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The Whole Truth?

—On Broadening the Scope of the U.S. Federal Perjury Statutes

*Luis López**

Abstract
The Supreme Court decision in Bronston v. United States asserts that a defendant can be charged with perjury only on the basis of what the defendant actually said, not on the basis of a truthful statement that may lead to a misleading interpretation. Robbins (2019) proposes to include misleading and incomplete testimony in the language of the U.S. federal perjury statute. Robbins claims that this addition would discourage sophisticated defendants from using misleading rhetoric to avoid telling the truth; he also claims that juries should have no difficulty identifying misleading statements. In this article, I explore the notions of 'misleading statement' and 'omission' to clearly delineate their semantic fields. I show that there are practical, as well as philosophical, difficulties in the changes to the perjury statute that Robbins proposes. Most importantly, the empirical work reported by Skoczeń (2021) shows that naïve subjects do not always agree in their interpretation of misleading statements and, even when they agree that a statement is misleading, they do not agree whether it should be regarded in the same category as a lie. These findings suggest that more work needs to be done in our understanding of linguistic interpretation before we are certain that we can predict the consequences of broadening the scope of the perjury statute.

Keywords
lies, perjury, implicature, misleading statement, omission, concealment

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* University of Illinois Chicago, luislope@uic.edu. The author would like to thank Stuart Green for comments on an earlier draft as well as two anonymous reviewers for insights and bibliographical pointers.

1. Introduction

Currently, U.S. federal law limits the scope of a perjury prosecution to actual statements. Perjury consists of making a believed-false statement under oath, concerning matters material to an official proceeding. Additionally, one must have the intention to commit the act.

(1) § 1621: "Having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true." (See also § 1623)

Perjury is regarded as a serious crime in any jurisdiction because a perjurious statement may easily derail the wheels of justice. This is crucial: the legal system is not concerned with lying per se, only with lying that could affect a sentencing – hence the emphasis on the materiality of the lie.

Robbins (2019: 292) proposes that the federal statute of perjury should include misleading and incomplete testimony:

(2) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false, misleading, or incomplete testimony and intends thereby to avoid or obstruct the ascertainment of the truth, makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration or omission, shall be fined under this title or imprisoned not more than five years, or both.

In other words, if a witness provides answers to the questioner that are not superficially false but omit material information or are phrased in such a way that they are meant to mislead a jury, then this witness commits perjury. As Robbins points out, language similar to this is already in the books in South Carolina and Oklahoma.

The purpose of this article is to examine Robbins' proposal and evaluate the possible consequences of adopting a statute of perjury like (2). I conclude that prosecuting misleading and omitted utterances as perjury presents considerable – maybe insurmountable – complexity. My analysis involves a discussion of the Supreme Court doctrine in Bronston v. United States,[1] which presents the most important Supreme Court decision on the scope of the perjury statute. I also rely on the legal commentary that is available on this decision, and my own disagreement regarding how it is often interpreted. Finally, I also discuss the rich body of work available to us from the philosophical literature on lies and misleading statements that is relevant for Robbins' (2019) proposal.

The rest of this article is organized as follows. Section 2 discusses Bronston v. United States. Section 3 presents Robbins' (2019) arguments to expand the statute. Section 4

[1] Bronston v. United States, 409 U.S. 352, 357–362 (1973).

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introduces the reader to the philosophical distinction between lying and misleading while section 5 discusses the concept of 'omission'. Sections 6 through 9 present my own take on the issue and highlights the difficulties that Robbins' proposed expansion of the scope of perjury would present. Section 10 presents the conclusions.

2. Background: The *Bronston* Case

The Bronston v. United States holding is without doubt the most influential in perjury jurisprudence in the USA (see Douglis 2017, Green 2001, Solan 2018, Solan & Tiersma 2005, Tiersma 1990 for extensive discussion). Samuel Bronston was a failed businessman being questioned in bankruptcy proceedings. The crucial piece of dialog that the case revolves around is the following:

(3) Q1: Do you have any bank accounts in Swiss banks, Mr. Bronston?
A1: No, sir.
Q2: Have you ever?
A2: The company had an account there for about six months, in Zurich.

It was true that Mr. Bronston's company had had a bank account in Zurich, so his statement was truthful. However, Mr. Bronston also had had a personal bank account in Zurich, which was very material to the case, and which A2 successfully hid. Although Mr. Bronston never said "no", the lawyer and everybody else in the courtroom took it that his answer to Q2 was "no". Did he commit perjury?

The lower court answered the question in the affirmative and so did the court of appeals. The latter provided an interesting reasoning: "an answer containing half of the truth which also constitutes a lie by negative implication; when the answer is intentionally given in place of the responsive answer called for by a proper question, is perjury." Thus, the Court of Appeals assumed that a jury can see through a misleading statement and can figure out someone's intent to mislead when providing a truthful statement.

The Supreme Court overturned this decision and argued that the statute does not allow for Mr. Bronston's prosecution. The consensus opinion on the Supreme Court's decision is that they decided to interpret the relevant statute as requiring a "literal truth" approach to perjury so that only statements that are literally false can be prosecuted: "the statute does not make it a criminal act for a witness to willfully state any material matter that implies any material matter that he does not believe to be true" (p. 358). They continue to argue that if a lawyer gets an unresponsive or incomplete answer, it is her job to ask again. In particular, they argue that juries should not be asked or even allowed to infer a witness' intent to mislead when she is providing a truthful answer. The intent to mislead can only be relevant when the witness has provided a false statement:

> It is no answer to say that here the jury found that petitioner intended to mislead his examiner. A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner; the state of mind of the witness is relevant only to the extent that it bears on whether "he does not believe [his answer] to be true." To hold otherwise would be to inject a new and confusing element into the adversary testimonial system we know. Witnesses would be unsure of the extent of their responsibility for the misunderstandings and inadequacies of examiners and might well fear having that responsibility tested by a jury under the vague rubric of "intent to mislead" or "perjury by implication."

This is a clear rebuke of the Court of Appeals reasoning.

