adopted an interesting position to the contrary, arguing that since health and welfare are a provincial matter, there can be no conflict between its own "dying with dignity" statute and the Criminal Code's 241(b). Quebec's position can be schematized as follows:

1. Criminal matters are solely federal.
2. Health care matters are solely provincial.
3. The Quebec dying with dignity statute is solely a health care matter.
4. Therefore it is not subject to federal override. Accordingly, 241(b) has no legal effect here.

The key to this position is premiss (3). Even Quebec agrees – indeed said so explicitly – that (3) couldn't be true unless it fell within the meanings of "medical treatment" and "palliative care" that killing a physician's patient is in objective fact treating him medically or easing his suffering by medical means.

In early December 2015 the Superior Court dismissed Quebec's position and ordered that the statute not be implemented until the federal scene had cleared up. Mr. Justice Pinsonnault found as follows:

> "Adding the word 'medical' to the expression 'aid in dying' is alone not enough to protect provincial legislation that is incompatible with federal criminal legislation."

In other words, the court found that

- Quebec's defence rested on semantic coercion.
- Whatever the social good of helping people kill themselves, it was not sufficient to override the wrong of semantic coercion.

Not everyone sees things in quite this way. My point in mentioning it here is that that's precisely how the Quebec Superior Court saw them.

[3] Article 14 provides that "no person is entitled to consent to have death inflicted on him". Article 241 states that anyone who "aids or abets a person to commit suicide" has committed an indictable offence and is subject to imprisonment for up to 14 years. Some, but not all, lies have malicious intent. Our focus here is on the other ones, lies motivated by benifiscence.

In the second week of December, 2015 the Quebec government sought and received leave to appeal to Quebec Court of Appeals the lower court's "hold your horses" order. The Quebec statute had been scheduled for implementation on Thursday, December 10th. The Appeal Court had scheduled a hearing for December 18. For the week in between, it would be questionable whether there is a lawful impediment then in effect to Quebec's proceeding as planned until such time as the appeal is settled. Legal scholars were divided on this matter, notwithstanding that on December 10 the Registrar of Quebec's College of Physicians advised that doctors who facilitate their patient's death could be at risk of prosecution. He admonished doctors to be prudent. Meanwhile the Federal Minister of Justice has petitioned the Canadian high court for a six month extension of the February 2016 deadline to bring federal law into compliance with that court's February 2015 finding. Of course, Quebec could consider invoking the notwithstanding clause as set out in section 33 of the Charter.

On Tuesday the 22nd of December, 2015, the Quebec Court of Apeal quashed the lower court's finding that the Quebec statute exceeded Quebec's legal authority. In his submission to the court below, the Attorney-General of Canada had taken the position that the Quebec statute transgressed the *paramouncy doctrine* by which, when a provincial law conflicts with a federal one, the federal law prevails. Mr. Justice Pinsonnault concurred and declared the federal prohibition to be in force until February 16, 2016. At the Court of Appeal, however, Quebec took a different tack, arguing that paramouncy couldn't apply if the federal law were "invalid". Since the federal law contravenes section 7 of the Charter, Quebec argued that an unconstitutional law is indeed invalid, and that paramouncy is not violated here, even though the federal law remains in force. Why? Because it remains in effect only by the grace of the Supreme Court of Canada, not by virtue of any constitutionally valid authority. The Quebec Court of Appeal concurred with this position.

