

# ISDC's Letter

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## Editorial

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Dear Readers,

This special edition focuses on the ISDC's annual "Droit & ..." event. The 2019 event took up the topic of *Lies and Bullshitting*, looking at these related but separate concepts from the point of law, economics, and psychology. The audience was treated to stimulating presentations on different aspects of how humans respond to falsehoods and fakery. While there were many moments of smiles and laughter, by the end of the evening, the participants gained a new appreciation of the fragility of a social system built on trust. Just how much, we must wonder, can we maintain relationships if communications cannot be presumed to be expressing a person's honest beliefs? For the lawyers among us, the question looms large: can law adjust behavior to increase the likelihood that people strive to be truthful?

We hope you will find this issue both useful and a pleasure to read.

Krista Nadakavukaren



## Introduction

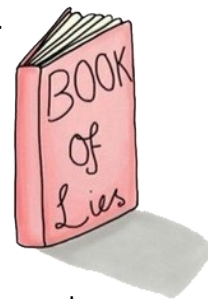
*Krista Nadakavukaren, Vice-Director, Swiss Institute of Comparative Law, Switzerland*

Before one can adequately study – or even discuss – lies and bullshit, it is essential to define the terms. This is particularly important because while both have something to do with falsehoods, there is more to each than the truth or not of a particular communication. A *lie*, according to the Oxford English Dictionary, is: “a false statement made with intent to deceive”. This is an unsurprising definition, but it is worth noting that it includes, as equal aspects of the definition, two parts: the falseness of the statement and the intent that the statement be false. That means, on the one hand, a communication that expresses something not false is not a lie; and on the other, that just because a statement is false it is not necessarily a lie. In the latter case, it may be simply a mistake. The lie, too, must be made – that is, wherever there is a lie, there must be a liar. This can become important for the law – because law can treat conduct and results of conduct separately.

The definition of bullshit is more difficult to reduce to a concise sentence. The main starting point for studies of bullshit, and indeed the conception mainly used by our speakers at the Law and Lies event, is that set out by Harry Frankfurt in his 1986 work, “On Bullshit”<sup>1</sup> (the essay preceding its release as a book in 2005). The notion that Frankfurt put forth was related to “humbug” (itself put forth by Max Black): “deceptive misrepresentation, short of lying, especially by pretentious word or deed, of somebody’s own thoughts, feelings, or attitudes”.<sup>2</sup>

Lying, although practiced with great frequency in every society in the world, is widely (through time and space) considered a behavior warranting condemnation. Indeed, Kant called the “intentional untruthful declaration” a categorically immoral act<sup>3</sup>, Montaigne called it “an accursed vice”<sup>4</sup>, and, as many can intuitively understand, people who realize (or believe) they have been lied to often resent that fact more than the lie itself. The personal issue, in most cases, is the breach of trust rather than the reliance on a false statement.

This is different in much of the law, where the falsity of the expression itself usually has to cause some harm before the act of the liar will be considered unlawful. In the United States particularly, the fact that a statement is false, even if intentionally false, will usually not be actionable, because the idea of free expression contained in the U.S. Constitution has been interpreted to ensure that speech cannot be made illegal on account of its “content”, or what it says. The core arguments in the United States regarding the hesitance to punish lying revolve around two central beliefs: one, that the most effective way to remedy the harm of false statements is to let true statements discredit them; and two, that strict rules against false speech risks stifling all speech. Both of these beliefs are a tribute to the single “marketplace of ideas” concept that is a fundamental tenet of American legal thought. More speech – regardless of its correctness – is considered a better solution to lies than would be any attempt to reduce the number of lies that can circulate.