However, I don't think the Bronston holding really settled so clearly on a literal truth doctrine. This is because footnote 3 of the same holding includes two very important hedges. Here is footnote 3:

> The District Court gave the following example "as an illustration only":
>
> [I]f it is material to ascertain how many times a person has entered a store on a given day and that person responds to such a question by saying five times when in fact he knows that he entered the store 50 times that day, that person may be guilty of perjury even though it is technically true that he entered the store five times. The illustration given by the District Court is hardly comparable to petitioner's answer; the answer "five times" is responsive to the hypothetical question and contains nothing to alert the questioner that he may be sidetracked. See infra, at 358. Moreover, it is very doubtful that an answer which, in response to a specific quantitative inquiry, baldly understates a numerical fact can be described as even "technically true." Whether an answer is true must be determined with reference to the question it purports to answer, not in isolation. An unresponsive answer is unique in this respect because its unresponsiveness by definition prevents its truthfulness from being tested in the context of the question – unless there is to be speculation as to what the unresponsive answer "implies."

Here is the first hedge: the literal truth doctrine should only apply to unresponsive answers because an alert questioner must realize that some important information has been hidden from view. If the answer is fully responsive, the questioner remains in the dark. The footnote does not clarify if a responsive answer that leads to false implicatures – as in the numerical fact – could lead to a perjury indictment. I believe the implication is that it could (see Tiersma's (1990) and Green's (2001: fn 73) response). The second hedge is that the context must be considered when considering if an answer is truthful: "whether an answer is true must be determined with reference to the question it purports."

The prose of footnote 3 suggests that the intent of Bronston was that a responsive answer that leads to wrong implicatures can be grounds for perjury after all; additionally, it suggests that whether a statement is perjurious must be considered in context. The United States v DeZarn[2] case certainly interpreted Bronston this way. DeZarn is a case that involved improper solicitation of campaign contributions from Kentucky National Guard officers at a "Preakness Party" that took place in 1990. DeZarn, the person

[2] United States v. DeZarn 157 F.3rd 1042, 1047 (6thCir.1998).

who had collected the contributions, was questioned under oath and the following dialog took place:

(4) Q1: In 1991 […] he held the Preakness Party at his home. Were you aware of that?
A1: Yes.
Q2: Did you attend?
A2: Yes.
[…]
Q3: Okay. Sir, was that a political fundraising activity?
A3: Absolutely not.

It is true that at the 1991 party there was no fundraising. But the questioner had made a mistake: the party in question had taken place in 1990 – in fact there had been no "Preakness Party" in 1991, but a completely different kind of gathering. DeZarn was condemned for perjury and lost the appeal to the Sixth Circuit. The Sixth Circuit judges wrote that the context made it clear that the questioner was asking about the 1990 party:

> Because we believe that the crime of perjury depends not only upon the clarity of the questioning itself, but also upon the knowledge and reasonable understanding of the testifier as to what is meant by the questioning, we hold that a defendant may be found guilty of perjury if a jury could find beyond a reasonable doubt from the evidence presented that the defendant knew what the question meant and gave knowingly untruthful and materially misleading answers in response (p. 1042).

Additionally, they argue that "the Bronston literal truth defense applies in cases where a perjury defendant responds to a question with an unresponsive answer" (p. 1048). Since DeZarn gave fully responsive answers, he couldn't claim the Bronston precedent. (See Green 2001 and Solan 2018 for detailed criticism of the DeZarn holding.)

Green (2001) and Solan and Tiersma (2005) provide thoughtful discussions of the Bronston decision and largely tend to agree with it. Solan and Tiersma (2005) concur with the Supreme Court that if a witness provides an unresponsive answer, it is the duty of the lawyer to make sure that their question is fully addressed – letting a witness evade an answer and later prosecute him for perjury is unacceptable. They point out that there is a profound power imbalance between questioner and witness, and this leads them to argue that the responsibility of getting complete, truthful answers rests on the questioner. Additionally, if witnesses are going to be responsible not only for what they say but also for what their answers might implicate in the minds of hearers, the task of a witness will be very difficult – terrifying, in fact. An answer might be misleading accidentally because the witness did not realize there was an ambiguity. Indeed, Solan and Tiersma point out that a clever interrogator might set up witnesses into a perjury trap.

3. Robbins' Argument

Robbins (2019) argues against the literal truth doctrine on perjury. As shown in (2), he proposes that the perjury statute should include misleading statements and statements that omit material information. He dismisses Solan and Tiersma's (2005) argument regarding the necessity of protecting witnesses against excessive perjury indictments and claims that it is possible to extend the statute to include misleading and incomplete testimony without creating damage to witness declarations. His main argument to expand the scope of the perjury statute seems to be that it is necessary so that sophisticated defendants cannot get away with avoiding truthful answers. Additionally, he expresses confidence that juries would be able to infer a defendant's intent to mislead (I will get back to this in section 9). Finally, he points out that omission (concealment) of material information is already part of other crimes, such as obstruction of justice and fraud. If we assume that juries can tell the intent of omitting information in fraud cases, they should also be able to divine this intent in perjury cases.[3]

Robbins particularly criticizes the Bronston holding. As mentioned, in his answer to the prosecutor's question, Sam Bronston avoided revealing that he did own several bank accounts in Switzerland. If Robbins proposal (2) had been adopted at the time of Bronston's deposition, his prosecution for perjury would have stood on solid ground and the Supreme Court would not have found a reason to overturn it. This he thinks should be a good result.

Robbins provides two examples of clever lawyers who should have been indicted for perjury but were not: Judge Brett Kavanaugh and ex-president William Jefferson Clinton. Both avoided providing material information under oath without incurring in perjury. A statute like (2), in which one can commit perjury by omission would discourage this sort of maneuver and would force witnesses to provide all material information as requested.