For readers interested in semantic coercion, it is notable that Mr. Justice Pinsonnault's rebuke against phoney, made-up meanings had no play in the recent proceedings above. The case was fought and settled entirely on non-semantic legal technicalities (I don't use that word disapprovingly.) This strikes me as odd. For one thing, it seems to blur the distinction between

- declaring a provincial law invalid because it conflicts with a federal law dealing with the same matter

and

- declaring a provincial law invalid because it is about a matter that exceeds its constitutional authority, *irrespective* of whether there is a federal law to opposite and contradictory effect.[4]

The paramouncy doctrine clearly applies to the first bullet just above but not in any necessary or even relevant way to the second. When we look again at the words we've quoted from Justice Pinsonnault's *ratio decedendi*, we see the second bullet doing the heavy lifting. But when defenders of his ruling took to the field in the Court of Appeal, they made no mention of bullet number two, and relied wholly on the considerations of bullet number one. Given their own take on the case, it was an ill-considered move. Whether a judge in any matter legitimately before him permits an attempt at semantic coercion to stand or fall, it is never in that particular an issue that

[4] For example, no Canadian province can legislate an act of war against e.g. North Korea. That is a federal matter from beginning to end.

turns on wrangles about *jurisdiction*. Either the meaning of "medical care" encompasses the right to be killed by a doctor or it does not. In neither instance is the judge's semantic decision in and of itself a matter of jurisdictional reach, even though the decision could have constitutional implications, as did the Pinsonnault semantic finding before it was set aside.

3. *Semantic cleansing: How falsehood metamorphoses into truth*

Semantic coercion is the enforcement of a lie about meaning. Aside from the postmodern zealots of whom contemporary universities have become so fond and indulgent, virtually everyone would agree that there are many contexts in which semantic coercion is counterproductive and, at times, to be assidulously avoided. Whether good or bad, it is not uncommon that one of the byproducts of semantic coercion is its propensity to provide progressive protective cover for the falsity of its lies, sending them from the bright light of an awkward transparency to the welcoming havens of opacity. Let's say that an act of *semantic cleansing* has occurred when by solely semantic means a false statement metamorphizes into a true one. The processes that underlie this kind of transformation are well understood, at least in a general sort of way. Two factors stand out for their importance although not in the names I'm about to mention. Babbling is one and *secundum quid* the other. Both these notions are very old, each having a presence in Aristotle's logical writings, notably his *On Sophistical Refutations,* in which their avoidance is strongly recommended. Babbling, says Aristotle, is a solecism and *secundum quid* a fallacy. In more recent conceptualizations they can be characterized as follows.

*Babbling:* Babbling occurs when X's position P is under attack or challenge by Y, and X is expected to make his case for P. If X's attempts prove unavailing, he is left with two options. He can defer to his challenger. Or he can stick it out, never mind that he has nothing to add to his already unsuccessful defence of P. With no new justifications to offer, the babbler simply *repeats* the proposition he can't prove and the premisses that don't work, and keeps on doing it under recurring protest[5]. We can see at once that babbling is illogical, lapsing into blatant and repetitive beggings of the question.[6]

Babbling is a transparent reflection of the intention not to give up. This creates a cost-benefit puzzle for Y. For if X is never going to give P up, what's the point in Y's pressing his challenge against it? In lots of such cases it is more sensible for Y to call it a day and head off to Flanagan's Bar and Grill for a beer. This kind of retreat embodies what some theorists call "dialectical fatigue". Relatedly, when a babbler knows his onions, he can execute what I'll call the *brick wall manoeuvre*. On the assumption that a brick wall can't be breeched by the resources at hand, it is easy to see that dialectical fatigue and subsequent retreat would be a matter of course.[7] The extent to which this matters is proportional to the extent to which P's truth matters. It might not matter much whether it snows in Barrie today, but it matters greatly whether Barrie is about to be terror-bombed. The present point is that, in retreat, resistance abates, whereupon the unopposed P is often presumed to take on a kind of social license. Why? Because it's no longer under challenge.

The *moral* here is that there are some things that we simply cannot conscientiously give up on. The *problem* is that when they're good at it, babblers can always engineer stand-offs,

[5] It is just what lotharios are bade to do when caught *in flagrante delicto.*

[6] In a simplified caricature, when you reply to a challenge to show that P with a repeated utterance of it, you are in effect arguing that P is the case because P is the case.

