

Liar Up

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Jeremy Waldron, *Damned Lies* (Mar. 4, 2021), available on [SSRN](#).

Among the damage left in the wake of the Trump administration is the degradation of truth. Of course, Donald Trump is not the first president to lie. He has, however, been successful in his assault on many institutions that Americans trust to deliver facts. Trump's lies about the election results not only left many of his supporters with a false view of reality, but also cast doubt on election officials, courts, and procedures designed to verify the votes. In his new essay, *Damned Lies*, Jeremy Waldron helps dissect and categorize lies. In the process, he illustrates the complex relationship lawyers have to truth. If Trump damaged democracy with his disregard for facts, what about the lawyers by his side? Should they be disciplined or simply condemned for their part? Waldron does not answer these questions but he provides those of us who are interested in them with a sophisticated way to approach the problem.

Waldron's essay seeks to answer the central question, what makes a lie particularly toxic in public life. What, in his words, makes it a "damned lie"? Of course, there is a legal question lurking beneath his excursion into moral philosophy: What sort of lies should our legal system tolerate? Do lawyers have a greater obligation to the truth than others? When, if ever, is it okay for lawyers to lie?

First Waldron distinguishes those who lie from liars. Calling someone a liar means that the lies are not merely incidental; they define him. They comprise his status and his role. Like the murderer in Macbeth who has no proper name, the liar can be reduced to his sin. Sound familiar? Waldron, at least, considers Trump a liar by this definition. He does not specifically address the significance of this distinction to his analysis but perhaps it would be more appropriate to condemn someone for his status than for isolated acts, at least if his lies are repeated and damaging. We have all lied, after all, but it would be wrong to reduce most of our worth to our least noble acts. The liar, however, deserves to be condemned for his lies.

In his typology of lies, there are white lies, used to spare someone's feelings, which are not so bad. Fibs are trivial lies, inconsequential except that they can undermine the speaker's credibility. There are barefaced lies that are so demonstrably false as to be absurd. But these are not as innocuous as they might seem because they can comprise an act of political prowess designed to groom one's audience to accept future lies. Here's where Trump begins to break faith in institutions previously trusted to deliver facts. "Trust me, not them" is implicit in the barefaced lie. Next, there are falsehoods that the speaker believes to be true. The criminal law treats these sorts of lies as relatively blameless. The rules of professional responsibility seem to regard a pattern of lies as problematic even when the lawyer does not know he is lying.¹ That said, several specific rules require that the lawyer know that he is lying.² For Waldron, it is not the fact that the speaker knowingly lies but rather the misrepresentation of reality that causes the damage. Waldron is less concerned with what he calls "bullshit," statements made without regard to truth and other forms of deceit, things that are misleading but not direct lies.

Next, Waldron addresses lies in different contexts. First, he discusses politician's lies. Lies, he argues are not only common but also to some degree necessary in politics. If the government is tasked with keeping the population safe, some level of deceit comes with the territory. That said, Waldron argues that Trump lied mostly for his own self-interest and so his statements fell outside of this category. To the extent one buys the paternalistic argument that lies may be necessary in some contexts to protect the public, this seems inapplicable to the legal profession. Lawyers may not lie to their clients even if doing so would promote the clients' interest.

But a politician, especially the president, has the capacity to do a great deal of harm, and the severity of the lie depends in part in its consequences. Perjury, lies made under oath, are literally damned lies because they were traditionally thought to be punished by damnation. But they too involve a particularly egregious harm, including sending innocent parties to jail or execution. We do tolerate a certain degree of deceptive courtroom conduct on the part of attorneys to advance their clients' interest, such as discrediting a truthful witness, but presumably we do so because we feel that truth is best served by an adversary system in which lawyers vigorously represent their clients' interests. The harm is tolerable because, in the courtroom, it serves the overall goal of truth.

Lies can harm individuals but they can also do significant harm to the community. Waldron relies on Immanuel Kant to explain that lies are wrong because they treat third parties with contempt, as means to an end, rather than ends in themselves. But Kant also described a harm to communities that depend on language as a bond. Lies make social discourse useless and trust impossible, tearing at the fabric of the community. Waldron points out that this harm is incremental. The convention of believing others is so strong that society can tolerate some lies, but the habitual liar takes advantage of the strength of this convention. He is a free rider. Waldron returns periodically to former President Trump. His lies at least momentarily undermined the ability of political language to convey reliable information. The Georgia officials could state facts about their process, the checking and rechecking of votes, and many simply refused to believe them.

That brings us to the courtroom. Why, Waldron asks, are lawyers prohibited from making affirmative misstatements or presenting false evidence in court? He astutely points out that the answer "they are officers of the court" is unsatisfying. The court is a miniature community that relies on adversary advocacy tempered by truth. In this context, truth is both vulnerable and critically important. It is vulnerable in that a lawyer will be tempted to bend the truth for his client. It is critical because justice is at stake. Lawyers as a community help to maintain the convention of truth telling in this precarious context. The rules of professional responsibility establish the outer limits of partisan spin in the courtroom. Lawyers are essential to this goal especially now that few witnesses truly believe that they will be damned if they lie under oath.

Waldron suggests that maybe the court is not the only such place where the convention of truth-telling is both vulnerable and essential. Perhaps there are pockets of politics where that is the case as well. The discourse surrounding elections may be such a context: the temptation to lie is enormous and the consequences of falsehoods dire. Waldron concludes that a lie in this combustible situation is a damned lie, leaving the reader to infer that he might support greater regulation of false speech in this context.

So, that brings me to a final question raised by Waldron's fascinating discourse on damned lies. What about the lawyers who lied to the public outside the courtroom about the election on Trump's behalf? Should they face repercussions for their falsehoods even though they were not inside a courtroom? Waldron's discussion leaves me with this tentative answer: lawyers do not play the same role outside the courtroom as they do inside of it. Lawyers are not guardians of the community entrusted with preserving faith in the truthfulness of communication in the political arena. They are political actors or advocates, but they are not in a unique position. Thus, lawyers should be condemned for lying like anyone else. Perhaps Rudy Giuliani, Sidney Powell, and Lin Wood became liars, in which case it would be appropriate to reduce them to their worst acts. They should be criticized for their damned lies, because the consequences were so grave. That said, professional discipline should be reserved for deception that casts doubt on a lawyer's judgement or ability to serve clients in other contexts, and therefore may not be appropriate. If these lawyers are culpable, it may be because lying in this context does severe damage to the political community, not because they are lawyers.

What is to be done with liars, including lawyers, in the political realm? What should the law do about lawyers and non-lawyers who tell such grave falsehoods that they damage not only third parties but also the fabric of trust that binds Americans together? Perhaps, the law and the rules of professional conduct can address this problem, but not all problems call for legal solutions and some legal solutions have unintended effects. Regardless of what the answer may be, Waldron's essay helps his readers understand the complexity of the question.

1. **Model R. of Prof. Conduct 8.4(c), cmt. 2.**
2. R. [8.4\(c\)](#), R. [4.1\(a\)](#), R. [3.3\(a\)](#).

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