There are exceptions to accepting liars and lies. Lying can be prohibited, it can be prohibitable, and it can be actionable in certain instances. The main legal prohibition on lying is the crime of perjury: where a person makes false expressions in an official context (in a court room, on an official document, or to a government official), having promised to tell the truth. Telling a lie could be prohibited in a setting in which persons are very likely to be hurt (a municipality could make it unlawful to yell “fire” in a crowded cinema). Finally, a false expression can be actionable if it injures the reputation<sup>5</sup> of a person (a civil action of libel or slander) and causes assessable damage. However, for each of these cases of unlawful

<sup>1</sup> Harry Frankfurt, *On Bullshit* (Princeton Univ. Press, 2005). The (unpaginated) text of this 20-page essay is available at [http://www2.csudh.edu/ccauthen/576f12/frankfurt\\_\\_harry\\_-\\_on\\_bullshit.pdf](http://www2.csudh.edu/ccauthen/576f12/frankfurt__harry_-_on_bullshit.pdf); viewed 6 November 2019).

<sup>2</sup> Max Black, *The Prevalence of Humbug* (quoted in Frankfurt).

<sup>3</sup> E.g., Immanuel Kant, *The Metaphysics of Morals* (). See Thomas L. Carson, *Kant and the Absolute Prohibition Against Lying* in: *ibid*, *Lying and Deception: Theory and Practice* (Oxford Scholarship Online: September 2010, DOI: 10.1093/acprof:oso/9780199577415.001.0001; viewed 27 November 2019).

<sup>4</sup> Michael Andrew Screech, *Montaigne & Melancholy: The Wisdom of the Essays* 103 (2000).

<sup>5</sup> See Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 *Ca. L.Rev.* 691, 693 (1986) (describing three approaches courts have taken to view reputation harm as actionable: property, honor, or dignity).

lying, the liar must have been at least negligent in not ascertaining the veracity of the statement (libel of public figures requires recklessness) and in the case of perjury, the standard is one of intent.

Interestingly, however, the US legal leniency toward liars pales in comparison to its permissiveness toward the bullshitter. Given the law's unwillingness to punish any accidental falsity, much bullshit itself is simply untouchable through legal actions. The bullshitter, too, defined by his/her inattention to the truth or falsity of the statement - is similarly safe from legal claims because either the statement is not false (although it may be misleading or irrelevant) or because the level of fault required is not met.

Where does that leave society? With a lot of inaccurate statements that need to be parced and considered. Herein lies the particular difficulty, however. As bullshitting proliferates, the belief members of a society have in the truth of what each individual is saying wanes. With that, trust also begins to dissipate.

Whether law can ever be the answer to the disappearance of societal trust was not a question that our event answered. But we began to think about how to think about it.



## When Does a Legal Presumption become a Lie?

Francesco Maiani, Associate Professor, Université de Lausanne

### 1. What is a “legal presumption”?

A legal presumption is a rule whereby a fact, although not proven (“unknown”), is considered as established on the basis of another, known fact.

Examples:

- Typically, a child born of a husband and wife living together is presumed to be the natural child of the husband.
- Under Swiss anti-discrimination legislation, discriminatory intent of the employer is presumed if the worker who claims to be a victim of sex discrimination proves differential pay or disadvantageous attribution of tasks - evidence of facts that make claim “plausible” but that leaves the employer’s state of mind unknown.
- Under international law, states are presumed to adhere to their treaty obligations such that, for example, inter-State renditions (extradition, expulsion) may be made based on fact of the receiving state having ratified the relevant Conventions. This known fact allows for a presumption that, for instance, a state party to the Geneva Convention will abide by it and thereby be “safe” for citizens of a third state that claim to be refugees. Similarly, if a state has ratified the ECHR or the Convention against Torture, this fact allows for a legal presumption that it treats prisoners in a manner compliant with these texts.

Legal presumptions constitute a deviation from the evidentiary rule that is at the basis of most legal systems: *Ei incumbit probatio qui dicit (he who alleges a fact must prove it)*. Under this normal rule:

- The husband who wishes to be recognized as the father of his wife’s child should actually prove that he is the natural father (e.g., via a DNA test).
- The woman who wants his employer condemned for discrimination should prove not only that there is differential, but also that the ground for this was her sex – (something famously difficult to prove!).
- The State intending to expel a person to another State should prove in every individual case that the person is *not* exposed to a risk of illegal *refoulement* or ill-treatment (another example of famously difficult-to-prove – because negative -- facts!).

