

## SYSTEMIC LYING

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### ABSTRACT

*This Article offers the foundational account of systemic lying from a definitional and theoretical perspective. Systemic lying involves the cooperation of multiple actors in the legal system who lie or violate their oaths across cases for a consistent reason that is linked to their conception of justice. It becomes a functioning mechanism within the legal system and changes the operation of the law as written. By identifying systemic lying, this Article challenges the assumption that all lying in the legal system is the same. It argues that systemic lying poses a particular threat to the legal system. This means that we should know how to identify it and then try to address it once we see it happening. Accordingly, this Article presents a guide to identifying a set of symptoms that are the hallmarks of systemic lying and posits a unitary cause, although not a one-size-fits-all solution. Through a series of case studies, it shows that systemic lying emerges as a saving mechanism that mediates between culture and law. Rather than allow the law to take its course and deliver what would be perceived as unjust outcomes, participants lie and preserve the façade of a system that delivers results consonant with popular moral intuitions. Systemic lying is both persistent and powerful because it achieves a type of licitness that individual lies or underground deception lack. At the same time, it poses a unique threat to*

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*the legitimacy of the system by signifying that truth is not paramount in the courtroom.*

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## INTRODUCTION

An English jury finds that the theft of a pair of pants constitutes manslaughter. A wife accuses her husband of adultery to obtain a divorce, and he goes along with it, even though they both know this is a lie. A southern jury acquits a white man of violence against a black man, despite clear evidence that the man is guilty. A police officer says he saw a man holding drugs in plain view, even though the drugs were concealed and were found in a search without probable cause. What do all these cases have in common? They are all examples of “systemic lies”: lies that participants in the legal system tell repeatedly, knowing they are lies and with the complicity of all participants, for what they see as a higher purpose.

This Article addresses two questions: Do these kinds of lies in the courtroom ever have efficacy? Can a legal system that relies upon truth telling for both procedural and substantive fairness tolerate systemic lying? These questions may seem surprising in the context of the American legal system, which offers the ideal of justice through two related guarantees—procedural fairness and outcome accuracy—that take truth telling by actors within the system for granted.<sup>1</sup> Yet, these questions deserve attention because over a long span of history, our legal system has experienced repeated bouts of what I will call “systemic lying.” These episodes are not historical relics. By many accounts, lying under oath by law enforcement personnel occurs as a matter of routine and stands as a modern and ongoing example of systemic lying.<sup>2</sup>

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1. See, e.g., *Carey v. Phipus*, 435 U.S. 247, 262 (1978) (“[A] purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests.”); see also Laurence H. Tribe, *Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice?*, 92 HARV. L. REV. 864, 871-72 (1979) (discussing whether the Court’s Fourteenth Amendment jurisprudence “reflects the value of assuring fair treatment as an individual and not simply the value of assuring correct outcomes”). The problem of how to enforce this degree of truthfulness has proved central to the design of legal systems over the centuries. See, e.g., GEORGE NEILSON, TRIAL BY COMBAT 4-6 (London, Williams & Norgate 1890) (observing that “[a] means of ensuring the truth in human testimony has been a thing desired in every age” and describing historical truth-enforcing mechanisms ranging from various forms of judicial dueling to extremely elaborate oaths).

2. See *infra* Part I.D.

This Article examines the phenomenon of systemic lying and offers a two-part answer to the questions posed above. Systemic lying in the legal system is inevitable and seemingly beneficial at times. It is inevitable because disjunctions between the law and social beliefs will arise that, when severe enough, provoke systemic lying as a way to recalibrate the system when formal change is not forthcoming. Thus, systemic lying alerts us to the existence of a strong and collective dissonance between moral beliefs and legal prescriptions. At the same time, systemic lying is not a desirable mechanism for reducing that dissonance. Although it may at times accomplish desirable ends, systemic lying is never a positive state for the legal system for two main reasons. First, it undermines the premise that truth is a means of achieving accurate and fair outcomes through law. Second, the open disregard of procedural checks intended to secure truth in the courtroom undermines the appearance of procedural fairness, which is an important key to legitimacy and obedience to the law.

Systemic lying, as I term it, has three key characteristics. First, unlike the act of one jury, one judge, one prosecutor, or one witness, it involves the cooperation of multiple actors within the system. Second, it must be done repeatedly and for a reason that is linked to the participants' conception of justice.<sup>3</sup> In other words, systemic lying requires that diverse actors in the system apply a particular principle that guides their deception across many cases. And finally, in a corollary of the first two requirements, systemic lying must be accepted within the system to the degree that it becomes an open secret. When these elements are met, lying may fairly be described as systemic because it takes on the characteristic of a functioning mechanism within the system rather than an inevitable byproduct of the human tendency to lie.<sup>4</sup> Precisely because lies are systemic,

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3. Ronald Dworkin refers to this type of conviction as the "popular morality" of a community," or the "set of opinions about justice and other political and personal virtues that are held as matters of personal conviction by most of the members of that community." RONALD DWORKIN, *LAW'S EMPIRE* 97 (1986).

4. See Anita L. Allen, *Lying to Protect Privacy*, 44 *VILL. L. REV.* 161, 165-66 (1999) (describing lying by professionals and "[o]rdinary people who value and practice a high degree of honesty" as a frequent occurrence). See generally TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION* (1995) (describing preference falsification as a particular type of lying occurring frequently around the world in many difficult political and social circumstances, either for reasons of politeness or to curry favor).

in the sense of being widespread, recurring, and told or tolerated by many participants, systemic lying in a legal system that privileges truth telling merits examination.

A subsidiary claim of this Article is that not all lying in the legal system can or should be understood to be the same. As framed here, systemic lying focuses on lies told in the courtroom or in ancillary proceedings, such as depositions, conducted under the formality of the oath. This focus tracks the dichotomy drawn in our system between the standard of truth expected in the courtroom and the standard tolerated beyond its boundaries. This Article uses the term “courtroom” metaphorically to encompass lies told under oath, whether in an actual courtroom or in some other setting in which sworn testimony or statements are given. It is the oath, not the physical space, that determines the boundary. Within the courtroom, under the force of the oath, our system unambiguously rejects material lies; outside that boundary, it is at times friendly to or tolerant of deception.

The American legal system overtly prioritizes truth in the courtroom through enforcement mechanisms such as the oath,<sup>5</sup> the threat of prosecution for perjury and false statement,<sup>6</sup> evidentiary rules allowing for the impeachment of witnesses,<sup>7</sup> and strong norms requiring obedience to and compliance with legal rules.<sup>8</sup> These formal

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Lying in different professions receives frequent press coverage. *See, e.g.*, Sandeep Jauhar, *The Lies that Doctors and Patients Tell*, N.Y. TIMES WELL BLOG (Feb. 20, 2014, 10:21 AM), <http://well.blogs.nytimes.com/2014/02/20/the-lies-that-doctors-and-patients-tell/> [<http://perma.cc/WC4V-RD4M>] (describing deception as a frequent occurrence by physicians when interacting with patients and by patients when interacting with doctors).

5. *See, e.g.*, FED. R. EVID. 603 (“Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness’s conscience.”).

6. *See, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2546 (2012) (“Perjured testimony ‘is at war with justice’ because it can cause a court to render a ‘judgment not resting on truth.’” (quoting *In re Michael*, 326 U.S. 224, 227 (1945))).

7. *See, e.g.*, FED. R. EVID. 608 (“A witness’s credibility may be attacked or supported by testimony about the witness’s reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character.”); *see also* 3 JACK B. WEINSTEIN ET AL., *WEINSTEIN’S EVIDENCE* ¶ 609[02] (1996) (noting that the rationale for allowing criminal defendants to be impeached with prior convictions and bad acts is that those instances of misconduct have a direct bearing on the defendant’s credibility as a witness).

8. *See* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 94-109, 125-34, 146-47, 161-69, 178 (1990) (finding that perceptions of legitimacy are tied to perceptions of procedural fairness and perceptions of legitimacy, in turn, have a significant effect on compliance); Tom R. Tyler,

and informal truth-enforcing devices apply not just to witnesses but to all participants in the system. Jurors swear oaths to uphold the law,<sup>9</sup> attorneys are bound by oaths and codes of ethics requiring truthfulness,<sup>10</sup> and judges and other government actors are bound by their own oaths to uphold the law.<sup>11</sup>

Outside the courtroom, by contrast, our legal system tolerates and sometimes welcomes deception.<sup>12</sup> For instance, unlike European countries, such as Germany, that prohibit lying to the accused during questioning,<sup>13</sup> American courts largely treat deceptive

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*Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U.L. REV. 361, 382 (2001) (“[P]eople’s willingness to trust authorities and to defer to their decisions is rooted in people’s judgments about the fairness of the processes through which those authorities exercise their authority.”).

9. *See, e.g.*, *People v. Hoffler*, 860 N.Y.S.2d 266, 271 (App. Div. 2008) (“The statutory requirement to administer an oath to insure [sic] that prospective jurors truthfully answer the questions posed to them serves as a significant safeguard of a criminal defendant’s fundamental constitutional right to a trial by an impartial jury.”).

10. *See, e.g.*, ALA. CODE § 34-3-15 (2014) (requiring that attorneys swear or affirm that they “will use no falsehood”); N.H. REV. STAT. ANN. § 311:6 (2014) (requiring admitted attorneys to swear or affirm that they “will do no falsehood, nor consent that any be done in the court”); WASH. REV. CODE ANN., ADMISSION TO PRACTICE R. 5 (West 2014) (requiring attorneys to swear an oath in which they vow to represent clients using “only those means consistent with truth and honor” and “never [to] seek to mislead the judge or jury by any artifice or false statement”). The American Bar Association’s Model Rules of Professional Conduct also require “candor toward the tribunal,” prohibiting lawyers from knowingly making “a false statement of fact or law to a tribunal,” offering evidence “that the lawyer knows to be false,” and failing to disclose controlling legal authority, among other things. MODEL RULES OF PROF’L CONDUCT R. 3.3 (2013).

11. For example, federal judges must swear an oath or affirmation before beginning to perform their duties. 28 U.S.C. § 453 (2012) (“I, \_\_\_\_\_, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as \_\_\_\_\_ under the Constitution and laws of the United States. So help me God.”). Judicial clerks and deputies in the federal system must swear the following oath:

I, \_\_\_\_\_, having been appointed \_\_\_\_\_, do solemnly swear (or affirm) that I will truly and faithfully enter and record all orders, decrees, judgments and proceedings of such court, and will faithfully and impartially discharge all other duties of my office according to the best of my abilities and understanding. So help me God.

*Id.* at § 951.

12. Deception is sometimes characterized as distinct from lying in that it focuses on the intent to deceive rather than on the telling of a factual untruth. Many, however, reject that distinction and include the intention to deceive as part of the definition of lying. *See, e.g.*, BERNARD WILLIAMS, *TRUTH & TRUTHFULNESS* (2002).

13. Jacqueline Ross, *Do Rules of Evidence Apply (Only) in the Courtroom? Deceptive Interrogation in the United States and Germany*, 28 OXFORD J. LEGAL STUD. 443, 447 (2008)

interrogation tactics as lawful as long as the defendants have been previously advised of their *Miranda* rights.<sup>14</sup> There are outer boundaries to the ability of law enforcement to use deception in interrogation, but they are fuzzy. For example, New York's highest court recently reversed a conviction based on evidence uncovered through "patently coercive" police lies.<sup>15</sup> Although not officially sanctioned, other forms of deception outside the courtroom have been greeted with a degree of indifference that arguably amounts to the same thing. For example, scholars have argued that the system tolerates prosecutorial deception in the form of suppressing exculpatory evidence by failing to provide a remedy for such conduct.<sup>16</sup>

Systemic lying would be of interest even were it the kind of behavior we would expect to be openly tolerated in the courtroom. Lying of many varieties is often socially transgressive even if not prohibited by any formal stricture, such as a legal or religious imperative.<sup>17</sup> Yet the practice of lying becomes far more problematic if it is formally prohibited by the very system in which it takes place. Thus, this discussion of systemic lying focuses on practices that deviate from the standard of truthfulness that our legal system purports to expect from its various participants.

Because lying is a multifaceted and complex phenomenon, the definition used here requires further clarification. There is an enormous literature, across disciplines, on the general theme of lies and

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(discussing the rules of criminal procedure in Germany).

14. *Illinois v. Perkins*, 496 U.S. 292, 297 (1990) ("Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda's* concerns."); see also *Miranda v. Arizona*, 384 U.S. 436 (1966).

15. *People v. Thomas*, 8 N.E.3d 308 (N.Y. 2014).

16. See, e.g., Beth Brennan & Andrew King-Ries, *A Fall from Grace: United States v. W.R. Grace and the Need for Criminal Discovery Reform*, 20 CORNELL J.L. & PUB. POL'Y 313, 326 (2010) (arguing for criminal discovery reform to remedy problems with prosecutorial disclosure); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 732 (1987) (arguing that the advantage to be gained from prosecutorial deception when weighed against the minimal risks should the deception be uncovered often proves "too much for prosecutors to resist"); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 842-71 (1997) (describing the extent to which prosecutors ignore their disclosure obligations).

17. As Sissela Bok writes, "some level of truthfulness has always been seen as essential to human society, no matter how deficient the observance of other moral principles." SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 18-19 (1978).



truth telling and the ways in which our ideas of truth and expectations for honesty are contingent upon social and cultural context.<sup>18</sup> This Article employs a definition of lying that tracks the legal system's own approach to enforcing truth mandates in the courtroom. By this measure, there are multiple ways an actor may "lie" in the courtroom. The most straightforward of these is by telling a factual untruth when under oath. This tracks the definition of perjury.<sup>19</sup> Yet, the legal system is also concerned with exposing deceptive testimony in the courtroom. Evidentiary rules aim to uncover deception by witnesses by allowing the introduction of prior inconsistent statements,<sup>20</sup> as well as impeachment with convictions for crimes involving "a dishonest act or false statement."<sup>21</sup> Thus, this Article treats deception in court as a form of "lying" whether or not it would qualify under the formal definition of perjury. Finally, intentionally breaking the oaths that constrain jurors, judges, and advocates to be truthful or to carry out their sworn duties truthfully will also be treated as a form of "lying."<sup>22</sup>

This Article is concerned both with exposing systemic lying in our system and with theorizing its presence and function in the law. To

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18. For example, lies are expected in politics. As Hannah Arendt famously wrote, "Truthfulness has never been counted among the political virtues, and lies have always been regarded as justifiable tools in political dealings." HANNAH ARENDT, *Lying in Politics: Reflections on the Pentagon Papers*, in *CRISES OF THE REPUBLIC* 3, 4 (1972). For a small sampling of other influential writing on truth and lying, see, for example, BOK, *supra* note 17; IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary Gregor ed. & trans., 1996) (1797); KURAN, *supra* note 4; WILLIAMS, *supra* note 12; Allen, *supra* note 4, at 165-66; Paul Butler, *When Judges Lie (and When They Should)*, 91 *MINN. L. REV.* 1785, 1792-1805 (2007); and see also Alasdair MacIntyre, *Truthfulness, Lies, and Moral Philosophers: What Can We Learn from Mill and Kant?*, in *THE TANNER LECTURES ON HUMAN VALUES* 307 (1995).