During Judge Kavanaugh's senate hearings regarding Professor Christine Ford's accusation of sexual assault, he gave evasive or irrelevant answers to the senators as well as the prosecutor Rachel Mitchell. For instance, when Mitchell asked Kavanaugh if he had ever passed out from drinking, he answered that he fell asleep after drinking but he never blacked out.[4] Thus, he denied having "blacked out" but he didn't answer if he had "passed out." The other, no less famous, example is that of then President Clinton during his deposition for the Paula Jones sexual harassment case. When he was asked if he had had sexual relations with Monica Lewinsky, he answered "no" – albeit, he was answering

[3] As an anonymous reviewer points out, Skoczeń (forthcoming) casts some doubt on the assumption that lay juries will have no difficulty determining aspects of a false statement in a fraud case, such as materiality.

[4] https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/?utm_term=.72d4ba2bc183 (accessed 27 June 2023).

according to the (bizarre) definition of sexual relations provided by the Jones team.[5] These two cases are presented as exempla for why the statute of perjury needs to be tightened up.

A section of Robbins' article shows how silence and concealment of material information is already a meaningful component of the legal system at large. One interesting example, discussed in Tiersma (1990), is People v. Meza.[6] Mr. Meza was charged with perjury because during jury selection he failed to reveal that he knew the defendant (he was in fact his brother-in-law) by raising his hand when he was asked. Notice, however, that this is not a case of omitting information: the gesture of raising or not raising one's hand had been codified previously with a specific meaning and therefore not raising one's hand qualified as a statement.

Robbins presents other cases where an individual provided incomplete information and was prosecuted under a different statute. One such example is United States v. Larranaga.[7] Larranaga was subpoenaed to bring in his company's records for a grand jury examination. These documents included the minutes of a meeting, from which he deleted the name of one of the participants, an information that was very much material to the case. Since the records he provided omitted crucial information, he was charged with false statement. The federal false statement statute (§ 1001) is similar to perjury, the only important difference is that false statement does not require the defendant to be under oath.

Likewise, one can commit obstruction of justice by concealing information. This is exemplified in People v. Williams[8], a case in which the defendant failed to disclose that she knew the perpetrator of a robbery she herself had reported. Thus, Robbins points out that although obstruction, false statement and perjury share many features in common, only the latter cannot be prosecuted if material information has been omitted.

Robbins also discusses another example in which a clever individual manages to avoid prosecution for perjury by using language artfully, in a manner that would make Judge Kavanaugh proud. In United States v. Eddy[9] the defendant was asked under oath if he had claimed to have an official medical degree and he answered no. Here is the relevant piece of dialog:

(5) Q1: Are you the same Terrance Alan Eddy that on or about March 20, 1981, contacted the Navy Medical Programs Recruiter for the Navy Recruiting District of Jacksonville, Florida?
A1: Yes, sir.
Q2: Claiming to be a doctor graduated from the Ohio State University School of Medicine?
A2: No, sir.

[5] https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/clintondep031398.htm (accessed 27 June 2023).

[6] No. H001333. Court of Appeals of California, Sixth Appellate District. February 2, 1987.

[7] United States v. Larranaga 787 F.2d 489, 498 (10th circuit 1986).

[8] United States v. Williams 552 F.2d 226,229 (8th circuit).

[9] United States v. Eddy 737 F.2d 564, 567–69 (6th circuit).

Q3: And expressing a desire to join the Navy as a doctor?
A3: No, sir.
Q4: And as proof or as part of your personal history submitted a diploma from the Ohio State University College of Medicine?
A4: No, sir.
Q5: And official college transcript?
A5: No.

This was a lie, Eddy had submitted a medical degree and college transcript as part of his application to join the Navy; but he argued that since these documents were forged it was truthful to say that he had not claimed to have submitted an official degree. Here there was a conflict between the clear contextual understanding of "official" (a document that is presented as proof of a credential) and the defendant's subjective understanding, (which meant something like "a document that has been emitted by an authorized officer.") The sixth court of appeals explicitly takes the Bronston holding as precedent to argue that the prosecution charge cannot stand: the defendant's answer was literally true, within his own understanding of the word "official." Robbins claims that his proposal for a statute of perjury (2) would cover this case and allow for the prosecution of the defendant. Robbins (2019: 286) goes on to argue that

> [b]ecause the Bronston Court broadly included all unresponsive answers within the literal truth defence without addressing the different types of unresponsive answers, it created a loophole for witnesses, allowing them to give unresponsive, but literally true answers and evade perjury.

His reformulation of perjury in (2) would cover this loophole because it would allow prosecution of Eddy (and maybe Clinton, for that matter) on the basis of the fact that they omitted material information that the questioners were seeking to elicit, and the questions were unambiguous.

Additionally, Robbins argues, his expansion of the perjury statute would not revolutionize the conception of perjury. The main effect would be that juries and judges could look at a statement and consider the speaker's intent in light of the context (recall that the Bronston's decision wanted to avoid guessing what goes on in a witness's mind, which is what the lower courts had done). The literal truth defense would still apply, in cases in which the questions were poorly formulated, or when the witness misunderstood the question. Juries could look at the objective meaning of a word, could consider if the witness understood it and whether the defendant chose a different meaning in order to mislead.

Consider now the Larranaga and Williams cases again. As mentioned, the defendant in the Larranaga case hid from a grand jury documents that showed that a material person had attended a series of meetings and he was charged with obstruction of justice. Robbins invites us to consider a hypothetical situation, I will call it Hypothetical Larranaga. He argues that if the defendant had been asked, "How many people attended this meeting?" and he had given a lower number than the actual number, he should be charged with perjury by omission. Likewise, if he was asked to give the names of people

attending the meeting and gave the names of some but not all attendees, he should be charged with perjury. Robbins seems to claim that the Bronston decision created a precedent that would let this hypothetical defendant go scot-free.

As for the Williams case, recall that the defendant had not mentioned that she knew the perpetrator when she reported a crime and was consequently charged with obstruction of justice. Robbins invites us to imagine a situation in which a witness hides similar pertinent information under oath – call it Hypothetical Williams. Such a witness should be charged for perjury by omission, according to Robbins.