### 2. Why do legal systems use “legal presumptions”?

Legal systems rely on legal presumptions for a number of practical reasons. These include the following:

- Social stability or predictability
  - it might not be conducive to tranquillity to run a DNA test in every individual case, to check whether the husband is *really* the father
- Facilitating the application of rules operating on facts that are difficult or costly to prove, especially for “weaker” parties
  - systematic DNA testing for every child would not only possibly increase the number of divorces, but also be very costly for the parents and/or for society
  - positively proving discrimination is notoriously difficult so you either forget about having effective anti-discrimination laws, or you start to tinker with presumptions
- Expedited and efficient administrative procedures
  - for a State intending to send a person to another State, acquiring a deep knowledge of (say) its penitentiary system is long-winded and costly. “They ratified the CAT, so let’s presume they’ll respect it...”



### 3. But when does a presumption become a lie?

Here we must introduce yet another fine distinction between several kinds of presumptions

- Normally, presumptions only establish a starting point: the fact is presumed but can be disproved by producing contrary evidence.
  - John, who is the husband of Dana, is registered as Alan's father. However Dana (who is divorcing John and has been in a relationship with Anthony for quite some time) can bring proof that Anthony is the father instead.
  - Marie-Antoinette shows that her employer is giving all the high-profile missions to her colleague Jean. Sex discrimination is "plausible", *but* if the employer proves that differential treatment was based on their respective work performances, and not on sex, then no discrimination will be found.
  - In such cases, presumptions *invert the burden of proof*. They allocate the risk that a fact is not proven differently than the normal rules. Nevertheless, they always leave a possibility for the "truth" to correct an ill-founded presumption.
- There are also "absolute" or "irrebuttable presumptions". Here, a fact is presumed and no contrary proof is accepted.
  - For instance, I have read that in French civil law (of which I am utterly ignorant), a creditor who willingly hands his title to the debtor is presumed to have been paid, and cannot disprove this by any means.
  - Of course, absolute presumptions are in constant danger of becoming lies. Think of it: even if it's crystal clear that the presumed fact is *not* true, the law is still applied as if that fact existed.

Even though conceptually legal presumptions only come in two "flavors", there is in fact a whole palette of nuances. Indeed, "rebuttable presumptions" come in many varieties

- those may be rebutted by *any* contrary proof, and
- those that can only be disproved by bringing specific kinds of proof or by satisfying a very high standard of proof.

Rebuttable legal presumptions, then, may be easier or harder to rebut. "Hard" presumptions are of course more at risk of becoming legalized lies. That is the case whenever there is clear proof that the presumed fact is not true, but said proof is not of the requisite kind or quality.

### 4. And what happens then? A story

Well, many things could theoretically happen. Legal presumptions that become "lies" often are – in essence – legal rules that create what may amount to (or not!) injustices. This means that

- society may live with it
- or there may be enough momentum to *change* those rules in Parliament based on negative experiences.

Sometimes, if the legal presumption is open to more than one interpretation (... as basically all legal rules are), there may be "antibodies" in the legal system that, over time, will correct the situation. Human rights, as high-ranking legal principles, may have just that effect.

An example of how recognizing that a hard legal presumption had become a problematic "lie" started the movement to change the rules can be found within the "Dublin system" of refugee law.

- The "Dublin system" establishes a presumption of trust among the state parties. That is, a "premise" of the system, recalled in the recital 3 of the Dublin III Regulation of 2013, is that the Member States, having ratified all the relevant instruments, "are considered as safe countries for third country nationals" seeking asylum in the EU.
- Starting in 2007, the UNHCR raises the alarm about the situation in Greece, where the practice on the ground is several light years removed from what the relevant standards prescribe.