19. See 18 U.S.C. § 1621 (2012) (defining perjury as "willfully subscrib[ing] as true any material matter which [a person] does not believe to be true" when he or she has sworn to testify truthfully).

20. See FED. R. EVID. 612 (providing for the introduction of extrinsic evidence for purposes of impeachment with a prior inconsistent statement); FED. R. EVID. 801(d)(1)(a) (providing that prior inconsistent statements given under oath are not hearsay and may be admitted for their truth).

21. FED. R. EVID. 609(a)(2).

22. See, e.g., *Lawyer's Oath*, STATE BAR MICH., <http://www.michbar.org/generalinfo/lawyersoath.cfm> [<http://perma.cc/4LT5-D8MV>] (last visited Apr. 12, 2015) ("I do solemnly swear (or affirm): I will support the Constitution of the United States and the Constitution of the State of Michigan; ... I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law.").

this end, I examine four examples of the phenomenon: pious perjury in eighteenth-century England, fabrications of fault or domicile in order to obtain divorces prior to reforms of divorce laws in the 1960s and 1970s, post-Reconstruction white southern jury nullification, and the current widespread practice of police perjury to avoid the exclusionary rule. These examples are purposefully drawn from different legal areas and historic periods. This approach reveals systemic lying to be a recurrent mechanism that, although in different guises, arises under certain conditions and performs the same function over time and across areas.

In each of the case studies, systemic lying is a product of severe disjunctions between cultural beliefs about justice and legal imperatives. The practice emerges as a saving mechanism that mediates between culture and law, much in the way that the law is often described as mediating between the social order and the large bureaucratic mechanisms of the state or the market.<sup>23</sup> Rather than allow the law to take its course and deliver what would be perceived as unjust outcomes, participants lie and preserve the façade of a system that delivers results consonant with popular moral intuitions.

The very collective and open nature of systemic lying and the fact that it occurs for a justice-related rationale allows it to escape the usual stigma attached to lying, particularly lying that occurs in a legal system that valorizes truth in the courtroom. The actors who collaborate to create systemic lying are not inhibited by their presumed belief that lying is morally problematic, nor does a fear of punishment control their behavior. Instead, they subscribe to an alternate account of justice under which they view themselves as engaged in a collective, order-promoting enterprise that necessitates lying. Ultimately, systemic lying is a persistent and effective phenomenon for the same reason that it is problematic. It achieves a type of legitimacy that individual lies or underground deception lack, gaining purchase within the legal system even as it undercuts the system's bedrock—the notion that truth is paramount in the courtroom.

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23. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., MIT Press 1996) (1992).

This Article proceeds in two parts. Part I offers four case studies of systemic lying. Part II offers an account of why systemic lying arises, what it offers us in the form of understanding disconnects between beliefs and legal prescriptions, and, finally, the reasons that we should not be complacent in the face of its ongoing presence in our legal system.

## I. SYSTEMIC LYING: FOUR CASE STUDIES

### A. *Pious Perjury*

In the early nineteenth century, the English law reformer Samuel Romilly campaigned to awaken public opinion to the “inordinate number of statutes imposing capital punishment” and the “widespread disinclination to put these statutes fully into effect.”<sup>24</sup> English criminal law in this period prescribed the death penalty for a broad range of crimes, many of them petty.<sup>25</sup> For example, in the late eighteenth century, English law defined grand larceny as “stealing above the value of twelvenpence.”<sup>26</sup> Unlike petit larceny, which under statute was punishable by transportation, grand larceny was punishable by death.<sup>27</sup> This means that the penal code mandated death for what amounted to trivial theft.

The twelvenpence threshold for grand larceny originated in the tenth century.<sup>28</sup> Not surprisingly, across the centuries during which the threshold remained unchanged, the value of a twelvenpence lessened dramatically.<sup>29</sup> Blackstone observed in his *Commentaries* that “while every thing else was risen in its nominal value, and become dearer, the life of man had continually grown cheaper.”<sup>30</sup> Juries squeamish at the idea of sentencing their compatriots to die

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24. 1 LEON RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750*, at 526 (1948).

25. This was also true in colonial America. If a colonial jury concluded that death was inappropriate, it would decline to find guilt or find the defendant guilty of a lesser crime. See Nancy Gertner, *Juries and Originalism: Giving “Intelligible Content” to the Right to a Jury Trial*, 71 OHIO ST. L.J. 935, 939-40 (2010).

26. 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*237.

27. *Id.* at \*237-38.

28. *Id.* at \*237.

29. *Id.* at \*238.

30. *Id.* at \*237.

for so little would change the value of the stolen goods when they issued a verdict so that it would not run afoul of the twelvence limit.<sup>31</sup> Blackstone called the practice “pious perjury,” a name that captured both the perception that the practice was just and the reality that it entailed lying under oath.<sup>32</sup>

Pious perjury used to avoid a capital sentence for a minor theft was both commonplace and open.<sup>33</sup> A number of factors account for this. The first and most important of these was the perceived moral necessity for avoiding death sentences in cases that jurors, judges, and attorneys alike did not believe warranted them.<sup>34</sup> A second, contributing factor was that alternative punishments, such as transportation, imprisonment, or fines, would still be imposed once a jury engaged in pious perjury and convicted a defendant of a lesser crime.<sup>35</sup> The choice was not between death and freedom, but rather between death and a punishment that at the time seemed consonant with the severity of the crime.

The near consensus that punishments should be mitigated led to a high degree of participation by actors within the system, that, in turn, allowed pious perjury to become routinized.<sup>36</sup> Pious perjury was practiced by judges and witnesses, as well as jurors.<sup>37</sup> The involvement of so many legal actors reflected not only the magnitude and cultural acceptability of pious perjury in the late eighteenth century but also the structure of the criminal trial itself. In the eighteenth century, the judge “remained in the foreground” of the trial.<sup>38</sup> At a time when it was still rare for the defendant to have his

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31. *Id.* at \*238.

32. *Id.* As Blackstone explained, this alteration was, in effect, perjury when jurors were sworn to give “a true ... verdict, so help you God.” *Id.*

33. THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE 269 (1985) (“[M]itigation of the capital sanction for theft was both commonplace and the subject of commentary in trial accounts, pardon records, and the professional and lay literature of the day.”).

34. *See, e.g.*, BLACKSTONE, *supra* note 26, at \*238; GREEN, *supra* note 33, at 282-88 (describing the perceived strength of evidence, character of accused, and perceived pettiness of accusation as major factors that contributed to jury and judge “general resistance to convict at a capital level”).

35. *See* GREEN, *supra* note 33, at 276 (describing the role of transportation “as a safety valve where mercy was deemed appropriate”).

36. *Id.* at 267.

37. *Id.*

38. *Id.* at 270-71.

or her own attorney, judges were active questioners who did not hesitate to reveal their own points of view during trials.<sup>39</sup> In addition, jury instructions were often “pointed and leading, if not coercive.”<sup>40</sup> Finally, class differences between upper-class judges and lower-middle-class jurymen meant that once instructed, juries were inclined to come to “verdicts that largely accorded with the views of the bench.”<sup>41</sup> In sum, the degree of acoustic separation between judge and jury that exists in the modern trial was not present in the eighteenth and early nineteenth centuries.<sup>42</sup> This meant that juries rarely falsified facts in isolation and instead often followed the judge’s own instructions.

Thus, pious perjury was almost never an independent undertaking by the jury. Given the extensive judicial control, it would have been impossible for the practice to take root without the cooperation of judges and magistrates.<sup>43</sup> Those authorities, however, seemed just as convinced as lay juries that justice demanded a softening of the penalties imposed by eighteenth-century criminal laws.<sup>44</sup> As one reformer explained, the overcapitalization of crimes meant that “[w]itnesses and juries, rather than violate their kind feelings, violate their oaths: and the judges themselves cannot permit the law to take its course.”<sup>45</sup> Judges were perhaps more willing participants in pious perjury because “most of the beneficiaries of mitigation suffered some substantial punishment.”<sup>46</sup> That they were participants, however, is beyond dispute.<sup>47</sup>

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39. *Id.* (citing John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 284 (1978)).

40. *Id.* at 271.

41. *Id.*

42. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630 (1984) (describing “acoustic separation” in modern law as theoretically dividing official actors who enforce the law from real world actors who must obey it).

43. GREEN, *supra* note 33, at 285-86.

44. *Id.* at 286-87.

45. 3 BASIL MONTAGU, *THE OPINIONS OF DIFFERENT AUTHORS UPON THE PUNISHMENT OF DEATH* 125, 125 (London, Longman et al. 1813) (recounting a statement by Sir J. Newport).

46. GREEN, *supra* note 33, at 267.

47. Sir Thomas Fowell Buxton offered a humorous example of such collusion by the authorities. According to Buxton’s retelling, even after a jury had returned a guilty verdict for a man who had stolen a pair of leather breeches, the three magistrates assigned to the case conspired with several judges to avoid imposing the death penalty. Thomas Fowell Buxton,

In addition to juries and judges, attorneys also encouraged the practice of pious perjury. To give one example, a prominent Scottish attorney for the defendant in a well-publicized dueling case told the jury that pious perjury, though irregular, had “received an extraordinary sanction” from “the great and most popular writer on the law of England—I mean Blackstone.”<sup>48</sup> He reassured these jurors that “pious perjury” is “quite familiar, done daily with the acquiescence of courts, and neither entailing reproach on juries among their neighbors, nor exposing them to the censure of their legal superiors.”<sup>49</sup> In essence, he argued that pious perjury was socially accepted and an ordinary and functioning part of the British justice system. Modern scholarship confirms the accuracy of his account. Legal historian Thomas Green writes, “we can reasonably infer that most laymen believed that jury-based mitigation was a legitimate part of the administration of the criminal law.”<sup>50</sup>

Pious perjury thus presents a paradigmatic case of systemic lying. It involved the cooperation of multiple actors in the legal system. These actors openly falsified verdicts because they did not believe that the required punishment fit the crime.<sup>51</sup> Once the movement to reform the system of criminal sanctions succeeded, pious perjury faded away as a routine mechanism to systematically altering punishments.<sup>52</sup> With the revision of criminal sanctions to align with the justice norms of the era, the need for systemic falsification of verdicts disappeared.<sup>53</sup>

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Member of Parliament, Speech in the House of Commons: Severity of Punishment 62 (May 23, 1821). Their ingenious solution was to alter the official record of conviction. *Id.* After the word “guilty,” the magistrates added the words “of manslaughter.” *Id.* In this way, as Buxton explained, “[T]he man was tried for stealing breeches, and convicted of [m]anslaughter.” *Id.*

48. Francis Jeffrey, *Speech for the Defense*, in THE TRIAL OF JAMES STUART, ESQ., YOUNGER OF DUNEARN, BEFORE THE HIGH COURT OF JUSTICIARY AT EDINBURGH, ON MONDAY, JUNE 10, 1822, at 147 (Edinburgh, George Ramsay & Co. 1822).

49. *Id.*

50. GREEN, *supra* note 33, at 310.

51. Of course, in each individual case, motives for mitigating sentences would depend on circumstances. *See id.* at 288. Jury nullification was also practiced in cases involving political dissenters and cases dealing with laws that were themselves perceived as unfair. *Id.* at 287-88. Still, the vast majority of this lying was caused by juries disagreeing with imposing capital punishment for theft. *Id.*

52. *See id.* at 356.

53. *Id.* (describing how after the reform of the capital punishment scheme in the 1830s, “[i]n the popular mind, and in reality, the jury would usually adhere to the letter of the law”).

*B. Fault Fictions in Pre-Reform Divorce*

A century and a half after pious perjury helped prompt reform of the British penal code, a law reform movement of a different sort was underway in the United States. Then, as now, the states were the primary regulators of marriage. They issued marriage licenses and controlled the process of marriage dissolution. In most states, divorces would be granted only “upon the proof by one party that the other had committed a serious offense against the marriage.”<sup>54</sup> Those offenses ranged from adultery, the exclusive grounds for divorce in states including New York,<sup>55</sup> to drunkenness, abandonment, mental cruelty, cruel and inhuman treatment, or, in the most lenient states, incompatibility.<sup>56</sup>

Although the divorce laws of most states had been in existence for less than a century, by the 1950s reformers were already advocating for change.<sup>57</sup> One attorney who led divorce reform efforts in New York explained that the divorce laws no longer reflected prevailing social mores.<sup>58</sup> While adultery was a criminal offense and grounds for social ostracism when the New York divorce law was passed in the late 1800s, by 1950, “adultery [was] shrugged off as a commonplace affair which [did] not materially affect the social or community status of the persons involved.”<sup>59</sup> In other parts of the country, divorce itself had lost much of the social stigma and moral opprobrium once associated with it.<sup>60</sup> Indeed, in the post-World War era, many argued that divorce had become “a necessary and desirable social institution.”<sup>61</sup>

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54. Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 15 (1990).

55. N.Y. CIV. PRAC. ACT § 1147 (1920); see also Richard H. Wels, *New York: The Poor Man's Reno*, 35 CORNELL L.Q. 303, 304-05 (1950).

56. Wels, *supra* note 55, at 306.

57. Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 36-38 (1996).

58. See Wels, *supra* note 55, at 307.

59. *Id.*

60. See Wadlington, *supra* note 57, at 32.

61. *Id.*; see also Henry S. Drinker, *Problems of Professional Ethics in Matrimonial Litigation*, 66 HARV. L. REV. 443, 444 (1953) (“[T]here can be no doubt that divorce is generally regarded with very much more complacency than before World War I.”).

Despite these changes in mores, divorce laws remained static and continued to require proof of fault.<sup>62</sup> In response to fault requirements that seemed out of step with social beliefs and the wishes of an increasing number of couples seeking divorce, a familiar pattern emerged. Divorce seekers began to “perjure themselves in order to have their marriage[s] dissolved.”<sup>63</sup> Couples either went to a state where they could more easily obtain a divorce, made a “fabricated statement of domiciliary intention”<sup>64</sup> in order to gain citizenship in the state and then petitioned for divorce in that state, or they made a case for divorce in their home jurisdiction by “perjuring themselves as to ... the conduct of their spouses.”<sup>65</sup> As a law professor put it in the *New York Times*, “Americans adjust to strict divorce laws in either of two ways: by running away from them (seeking out-of-state or foreign divorces) or by staying at home and resorting to collusion and fraud.”<sup>66</sup>

Both responses to strict divorce regimes present examples of systemic lying. Litigants, attorneys, judges, and often paid witnesses cooperated in maintaining and accepting the lies that facilitated fault divorces in large numbers of cases in which no actual fault, or alternatively no jurisdiction over the case, existed. This lying became routine and was done across cases (and states) all for the same reason: to obtain a legal divorce when one would otherwise not be available.<sup>67</sup> These practices became an accepted and acknowledged feature of the U.S. divorce system.<sup>68</sup>

Couples with sufficient means who lived in states with relatively strict divorce regimes could leave the state for a short period, comply with facial domiciliary requirements—such as residence for six weeks—in a state with a less strict fault regime, falsely swear that

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62. See Wadlington, *supra* note 57, at 32.

63. *Id.* at 35.

64. *Id.*

65. *Id.* at 85.