We will return to Eddy, Hypothetical Larranaga and Hypothetical Williams, as well as the Clinton and Kavanaugh cases in section 6. Before we discuss these cases, we need to clarify what 'misleading' and 'omission' are.

4. What is Misleading?

Robbins' (2) suggests that we add misleading statements to the scope of the perjury statute. However, he does not define what 'misleading' means or what properties a misleading statement is meant to have, and this makes his proposal hard to evaluate. Fortunately, there is a rich literature on the distinction between lying and misleading, some of which can be found in the references section (see also Fallis (2018) for a general overview). I follow their lead in this section.

The literature on deceptive and misleading speech takes as their starting point the work of the philosopher Paul Grice (1975) and his distinction between 'what is said' and 'what is implicated' linked by the crucial notion of implicature. An implicature is a plausible – not necessarily logical – inference that one can draw from an assertion. This inference is based on what he called the Cooperative Principle, which regulates our interpretation of speech acts; the Cooperative Principle claims that in every speech act we expect that our interlocutor cooperates with us and provides us with information that is true, relevant, and sufficient (but not excessive). The Cooperative Principle can be articulated by a series of maxims, of which I select two as most relevant for our purposes. The Maxim of Relation enjoins the speaker to be relevant to the hearer. The Maxim of Quantity tells us not to say less than is required (and not to say more than is required, although this second clause is not relevant for our purposes). Here are some examples of how the maxims and the implicatures work:

(6) Chris: Are you coming to the party?
Sam: I have work to do.

(7) Chris: Did you buy the milk?
Sam: I'm going to the store now.

(8) Chris: How did the exam go?
Sam: Some students got an A.

(9) Chris: I ate three of your cupcakes.
Sam: There are five cupcakes missing.

In (6), Sam has not answered Chris' question – she has not said yes or no –, thus violating the Maxim of Relation; in legalese, we would say that Sam's answer is unresponsive. However, Chris can easily infer that Sam is not planning on going to the party because partying and working are incompatible activities. We can see that a violation of Relation triggers the hearer's implicatures because without these implicatures Sam's answer is not understandable.

In (7), Sam again has not answered the question and consequently has violated Relation, but Chris can infer that the question was answered indirectly: Sam has not bought the milk, but he is about to do so.

In (8) Chris will probably conclude that not all the students got an A. This is not a logical inference: if all the students had indeed gotten an A, Sam's answer in (8) would be a logically true statement. The implicature that in fact not all the students got an A is triggered by the assumption that if it were the case that all students got an A, Sam would simply have said, "all the students got an A," which is more informative than (8). This is a classic example of how the Maxim of Quantity operates: a speaker is expected to provide sufficient information and avoid providing too little information.

(9) also exemplifies a violation of Quantity, at least as understood in Grice's work.[10] If Chris ate five cupcakes, then it is logically true that she ate three. Thus, Chris' statement is true although misleading because she knows that Sam will understand Chris' statement as meaning "I ate exactly three cupcakes."

It is perfectly possible that one can utter a true statement that leads the interlocutor to a false implicature. In (6), it may be true that Sam has work to do but he may have planned to go to the party afterwards. In this situation, we may say that Sam's answer is misleading since it has led Chris to the wrong implicature. In this scenario, we may even say that Sam misled Chris intentionally when he uttered (6) if he planned to go to the party all along. In (7), Sam may indeed be going to the store but maybe he has no intention to buy any milk, thus leading Chris to making the wrong inference. Finally, in (8) it might be the case that all the students got an A after all, and Sam is just toying with Chris; in (9) it is possible (maybe likely) that Chris ate five cupcakes.

Green (2001) and Saul (2012) (among others) argue that lying is about the literal content of one's statement; misleading is about the implicatures that we derive from it; this is approximately the consensus opinion (with the notable exceptions of Dynel (2020) and Meibauer (2005, 2014), who argue that falsely misleading is a form of lying). Green fur-

[10] Contemporary understanding on the interpretation of numbers has shifted substantially and some scholars do not regard Sam's inference that Chris is claiming that she ate exactly three cupcakes as implicatures. See Spector (2013) for discussion. In the article I will continue to talk about this inference as "number implicatures".

ther argues that the distinction is both conceptual and moral: lying is morally more reprehensible than misleading, as the latter requires some participation of the hearer – this is a position that has a long tradition in the history of philosophy, as can be extracted from the writings of Augustine of Hippo and Immanuel Kant, among many others (see Michaelson & Stokke (2018), Fallis (2018: 27); see also Saul (2012) for a contrary opinion). Green and Kluger (2012: 48–52) study the responses of naïve subjects to lying and misleading statements with respect to their blameworthiness. They find a significant difference (6.47 versus 5.39 in a 7-point scale of "blameworthiness"), which confirms the traditional view that lying is worse morally than misleading. Additionally, Wiegmann and Engelmann (2022) show that experimental subjects prefer misleading to lying, as there seems to be less responsibility involved in the former. Finally, Green (2001) goes on to argue that perjury is lying in a judicial context, while misleading with a true statement is not lying and therefore not perjury.

Let's adopt the notion that a misleading statement is a true statement that leads the hearer to draw a false implicature. It is usually taken that Sam Bronston's answer is a violation of Relation (Tiersma 1990, Solan & Tiersma 2005), since he does not answer the question; moreover, his answer is misleading since it led his audience to reach a mistaken conclusion. Quite possibly, he intended to mislead his audience. We could say that the Bronston holding forbids a prosecution for perjury when Relation has been violated triggering a false implicature. However, foonote 3 suggests that perjury can be prosecuted when other maxims are violated (or at least when Quantity is violated), as long as the answer appears to be fully responsive.