[7] There is not much of the original Aristotle in this more modern reconceptualization. But the core of it remains constant: Babbling is saying the same thing over and over.

leaving space for the social license presumption again to arise, as when X says to Y, "Since you haven't laid a glove on P, who are you to tell me that it can't be acted on?"

*Secundum quid*: Everyone knows that Barack Obama is a white-toothed man with an attractive smile. Everyone knows that in today's preferred euphemism, he is African-American with an attractive smile hence not a white man. Suppose that, for whatever reason, people in general omitted the qualifying phrase "-toothed" and spoke of Mr. Obama as being white. Of course, he is indeed white in certain respects, but he isn't white in all relevant respects. Omission of a needed qualification can convert a true assertion into a false one, and commit the *secundum quid* fallacy.[8] Needless to say, the present example is not a realistic one, but that in no way means that it is unrealistic to think that people sometimes really do make *secundum quid* mistakes. So let's briefly return to *Saskatchewan,* 2015. The Supreme Court made it the case that section 2(d) of the Charter carries a meaning in virtue of which essential service public servants have a constitutional right to withdraw a publically essential service. The truth of the matter lies elsewhere. Section 2(d) does not carry that meaning. It does not mean that in fact.

On the other hand, given the way our system has been designed, something else is true. Thanks to *Saskatchewan,* section 2(d) really does now carry a meaning *in law* according to which the right to strike is guaranteed and enforceable. We can now begin to see how babbling and *secundum quid* might enter the picture in tandem. If we downplay the repetitive-utterance feature of babbling and emphasize its stonewalling character, we'll have a way of comparing courts to babblers. A babbler is someone who executes the brick wall manoeuvre. Courts of last resort are brick walls by their very construction. They routinely do what a babbler does when she has the will and the staying power to do it.

The finding in *Saskatchewan* was immediately consequential. Dissenting lawyers simply dispersed. How could they not have? The Supreme Court's word is final.[9] By its very nature, a Supreme Court judgement evacuates the field of opposition. Protest becomes fruitless. From the very day of that judgement, Canadian jurisprudence and public life in general have been dispossessed of any practicable occasion to act on the knowledge that 2(d) doesn't in fact mean what the court forced it to mean, not only in the matter before them then and there but in all matters whatever on which 2(d) could be brought to bear by a judge who seeks refuge in it.

It thus comes to pass in Canadian juridical, governmental and public life, that the distinction between true meaning and semantically coerced false meaning loses meaningful practical sense. In so doing, the distinction between actual meaning and meaning in law becomes impractical and operationally unmotivated. Withal, the qualification "in law" starts to fall into routine day-to-day disuse, give rise to an important feature of the dynamics of meaning:

- The greater the extent to which this continues, the less it is true that 2(d) doesn't in fact mean what *Saskatchewan* declared it to mean.

The reason why is that in human languages the meanings of words and sentences supervene upon routine usage. As we've seen, there was a time when the English word "deer" meant just about any furry four-footed animal. Altered usage would in due course bring about that as a matter of fact "deer" does not mean that but rather that it means *deer,* for example, Bambi. More

[8] The present conception of *secundum quid,* unlike the solecism of babbling, is quite faithful to Aristotle's original conception.

[9] Even when it reversed itself in the span of twenty-two years on physician assisted suicide, the court didn't so much breech its own wall as replace it in 2015 with a re-jigged and retrofitted one . (Yes, sure.)

recent is what happened to "gay". Once denoting a sunny and frolicsome cordiality, more lately it means "homosexual". One could argue that this is now its dominant meaning in everyday English usage. Even so, at the time of its adoption, and long after, the word "gay" did not mean "homosexual" in fact.