66. Monrad G. Paulsen, *For a Reform of the Divorce Laws*, N.Y. TIMES, May 13, 1962, at SM12.

67. In 1960, for example, Alabama granted 17,035 divorces, which was a record high. *Id.* The Alabama Health Department explained the numbers by citing the fact that “[t]he state’s divorce laws have attracted many outsiders.” *Id.* According to the Department, “a person may arrive, obtain a decree and leave the following day.” *Id.*

68. One scholar put the number of divorces obtained, despite being based on the prohibited ground of “mutual consent,” at 80 to 90 percent. Drinker, *supra* note 61, at 446.



they intended to remain in the state, and obtain a divorce from courts fully aware that the whole enterprise was a charade. In Nevada, for example, a popular state for migratory divorces because of its relaxed fault grounds, a divorce plaintiff, in addition to meeting the six-week residency requirement, would be asked if it was still his or her present intention “to live here indefinitely and make Nevada your home?”<sup>69</sup> Affirmative answers would go unchallenged, “even if the plaintiff [left] Nevada the day after receiving a decree.”<sup>70</sup> These so-called “migratory divorces” were all the more appealing because several states allowed for an uncontested divorce, requiring the presence of only one spouse.<sup>71</sup>

If a couple did not have the means or time to leave a state with a strict fault regime, their best option was to fabricate fault. In New York, for example, a de facto regime developed under which “all that [was] required [to obtain a divorce] [was] proof that the defendant was found in a room with a person of the opposite sex (who need not be identified beyond the positive fact that such person was *not* the husband or wife of the defendant).”<sup>72</sup> An industry arose involving private detective agencies who hired women who would “arrange[] to be found in bed in the same room as the newly arrived defendant.”<sup>73</sup> The industry was profiled in a 1949 to 1954 report of the New York County District Attorney that identified “a woman who played the role of a correspondent in scores of arranged hotel raids.”<sup>74</sup> Another report that looked at testimony in divorce cases between 1929 and 1933 highlighted a “surprising state of undress in which the defendant and co-respondent [were] generally found.”<sup>75</sup> A smaller study looked at 104 undefended divorce cases in New York

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69. Paulsen, *supra* note 66, at SM12.

70. *Id.*

71. *See, e.g.*, NEV. REV. STAT. ANN. § 125.020 (West 2014) (providing jurisdiction based on domicile of either plaintiff or defendant); *see also* Worthington v. Dist. Court, 142 P. 230 (Nev. 1914) (requiring in-state domicile of at least one party for jurisdiction to grant a divorce).

72. Wels, *supra* note 55, at 316.

73. *Id.*

74. Paulsen, *supra* note 66, at SM12.

75. *See* Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 COLUM. L. REV. 1121, 1130 & n.65 (1936) (citing statistics showing that in a sample of around 485 divorce cases, witnesses testified that the male appeared absolutely nude in 21 cases and the female appeared nude in 55 cases; the male appeared in underwear in 119 cases and the female appeared in a negligee in 67 cases).

and revealed that “close relationships” existed between the defendant and witnesses for the complainant in 81 of those cases.<sup>76</sup> Yet another report from a New York County Grand Jury Presentment found that “widespread fraud, perjury, collusion and connivance pervade matrimonial actions of every type.”<sup>77</sup>

Judges presiding over divorce cases were aware that perjury was routine. One New York Supreme Court judge described the prototypical divorce case as follows: “She is always in a sheer pink robe. It’s never blue—always pink. And he is always in his shorts when they catch them.”<sup>78</sup> Nevertheless, courts accommodated those seeking divorces on trumped up fault grounds by not demanding rigorous proof and ignoring clear indicators that the participants lacked credibility. Many factors made it obvious that divorce proceedings often involved collusion, fraud, and perjury, including: the large number of uncontested cases, the large percentage of unnamed correspondents, the large numbers of defendants and hotel room women who opened the door while scantily clothed, the commonplace of the defendant’s friend testifying against him, and the “unusually short period commonly intervening between the alleged adultery and the service of process.”<sup>79</sup> Sworn complaints alleging adultery and evidence to the effect that “a man and a woman who are not married [were] found together in a hotel bedroom”<sup>80</sup> were accepted “despite the fact that in many cases the court [was] probably not actually deceived.”<sup>81</sup>

The speed of proceedings was another hallmark of pre-reform divorce cases. In California, the average uncontested divorce proceeding took less than ten to fifteen minutes, despite the fact that “the uncontested divorce purport[ed] to preserve the adversary process in form.”<sup>82</sup> Rather than making an “honest inquiry into fault adversarily proven in order to arrive at the truth,” however, most

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76. *Id.* at 1130, 1131 & n.66 (citing statistics compiled from divorce transcripts in 1929).

77. Paulsen, *supra* note 66, at SM12.

78. John G. Rogers, *Divorce Court: “Nothing but Perjury and Collusion,”* N.Y. HERALD TRIB., Oct. 1, 1965, at I9.

79. Note, *supra* note 75, at 1130, 1131 & n.67 (noting that one survey of 408 cases found that 173 divorce summons were served within three days of the alleged adultery).

80. Wels, *supra* note 55, at 316.

81. Drinker, *supra* note 61, at 448.

82. Timothy B. Walker, *Beyond Fault: An Examination of Patterns of Behavior in Response to Present Divorce Laws*, 10 J. FAM. L. 267, 284 (1971).

judges focused on “more pressing problems of property settlement, alimony, and child custody.”<sup>83</sup> A California judge, speaking after that state’s divorce reform efforts had succeeded, lauded as one of the law’s triumphs the fact that “the old hypocrisy and prejudy [sic] are no longer countenanced in court.”<sup>84</sup> A Texas attorney arguing in favor of divorce reform in 1972 described the current law as “de-meaning to the judiciary and to clients” because of the frequency of obvious perjury in fault-based divorce cases.<sup>85</sup> In Boston, one couple even went to court to sue for the right to a no-fault divorce.<sup>86</sup> Their argument was, in part, that the state should not “require perjury as the only means by which either plaintiff may obtain a decree of divorce.”<sup>87</sup> Thus, the judges and the parties echoed the public rhetoric when they pointed to widespread perjury as a prominent feature of divorce cases in states requiring proof of fault.

Attorneys, as one might expect, were complicit. As described by one California divorce reformer, in these cases “[t]he plaintiff and her witness[es] have been rehearsed in their parts by the attorney.”<sup>88</sup> Indeed, “sometimes the rehearsal [was] almost too letter-perfect.”<sup>89</sup> The sheer pink robe and the shorts cited by the New York judge as ubiquitous features of fault divorce cases show how the fabrications were “thinly concealed behind the masks of the courtroom players.”<sup>90</sup> During a discussion on divorce reform in Boston, a judge acknowledged that “lawyers under the present situation must be in an embarrassing position. They’re supposed to be an officer of

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83. *Id.* Of course, some judges did object to the frauds being perpetrated in their courtrooms. For example, a Missouri judge held an attorney guilty of criminal contempt for “coaching three Buffalo, N.Y., residents to give perjured testimony that the plaintiffs had been Missouri residents for more than one year.” Paulsen, *supra* note 66, at SM12. Similarly, a court in Alabama on its own motion set aside a 1954 divorce decree between two New Yorkers because of the fraud “perpetrated upon the Alabama courts by the parties’ false assertion that they were domiciled in Alabama.” *Id.*

84. Barbara Carlson, *Panelists Back No-Fault Divorce at Bar Association Discussion*, HARTFORD COURANT, Oct. 3, 1972, at 9.

85. *Id.*

86. Margo Miller, *Couple Ask Court to Let Them Divorce Without Charges Against One Another*, BOS. GLOBE, May 25, 1973, at 7.

87. *Id.*

88. Herma Hill Kay, *A Family Court: The California Proposal*, 56 CALIF. L. REV. 1205, 1219 (1968).

89. *Id.*

90. *Id.*

the court but also have the responsibility to do their best for a client.”<sup>91</sup> That responsibility often translated into assisting clients in trumping up grounds for divorce and selling them to a judge who himself was fully aware that the entire enterprise was a charade.<sup>92</sup>

Given the blatant and widespread nature of the frauds in these cases and the fact that the courts tolerated the use of lies to satisfy legal standards, it is not surprising that reformers cast their calls for reform “as efforts to save the integrity of the law and the legal process by allowing humane and dignified divorce to couples who were certain that their marriage was dead.”<sup>93</sup> As was the case with pious perjury, reformers suggested that the integrity of the legal system was threatened by “the trail of perjury and subterfuge” that had come to provide de facto access to no-fault divorces.<sup>94</sup> The conviction that divorce reform would be good for families and that “no-fault divorce more accurately reflected modern conceptions of terminating marital relations than did the prior laws” completed the major argument for reform.<sup>95</sup> Reformers eventually succeeded in effectuating change in the divorce laws of most states. By the late 1980s, almost every state had adopted some type of no-fault regime, allowing for divorce based on the ground of marital breakdown.<sup>96</sup>

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91. Ellen Pfeifer, *Law Panel Discusses No-Fault Divorce Bill*, BOS. GLOBE, Jan. 29, 1972, at 3.

92. At times, attorneys went too far even for lenient courts. *See, e.g., In re Gale*, 75 N.Y. 526, 528 (1879) (disbarring a New York lawyer who had played the part of the correspondent in a divorce case).

93. Scott, *supra* note 54, at 17.

94. Olive M. Stone, *Moral Judgments and Material Provision in Divorce*, 3 FAM. L.Q. 371, 371 (1969).

95. Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYUL REV. 79, 91-97 (describing reasons put forward by advocates of divorce reform). Of course, those reforms have not necessarily been a success by every metric. Feminist scholars, in particular, have argued that the availability of no-fault divorce had negative economic consequences for women. *See, e.g.,* Elisabeth M. Landes, *Economics of Alimony*, 7 J. LEGAL STUD. 35, 55-56 (1978). In addition, divorce proceedings are still, by many accounts, the site of false testimony. As one scholar states, “[T]here are indications that no-fault grounds for divorce have only caused the lying to shift” to child custody and visitation disputes in which parents falsely accuse each other of abuse. Wardle, *supra*, at 105. Nonetheless, shifting from a regime in which all parties collude in lies to one in which witnesses lie in highly contested custody battles is a move away from systemic lying and into a more routine problem with ascertaining truth in an adversarial legal system.

96. Wardle, *supra* note 95, at 88-90 (discussing history of the adoption of no-fault divorce laws in the United States).

*C. Jury Nullification and the Post-Reconstruction South*

The story of jury nullification beginning in the post-Reconstruction South is familiar.<sup>97</sup> White juries routinely convicted black defendants accused of crimes against whites or exonerated white defendants accused of crimes against blacks. This systemic post-Reconstruction nullification of verdicts was enabled by the fact that it was not just juries that were all white; “state judicial systems [were] composed entirely of white sheriffs, white prosecutors, white juries, and white judges.”<sup>98</sup> Grand juries who refused to hand down indictments were also key players. In the words of Gunnar Myrdal, “It is notorious that practically never have white lynching mobs been brought to court in the South, even when the killers are known to all in the community and are mentioned by name in the local press.”<sup>99</sup>

Under the system as it existed, white defendants could be assured of not being indicted, or if they were, of acquittal, thereby depriving African Americans of protection from the concentrated efforts of the Ku Klux Klan to murder and intimidate them through violence, as well as from less orchestrated attacks on their lives or livelihoods.<sup>100</sup>

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97. See, e.g., JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 109 (1994); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 64 (1977); GEORGE C. WRIGHT, *RACIAL VIOLENCE IN KENTUCKY, 1865-1940*, at 54-55 (1990); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 889 (1994); Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1184 (2011); James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 921 (2004).

98. KLUGER, *supra* note 97, at 64.

99. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 552-53 (1944).

100. The effect of white southern jury nullification went beyond encouraging violence against African Americans. A University of Chicago study conducted in the 1950s made two striking conclusions: “First, all-white juries had trouble taking seriously violence within the black community,” and “[s]econd, all white juries reacted with severity to black defendants charged with violence against whites, convicting them in disproportionate numbers.” ABRAMSON, *supra* note 97, at 110.

Well-known cases—Emmett Till<sup>101</sup> and the Scottsboro boys,<sup>102</sup> to name just two—bear out this proposition. Others that are less well-known also show just how pervasive the idea that whatever the letter of the law, it did not apply in the same way to blacks. To give one example, a group of white men who shot a white man found napping on their couch (he had come to the house to buy liquor but found nobody home) convinced a judge to dismiss charges by explaining that they mistook the stranger for a black man.<sup>103</sup>

The collective and open enterprise of denying justice to African Americans had deep roots in a culture that denied the personhood of recently emancipated slaves. Senator Oliver P. Morton of Indiana summarized the motivations for southern jury nullification during debate over the Civil Rights Act of 1875. Morton argued that white men in the South “have been educated and taught to believe that colored men have no civil and political rights that white men are bound to respect.”<sup>104</sup> Thus, in a sense, white jurors “understood the law to permit white violence,”<sup>105</sup> even though such an interpretation “was not constitutionally plausible after the Civil War and Fourteenth Amendment.”<sup>106</sup> Indeed, Ku Klux Klan members freely “acknowledged their willingness to disobey the law as jurors in defense of one another.”<sup>107</sup> Senators heard testimony that Klan members swore oaths “to commit perjury as jurors, and to acquit at all hazards one of their number who may be upon trial.”<sup>108</sup>

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101. Emmett Till was murdered in Mississippi in 1955 in retaliation for his apparently having whistled at a white woman. See STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMETT TILL*, at ix-x (1988). His murderers—two white men—were acquitted by an all-white jury and months later confessed to the killing in a magazine interview. *Id.*

102. The Scottsboro boys were black teenagers accused of raping two white teenage girls on a train in Alabama in 1931. See DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (rev. ed. 2007). After an initial trial and appeal, one of the alleged victims admitted fabricating the rape story during a retrial. *Id.* Nevertheless, the all-white jury convicted all of the defendants. The case was tried three times and all three times, the jury handed down guilty verdicts despite the recantation by one of the victims. *Id.* Only once was there a black juror. *Id.*

103. WRIGHT, *supra* note 97, at 54.

104. 3 CONG. REC. 1795 (1875) (statement of Sen. Morton).

105. Bressler, *supra* note 97, at 1184.

106. *Id.* at 1184, 1188.

107. Forman, *supra* note 97, at 921.

108. CONG. GLOBE APP., 42d Cong., 1st Sess. 252 (1871) (statement of Sen. Morton).

Thus, this group of white southern nullifiers was acting not out of confusion about the letter of the law, but because it “fe[lt] and believe[d], morally, socially, politically, or religiously, that it [was] not murder for a white man to take the life of a negro with malice aforethought.”<sup>109</sup> As the Freedmen’s Bureau commissioner in Mississippi and Louisiana wrote of the post-emancipation South:

Wherever I go ... I hear the people talk in such a way as to indicate that they are yet unable to conceive of the negro as possessing any rights at all. Men who are honorable in their dealings with their white neighbors will cheat a negro without feeling a single twinge of their honor. To kill a negro they do not deem murder; to debauch a negro woman they do not think fornication; to take the property away from a negro they do not consider robbery.