5. What is Omission?

Robbins' (2019) proposal suggests that we consider "incomplete statements" to be perjurious, as well as using books or other materials that contain "false material declaration or omission." In his abstract and discussion, he uses terms like "withholding information," "omission" and "evasive (answer)" as if their meaning were obvious and/or synonymous. However, these and other terms (such as: "concealment," "reticence," "half-truths," "palters") have been debated in the literature – they seem to have partially overlapping meanings but there are some differences (see Dynel (2020) for useful discussion). The philosophically inclined reader may consider that all of them be regarded as violations of Quantity, as in Dynel (2020). Let's dwell a little deeper into this semantic field.

Omitting information is not necessarily deceptive. Whenever we speak, we always make a selection of what we want to say, and this qualifies as omission. When Pat talks to his wife on the phone while she is travelling abroad, he may omit mentioning that he has a hole in his sock and he needs to do the laundry because he thinks these facts are not interesting to Pat's wife. But Pat's wife does not think that she has been deceived.

A more useful term to discuss perjury is "concealment," which can be defined as withholding information with the purpose of deceiving someone.[11] I will use this term in the following except when quoting Robbins' words or to use his expression "perjury by omission."

In their landmark study, Chisholm and Feehan (1977) point out that when omitting information, you allow your interlocutor to acquire or maintain a false belief or lose a true belief. In order to cause your interlocutor to develop a new false belief it is necessary to perform an act of commission – you need to actually say or do something. Moreover, Chisholm and Feehan also make a distinction between positive deception and negative deception. If a speaker withholds information, she may keep her interlocutor ignorant about some fact (negative deception) or she may allow the interlocutor to acquire or maintain a false belief (positive deception).

I think the acts of lying, positive deception via commission (=misleading), positive deception via omission and negative deception via omission stand in a scale that maps onto a moral scale. Suppose a politician's spokesperson is in a press conference while a case of corruption that may involve his boss is a hot topic. The spokesperson knows that his boss is part of the conspiracy but sees his job as trying to hide it as best as possible. At this point we can imagine four possible scenarios. If, in response to a direct question, he denies any involvement, he will have lied and caused (or tried to cause) a false belief in the press and public. If the spokesperson answers the same question by saying that his boss has always been honorable, he is being misleading. If the spokesperson senses that the press are presupposing the politician's innocence and he manages the press conference in a manner that does nothing to dispel the wrong presupposition (therefore, indirectly, feeding it), he did not lie but he did bring about a positive deception via omission by allowing the press to maintain a wrong belief. Finally, if he did not reveal some crucial fact about his boss that the press and the public should know about, and was not asked about it, he engaged in negative deception.

Transposing the previous scenario to a legal context, we could ask if the spokesperson has committed "perjury by omission." I would say that negative deception via omission can never be grounds for perjury even with a statute like (2): If a witness is never asked about something very relevant to the case at hand, she has no legal obligation to volunteer information. As for the two species of positive deception, I admit that I am not at all certain. Robbins (2019) does not discuss the various forms of omission or concealment and therefore I do not have a clear idea as to what the scope of his (2) should be. This uncertainty shows up again in sections 7 and 9, where we see that naïve subjects have a hard time deciding if misleading statements are equivalent to lies.

[11] The word *conceal* can also be used to physically hide something. I will ignore this usage in this article.

6. Loopholes to the Perjury Statute?

Keeping the framework of sections 4 and 5 in mind, we can now go back to the Eddy case as well as Clinton's deposition and Kavanaugh's answers during the senate hearings. The question I would like to ask in this section is whether it is really the case that the Bronston holding creates the loopholes that Robbins claims it does. Notice that both Eddy and Clinton provided fully responsive answers – both witnesses provided clear negative answers to the questions – and therefore the hedge proposed in footnote 3 would apply: Recall that footnote 3 instructs us that the Bronston decision only applies to unresponsive answers that an attentive questioner would detect as evasive, not to responsive answers that provide no clues for the questioner that some information is being hidden.

Focusing on the Eddy case, recall that the footnote 3 of the Bronston holding says that the literal truth of a statement must be resolved in the context in which it is given: "Whether an answer is true must be determined with reference to the question it purports to answer, not in isolation."

In Eddy, the prosecutor asked if the defendant had submitted a diploma and official transcripts and the defendant answered "no" – A truthful answer, he claimed, since the documents were forged. The context makes it clear what "official" means and what the question is aimed at: the prosecutor asked if the defendant submitted documents that were meant to stand for a diploma and an official transcript from a medical school. It seems to me that the perjury charge should have been sustained by the court of appeals within the parameters set by the Bronston case. If this is the case, then broadening the scope of perjury as in (2) seems unnecessary.

Clinton gave his answer according to the definition of "sexual relations" provided by the Paula Jones team; therefore, he had grounds to assume that when the questioner asked him if he had "sexual relations" with Monica Lewinsky, the questioner was using his own definition of "sexual relations." I don't see how Bill Clinton could be prosecuted, or even how his answer could be regarded as misleading in a legal context.

Notice that neither the Eddy nor the Clinton cases involve misleading statements, as defined in the philosophical literature, since they did not trigger any false implicatures (either they are false statements on their face, or they are not.) If these cases are to be regarded as misleading, then we need a new, more encompassing, definition of misleading.

Take now Kavanaugh's answer that he didn't "black out," avoiding answering whether he had "passed out." It looks a little more like the Bronston example, to the extent that he provided an unresponsive answer. Most of Kavanaugh's answers in the hearings fall in the same category. A good questioner should have noticed the deflection and probe deeper. Consequently, it seems to me that this case falls within the purview of the Bronston holding. Could someone be charged for avoiding answering the question? Statute (2) proposes that omitting information can be the basis for a perjury charge with

the consequence that an unresponsive answer can be regarded as omitting information. However, I think that even under a perjury statute like (2) charging someone for perjury on the basis of a semantic difference between "black out" and "pass out" would be difficult. The defendant could easily argue that he was not aware of the difference or that he misheard the prosecutor. The other evasive answers provided by Kavanaugh are equally slippery.

It looks to me then that Eddy could have been charged with perjury with the current perjury statute while both Clinton and Kavanaugh would not, with either (1) or (2). Having said this, I would like to highlight that Robbins does not claim that (2) would allow the prosecution of Clinton or Kavanaugh. His point is rather that if the perjury statute includes the notion of "misleading answer," witnesses and defendants would be strongly motivated to provide precise accurate answers. As it is, Robbins claims it almost encourages chicanery.