- Transfers continue unabated, however:
  - Courts tend to look the other way: either they deem the presumption irrebuttable, or they raise extremely high hurdles (e.g. bring the proof that you are *individually* at risk)
  - Even the ECtHR lends a hand with its 2008 *KRS* decision. Very interestingly, it says that the presumption *may not* be absolute. But it accepts that it is not rebutted in the case of Greece despite abundant evidence to the contrary.
- Thousands are transferred to what everyone knows will be inhuman or degrading treatment... and thousands keep appealing to the ECtHR, which is *flooded* with requests.
- ... Until it's too much. In its 2011 *MSS* judgment, the ECtHR
  - Clarifies once more that the presumption must be rebuttable if it is to be compatible with the ECHR
  - Rejects the idea that some form of "individualized risk" must be shown to rebut it (which is an absurd legal theory anyway)
  - Concludes that the situation in GR is so bad that the presumption is rebutted *for all and any protection seekers!*
- At this point, an interesting fencing match begins between the ECtHR and the ECJ on what must be proved, precisely, for the presumption to be rebutted.
  - The ECJ tends to favour "mutual trust" between the Member States on grounds of efficiency, so tends to have a restrictive stance
  - The ECtHR is not insensitive to efficiency considerations, but it's job is to ensure that MS do not violate the ECHR
  - So the ECJ says: yes the presumption may be set aside, but only if there is evidence of "systemic deficiencies in the asylum system"... which most take to mean a "Greek situation" on the ground, where the asylum system has collapsed completely or (perhaps more accurately) just isn't there
  - This however means accepting that we base ourselves on a "safety" that may be perfectly fictitious in every other situation! Consider the situation of a woman trafficked to Italy, escaping to Switzerland, and at proven risk of being tracked down and murdered by her exploiters if returned there. While she dies on the ground with her throat slit open, she will surely find great comfort in the idea that she did not fall victim to a "systemic deficiency" of the Italian asylum system!
  - And so in *Tarakhel*, the ECtHR says "no, that test is wrong". Anyone showing a "real risk" of ill-treatment will have rebutted the presumption, whether that risk stems from systemic or individual circumstances
  - Disagreement between the two Courts is at this point so strong that protecting "mutual trust" is one of the reasons invoked by the ECJ to torpedo the accession of the EU to the ECHR in the infamous Opinion 2/13... the things you do for the sake of a legal presumption
  - Eventually, however, the ECJ rallies itself to the position of the ECHR in more recent Dublin cases such as *CK* or *Jawo*.

All in all, the presumption has turned to lie for many unhappy asylum seekers shuffled throughout Europe to un-safety. This still happens, alas, but slowly, the complex thing that is Europe's composite legal order has at least minimized the risk that *this* particular presumption may turn into a deadly lie for the future!

## References

1. P. Moor, *Dynamique du système juridique*, Schulthess Verlag, Zurich, 2010., p. 99-100
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3. <https://definitions.uslegal.com/l/legal-presumption/>

## Not Liars: What Do We Know About Bullshitters?

*John Jerrim, Professor, UCL Institute of Education and Education Datalab*

*Phil Parker, Professor, Australian Catholic University*

*Nikki Shure, Lecturer, UCL Institute of Education and IZA*

“Bullshitters” are individuals who claim knowledge or expertise in an area where they actually have little experience or skill. Despite this being a well-known and widespread social phenomenon, relatively few large-scale empirical studies have been conducted into this issue. Our paper attempts to fill this gap in the literature by examining teenagers’ propensity to claim expertise in three mathematics constructs that do not really exist. Using Programme for International Student Assessment (PISA) data from nine Anglophone countries and over 40,000 young people, we find substantial differences in young people’s tendency to bullshit across countries, genders and socio-economic groups.

### How do we construct the bullshit scale?

In the 2012 edition of PISA, 15-year-olds across the world were asked how well they understood a set of 16 mathematical constructs. They were asked to indicate a response on a five-point scale, from 1 (“never heard of it”) through to 5 (“know it well, understand the concept”).