The reason of all this is simple and manifest. The whites esteem the blacks their property by natural right.<sup>110</sup>

Echoing this account, a northern reporter wrote after a trip to the South, “I did not anywhere find a man who could see that laws should be applicable to all persons alike.”<sup>111</sup> The short-lived Black Codes, which prescribed a separate set of laws applicable only to blacks, were a result of these attitudes.<sup>112</sup> After the passage of the Civil Rights Act of 1866 and the Fourteenth Amendment, which precluded the use of a separate formal legal code for African Americans, systemic lying was one way for whites in the South to maintain a racist justice system. Southern jury members, judges, sheriffs, and prosecutors routinely violated their oaths to uphold the law by acquitting white defendants of crimes against African Americans and convicting obviously innocent black defendants of crimes against whites.<sup>113</sup>

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109. Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 466 (1998) (quoting *Lester v. State*, 2 Tex. Ct. App. 432, 442-43 (1877)).

110. LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 364 (1979).

111. *Id.* at 364 (quoting SIDNEY ANDREWS, *THE SOUTH SINCE THE WAR* 398 (Boston, Ticknor & Fields 1866)).

112. *Id.* at 370-71.

113. *See, e.g.*, Bressler, *supra* note 97, at 1182 (describing jurors, sheriffs, justices of the peace, and other officials’ reluctance to prosecute whites); Forman, *supra* note 97, at 909-10

Foreseeing that “all-white juries would serve as instruments of oppression,”<sup>114</sup> Republican legislators sought to forbid state jury discrimination. They achieved formal success in the Civil Rights Act of 1875, which forbade disqualification from the jury on the basis of race.<sup>115</sup> The Act also made it a crime for state or federal officials to discriminate on the basis of race in selecting jurors.<sup>116</sup> Despite that legislative success, however, the reality on the ground was different. A 1910 study concluded that African Americans never served on juries in Alabama and Georgia, and they rarely served in several other states, including Florida, Louisiana, Mississippi, Missouri, South Carolina, and Virginia.<sup>117</sup> In 1940, a Carnegie Foundation study found that “the vast majority of the rural courts in the Deep South ... made no pretense of putting Negroes on jury lists, much less calling or using them in trials.”<sup>118</sup>

In addition, even when the U.S. Supreme Court belatedly began to enforce antidiscrimination laws in the context of jury discrimination in the 1930s, “jury commissioners were under no affirmative obligation to make jury lists representative of the population, and so many kept on with attempts to fob off as coincidental the racial disparities in their jury lists.”<sup>119</sup> Despite increasing willingness on the part of the Supreme Court to find unconstitutional discrimination based on evidence of the “systematic exclusion” of African Americans from juries and a steady stream of such cases from 1935 to 1975, the practice of exclusion and the nullification that it enabled continued.<sup>120</sup>

Certain factors complicate this account as an example of systemic lying. The history of racial justice and injustice in the post-Reconstruction South is complex and still being uncovered. In light of what we know about that time period, it is clear that this form of jury nullification in the South differs significantly from systemic

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(describing all-white jurors' participation in systemic lying).

114. Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 705 (1995).

115. Civil Rights Act of 1875, ch. 114, 18 Stat. 335-37, *declared unconstitutional by The Civil Rights Cases*, 109 U.S. 3, 25 (1893).

116. *Id.*

117. GILBERT THOMAS STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW* 253-72 (AMS Press 1969) (1910).

118. MYRDAL, *supra* note 99, at 549-50 (citation omitted).

119. ABRAMSON, *supra* note 97, at 109.

120. For a brief outline of this history, see *id.* at 108-12.



lying that arises in contexts not poisoned by animosity toward the rule of law. As Darryl Brown has observed in his work on the wider practice of jury nullification, all-white juries were composed in violation of the law.<sup>121</sup> Among other factors, this led him to question whether southern white jury nullification belongs in the broader category of jury nullification.<sup>122</sup> Brown is also skeptical about whether southern nullification in the Jim Crow era fits the jury nullification paradigm because local law enforcement officials and “[j]udges violated the rule of law roughly as much as juries.”<sup>123</sup> Despite his reservations, Brown concludes that these factors do not disqualify southern white jury nullification from being classified under the broader category of jury nullification.<sup>124</sup> Instead, he argues that they have important implications for those who would seek to rein in the practice.<sup>125</sup> According to Brown, the participation of other actors suggests that controlling jury nullification is not simply a matter of controlling, or in extreme cases eliminating, juries.<sup>126</sup>

The same factors that Brown deals with uneasily in his broader discussion of jury nullification underscore why we need an additional category in order to understand this particular form of multi-actor, socially driven nullification. The lens of systemic lying suggests that attempting to draw conclusions about jury nullification from the history of white southern jury nullification may be a mistake. Rather than a practice best evaluated in light of theories of jury nullification, white southern jury nullification is better understood in the context of other instances of systemic lying. It represents a society in revolt against particular outcomes prescribed by the justice system and using collective lying to alter those outcomes.

Unlike the general understanding of jury nullification as an instance in which individual juries refuse to follow the law for case-specific reasons, white southern jury nullification caused a “collapse of the rule of law” precisely because it occurred consistently over

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121. Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1192 (1997) (noting that verdicts exonerating white defendants for crimes against blacks “are not proper examples of jury nullification because the juries themselves were illegitimate”).

122. *Id.* at 1191-92.

123. *Id.* at 1195.

124. *See id.* at 1196.

125. *Id.*

126. *Id.* at 1195-96.

time with the open participation of many legal actors.<sup>127</sup> The case is complicated by the pervasive race-based distortions in the legal system. Nevertheless, it stands as a cautionary example of systemic lying. White southern juries, with the help of attorneys and judges, nullified consistently across different types of cases for a unified, justice-related rationale: they simply did not believe that it was a moral affront to commit crimes against blacks.<sup>128</sup> Or, conversely, they believed that the mere potential for black-against-white violence, particularly sexual violence, justified the punishment of even factually innocent black defendants.<sup>129</sup> In essence, systemic lying operated to rewrite the substantive criminal code so that it tracked the beliefs of key actors about how the rule of law should apply to African Americans.

Brown characterizes white southern jury nullification as a product of “local norms and sentiments strongly [in] conflict with statutes and principles reflecting the consensus of the larger, national community.”<sup>130</sup> That dynamic illustrates an important point about systemic lying: so long as a cultural group—or a group with shared norms—is large enough to control multiple actors in the judicial system, the group may be able to enact their own vision of justice and, in essence, establish an alternative legal system applicable to the disfavored group. In this way, white southern jury nullification functioned as a law-making as well as a law-applying system—effectively preventing the punishment of whites who committed violence against blacks.

Responses to systemic lying will often prove both complex and elusive. In the South, where multiple actors colluded to violate their oaths to uphold the law because of a strongly felt belief, however repellent, that their cause was righteous, neither the usual checks on rogue actors nor any basic procedural tweak had the power to recalibrate the system to afford equal justice to African Americans. Integrating southern juries took a national civil rights movement with activists willing to risk their lives and liberty, extensive federal

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127. *Id.* at 1194.

128. See Bressler, *supra* note 97, at 1183-84.

129. See, e.g., Iris Halpern, *Rape, Incest, and Harper Lee's To Kill a Mockingbird: On Alabama's Legal Construction of Gender and Sexuality in the Context of Racial Subordination*, 18 COLUM. J. GENDER & L. 743, 781-82 (2009).

130. Brown, *supra* note 121, at 1193.

intervention, and multiple trips to the U.S. Supreme Court. By many accounts, nullification of verdicts in cases involving white-on-black violence is still present in the system, although to a lesser extent.<sup>131</sup> Unlike the examples of pious perjury and the fabrication of fault or domicile in the divorce context that helped provoke reform and disappeared rapidly post-reform, the case of white southern jury nullification demonstrates that systemic lying can arise in reaction to reforms intended to promote justice, and that under such circumstances, it may prove far more impervious to attempts to eradicate it.

#### *D. Testilying*

The exclusionary rule has been a feature of American constitutional jurisprudence since at least 1914.<sup>132</sup> It was not until the Supreme Court decided *Mapp v. Ohio* in 1961 and extended this procedural rule grounded in the Fourth Amendment to state criminal prosecutions by incorporation through the Fourteenth Amendment that it achieved its current place as a central feature of U.S. criminal procedure.<sup>133</sup> By all accounts, *Mapp*'s extension of the exclusionary rule to cover state law enforcement practices had an immediate and profound impact on the testimony of police officers. The case is largely credited with introducing an era in which police fabricate probable cause for warrantless searches and

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131. See, e.g., Tamara F. Lawson, *A Fresh Cut in an Old Wound—A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutors' Discretion, and the Stand Your Ground Law*, 23 U. FLA. J.L. & PUB. POL'Y 271, 289-90 (2012) (arguing that the initial failure to prosecute the white defendant, George Zimmerman, in the murder of Trayvon Martin is a descendant of a more problematic era for black defendants in the criminal justice system); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 420 (1996) (arguing that whether unconscious or conscious, race still influences jurors' perceptions of behavior and thereby their application of legal standards such as "reasonableness"). The recent refusal of a grand jury in Missouri to indict officer Darren Wilson, a white police officer who shot and killed an unarmed African American teenager has also been understood to be part of this legacy. See, e.g., Jeannine Bell & Mona Lynch, *Cross-Sectional Challenges: Gender, Race, and Six-Person Juries*, (Ind. Legal Studies Research Paper Series, Paper No. 310), available at <http://perma.cc/ZS4R-2WBY>.

132. Based on the Fourth Amendment to the United States Constitution, the rule is usually understood to have been formulated in a trio of cases decided between 1886 and 1914. See *Weeks v. United States*, 232 U.S. 383 (1914); *Adams v. New York*, 192 U.S. 585 (1904); *Boyd v. United States*, 116 U.S. 616 (1886).

133. 367 U.S. 643, 659-60 (1961).

lie about it in exclusionary rule hearings, a practice dubbed “testilying” by members of the New York Police Department.<sup>134</sup>

In the fifty years since *Mapp*, testilying has become routine and bears all the characteristics of systemic lying. Like pious perjury, divorce fault fabrication, and white southern jury nullification, it is a group enterprise. Testilying requires the cooperation of prosecutors, police officers, and judges who are willing to ignore obvious falsehoods in the courtroom. Evidence exists that defendants and their attorneys are also complicit in the limited sense that, for a host of reasons, they rarely bring formal complaints of police dishonesty.<sup>135</sup> In its purest form, as opposed to its corrupt form in which evidence is fabricated,<sup>136</sup> testilying is understood to be done

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134. MILTON MOLLEN ET AL., COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCS. OF THE POLICE DEP’T, CITY OF N.Y., ANATOMY OF FAILURE: A PATH FOR SUCCESS 36 (1994) [hereinafter MOLLEN ET AL., COMMISSION REPORT].

135. See Melanie D. Wilson, *Improbable Cause: A Case for Judging Police by a More Majestic Standard*, 15 BERKELEY J. CRIM. L. 259, 286 (2010) (“Although there is convincing evidence that police dishonesty, including perjury, is a prevalent and serious problem, in the District of Kansas, defendants and their lawyers rarely accused officers of lying.”). This may also reflect prosecutors dropping charges in the cases with the strongest evidence of police dishonesty. Nevertheless, as Wilson notes, “even if the defendant knows that officers have falsified police reports, lied in affidavits to secure a warrant, or committed perjury in a hearing to justify a search in which the defendant’s constitutional rights were violated, she may forego an argument of police dishonesty in court” for reasons including the perception that the judge will not credit her account. *Id.* at 287.

136. Police perjury in cases in which an officer has actually found contraband in the possession of a defendant and genuinely believes that he or she must lie at a suppression hearing in order to avoid letting a guilty defendant go free is only one form of police manipulation of the truth to gain convictions. The past decade of work with DNA to uncover wrongful convictions has confirmed that police lie, coerce confessions, or influence witness testimony to further a theory of the case that will result in a conviction, whether or not they believe, rightly or wrongly, in the guilt of the defendant. The problem is so significant that the Brooklyn District Attorney, Charles J. Hynes, created a unit whose mission is specifically to look into questionable convictions. See Michael Powell & Sharon Otterman, *Jailed for 2 Decades in Rabbi’s Death, Unjustly, Prosecutors Find*, N.Y. TIMES, Mar. 20, 2013, at A1. That unit recently announced that it will ask for the release of a prisoner, David Ranta, who had been convicted of killing a rabbi in a botched robbery. *Id.* No physical evidence connected him to the crime and all of the witnesses in the case had signed statements recanting their testimony. *Id.* The original investigation by police, “according to investigators and legal documents, broke rule after rule.” *Id.* For example, police coached a witness before a lineup, bribed other witnesses with visits to prostitutes, improperly questioned the suspect, and failed to keep any notes of an interrogation as required by department procedure. *Id.* The trial judge expressed his concern that the officers had “taken it upon themselves to be judge, jury and partial executioner.” *Id.* Nevertheless, he sent the case to the jury without any hint of that concern. *Id.*

Yet, these forms of corruption are distinct from testilying, which is done in order to

for a rationale that is intertwined with the goals of the justice system—to ensure that the truth of the underlying criminal conduct is revealed by evidence that might otherwise be suppressed. Finally, testilying is an open practice in the criminal justice system and has been written about and debated in law journals and the media for decades.

Testilying seems to have begun in the immediate wake of the *Mapp* decision. As early as 1968, a study by Columbia law students found that in New York narcotics cases after *Mapp*, there was a steep decline in police testimony that “contraband was found on the defendant’s body or hidden in the premises,” in which case it might have been subject to exclusion on Fourth Amendment grounds based on the fact that a search occurred without probable cause.<sup>137</sup> Instead, the study found a “suspicious rise in cases in which ... officers alleged that the defendant dropped the contraband to the ground” or openly exposed the contraband, in which case it was in plain view and no Fourth Amendment problem could arise.<sup>138</sup>

At about the same time, Irving Younger, who at various times served as a prosecutor, judge, and law professor, reported similar observations. His work in the late 1960s began to bring the issue of police perjury to the attention of the broader public through an article in *The Nation* that was then picked up by *The New York Times*. Younger wrote that after *Mapp*, “police made the great discovery that if the defendant drops the narcotics on the ground, after which the police man arrests him, the search is reasonable and the evidence is admissible.”<sup>139</sup> He hypothesized that because police could not ensure that defendants actually would drop the drugs or otherwise expose them without being searched, they began to lie during hearings in order to avoid the suppression of the drug evidence.<sup>140</sup> In a 1967 article with the headline *Ex-U.S. Aide Links*

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overcome a specific aspect of the system by officers who believe that their testilies will achieve a just outcome when they have found indisputable evidence of guilt. True testilying is separated from the broader category of police corruption by its use in one specific circumstance for a specific reason—at a suppression hearing when an officer has found contraband in the possession of the defendant.

137. Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87, 95 (1968).