7. Misleading by Omission (Concealment)

Consider now the hypothetical cases presented by Robbins. In Hypothetical Larranaga a witness is asked about the number of people and the names of these people who were present at a meeting and the witness gives a number inferior to the right one. It seems clear that the Bronston holding would not protect this hypothetical defendant if we take footnote 3 under consideration once again.

> The District Court gave the following example "as an illustration only":
>
> [I]f it is material to ascertain how many times a person has entered a store on a given day and that person responds to such a question by saying five times when in fact he knows that he entered the store 50 times that day, that person may be guilty of perjury even though it is technically true that he entered the store five times. The illustration given by the District Court is hardly comparable to petitioner's answer; the answer "five times" is responsive to the hypothetical question and contains nothing to alert the questioner that he may be sidetracked. See infra, at 358. Moreover, it is very doubtful that an answer which, in response to a specific quantitative inquiry, baldly understates a numerical fact can be described as even "technically true."

In this footnote, the Supreme Court discusses a specific case of misleading using a number that is smaller than the actual number and concludes that it is not comparable to the Bronston case because the answer is responsive. Since it is not comparable, we may conclude that providing a smaller number than the true number may make one liable for perjury. Thus, (1) and Bronston would allow for the prosecution of Hypothetical Larranaga and expanding the perjury statute as in (2) is unnecessary.

The Hypothetical Williams case seems to be the only one that (2) captures while (1), in combination with the Bronston holding, probably does not. In this hypothetical case,

the witness omits a very material piece of information, namely, that she knew the robber, and the questioner would probably not be able to realize the occultation involved. However, our reasoning in section 5 leads us to conclude that simply not mentioning something – negative deception via omission – can hardly be considered a lie, or even misleading. Let's then focus on positive deception. The omission of relevant information has to be placed in the relevant context in order for it to be regarded as truly misleading. In a cross-examination, the context is provided by the prosecutor's questions. Assume that a witness answers "no" or "nothing" to either of the questions in (10). Which ones would qualify as perjurious?

(10) a. Do you know the robber?
b. Is there anything else you can say about the robber?
c. What else can you say about the robbery?
d. Is there anything else pertaining to this case that you'd like to tell us?

A negative answer to (10a) would certainly lead to perjury conviction under the literal truth doctrine in (1). A negative answer to (10b–d) would seem to include positive deception as defined above because it allows the prosecutor to maintain the wrong assumption that the victim did not know the robber. The definition of perjury in (2) would capture all of them because a negative answer to all of (10b–d) would conceal material information. However, the answers in (10) seem to be in a cline from more to less "a lie" as the question becomes less specific and more general. I suspect that a negative answer to (10b) would lead most people to take it to be perjurious but a negative answer to (10c) would probably make us hesitate because the subject matter is the robbery rather than the robber. In (10d), the defendant could argue that her answer was truthful because what it meant was that she did not want to say that she knew the robber. It seems that an important aspect of whether an act of concealment is perjurious depends on the question under discussion, which adds an additional complexity to our decisions. (For detailed discussions of Question Under Discussion and discourse structure, see Roberts (2012), Stokke (2018)).

Thus, we seem to be at an impasse. The Hypothetical Williams case would seem to truly call for a rewriting of the perjury statute as suggested by Robbins. But this might not be an optimal result if the intuition that there is a cline in culpability is real and shared by most people. The law needs categorical rules, not fuzzy ones.

8. How do you Prove that a Witness Tried to Mislead a Jury?

Let's mull over the complications that might arise if we incorporate (2) to our legal system to embrace a concealment of material information so we can capture Hypothetical

Williams. The difficulty arises because the inferences that one must make are considerably more complex than in a literal truth framework. A definition of perjury like (1) only requires that we inspect the answer provided by the witness and that we ascertain what the witness believed at the time she answered. If it is proved that the witness asserted something that she did not believe, then we can conclude the witness purposefully said something material and believed-false. However, finding out if a witness was misleading as required by (2) requires different considerations that arise out of the definition of mislead: you need to show that the witness wants to lead the jury to a wrong conclusion in order to affect their decision because that is what "misleading" means.

Consider the following hypothetical scenario. The prosecutor asks a witness: "When you walked into the room, what did you see?" The witness answers: "The sculpture was smashed to smithereens." The witness does not mention that there was a hammer in the room, which may be the instrument of the crime. Could the witness be prosecuted for perjury? There are at least four factors to consider: (i) is the presence of the hammer material for the case? (ii) If the answer to (i) is positive, we have a new question: is the witness aware of the materiality of the hammer? (iii) If the answer to (ii) is positive, yet another question must be answered: did the witness omit mentioning the hammer purposefully (or did she forget or otherwise neglect to mention it)? (iv) If the answer to (iii) is that the defendant hid information purposefully, we may ask one final question: did she do it because she wanted to protect someone (maybe herself) or something and she thought she would not alter the result of the trial or did she do it because she wanted to alter the result of the trial?

If we follow Robbins' lead and we incorporate omission (concealment) and misleading in our perjury statute, all four of these questions need to be asked and answered positively: we need to find out if the witness was aware that she was omitting an item that was material to the case and she has to do it with the purpose of obstructing justice: only if all of this holds can we consider that someone misled and therefore could be prosecuted for perjury. The hardest questions, of course, are the third and the fourth ones, which force us to make assumptions regarding someone's state of mind and goals – the jury must be able to infer the defendant's intent to mislead (Robbins 2018: 287). And I think the answer to these questions would be material for the resolution of the case: How do you prove that someone hid some information with the purpose of obstructing justice? Robbins does not deal with this question in any detail in either of the two hypothetical cases, Hypothetical Larranaga and Hypothetical Williams that he discusses. We can conjecture that question (iii) would be answered positively in these two cases, since it would be surprising if the defendants forgot to mention the relevant facts. However, it seems to me that in the iconoclastic example that I suggest, the answer to (iv) could be extremely difficult to ascertain.