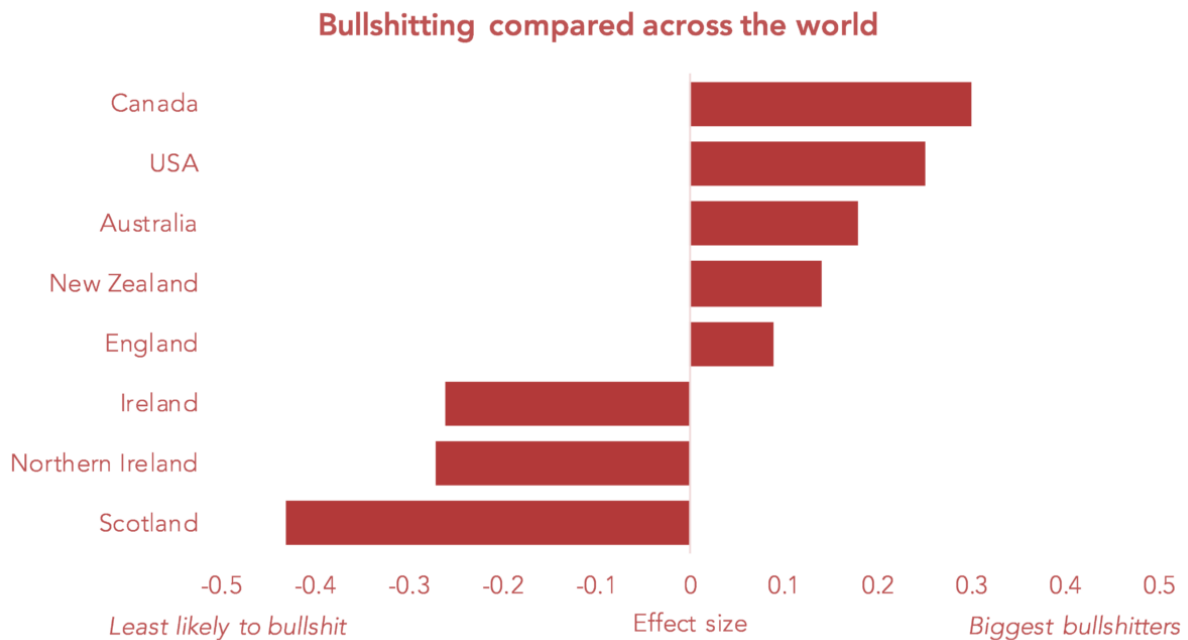
These constructs were:

1. Exponential function
2. Divisor
3. Quadratic function
4. *Proper number*
5. Linear equation
6. Vectors
7. Complex number
8. Rational number
9. Radicals
10. *Subjunctive scaling*
11. Polygon
12. *Declarative fraction*
13. Congruent figure
14. Cosine
15. Arithmetic mean
16. Probability

There is, however, a catch. The three constructs in italics above are completely made up! There is no such thing as a ‘proper number’, ‘subjunctive scaling’ or a ‘declarative fraction’ – yet some teenagers said that they knew such constructs well. We hence use how teenagers in Anglophone countries responded to these three fake constructs to create a ‘bullshit scale’. We look at English-speaking countries to avoid any issues related to the translation of the concepts into other languages. These countries are Australia, Canada, England, Ireland, New Zealand, Northern Ireland, Scotland, USA, and Wales.