138. *Id.*

139. Irving Younger, *The Perjury Routine*, NATION, May 8, 1967, at 597.

140. *Id.*

*Police to Perjury*,<sup>141</sup> Younger asserted that police perjury to avoid the exclusionary rule was widely recognized, and claimed that he was simply exposing something that “[e]very lawyer who practices in the criminal courts knows ... is commonplace.”<sup>142</sup>

Thus, soon after police perjury seems to have ballooned in response to *Mapp*, testilying was openly discussed in both scholarly and public forums. And in those discussions, it was linked to the single justice-based rationale of avoiding the application of the exclusionary rule in cases in which evidence of guilt had been found. That multiple actors must cooperate in order for testilying to occur is implicit in one often-repeated quote from Younger’s *Nation* article: “[E]ven if his lies are exposed in the courtroom, ... the policeman is as likely to be indicted for perjury by his co-worker, the prosecutor, as he is to be struck down by thunderbolts from an avenging heaven.”<sup>143</sup>

In the succeeding decades, police lying to avoid the strictures of the exclusionary rule has continued to be written about in largely the same terms that Younger used. In the mid-1990s, New York’s Mollen Commission, established to investigate allegations of widespread corruption in the New York City Police Department, discovered that New York City police had a shoptalk term, “testilying,” for the practice of telling lies to avoid the exclusionary rule.<sup>144</sup> After hundreds of interviews and hearings, and analysis of thousands of internal police department documents, the Mollen Commission concluded that testilying was “probably the most common form of police corruption.”<sup>145</sup>

In 1998, an analysis of all fourteen prior studies of the post-*Mapp* exclusionary rule concluded that testilying was both linked to the exclusionary rule and openly entrenched.<sup>146</sup> Although finding that many of the previous studies were “skewed” by the researcher’s initial premise, the authors wrote that the “costly effect of the exclusionary rule that emerges from the [previous] studies is that it has

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141. Sidney E. Zion, *Ex-U.S. Aide Links Police to Perjury*, N.Y. TIMES, May 14, 1967, at 112.

142. *Id.*

143. Younger, *supra* note 139, at 597.

144. MOLLEN ET AL., COMMISSION REPORT, *supra* note 134, at 36.

145. *Id.*

146. L. Timothy Perrin et al., *If It’s Broken, Fix It: Moving Beyond the Exclusionary Rule—A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669 (1998).

encouraged police officers to falsify their reports and their testimony.”<sup>147</sup> The authors found their own results to be consistent with what they identified as “the widely held belief that the exclusionary rule imposes a substantial cost on society in the form of police officer deception.”<sup>148</sup>

Recent work, acknowledging the “extensive evidence that at least some police give perjured testimony during suppression hearings to avoid application of the exclusionary rule,” has begun to focus on other facets of the problem, including the complicity of other actors.<sup>149</sup> One study, conducted by Melanie Wilson in the District of Kansas, addresses the question whether judges are complicit in police perjury.<sup>150</sup> The Wilson study suggests that in close cases hinging on credibility, “trial judges would decide for the government on the issue of police credibility 100% of the time.”<sup>151</sup> Even when the balance of the evidence clearly favored the defendant, judges in Kansas continued to find in favor of the government.<sup>152</sup> Wilson concludes that if Kansas is representative, “trial judges will reject even defendants’ strongest proof about 78% of the time.”<sup>153</sup> More than forty years after Irving Younger wrote about police perjury, Wilson’s study indicates “that judges habitually accept the policeman’s word.”<sup>154</sup>

Wilson also found that “criminal defendants rarely assert in court pleadings or hearings that police have lied.”<sup>155</sup> She offers no firm explanation for this finding, but her hypotheses suggest that defense attorneys contribute to the persistence of testilying by advising clients not to challenge police credibility.<sup>156</sup> She speculates that “defense lawyers believe that their clients have the greatest chance of winning a motion using a legal argument, instead of directly claiming police perjury” or that “defense lawyers believe ... that

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147. *Id.* at 710-11.

148. *Id.* at 735.

149. Wilson, *supra* note 135, at 273.

150. *Id.* at 273, 277-78.

151. *Id.* at 308.

152. *Id.*

153. *Id.*

154. *Id.* at 277.

155. *Id.* at 307.

156. *Id.* at 288.

judicial recognition of police dishonesty is so uncommon that it will rarely advance the defendant's cause to assert police lies."<sup>157</sup>

Anecdotal evidence supports those hypotheses. In 1973, for example, a deputy district attorney and a deputy public defender debated the practice in the letters section of the *Los Angeles Times*. Rudolph Pearl, the public defender, responding to the Attorney General's complaints about the appellate court's exclusionary rule decisions, argued that "the practical root cause of the difficulties with the exclusionary rules is the lack of good faith on the part of the judiciary and law enforcement officers in enforcing the rules."<sup>158</sup> Pearl included judges in the problem, claiming that "a policeman learns that if he lies on the witness stand his testimony will be accepted by the judge."<sup>159</sup> In 1985, an article titled *The System Covers Up for Police Perjurers* was featured in major U.S. newspapers.<sup>160</sup> That article echoed the argument that prosecutors, judges, and police work together to admit perjured testimony by the police in suppression hearings.<sup>161</sup> It reported on a speech in which Boston defense attorney Michael Avery charged that "there is a conspiracy to protect police officers who commit perjury."<sup>162</sup> Avery is quoted as claiming that every judge in the Massachusetts criminal courts "routinely has appearing before him or her police officers who commit perjury in order to make charges stick in criminal cases. Everyone knows this, yet few judges would admit it, and none have addressed the problem."<sup>163</sup>

Testilying gained national attention during the O.J. Simpson trial, which highlighted the broader problem of police lying and also illustrated the subsidiary problem of police testilying.<sup>164</sup> The case involved blatant lies at an exclusionary hearing by the police who

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157. *Id.*

158. Rudolph Pearl, Letter to the Editor, *The Totalitarian Danger of Allowing Improper Evidence*, L.A. TIMES, Sept. 29, 1973, at B4.

159. *Id.*

160. Nat Hentoff, *The System Covers Up for Police Perjurers*, HARTFORD COURANT, Sept. 19, 1985, at D11. The article was also printed in the *Washington Post*. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. The blatant example of police lying came in the form of Detective Mark Fuhrman's assertion that he had not used the word "nigger," a claim that was proved false by a recording that caught him using it repeatedly. See James Sterngold, *Detective in Simpson Case Pleads No Contest to Perjury Count*, N.Y. TIMES, Oct. 3, 1996, at A16.



had searched the Simpson home without a warrant and recovered the infamous bloody glove.<sup>165</sup> The judge credited the officers' testimony that "Simpson was not a suspect at the time of [the] search," even though it was belied by their own admissions that they knew Simpson had previously assaulted his ex-wife and that an ex-spouse is generally a suspect in a murder case.<sup>166</sup> After Simpson's acquittal, the suppression hearing became a prime example for scholars and commentators of "the willingness of judges to subvert the law in criminal cases in order to thwart application of the exclusionary rule."<sup>167</sup> Scholars argued that police perjury was key to the prosecution's failure, and that, as a result, prosecutors around the country had trouble finding jurors who were not mistrustful of the police.<sup>168</sup>

The Simpson trial may have influenced public perceptions of the police, but it had no discernable effect on the practice of testilying. Both public excoriations of a system that tolerates testilying and scholarly investigation of the practice continue apace. The U.S. Supreme Court's frequent adjustments of the warrant requirement have, by many accounts, simply made it more necessary for police to fabricate probable cause for searches as it becomes less and less clear when a warrant is required.<sup>169</sup> Also, there are typically no repercussions for police who lie or for the prosecutors who put them on the stand.<sup>170</sup> As the former San Francisco Police Commissioner explained, police "know that in a swearing match between a drug defendant and a police officer, the judge always rules in favor of the

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165. See *Simpson Murder Case Transcript of Ruling Denying Motion to Suppress Evidence*, L.A. TIMES, July 8, 1994, at A25.

166. Butler, *supra* note 18, at 1795; see also Sterngold, *supra* note 164, at A16.

167. Butler, *supra* note 18, at 1796.

168. Alan Dershowitz, *Police Perjury Destroyed the Simpson Prosecution*, BUFF. NEWS, Oct. 7, 1995, at 3B; Sterngold, *supra* note 164, at A16.

169. See, e.g., Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1619-20 (2012) ("The gradual evisceration of the warrant requirement is one cause of Fourth Amendment uncertainty.").

170. For example, a recent scandal in Philadelphia involved the firing of an assistant district attorney who sought to drop charges in a case that turned on testimony from a police officer who had previously admitted to lying under oath. Daniel Denvir, *The DA's Tangled Web with a Lying Cop*, PHILA. CITY PAPER (Sept. 4, 2014), <http://citypaper.net/News/The-DAs-tangled-web-with-a-lying-cop/> [<http://perma.cc/EKM8-3ADG>]. Rather than prosecute the officer for perjury, which he had already admitted under oath, supervisors in the district attorney's office apparently laughed at the suggestion that the officer be taken off the street. *Id.*

officer.”<sup>171</sup> Scholars like Wilson have begun the task of developing concrete evidence that judges’ willingness to credit police testimony cannot simply be explained by superior police credibility.<sup>172</sup> Instead, even when they have every reason to disbelieve officers, judges routinely admit evidence that, from a legal perspective, clearly should be excluded.<sup>173</sup>

## II. TOWARD A THEORY OF SYSTEMIC LYING

The four case studies in this Article arose in different time periods, social milieus, and moments in legal history; were motivated by distinct sentiments and contexts; and were resolved in differing ways. This diversity of particulars provides both a factual basis and a justification for articulating a broader theory of systemic lying. It is precisely because the practice of systemic lying has recurred over time and in different contexts, yet has significant common features, that it deserves theoretical attention. This Part focuses on the linkages between disparate episodes that have until now been treated as unrelated to offer an explanation for systemic lying’s multiple appearances in the legal system. It posits that systemic lying arises in response to stark disconnects between the moral beliefs of the actors in the legal system and the outcomes that would come from adherence to formal legal imperatives. Systemic lying gains purchase in the system only when moral beliefs are both shared and powerful enough that they cause a breakdown of obedience to a central and unambiguous procedural tenet of our justice system—the requirement of truthfulness in the courtroom.

As a mechanism for reducing the dissonance between formal legal outcomes and moral beliefs, it is tempting to seek a way to typologize systemic lying into desirable and undesirable categories. Indeed, many other mechanisms by which legal actors achieve change through extralegal means have been lauded for their ability

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171. Peter Keane, *Why Cops Lie*, SFGATE (Mar. 15, 2011, 4:00 AM), <http://www.sfgate.com/opinion/openforum/article/Why-cops-lie-2388737.php> [<http://perma.cc/5UAL-8TFQ>].

172. See Wilson, *supra* note 135, at 263-65.

173. *Id.* at 301 (citing an empirical study in Kansas showing that “even when the defendant produced substantial evidence of at least one significant false statement by police, trial judges ... heavily favored the government and usually concluded that any false statements by police resulted from unintentional mistakes”).

to produce normatively desirable ends. This Part explores and ultimately rejects the possibility of a typology of systemic lying that does not hinge on a set of moral or normative priors. It argues instead that there is one clear shared benefit of systemic lying: its ability to signal that there is an important dissonance between law and moral beliefs. Finally, this Part suggests that we should not be complacent in the face of systemic lying. Whether we like or dislike the substantive outcomes systemic lying produces, reducing the dissonance between legal and moral norms through disregard of the courtroom oath poses real dangers for the system. It threatens the truth imperative in the courtroom by suggesting that compliance is optional and will be enforced selectively. More broadly, systemic lying represents an affront to procedural justice that has the potential to undermine legitimacy.

*A. Systemic Lying as a Response to Moral-Formal Conflict*

Systemic lying arises in response to severe disconnects between a community's beliefs about what is just in a particular case and the outcomes that a strict adherence to the law would produce. Conceptualized another way, systemic lying is a result of misalignments between strongly held community norms and the normative force of the law. Multiple actors within the legal system experience what Leon Festinger first labeled "cognitive dissonance."<sup>174</sup> In the legal context, Robert Cover articulated this phenomenon as the need to confront "inconsistency among consciously held and articulated principles."<sup>175</sup> The actors in the legal system confront a "moral-formal" dilemma.<sup>176</sup> Here, the systemic liars' understanding of what would be just in a particular case conflicts with the mandate that they uphold the law in court. Their "fidelity to the formal system" would "block direct application of the moral or natural law proposition."<sup>177</sup>

Under Cover's framework, dissonance-reducing behaviors are likely to arise in situations in which actors "must choose among closely

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174. LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957).

175. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 227 n. (1975).

176. *Id.* at 197.

177. *Id.*

balanced, inconsistent alternatives.”<sup>178</sup> The actors have strong reasons to choose formal compliance with the law, and equally strong reasons to refuse to comply in order to achieve a just outcome.<sup>179</sup> Cover addresses the dilemma that antislavery judges faced when asked to enforce fugitive slave laws.<sup>180</sup> He explains that judges experienced a conflict between their obligation to “apply[] legal rules impersonally” and their self-image as “moral human being[s].”<sup>181</sup> When confronted with an ordinary case involving some cognitive dissonance, the judge might, without too much trouble, choose “role fidelity” and uphold the law.<sup>182</sup> Fugitive slave cases, however, generated “a more particular dissonance between antipathy to a result that would condemn a man, fundamentally innocent, to undeserved slavery and the knowledge or belief that such an action was required by fidelity to role expectations and rules.”<sup>183</sup> The “dissonance reducing” behaviors Cover identifies consist of rhetorical strategies used by the antislavery judges, among them increased reliance on formalism, to reduce the dissonance between their moral beliefs and results required by law.<sup>184</sup>

Cover’s cognitive dissonance study reveals not “judicial civil disobedience,”<sup>185</sup> as he had advocated in previous work, but its opposite, judicial formalism accompanied by rhetoric that increased the “moral comfort” of the judges.<sup>186</sup> When Cover’s framework is applied to systemic lying, the practice emerges as a dissonance-reducing behavior that falls between strict obedience to the law and overt civil disobedience. The actors pay lip service to the law, as did Cover’s

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178. *Id.* at 227.

179. *Id.* at 228.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 229 (“These judges exhibited three patterns in their judicial and extrajudicial reflections on fugitive slave cases: (1) elevation of the formal stakes, (2) retreat to a mechanical formalism, and (3) ascription of responsibility elsewhere.”).

185. Cover’s theory in *Justice Accused* has been contrasted with the forceful call to action in his earlier essay in which he called for judges to “simply refuse to follow law or authority and set resisters [to the Vietnam war] free.” Robert M. Cover, *Atrocious Judges: Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression*, 68 COLUM. L. REV. 1003, 1007 (1968) (reviewing RICHARD HILDRETH, *ATROCIOUS JUDGES* (1856)).

186. Here, I borrow from James Whitman’s description of the development of the reasonable doubt standard as a way to increase the moral comfort of judges and juries. JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT* (2008).

judges. But unlike the antislavery judges who ultimately followed the law, systemic lying allows actors to thwart the formal law even as they purport to apply or follow it. The practice of systemic lying thus emerges as a way for legal actors to ameliorate dissonance while maintaining the charade of compliance with the letter of the law. Rather than resort to “naked acts of power” or highlight the “moral reasons for the decision,”<sup>187</sup> systemic lying reduces dissonance between legal and moral norms through the more subtle, yet more compromising, act of falsehood.