Allow me to dwell some more on Robbins' examples. If we take for granted that the answer to (iii) is positive, how do we know why the victim chose not to mention that she knew the robber? We could imagine a scenario in which Hypothetical Williams was

afraid to incriminate the robber because of a possible retaliation and thought the police would catch him anyway given all the evidence. Therefore, she thought that not mentioning the robber's name would not obstruct justice and it was simply safer not to mention it. Consequently, she did not intend to mislead. Misleading contrasts substantially with providing a false statement. If a questioner asks a witness "Did you know the robber?" and the witness answers "No", this is perjury, regardless of other circumstances, because all that we require is that she believes false what she is saying. However, if she didn't mention it and was never asked directly, then an intent to mislead must be proven.

Is it worth our while to expand the perjury statute to include omissions? Notice that the cases that Robbins presents are hypothetical, built on real obstruction of justice cases. There does not seem to be real cases, despite the fact that the article is backed by broad and meticulous research. This suggests that maybe there aren't many cases to be found and the usefulness of revising the perjury statute could be questioned.

9. The Consistency of Implicatures

A cornerstone of Robbins' argument to expand the scope of the perjury statute is that juries will be able to ascertain if a false implicature deserves to be considered perjury. That is, he is proposing that we blur the boundaries between making a false statement and making a misleading statement so that perjury can stand astride both. The question that arises is whether this confidence in ordinary citizens is well placed. In order for this to be the case, we need to find out whether the following two assumptions hold true:

(i) naïve subjects are able to categorize false statements and false implicatures confidently and systematically together within the same class. We may call this class of propositions "lie." If so, then we can confidently transpose the category "lie" into the legal realm as "perjury." However, if subjects hesitate whether a false implicature belongs in the class "lie" together with a false statement, providing inconsistent judgments to similar cases, then we should hesitate to assume that they are going to be able to judge if a false implicature is perjury.

(ii) naïve subjects are unanimous in attributing an implicature to a particular statement. If some subjects draw the implicature while others suspend it, then we should hesitate to prosecute somebody of perjury on the basis of a misleading implicature that possibly not all members of the jury had drawn.

There is an abundance of recent empirical work on lies and implicatures that we can exploit. The results are not encouraging for Robbins' proposals. The answer to (i) is that naïve subjects are not consistent in placing false statements and false implicatures in the same category. The answer to (ii) is that not all subjects draw an implicature where we would expect them to do so, and a factor such as the trustworthiness of the witness af-

fects how likely subjects are to draw an implicature. These two results put together suggest that we need to think carefully of the possible consequences of enlarging the scope of perjury to embrace misleading statements.

Let's start with (i). A rich body of empirical work has investigated whether implicated misleading propositions are regarded as lies by naïve native speakers of English (Antomo, Malin, Müller, Paul & Thalman 2018, Weissman 2019, Weissman & Terkourafi 2018, Wiegmann, Rutschmann & Willemsen 2017, Wiegmann & Meibauer 2019, Wiegmann, Willemsen & Meibauer 2021.) The empirical investigation of lying is an ongoing research program and, as such, the different studies obtain sometimes contradictory results. But some threads are clear.

One clear conclusion of the empirical work is that false number implicatures – the ones exemplified in (8) – are regarded as lies (Weissman & Terkourafi 2018). In this article, they show that if you eat five of your roommate's cupcakes and you only own up to three, experimental subjects will agree you lie. On a 7-point likert "lie" scale, false number implicatures received a score of 6.5 – while even straight false statements got a lower score of 6.18.

For other implicatures, the results are less conclusive. Summarizing all the work would take much space, so I discuss here only two representative results. Antomo et al. (2018) report that false implicatures, including stimuli similar to the utterance "some pupils failed" (falsely implicating that "not all pupils failed"), receive an average score of 2.22/2.61 in a 5-point "truthfulness" scale.[12] However, actual false statements received a "truthfulness" score of 1.11. The difference is significant and suggests that at least some naïve subjects hesitate to call a misleading implicature a lie. Likewise, Weissman and Terkourafi (2018) report that the utterance "some co-workers got drunk," falsely implicating that "not all co-workers got drunk," gets a lie score of 3.1, on a 7-point scale (while straight false statements got an average score of 6.18, as mentioned above). Generally speaking, we find that false implicatures are regarded as "almost lies" but are not regarded as "lies" the way false statements are.[13]

To conclude, it seems that naïve subjects regard false implicatures based on numbers in the same class as false statements. Interestingly, the hypothetical example that the Supreme Court, in footnote 3's decision to Bronston, used is also based on the number implicature. This result supports the idea that false implicatures based on numbers could lead to a prosecution for perjury.[14] However, other types of false implicatures are not classified in the same category as false statements and therefore expanding perjury to embrace them might be difficult to do consistently.

[12] The score 2.22 was for generalized conversational implicatures while 2.61 is for particularized conversational implicatures. For the purposes of this article, we do not need to dwell on this distinction.

[13] As pointed out by an anonymous reviewer, even truthful implicatures are subject to contextual factors. See Tsvilodub, van Tiel and Franke (2023), which includes a discussion of relevant studies.

[14] Incidentally, this result may support analyses that treat numbers separate from quantity implicatures, see fn 10.

Point (ii) is even more fundamental: if naïve subjects do not agree on attributing an implicature to a statement, then perjury prosecutions based on false implicatures are extremely hazardous. This point has been researched by Skoczeń (2022) with a complex experimental design that here I will simplify to highlight the aspects that are relevant for our purposes. An interesting aspect of her design is that some of her subjects were provided the stimuli framed in a business context while others were told they were in a courtroom. This way she could find out if subjects were more or less likely to draw implicatures in a courtroom as in a regular life situation (recall this was one of the concerns that the Supreme Court had.)