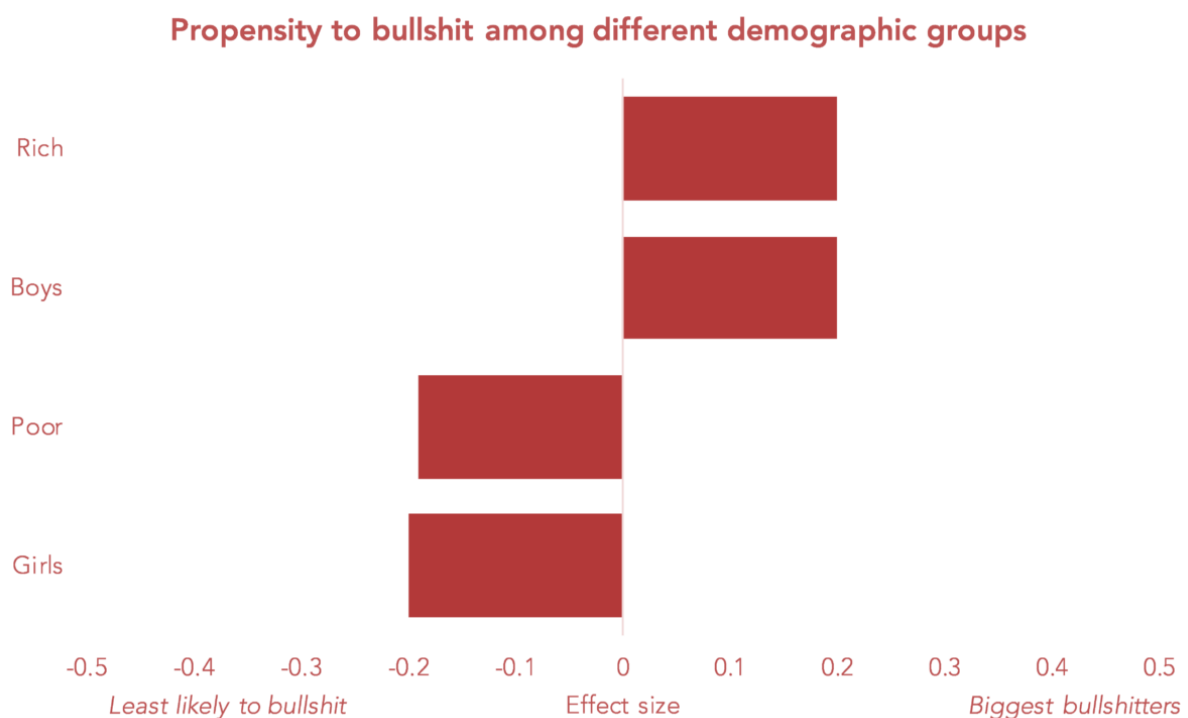


The chart below compares average scores on this scale across English-speaking countries. Results have been standardised, so positive figures indicate being above the international average on the bullshit scale and negative figures below the international average. The magnitude of results are reported as effect sizes (standard deviation differences).



North American teenagers are found to be the biggest bullshitters in the English-speaking world – Canada and the United States take the top two places (there is no statistical difference between the two). In the middle of the pack are England, Australia and New Zealand. Whereas it is the Irish, Northern Irish and Scottish who are the least likely to bullshit.

The paper also explores differences between demographic groups, as illustrated in the chart below.



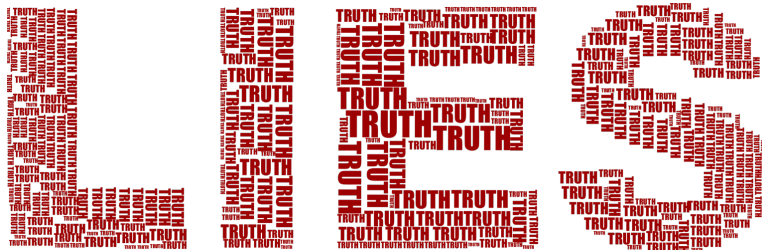


Young men were found to be much bigger bullshitters than young women, while rich kids were much more likely to bullshit than the poor.

We also find that bullshitters exhibit high levels of overconfidence and believe they work hard, persevere at tasks, and are popular amongst their peers. This is done using questions from the PISA background questionnaire on their self-efficacy, perseverance, and friendships. The difference between high bullshit individuals and low bullshit individuals remains statistically significant once we take into account their school, family background and gender. Together this provides important new insight into who bullshitters are and the type of survey responses that they provide.