Before turning to the problems with resolving dissonance through falsehood, it is worth unraveling more fully how the “moral-for-formal”<sup>188</sup> dilemmas described in the case studies are ameliorated through systemic lying. Although systemic lying is a product of cognitive dissonance, it differs from the fugitive slave example, in which judges were the primary actors,<sup>189</sup> because it is by definition collective. For systemic lying to take hold, it is not enough for a marginalized or even powerful but discrete group, such as judges, to believe that injustice will result from a strict application of the law. Instead, systemic lying arises only when moral beliefs are both shared and powerful enough that they cause a breakdown of obedience to a central and unambiguous procedural tenet of our justice system—the requirement of truthfulness in the courtroom. Judges, attorneys, and often jury members must all decide that justice demands different outcomes from those that would be produced by fidelity to the facts and the law, and that achieving those outcomes is worth sacrificing the courtroom demand for truthful testimony.

The fact that systemic lying is a collective enterprise is also an important key to its staying power and functionality. Whereas antislavery judges reinforced their own determination to apply a distasteful law by “ascri[bing] ... responsibility elsewhere,”<sup>190</sup> systemic liars gain reinforcement from the perception that shared social norms favor the lie over strict adherence to the law. As a collective enterprise, systemic lying offers a veneer of legitimacy that

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187. Cover, *supra* note 185, at 1007.

188. See COVER, *supra* note 175, at 197-98.

189. Cover describes the importance of advocates as well, but ultimately the decisions in these cases were made by judges. See *id.* at 197 (discussing the behavior of “judges and the men who addressed them”).

190. *Id.* at 229.

eases the moral burden of each individual's participation in the practice in multiple ways. Rather than seek justifications for their decisions in formal law, systemic liars have the perceived wisdom of the crowd to push them in the direction of the systemic lie over an adherence to the formal demands of truthfulness.<sup>191</sup> Just how that collectivism works to reinforce the practice is complex, but the knowledge that others have made the same determination offers a degree of "moral comfort" to the systemic liar that must be acknowledged in an account of the endurance and expansion of systemic lying. The rhetoric employed by attorneys in pious perjury cases supports this notion. As the Scottish barrister described above argued to his jury, they could take comfort in knowing the practice was "quite familiar, done daily with the acquiescence of courts, and neither entailing reproach on juries among their neighbours, nor exposing them to the censure of their legal superiors."<sup>192</sup>

Even as it suggests a forceful moral consensus, the group dynamic of systemic lying may also allow the practice to detach itself from its moral groundings. Cass Sunstein and others have suggested that in situations in which group members follow practices established previously within a group, the group mentality can take on its own force to the exclusion of individual members' beliefs.<sup>193</sup> Thus, the collective nature of systemic lying may at some point strip participants of their own moral agency, impelling them to comply with a specific systemic lying norm based on their group membership rather than on any judgment about the substance of the practice. Sunstein argues that this phenomenon is an important caveat to the idea that there is invariably wisdom in crowd decision making; crowds can move in perverse directions because of their inclination to follow the leader.<sup>194</sup> Although any given instance of systemic lying reflects a group reaction to dissonance between legal norms and moral norms, there may be a diminution in the degree to which

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191. See, e.g., Jeremy Waldron, *The Wisdom of the Multitude: Some Reflections on Book 3, Chapter 11 of Aristotle's Politics*, 23 POL. THEORY 563 (1995) (describing the theory that in the context of political decision making, aggregate decision making is better than individual decision making).

192. Jeffrey, *supra* note 48, at 147.

193. See CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS 119-20 (2009); see also ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON 147 (2009) (discussing pathologies that impair group decision making).

194. CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 122-24 (2003).

subsequent actors engage in the moral calculation involved in choosing the lie over imperatives of truth in the courtroom.

Systemic lying is therefore a more complicated phenomenon than the response of one actor to a “moral-formal” conflict. The case studies suggest that, at a minimum, systemic lying may arise when the law has lagged behind evolving moral beliefs, when the law changes ahead of those beliefs, when the system confronts a particularly difficult question—such as a so-called “Dirty Harry problem”—or when a need exists to balance constitutional and crime-fighting imperatives.<sup>195</sup> In the case of pious perjury, for example, neither the public nor the judges agreed with the mandates of an outmoded penal code, leading to a widespread practice of altering verdicts to allow lesser punishments, such as transportation or imprisonment, which were more in line with popular beliefs.<sup>196</sup> Similarly, couples seeking divorces in strict fault states reacted to laws that were out of step with social attitudes by colluding in and permitting the systematic fabrication of fault or domicile.<sup>197</sup> For juries composed of white southerners in the post-Reconstruction South, the violent conflict between the law and their own beliefs about the justice system’s applicability to African Americans was the product of the imposition of a new legal order, rather than a result of outmoded laws.<sup>198</sup> Despite its moral repugnance, this practice is nonetheless an example of a severe disjunction between the vision of justice offered by the legal system and that of the judges, attorneys, and laypeople charged with carrying it out.

Finally, with testilying, we see a contemporary example of consensus among legal actors that justice is served by oath breaking.<sup>199</sup> This example of systemic lying, however, involves oath breaking motivated by a desire to avoid the impact of procedural rules that would have the effect of allowing a factually guilty defendant to

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195. See, e.g., Carl B. Klockars, *The Dirty Harry Problem*, 452 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 35-36 (1980) (describing the “Dirty Harry problem” as a dilemma in which only morally problematic means are available to “achieve the good end”).

196. See *supra* Part I.A.

197. See *supra* Part I.B.

198. See *supra* Part I.C.

199. See, e.g., Christopher Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037, 1044 (1996) (arguing that police lie out of “a desire to see the guilty brought to justice” despite the technicalities of the exclusionary rule).

escape punishment.<sup>200</sup> Although the idea that we might privilege competing policy goals over the quest to convict the guilty is deeply embedded in our legal system,<sup>201</sup> the exclusionary rule put new and direct pressure on the conflict between the ideal of procedural justice and the fundamental premise that the justice system should, if it does nothing else, punish the guilty.<sup>202</sup> As Justice Cardozo wrote in a much-quoted early exclusionary rule opinion, it is difficult to accept that a criminal should “go free because the constable ... blundered.”<sup>203</sup> More recently, Chief Justice Roberts expressed a similar view, writing that “[t]he principal cost of applying the [exclusionary] rule is, of course, letting guilty and possibly dangerous defendants go free.”<sup>204</sup> The Chief Justice went on to observe that releasing those defendants “offends basic concepts of the criminal justice system,”<sup>205</sup> an observation that could be taken to validate the view that the end of convicting a law breaker justifies the means of lying under oath when it comes to the exclusionary rule.

Although other motives certainly exist for testilying—among them pressure to secure convictions—just as in the other examples of systemic lying, broader community moral beliefs play a crucial role in guiding police and judicial decisions about whether to disregard legal requirements.<sup>206</sup> With no less a figure than the Chief Justice suggesting that it is antithetical to justice to let a guilty

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200. *Id.*

201. *See, e.g.*, FED. R. EVID. 408 (providing a special relevance rule excluding attempts to compromise or settle, along with conduct during settlement, as evidence of fault, based on the policy goal of encouraging settlement); FED. R. EVID. 410 (providing a special relevance rule excluding withdrawn guilty pleas and statements during plea negotiations, based on the policy goal of encouraging plea bargains); FED. R. EVID. 501 (detailing spousal and other evidentiary privileges).

202. For an excellent discussion of problems with theorizing the exclusionary rule as a procedural mechanism that is designed to deter police misconduct, see Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1894-97 (2014).

203. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

204. *Herring v. United States*, 555 U.S. 135, 141 (2009).

205. *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 908 (1984)).

206. Comment, *supra* note 137, at 100 (“Police behavior seldom exceeds the limits of community-approved standards. When a community protests, claiming that police patrol practices exceed acceptable limits, it is not necessarily demanding strict compliance with constitutionally mandated procedures. Instead, the community may only be asking that the police be more selective in deciding whom to line up against the wall.” (internal citations omitted)).



defendant go free, it is not surprising that testifying has become a routine practice in the law enforcement community.

*B. A Typology of Systemic Lying?*

As is evident from Cover's work on antislavery judges, systemic lying is not the only way in which legal actors resolve moral-formal dilemmas or law/justice conflicts that stem from misalignments between law and social beliefs. "Nullification practices," William Simon's useful shorthand for informal law-changing mechanisms, allow both legal and non-legal actors to adapt legal outcomes to moral and social values.<sup>207</sup> Juries, judges, and prosecutors all have the power to change formal law through the refusal to seek indictments, hand down verdicts, enforce laws, or follow statutory or even constitutional imperatives.<sup>208</sup> Proponents of these informal practices have argued that the process of legal elaboration can productively involve not just rigid adherence to jurisdictionally sound laws<sup>209</sup> but also consideration of the moral values that undergird the law. When actors "nullify" the law, in other words, they arguably engage in a valuable form of legal development.

For example, in discussing modes of constitutional formation, Bruce Ackerman and Neal Katyal laud the "constrained illegality and quasi-direct democracy" of the Federalists' call for ratifying conventions as a "revolutionary break with existing rules" that nonetheless "represented a breakthrough for democratic ideals."<sup>210</sup> In the corporate law context, Ian Ayers has argued that when certain state courts have blatantly refused to follow clear statutory mandates, such nullification of "Procrustean, immutable provisions

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207. William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 226 (1996).

208. *Id.*

209. This positivist approach is typified by Justice Scalia's assertion, "I do not feel empowered to revoke those laws that I do not consider good laws. If they are stupid laws, I apply them anyway, unless they go so contrary to my conscience that I must resign." Antonin Scalia, Justice, U.S. Supreme Court, Address at Gregorian University: The Common Christian Good (May 2, 1996), available at <http://perma.cc/6PYG-G5CT>. Justice Scalia distinguishes between so-called "natural law" and "positive law" explaining that God applies the former and it is his job to apply the latter. *Id.*

210. Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 567-68 (1995); see also Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 456 (1989).

by a few individual state courts” has the capacity not only to promote dialogue with their own state legislatures, but also to inform and motivate legislative action more broadly.<sup>211</sup> Paul Butler and others have made similar arguments in the criminal law context, suggesting that judges should and do engage in their own form of nullification “when the correct legal response conflicts with the correct moral response.”<sup>212</sup>

Along the same lines, Guido Calabresi has suggested that even when confronted by the plain language of statutes, courts should take a common law interpretive approach to “statutory rules that are out of phase.”<sup>213</sup> According to Calabresi, this approach would simply bring to the surface what courts had been accomplishing “through subterfuges, fictions, and willful use of inappropriate doctrines.”<sup>214</sup> Yet, the rhetorical device of the legal fiction itself has inspired the same argument. Sir Henry Maine wrote that “[a]t a particular stage of social progress,” legal fictions “are invaluable expedients for overcoming the rigidity of law.”<sup>215</sup> Blackstone argued that such fictions could be “highly beneficial and useful” because “no fiction shall extend to work an injury; it’s [sic] proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law.”<sup>216</sup>

Superficially, systemic lying seems akin to the deft use of a legal fiction or the refusal to follow an “out of phase” statutory rule.<sup>217</sup> Systemic lying, informally yet effectively, changes the law by providing a mechanism for routinely circumventing it. Given this similarity, it is no surprise that just as scholars have argued in favor of other nullification practices, there have been calls for systemic lying. For example, Paul Butler has argued, controversially, that black jurors should engage in a form of systemic jury nullification

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211. Ian Ayres, *Judging Close Corporations in the Age of Statutes*, 70 WASH. U. L.Q. 365, 370 (1992).

212. Butler, *supra* note 18, at 1792-1805 (describing instances when judges “subvert” legal mandates based on moral beliefs and advocating such subversion).

213. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 166 (1982).

214. *Id.*

215. Henry Sumner Maine, *Ancient Law*, in *THE PROBLEMS OF JURISPRUDENCE* 371 (Lon L. Fuller ed., 1949).

216. BLACKSTONE, *supra* note 26, at \*43.

217. CALABRESI, *supra* note 213, at 166.

of verdicts against nonviolent African American lawbreakers.<sup>218</sup> Butler makes the case that such nullification is justified despite a defendant's factual guilt because "no moral obligation [attaches] to follow an unjust law."<sup>219</sup>

According to his theory, black jurors have a "legitimizing function" in a legal system that has historically excluded them, making their decision to nullify a particularly powerful tool to promote change.<sup>220</sup> He cites examples in which other actors in the system, from spectators in the courtroom to defense attorneys, could contribute to the nullification practice by "send[ing] ... black jurors a message" that they should "consider the evidence presented at trial in light of" the racial discrimination inherent in the system.<sup>221</sup> Butler makes it clear that in his vision, systemic nullification of certain verdicts against black defendants would not only involve many African Americans sitting on juries and refusing to convict for a consistent, justice-related rationale—"that the American criminal justice system discriminates against blacks"<sup>222</sup>—but that such nullification could engage other actors in the legal system and would be an open secret with hoped-for repercussions for the substantive law.

Josh Bowers has argued for a different form of systemic lying.<sup>223</sup> His argument is that defense attorneys should be required to "advise and assist innocent defendants who wish to mouth dishonest on-the-record words of guilt."<sup>224</sup> Bowers offers a justice-related rationale for his proposal. He suggests that the system perpetrates an injustice when it allows "a factually guilty defendant to make a rational choice in the face of plea bargaining's benefits and trial's potential penalties and travails, but ... force[s] an innocent defendant ... to risk, against her will, an uncertain trial with significant downside."<sup>225</sup> Citing the system's strong aversion—grounded in what

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218. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995).

219. *Id.* at 708.

220. *Id.* at 714.

221. *Id.* at 684-85, 688-90 (describing controversy over a judge's refusal to allow black defense attorney in murder trial of black man to wear *kente* cloth, an African cloth that had been adopted as a symbol of racial pride, in front of jury).

222. *Id.* at 689-90.

223. Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1121 (2008).

224. *Id.*

225. *Id.* at 1159.

he believes to be an “antiquated truth-seeking ideal”<sup>226</sup>—to existing mechanisms that allow defendants to plead guilty when they, in fact, believe they are innocent, such as *Alford* and *nolo contendere* pleas, Bowers argues that allowing attorneys to recommend and judges to accept what he terms “false admissions” would be analogous to creating a legal fiction.<sup>227</sup> The false admission would be “another means of bending law to ‘promote[] function, form, and sometimes even fairness.’”<sup>228</sup>

Both Bowers and Butler echo the principle, expressed by Calabresi, Ayers, Ackerman and Katyal, that at times acting in a way that is not consistent with formal legal prescriptions will serve the ends of justice and possibly lead to a change in the law. Dworkin makes a similar claim in the context of Vietnam-era draft resistance. He argues that there was a strong case for the exercise of discretion not to prosecute conscientious draft offenders, in part because there was a strong case “for changing the laws in their favor.”<sup>229</sup> These arguments are attractive, and as a descriptive matter they seem to explain at least two of the case studies of systemic lying. Like all instances of systemic lying, both pious perjury and the practice of fabricating fault in divorce cases were justified on the ground that they accomplished important moral goals.<sup>230</sup> And unlike the other two case studies examined here, both also anticipated legal reforms that validated the moral position of the systemic liars.

Of course, the justifications advanced for nullification practices do not easily accommodate the case of white southern jury nullification. Although southern jury nullification did provide an avenue for the expression of strongly held beliefs that the law was “out of phase,” to use Calabresi’s expression,<sup>231</sup> it did not adjust the law in a way that was later validated through reform. Dworkin might

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226. *Id.* at 1171.