In the experiment, different groups of subjects read that an accountant had said "some of the invoices are unpaid" in different situations:

> [neutral] Imagine a conversation at the company headquarters. The main accountant of the company says in reply to the boss' question during the conversation at the company's headquarters: "Some of the invoices are unpaid."
>
> [courtroom no explicit motive] Imagine a courtroom hearing. The main accountant of the company says in reply to the judge's question during the courtroom hearing: "Some of the invoices are unpaid."

At this point, subjects were asked: "On a scale from 0 (completely unlikely) to 100 (certain) how likely is it that all of the invoices are unpaid?" This question tested if the subjects had drawn the implicature 'some ~ not all'. Skoczeń found that the probability that a subject would have drawn the implicature was between 53 % and 54 %, and there was no significant difference between the business and the courtroom context.

The crucial questions, however, were the following. First, subjects were asked about the communicative intentions of the accountant: When uttering "Some of the invoices are unpaid," the main accountant wanted to communicate that: (a) only some but not all of the invoices are unpaid; (b) at least some and maybe all of the invoices are unpaid. The results were as follows:

Table 1: "Some of the invoices are unpaid."

Result	Maybe all	Some ~ not all
Neutral	34	66
Courtroom	31	69

As you can see, about 2/3rd of the subjects took the accountant to mean "some but not all". The rest abstained from drawing the implicature – thus acting as an alert or even suspicious hearer.

At this point then the subjects were told that, in fact, it turned out that all invoices were unpaid. The final question then was: Did the accountant lie (on a scale of 1 to 7)? Those who had drawn the implicature were very likely to say yes while those who did not were on the fence:

Table 2: "Did the accountant lie?"

Result	Maybe all	Some ~ not all
Neutral	3.95	5.31
Courtroom	3.67	5.31

To conclude: Even when dealing with a classic implicature, it turns out that not all subjects draw it in a situation in which you would expect the implicature. Those who draw it are very likely to take the false implicature to be a lie.

In Skoczeń's study there is little difference between the courtroom context and the business context, which seems to imply that subjects – at least in an experimental condition – do not tend to be more suspicious of possibly misleading implicatures in a courtroom context. However, Weissman (2022) does find that subjects tend to interpret witnesses' statements in the courtroom more literally than in casual contexts, avoiding available implicatures in courtroom contexts. If Weissman's results are confirmed, we will have some support for Robbins' proposal, which is based on the idea that lay juries would be alert to detect implicatures.

There is another surprising finding in Skoczeń's article. Some of her subjects were exposed to a third context in which the accountant had a motivation to mislead:

> [courtroom with explicit motive] Imagine a courtroom hearing. The main accountant of the company undergoing the bankruptcy proceedings has interest in claiming that there is a paid invoice because this increases his chances of receiving substantial remuneration before the company is declared bankrupt. The main accountant of the company says in reply to the judge's question during the courtroom hearing: "Some of the invoices are unpaid."

Providing this motivation made a significant difference among subjects' responses. They were significantly more likely to suspend the 'some ~ not all' implicature (63 %) although they thought the accountant meant for this audience to draw the implicature (65 %) – that is, the subjects became very suspicious, thinking that the accountant would try to hide the actual state of affairs with a misleading true statement. Those who suspended the implicature were significantly more likely to find the accountant to be a liar if it turned out that all invoices were unpaid (4.52%). Wiegmann (2022) also shows that when the intent to mislead is made explicit to the experiment participants, the latter are more likely to judge a misleading implicature as a lie.

What this means is that subjects are more likely to think someone tried to mislead them if she had a motive to do so. This leads to a chilly consequence: defendants may be found guilty of perjury on the basis of false implicatures that they did not intend.

These empirical findings suggest that expanding the scope of the perjury statute to incorporate truthful but misleading statements presents considerable challenges.

10. Conclusions

The federal perjury statute says that perjury involves stating something that you believe is false. The Supreme Court's Bronston decision affirmed that an unresponsive answer cannot be the basis for a perjury prosecution if it is truthful. In a footnote, the Supreme Court seems to suggest that a false numerical implicature that looks like a responsive answer could be the basis for a perjury prosecution.

Robbins (2019) proposes to change the federal statute to include misleading statements and omissions. In this article, I have pointed out that expanding the statute in this direction would raise some difficulties: (i) In the absence of a direct question, extracting culpability out of silence depends on the question under discussion in a manner that seems to be gradient rather than categorical; (ii) showing that a certain omission amounts to intentional misleading of a material issue in order to affect the work of justice is extremely difficult; (iii) empirical work shows that naïve subjects do not systematically categorize false implicatures as lies at the same rate that they do false statements; (iv) empirical work shows that naïve subjects do not always draw available implicatures, and whether they do or not affects whether they judge some implicature a lie or not; (v) in judging a false implicature a lie, naïve subjects are influenced by the perceived trustworthiness of the defendant/witness.

On the other hand, one piece of research (Weissman & Terkourafi 2018) shows that misleading numerical implicatures are taken to be lies, which provides support for the idea of including them in a perjury statute. But for other misleading implicatures the results are fuzzy, and we need more research before we undertake a risky change.

A final consideration is the moral difference found by scholars and naïve subjects between causing someone to hold a false belief and allowing someone to hold a false belief (see in particular the results in Green & Tugler 2012). If there is a moral difference, doling the same punishment for both would seem to be unfair.

Given all these difficulties, should we expand the scope of the perjury statute? At least, the questions raised in this article should be sorted out before this is done. However, the problem that sophisticated witnesses may play by the rules while hiding their guilt with evasive answers or false implicatures remains. I would like to suggest that, instead of approaching this problem by broadening perjury, it could be approached by focusing on legal education, in particular training lawyers in the technical aspects of semantic/pragmatic phenomena like 'some ~ not all' (and other implicature scales), to be alert to obvious grammatical features like the verbal tense, and to be alert to evasive answers that utilize lexical ambiguity, violations of Relation and other phenomena. Rather than expanding the scope of the perjury statute, the goal should be to strengthen lawyers' questioning and make it more precise.

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