### Implications

This scale was constructed using questions asked of 15-year-olds on a low-stakes skills test. Despite this limitation, we believe this research has started to open an important new area of social science research. Bullshitting is a widely recognised social 'skill' which is likely to have an impact upon a person's life. We have established how some groups are clearly more likely to bullshit (and be caught bullshitting) than others, and that these individuals tend to display certain other psychological traits (most notably a striking overconfidence in their own abilities). It is critical that a developmental perspective is now taken with respect to bullshitting so that we can understand what leads individuals to develop such habits, and whether it turns out to be associated with better or worse social and labour market outcomes.



## Implications of Bullshit and Lies for Social Perception, Persuasion, Memory, and Decision Making

*John V. Petrocelli, Professor of Psychology, Wake Forest University*

Our beliefs, what we believe to be true, are the most fundamental things to our decisions. What are my beliefs based on? Are they based on truth, facts, data, evidence, established empirical-logical-semantic-systemic knowledge, or are they based on lies and bullshit?

The reality is that beliefs are often based on pure bullshit. A deeper understanding of bullshitting might be one of the single most important intellectual and social issues that we are facing at the moment. Altering the concern for truth, what is said (and how it is being said) is likely to be the most straightforward but significant means of improving the integrity and impact of empirical knowledge.

Yet, there is a great struggle against bullshit today. As philosopher Harry Frankfurt noted over 30 years ago,

*“Most people are rather confident of their ability to recognize bullshit and to avoid being taken in by it. So, the phenomenon has not aroused much deliberate concern, or attracted much sustained inquiry. In consequence, we have no clear understanding of what bullshit is, why there is so much of it, or what functions it serves.”*

As Frankfurt emphasizes, bullshitting is not lying: the liar actually knows and cares about the truth so that he can tell a successful lie. But the bullshitter doesn't even care to know the truth, he isn't paying any attention to it, and he isn't even trying to know.

The antecedents of bullshitting include: the obligation to provide an opinion; the ease of “passing” bullshit (i.e., accountability, attitude of audience); and a lack of knowledge/expertise. It is easy, then, to see why there is so much bullshitting that takes place. Social situations sometimes seem to *force* us to talk about things we know nothing about. Like the salesman who needs to make sales, or the politician who needs to win votes, sometimes we feel a need to share opinions and voice things of which we know little to nothing about, and what often comes out, is bullshit.

My talk today is but one response to one of Frankfurt's most important claims: [bullshit is more insidious than lies]

My team and I have studied people's responses to bullshitting and lying. We start with two hypotheses:

1. *Insidious bullshit hypothesis*: Bullshitting is evaluated less negatively than lying, but bullshit is more damaging to society than the lie (Frankfurt, 1986). Some concern for truth is better than no concern for truth; and perhaps there is more bullshit than lies.
2. *Dismissal hypothesis*: people dismiss the liar more readily and easily than the bullshitter (subsequent influence of bullshitters should be greater than that of the liar, because what the bullshitter says isn't necessarily false).

We test the hypotheses with four experimental studies comparing the effects of bullshitting vs. lying. Experiment 1 compared social judgments of a bullshitter and liar sharing the same message and examined the mediating roles of ignorance, dishonesty, and sharing one's opinion. Experiment 2 examined the role of bullshit versus that of evidence-based communication in a traditional persuasion paradigm with strong and weak argumentation. Experiment 3 explored the effect of bullshit versus lies on attitudes and attitude certainty. Experiment 4 compared bullshitting versus lying in an illusory truth paradigm [Editor's note – the illusory truth paradigm predicts that people begin to perceive false information as less false – or even as true - after repeated exposure to that information].



The results suggest that the consequences of bullshitting include the following:

- bullshit is perceived negatively, but not as negatively as lying;
- bullshit appears to cue peripheral route processing (reduces the potency of strong argumentation, but enhances the potency of weak argumentation); and
- bullshit does not reduce the illusory truth effects as does lying.

These results indicate that from multiple angles, bullshit appears to be more insidious than lies. Although the benefits of bullshitting for the individual may be favored over lying, the unwanted consequences of bullshit for society may be more devastating than the lie.



#### Reference

1. Petrocelli, J. V., Antecedents of bullshitting, *Journal of Experimental Social Psychology* 2018/76, 249-258.

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