227. *Id.* at 1170-74.

228. *Id.* at 1174 (quoting Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 875 (1986)).

229. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 220-21 (1977) (arguing that once the Supreme Court makes a ruling on the constitutionality of draft laws, courts and prosecutors should primarily show respect for the dissenters’ position through the exercise of sentencing discretion).

230. *See supra* Part I.A-B.

231. CALABRESI, *supra* note 213, at 166.

distinguish the case of the white southern nullifiers in the same way that he addresses the difference between conscientious draft objectors and “sincere and ardent segregationists [who] believe[d] that the civil rights laws and decisions [were] unconstitutional.”<sup>232</sup> According to Dworkin, the difference between the two cases has to do with whether the law at issue reflects an “official decision that individuals have a moral right to be free from some harm.”<sup>233</sup> If a law reflects a judgment that we have a moral right to be free from violations that involve personal injury or the destruction of property, it is “a powerful argument against tolerating violations.”<sup>234</sup>

This distinction between laws that protect “moral rights” and those that simply reflect values of “social or administrative convenience” is not particularly illuminating when applied to the case studies of systemic lying.<sup>235</sup> The first category certainly applies to white southern jury nullification, which without a doubt sought to take away moral rights from blacks, such as the right to be free from violence. But it would likely also apply to the moral right to be free from petty theft, which the eighteenth-century penal code expressed. Further, it is difficult to say where this distinction would leave fault fabrication in divorce cases. An argument could be—and was—made that children had a moral right to a two-parent household absent the most exigent circumstances or that society had a moral right to seek to preserve marriages. This is a weaker fit with Dworkin’s “moral right” category because it conflicts with other important rights of autonomy and self-determination.

At the same time, divorce fault fabrication does not fit any better with Dworkin’s description of why laws regulating the draft did not invoke moral rights. The saving technicalities that Dworkin claims made draft laws administrative rather than rights preserving—that they allowed for a great deal of administrative discretion and reflected considerations of fairness in the sense that they spared sons of mothers who had already lost one son in the war<sup>236</sup>—did not exist in pre-reform divorce statutes.

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232. DWORKIN, *supra* note 229, at 218.

233. *Id.* at 217.

234. *Id.* at 217-18.

235. *Id.* at 218.

236. *Id.*

This analysis is by no means exhaustive, but it provides a taste of the difficulties inherent in attempting to form a typology of all systemic lying from the perspective of whether it is morally justified or justifiable. Systemic lying is a unified practice in the sense that it is a particular mechanism for resolving dissonance arising from moral-legal dilemmas, but its particular forms do not offer a unitary, or even binary, message about the moral rightness or wrongness of the practice.

What systemic lying offers instead is a consistent structural message about the presence of a particular form of tension within the legal system: the existence of strong and collective dissonance between moral beliefs and legal prescriptions. As described above, a common refrain in the calls for practices that informally adapt the law to changing beliefs or circumstances is the idea that they are beneficial because they will promote reform. What we can extract from this refrain is the underlying idea that these types of practices tell us something about the way the law is tracking beliefs or keeping up with modern realities. It is this self-reflective function, not its potential to achieve justice ahead of law reform, that is the one unmitigated benefit of systemic lying.

### *C. Systemic Lying as Problem or Solution*

Systemic lying is valuable as a symptom of a larger problem that may require remediation through legislative, judicial, and/or other forms of intervention. Yet, it is not a positive condition for the legal system such that we should welcome it when it appears and rationalize it as an efficient *de facto* solution to certain moral-formal dilemmas. There are reasons for this that would emerge from any discussion of nullification practices: they are often undemocratic in nature, unreviewable, and inconsistently applied, and they can be deployed for ill as well as for good.<sup>237</sup> Those arguments are relevant to systemic lying, but their contours are not markedly different in

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237. See, e.g., Steven M. Warshawsky, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 GEO. L.J. 191, 219, 222-23 (1996) (arguing that democratic legitimacy problems, unreviewability, and justice deficits inhere in jury nullification); Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563, 2565 (1997) (describing democratic legitimacy problems inherent in jury nullification).

this context than in others in which they continue to be discussed. Rather than rehash them, this Section focuses on the ways in which systemic lying has the potential to be uniquely destabilizing in a justice system that holds out the oath and the truth imperative in the courtroom as fundamental legitimizing forces.

The American legal system's view of truth is far from absolute.<sup>238</sup> As discussed in the previous Section, many have persuasively argued that the contingency of preventing a grave injustice could permit (or even mandate) lies in narrow circumstances.<sup>239</sup> If we accept the premise that it is at times right to lie to prevent the miscarriage of justice,<sup>240</sup> then we leave open the possibility that it will sometimes be right to approve systemic lying in certain scenarios. Whether it is right will, in turn, require case-specific moral analysis.<sup>241</sup> This Section does not foreclose the possibility that systemic lying may be a morally correct response to certain situations. It is important to recognize, however, that there are costs to the practice that are associated with features unique to systemic lying.

Because it involves the open violation of principles of truthfulness in the courtroom, systemic lying undermines the important premise that in the context of our justice system, truth will help guarantee accurate and fair outcomes through law. A related but distinct threat comes from the collaboration of multiple actors. The open disregard of procedural checks intended to secure truth in the courtroom, such as perjury prosecutions, impeachment of witnesses, and judicial refusal to countenance false evidence, not only is problematic if we believe in the system of checks and balances, but also

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238. Our approach to deceptive interrogation practices provides one example of our openness to deception. *See, e.g.*, Ross, *supra* note 13.

239. *See, e.g.*, Butler, *supra* note 18, at 1822-23 (acknowledging lying as a "moral cost" but arguing in favor of judicial subversion of the law in limited circumstances); *see also supra* Part II.B (discussing the practices that involve deception yet are seen as positive for the legal system).

240. *See* IMMANUEL KANT, *On a Supposed Right to Lie from Altruistic Motives* (1797), reprinted in *CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY* 346, 346-50 (Lewis White Beck ed. & trans., 1949) (arguing that there is a categorical imperative to tell the truth even when it seems that a lie would save a life).

241. As Tom Tyler observed when explaining his decision to focus on procedural justice and its relationship to perceived legitimacy as opposed to outcome favorability: "Because there is no single, commonly accepted set of moral values against which to judge the fairness of outcomes ... such evaluations are difficult to make." TYLER, *supra* note 8, at 109.

because it undermines the appearance of procedural fairness, which is an important key to legitimacy and obedience to the law.

### 1. *The Truth Imperative*

In her seminal work on lying, Sissela Bok outlines the reasons for what she argues is the “centrality of truthfulness” in human societies.<sup>242</sup> Those reasons include both a fear of the coercive power of deception as well as the need for a “minimal degree of trust” for language and action to have any meaning.<sup>243</sup> Without the ability to distinguish and rely on truth, members of a society could no longer make judgments about reality.<sup>244</sup> Such a society, according to Bok, would collapse.<sup>245</sup>

Bok’s focus is on societies rather than law, but her analysis offers insight into any system that is predicated on mutual reliance and trust for its operation. The American legal system privileges truth in the courtroom in part because truth is essential to the whole idea of law. Without the guarantee that witnesses will generally be truthful and that other legal actors will generally comply with their own obligations to themselves to be truthful as they carry out the law, the system would become unmoored from reality to a degree that would eliminate its usefulness as a system of law rather than a system of blind coercion. As Bok writes, “trust in some degree of veracity functions as a *foundation* of relations among human beings; when this trust shatters or wears away, institutions collapse.”<sup>246</sup>

Of course, this does not suggest that no lying can be tolerated or even tell us “what kinds of lies should be prohibited.”<sup>247</sup> Bok contends that “in any situation where a lie is a possible choice, one must first seek truthful alternatives.”<sup>248</sup> As the preceding Parts have pointed out, our legal system has not obviously embraced this maxim. We have long tolerated and condoned practices that involve forms of oath breaking and fiction for reconciling fundamental

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242. BOK, *supra* note 17, at 18 (emphasis omitted).

243. *Id.*

244. *Id.* at 19.

245. *Id.*

246. *Id.* at 31.

247. *Id.*

248. *Id.*



misalignments between formal legal outcomes and social conceptions of what is just. Systemic lying has been equated with both the legal fiction and with jury nullification. Yet the stakes involved in institutionalizing repeated and collective lying in the courtroom are higher than those involved in more subtle manipulations of the law by individual players.

In a system that holds out the oath and the promise of truthfulness in the courtroom as key means of achieving both coherence and factual accuracy, any practice through which participants lie repeatedly in violation of a sworn duty destabilizes the system by showing truth to be a subordinate value. When the lying involves judges and attorneys who are themselves officers of the court and are under a professional obligation to maintain the integrity of the system, the corrosive potential multiplies. If prosecutors tolerate perjury, then the threat of perjury prosecution loses its efficacy as a truth-enforcing mechanism. If jurors systematically violate their oaths, jury verdicts are always suspect. If judges rule in favor of police officers who are obviously lying, the credibility with which judges invoke the coercive power of their office is diminished. Ultimately, systemic lying has the capacity to undermine the justice system to a fatal extent by replacing the mechanism of truth with an inferior and dangerous substitute, the lie for a “good” cause.

The danger that systemic lying poses to the legal system has been underappreciated in part because the distinctions between forms of lying in the system have gone unacknowledged. In particular, systemic lying has been equated with both legal fictions and routine jury nullification. As this Section shows, these practices are distinct from systemic lying and serve as useful counterpoints. Although legal fictions and jury nullification may pose challenges of their own to the premise that the legal system is undergirded by truth, they do not undermine either that premise or that reality to the same degree as systemic lying.

The legal fiction provides a useful first point of distinction because it helps elucidate why lying under oath is an important feature of systemic lying. In making the claim discussed in the previous Section that the system should permit false guilty pleas, Professor Bowers elides the legal fiction with the systemic lie. He argues that his proposal would simply create a species of legal

fiction to address dissonance between popular mores and the law.<sup>249</sup> Bowers is able to make this claim because legal fictions suffer from definitional infirmities. Yet legal fictions by any definition, although mechanisms for legal change, are distinct from systemic lying. In his classic account, for example, Lon Fuller was able to characterize legal fictions as “linguistic phenomen[a]”<sup>250</sup> and to analyze them as such precisely because of one of these differences: legal fictions are written judicial constructions. In Fuller’s words, they are the “growing pains of the language of the law” which often “fill[] a real linguistic need.”<sup>251</sup>

Rather than involving collective oath breaking in the courtroom, legal fictions are an accepted common law judicial tool for adapting legal concepts to cover new circumstances that fit the sense of the concept but not its formal terms. They have been criticized for confusing the lay consumer of the law,<sup>252</sup> but they do not implicate the legal imperative of truth in the courtroom. Judges’ oaths generally require that they faithfully and impartially discharge their duties under the laws and the Constitution.<sup>253</sup> As a long-established mechanism for applying the law, the legal fiction does not contravene that sworn duty in the generality of cases.

Jury nullification presents another important contrast to systemic lying. Much of the scholarly discussion of jury nullification has not offered a clear definition of terms.<sup>254</sup> By most accounts, however, jury nullification happens whenever “a jury votes to acquit a defendant despite the fact that the defendant is guilty under the letter of

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249. Bowers, *supra* note 223, at 1171 (“False pleas are only less truthful than ... other fictions by degree.”).

250. LON L. FULLER, *LEGAL FICTIONS* 11 (1967).

251. *Id.* at 22.

252. Jeremy Bentham, *A Comment on the Commentaries*, in *A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT* 59-60 (J.H. Burns & H.L.A. Hart eds., 1977).

253. *See, e.g.*, 28 U.S.C. § 453 (2012) (prescribing an oath for federal judges).

254. *See, e.g.*, *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) (“[N]ullification’ can cover a number of distinct, though related, phenomena, encompassing in one word conduct that takes place for a variety of different reasons.”); Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI.-KENT L. REV. 1249, 1253-55 (2003) (“Scholars examining the issue of jury nullification agree that defining and identifying jury nullification is complex.”); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 881 (1999) (“At the most general level, jury nullification occurs when jurors choose not to follow the law as it is given to them by the judge.”).

the law.”<sup>255</sup> Because juries are sworn to uphold the law, their decision not to convict when the facts seem to permit no other outcome constitutes oath breaking.<sup>256</sup> There is also general agreement that jury nullification occurs for one of several reasons. The jury may believe that the law itself is unjust.<sup>257</sup> The jury may decide that applying the law in a particular case would be wrong.<sup>258</sup> Or, the jury may conclude that the punishment would be too harsh if it were to convict in a given case.<sup>259</sup> Thus, like systemic lying, jury nullification as it has been understood reflects rationales that are closely linked to the jury’s perception of justice.

Unlike systemic lying, however, even if the jury’s case-specific reason is broad enough to apply in other cases, the features of our jury trials—juries are selected anew for each case and cannot be told they have the power to nullify—should preclude consistent nullification for the same reason across cases. Thus, the broad umbrella of jury nullification is distinct in at least one crucial way from systemic lying—it does not have a unified, justice-based rationale that holds constant across cases.<sup>260</sup>

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255. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1340 (2008).

256. See, e.g., *Thomas*, 116 F.3d at 614 (“Nullification is by definition, a violation of a juror’s oath to apply the law as instructed by the court—in the words of the standard oath administered to jurors in the federal courts, to ‘render a true verdict *according to the law and the evidence.*’” (quoting FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DIST. COURT JUDGES 225 (4th ed. 1996)); MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY 50-62 (1973) (outlining arguments that jury nullification violates jurors’ obligation to decide cases in accordance with instructions and evidence).

257. See, e.g., Brown, *supra* note 121, at 1178 (describing a category of nullification in which “jurors simply refuse to enforce a valid (although in their minds unjust) statute”).

258. *Id.* at 1183 (identifying jury nullification in cases “in which a just law seems unjustly applied”).

259. See, e.g., *Thomas*, 116 F.3d at 614 (noting that “jurors may nullify, for example, because of the identity of a party, a disapprobation of the particular prosecution at issue, or a more general opposition to the applicable criminal law or laws”); Barkow, *supra* note 255, at 1340.

260. The Zenger case provides a classic example of jury nullification. Zenger was charged with seditious libel for publishing a newspaper critical of the New York governor. JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 93-100 (Stanley Nider Katz ed., 2d ed. 1963). In such a prosecution, truth was not a recognized defense. The Attorney General only needed to prove that Zenger had printed or published the statement. Andrew Hamilton argued successfully for the defense that although Zenger had published the offending papers, truth should be a defense in such an action and the jury should act on its conscience and acquit. *Id.*

Under its broadest construction, jury nullification also lacks another important feature of systemic lying—the cooperation of multiple actors in the system. Scholars have long debated whether judges or attorneys should be permitted to instruct or make arguments to the jury about nullification.<sup>261</sup> The reality is, however, that since the U.S. Supreme Court held in 1895 that juries do not have the power to find the law,<sup>262</sup> federal judges must instruct jurors to follow the law as articulated by the judge in jury instructions.<sup>263</sup> With the exception of two states with limited constitutional provisions allowing the jury to find law<sup>264</sup> and one state with recent legislation entitling judges to allow defense attorneys to inform the jury of “its right to judge the facts and the application of the law in relationship to the facts in controversy,”<sup>265</sup> most states are similarly restrictive. Defense counsel “can neither argue that the jury should disregard those instructions nor present evidence in favor of the proposition that the defendant should be acquitted despite violating the law.”<sup>266</sup> An attorney who hints of nullification to the jury can be sanctioned,<sup>267</sup> and a judge who suggests it commits reversible error.<sup>268</sup> Those very real checks on cooperation by judges or attorneys

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261. Compare Butler, *supra* note 218, at 708 (arguing in favor of jury nullification to confront racial inequities within the criminal justice system), with Rebecca Love Kourlis, *Not Jury Nullification; Not a Call for Ethical Reform; But Rather a Case for Judicial Control*, 67 U. COLO. L. REV. 1109, 1111 (1996) (“By allowing or encouraging juries to follow their individual consciences to determine which laws are unjust, we are enabling the views of a very small minority, for better or worse, to become the law.”).