Perhaps it doesn't matter all that much that the same-sex liberation lobby – an enormously skilled advocacy group – should have appropriated the word "gay". More consequential perhaps is of the word "intelligence" in its appropriation by the AI community, ensuing from Alan Turing's ground-breaking 1950's paper "Computing machines and intelligence" in the philosophy journal *Mind*. The question it posed was to the extent to which, if any, a machine can be an adequate simulation of the human mind, as determined by an "imitation game". In 1950, it was a truism that, given the meaning of "artificial", an artificial X is *not* a kind of X. Think here of artificial silk, artificial rubber, artificial coffee, artificial teeth, and so on. Artificial minds would fall effortlessly into this same camp. In short order, two competing philosophical positions arose. Strong AI asserts that adequately programmed computers have minds in just the same sense as yours or mine. Weak AI hedges the bet, claiming that the best way of investigating minds is by assuming – but not asserting – that Strong AI is true. In the beginning, the word "artificial" left open the question whether the noun that it qualified denoted honest-to-goodness intelligence. Strong AI was a decision to close that question and Weak AI a decision to keep it open, while at the same time pretending that it was closed.

Today there is a huge literature on agent-based intelligent interaction, a great deal of which is computationally formatted. In those uses "artificial" no longer means what it meant in 1950, before Strong AI put down deeper roots. Whereas being an artificial one was a way of not being a mind, in these more recent and growingly entrenched uses, the reverse is true. One of the better ways of being a mind is being an artificial one. By now the dominant working assumption is that computers really are intelligent, and in many respects far more so than we.

Determined usage over the past sixty and more years has erased the semantic implication that "artificially intelligent" is a way of describing something *not* intelligent, no matter the marvels of its performance. Today it is a way of identifying a different way of being what we ourselves are when we ourselves are intelligent. This, if accurate, is metaphysically consequential, bearing on issues such as brain-mind dualism. The question it poses is this:

- Should we base our *metaphysical* findings on shifts in the signification of words driven by the determination (or new habit) of giving words meaning they didn't possess at the time?

There is a certain linkage to these considerations. The land's highest court is by its very constitution a stonewaller, which is what a determined babbler seeks to be. When you ask a babbler what justifies his claim that P, and he replies that it's because P is true, he's babbled and he's stonewalled. When you challenge the Supreme Court to justify the fib that "X" means "Y", and it replies that it's because it says so, that too is babbling and that too is stonewalling. Babbling occasions dialectical fatigue, and fatigue motivates retreat. Unopposed falsities empty genuine distinctions of practical use, and linguistic practice changes accordingly. Since usage is the effectuator of actual meanings, coerced meanings that are factually false metamorphize into common meanings that are factually true. "Gay"'s appropriation wasn't imposed by a court's semantic stipulation, but it was an act of coercion all the same, brought about by the determination of homosexual activists to refer to homosexuals as gays and to expect others to do

the same. That's one good way of effecting semantic change. If enough of the right people enough of the time persist in meaning "Y" by "X", even when it doesn't, sometimes the persistence pays off and the practice spreads widely enough and causes displacement enough, that before you know it "deer" means *deer* and "free to associate" means "free to strike [even if you're an ER paramedic]".

Some of these appropriations or semantic reassignments matter more than others. The "deer" reassignment is harmless. The "gay" reassignment was important for gays but not something that bothered the rest of society to any significant extent. The reassignment of "medical care" has been a shattering concern for the very large chunk of the public. That an infant would die because the paramedics who could have saved her had downed their tools in a strike made legal by the semantic coercion danced upon s. 2(a) is beyond bearing.

There is in this an interesting lesson to learn. Coerced meanings in law have consequences not just for law, but the semantics of English at large. This, after all, was the point that Humpty-Dumpty was making when he replied to a perplexed Alice, "The question is, which is to be the master – that's all." In his *1984*, George Orwell frames what is still the best answer in English fiction to Humpty-Dumpty's cynicism. The dynamic character of meaning is nothing to fret over as such. It is business as usual in the languages of humanity, for the greater good of adaptative communicational efficacy, to say nothing of expressive refreshment. Even so, sometimes the suppression of present-day meanings turn out badly. We should not lose sight of the crippling dangers of Newspeak.