262. *Sparf v. United States*, 156 U.S. 51, 106-07 (1895).

263. For a comprehensive survey of the federal case law on this issue, see Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. MICH. J.L. REFORM 285, 310 n.116 (1999).

264. Indiana and Maryland both maintain a limited right for juries to find law. See IND. CONST. art. I, § 19; MD. CONST. art. XXIII.

265. See H.B. 146, 2012 Sess. (N.H. 2012).

266. KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 361 (1987).

267. ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-7.7(d) (3d ed. 1993) (prohibiting defense counsel from making arguments “which would divert the jury from its duty to decide the case on the evidence”).

268. See, e.g., *People v. Goetz*, 532 N.E. 2d 1273, 1274 (N.Y. 1988) (“While there is nothing to prevent a petit jury from acquitting although finding that the prosecution has proven its case, this so-called ‘mercy dispensing power’, as defendant concedes, is not a legally sanctioned function of the jury and should not be encouraged by the court.”).

mean that jury nullification, if it occurs,<sup>269</sup> is the product of one actor within the justice system: the jury.

Systemic lying, in contrast, involves collective lying, either through individual actors whose lies are then countenanced by others in contravention of explicit legal imperatives or through oath breaking by multiple actors in the system. It is this collective and open violation of the truth imperative in court repeatedly for the same reason with the collaboration of actors who are responsible for policing the system for untruths that has the greatest capacity for harm. When systemic lying occurs, other instances of lying in court are likely to increase because participants will no longer believe that the truth is important, or because they will not credit the mechanisms put in place to encourage or coerce truthfulness. If, as the system assumes, maximizing truthfulness is central to the project of producing just and accurate outcomes, then this risk should be troubling in and of itself. In addition, there is a clear trajectory from what is perceived to be justified lying to breakdowns in obedience to other requirements of the system. For example, an officer who engages in testilying may graduate to coercion and evidence planting, extending the questionable moral imperative to lie in a case of obvious guilt to increasingly problematic scenarios.<sup>270</sup>

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269. How often jury nullification occurs is unclear. In civil cases, the empirical data “suggest that the phenomenon is not terribly prevalent.” Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1610-11 (2001). In criminal cases, scholars have reached a similar conclusion. As the authors of one empirical study observed, “[I]t is difficult for jurors themselves—and even more so for judges or lawyers—to separate clearly the evidentiary versus the nullification motives that may underlie jury verdicts,” making it even more challenging for scholars to determine how often the practice occurs. Hannaford-Agor & Hans, *supra* note 254, at 1277. That study found it “unlikely that jury nullification plays a dominant role in the large majority of cases” because other factors, such as perceptions of the strength of the evidence and the dynamics of the jury deliberation, also play major roles in acquittal and hung juries. *Id.* at 1276.

270. In a recent op-ed in the *New York Times*, Michelle Alexander, the author of *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, argued that police lying has reached epidemic proportions. Michelle Alexander, Op-Ed., *Why Police Lie Under Oath*, N.Y. TIMES, Feb. 3, 2013, at SR4. Alexander contended that “the police shouldn’t be trusted any more than any other witness, perhaps less so,” citing our “seemingly insatiable appetite for locking up and locking out the poorest and darkest among us” as the explanation for “a police culture that treats lying as the norm.” *Id.* In order to meet the arrest quotas that are the key to federal and other funding, police departments encourage their officers to fabricate the probable cause necessary to make arrests. *Id.* Fiction, too, provides examples of the slippery slope to corruption. See, e.g., TANA FRENCH, *BROKEN HARBOR* (2013) (describing the resignation of a police detective who plants evidence to secure the conviction and safety of a

By undermining truth in the courtroom, systemic lying threatens that bedrock principle of the legal system, opening the door to lying and corruption of many varieties and ultimately offering the prospect of a system wholly removed from reality.

## 2. *Procedural Integrity*

Systemic lying also has the potential to influence perceptions of the procedural fairness of the system. The legal system is structured around dual imperatives: to “arrive[] at the truth,” particularly in criminal trials, and to use legally permissible and procedurally acceptable means in doing so.<sup>271</sup> This suggests that both truthfulness and procedural fidelity are important. Systemic lying can deliver what may in some cases be more “just” outcomes, but it does so at the expense of compliance with and enforcement of procedural mechanisms intended to promote truthfulness. This is problematic because it conveys the outward message that procedural protections are not absolute and because it may have real repercussions for the system’s ability to carry out its mandate. If, as Tom Tyler has persuasively shown in multiple contexts, “procedural issues are the primary concern when people evaluate their experiences with legal authorities,” then producing a “just” outcome while openly sacrificing procedural protections is a dangerous tradeoff.<sup>272</sup> Systemic lying may affect compliance with the law because it harms the perception of procedural fairness and thereby legitimacy and that perception is crucial to compliance with legal rules.<sup>273</sup>

In the case of systemic lying, the procedural protections at issue are the checks built into the system to enforce compliance with the oath. When one actor in the system violates the oath, as is arguably the case when a jury nullifies or a judge interprets a statute in a

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murderer who would otherwise commit suicide, but once he has opened the door to corruption, no matter how justified, the detective is convinced that he will not be able to resist similar and possibly less justified falsehoods in the future and that his only option is to give up being a police officer).

271. *United States v. Havens*, 446 U.S. 620, 626 (1980); *accord Addington v. Texas*, 441 U.S. 418, 425 (1979) (“[T]he function of legal process is to minimize the risk of erroneous decisions.”); *Tehan v. United States*, 382 U.S. 406, 416 (1966) (“The basic purpose of a trial is the determination of truth.”).

272. TYLER, *supra* note 8, at 108.

273. *Id.* at 62.

way that is clearly unsupported by its language, those checks may be silent, but they are not necessarily overridden. In systemic lying, by contrast, the very actors who should, for example, ensure that police perjury is punished and discredited are complicit in allowing the perjury to thrive and continue. That sends a message not only about the importance of truth but also about fairness and the procedural protections that are crucial to our system of justice. How people react to systemic lying may depend on their assessment of the outcomes it produces. In other contexts in which citizens come into contact with the criminal justice system, however, perceptions of procedural fairness affect perceptions of the legitimacy of the system more than other concerns, such as whether the law itself is just.<sup>274</sup>

Those who have advocated for and against practices that amount to systemic lying have, not surprisingly, responded to the problem it poses for legitimacy. Reformers seeking to change the harsh criminal penalties that fostered pious perjury also understood it to be a threat to the integrity of the system. Rather than endorse pious perjury as a way of ameliorating the harsh penal laws they sought to change, they argued that grave legitimacy problems would be inevitable in a system that relies on lies to achieve justice. Much as philosophers would later argue that “social relationships ... need to be sustained by mutual truth and credibility,”<sup>275</sup> the reformers argued that pious perjury threatened the very existence of the legal system.<sup>276</sup> Those seeking reform of U.S. divorce laws made similar claims, demanding reform in order “to save the integrity of the law

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274. *See id.* at 108.

275. MacIntyre, *supra* note 18, at 326-28.

276. As one reformer stated:

[W]hen the public see twelve respectable men—in open court—in the face of day—in the presence of a judge—calling God to witness, that they will give their verdict according to the evidence, and then declaring things, not very strange, or uncommon, but actual physical impossibilities, absolute miracles ... what impression on the public mind must be made, if not this—that there are occasions, in which it is not only lawful, but commendable, to call God to witness palpable and egregious falsehood?

Buxton, *supra* note 47, at 63; *see also* 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE 386 (London, Hunt & Clarke 1827) (excoriating Blackstone for the “flat contradiction in terms” inherent in calling any form of perjury “pious”).

and the legal process.”<sup>277</sup> As was the case with pious perjury, these reformers suggested that the legitimacy of the legal system was being undermined by routinized lying in divorce cases.<sup>278</sup>

In contrast, advocates in favor of practices that would amount to systemic lying claim that the system already lacks legitimacy in their areas of focus and that their proposals would be an improvement over existing bad practices.<sup>279</sup> In essence, they contend that the fact that it may undermine legitimacy does not necessarily foreclose the possibility that systemic lying provides countervailing and justifiable benefits in a system with real justice deficits. Similar arguments have been persuasive when applied to jury nullification, which by definition also involves oath violations. Jury nullification, however, has not destabilized the system. Indeed, despite occasional unfavorable media coverage,<sup>280</sup> jury nullification is more often praised as an important safety valve in a system that cannot always provide perfect justice.<sup>281</sup>

Despite its potential perils, whether systemic lying should similarly be embraced as a safety valve in an imperfect system is a complicated question. Bowers identifies two ways in which contemporary courts are arguably using systemic lying as a safety valve in the context of plea bargaining.<sup>282</sup> The first is by allowing defendants to plead guilty to crimes they clearly did not commit.<sup>283</sup> And the second is by allowing defendants to enter guilty pleas to hypothetical

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277. Scott, *supra* note 54, at 17.

278. *Id.* at 15-16.

279. Bowers, *supra* note 223, at 1123-24 (suggesting that innocent defendants should plead guilty rather than *nolo contendere* when accepting a plea bargain); Butler, *supra* note 218, at 679 (arguing that jurors should consider refusing to vote to convict nonviolent black defendants).

280. For example, after the police officer on trial for beating Rodney King was acquitted despite a video that clearly showed the event, “jury nullification was one of several explanations offered” in the media for the acquittal. Marder, *supra* note 263, at 294-96.

281. See, e.g., Milton Heumann & Lance Cassak, *Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases*, 20 AM. CRIM. L. REV. 343, 386 (1983) (arguing that nullification is part of “the jury’s role as the conscience of the democratic community”); Jack B. Weinstein, *Considering Jury “Nullification”: When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239, 244 (1993) (arguing that jury nullification “does not cast doubt on the jury process; rather, it reaffirms the liberty of a free society upon which it is based”).

282. Bowers, *supra* note 223, at 1170-71.

283. *Id.* at 1170.



crimes.<sup>284</sup> Both are ways to adjust sentences downward under the sentencing guidelines; and both are different from ordinary plea bargaining in that they do not involve adjusting the consequences of a plea by choosing from a list of crimes that in fact describe the conduct of the defendant. Instead, they require multiple actors to acquiesce in an untruth under circumstances in which such falsehood is explicitly prohibited. According to Bowers and others, these practices are happening because of the perception that, in their absence, the combination of the criminal code and the sentencing guidelines will not allow for just sentences.<sup>285</sup> Forms of plea bargaining that satisfy these criteria are thus successors to pious perjury in the sense that they use collective lying to add sentencing options. Should they be embraced as an ongoing remedy for sentencing problems that have so far proved intractable in the face of reforms?<sup>286</sup>

There are two ways to answer this. The first answer is that whether we think systemic lying in the plea bargaining context is worth the risks to the judicial system's truth imperative and ultimately to its legitimacy will depend on how we view sentencing laws and how we understand what is morally right in particular sentencing scenarios. The second answer is that we should reject systemic lying as a long-term solution to any moral-formal dilemma, no matter how intractable. This rejection is called for, in part, because of the potential for systemic lying to mask problems within the system and, in so doing, delay reforms. More importantly, however,

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284. *Id.* at 1170-71

285. *See, e.g., id.* at 1159-65, 1173-74.

286. *See, e.g.,* Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 6-21 (2010) (describing the history of sentencing reform from full discretion for judges to mandatory sentencing under strict guidelines to the hybrid *Booker* era). That systemic lying has taken root in at least two areas of criminal law in the form of testifying and dishonest pleas reinforces the notion, put forward by many, that criminal law is experiencing a profound and multifaceted crisis. *See, e.g.,* Randolph N. Stone, *Crisis in the Criminal Justice System*, 8 HARV. BLACKLETTER J. 33, 33-34 (1991) (arguing that the criminal justice system is not only in crisis due to funding, caseload, and overcrowding problems, but also because there is a crisis in the rule of law). And there is some evidence that momentum may be building to address some of the substantive problems that have led to systemic lying in this context. The issue of sentencing, in particular, has recently generated an improbable alliance between libertarian Republicans and Democratic Attorney General Eric H. Holder, Jr., in favor of reform. Matt Apuzzo, *Unlikely Allies Push for a Liberalization of Sentencing Laws*, N.Y. TIMES, Mar. 4, 2014, at A13 (describing an "unlikely" alliance between Eric Holder and Senator Rand Paul to promote sentencing reform). Whether those efforts will enable us to move beyond systemic lying in the plea context, or in other contexts, remains to be seen.

we should reject systemic lying because in the long run the system cannot sustain it as a solution to problems arising from strong discord between collective moral beliefs and legal prescriptions. As Bok writes, “only where a lie is a *last resort* can one even begin to consider whether or not it is morally justified” and even then, we should “seek truthful alternatives.”<sup>287</sup>

History suggests that episodes of systemic lying will have an uneasy and ultimately transitory presence in the justice system. At some point, there will be majority support for sustained attention and intervention to address the problem, however imperfectly. This Article cannot definitively answer how we get to what we might call systemic lying “tipping points” and move into some consensus that we should commit to resolving the problems that generate systemic lying.<sup>288</sup> Factors such as the political climate, the degree of moral consensus, the relative visibility or marginalization of the groups affected, and the availability of a clear remedy will undoubtedly play a role. What the case studies—as well as the current momentum in favor of criminal justice reform—do suggest is that we will ultimately arrive at such moments. Systemic lying has been a feature of the common law for centuries, but unlike other so-called nullification practices, it should not be granted a legitimized place in our legal system.

### CONCLUSION

The taxonomy of systemic lying is a powerful tool. It points to a form of lying that poses a particular threat to the legitimacy and functioning of the legal system. In a legal regime designed to keep lying to a minimum, collective lying in the courtroom that is accepted as a way to circumvent substantive law, procedural rules, or constitutional imperatives presents challenges that are distinct from those that arise from other means of resolving cognitive dissonance in the law. Identifying systemic lying is important because it tells us that our legal rules are out of adjustment with the beliefs of a social group wide enough to embolden multiple actors in

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287. BOK, *supra* note 17, at 31.

288. Malcolm Gladwell, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 12 (2000) (describing tipping points as “moment[s] of critical mass” when social change occurs).

the legal system to collude in lying to achieve different legal outcomes. Although cures for systemic lying are often challenging and always varied, it is imperative that we seek them and protect the integrity of our legal actors, of our courtrooms, and of our system of justice itself.

