SYSTEMIC LYING

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

CONTENTS

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 a reason. 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.[1] Yet, these questions deserve attention. Why? 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 now occurs as a matter of routine and stands as a modern and ongoing example of systemic lying.

This paper 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 existence of strong and collective dissonance between moral beliefs and legal prescriptions. At the same time, systemic lying is not a desirable mechanism for reducing

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[1] *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 262 (1978) (stating that "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 5 (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).

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.[2] 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.[3] Precisely because lies are systemic, 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. Systemic lying, as framed here, 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. The oath, rather than the physical space, determines the boundary. Within the courtroom

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[2] Ronald Dworkin refers to this type of conviction as the "'popular morality' of the 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." LAW'S EMPIRE 97 (Harvard U. Press 1986).

[3] *See* Anita L. Allen, *Lying to Protect Privacy*, 44 VILL. L. REV. 161, 16566 (1999) (describing lying, even by "[o]rdinary people who value and practice a high degree of honesty," and professionals as a frequent occurrence), TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES (Harvard 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). Lying in the professions receives frequent press coverage. *See, e.g.*, Sandeep Jauhar, "The Lies that Doctors and Patients Tell," The New York Times, Feb. 20, 2014 (describing deception as a frequent occurrence by physicians in interacting with patients and patients interacting with doctors).

under the force of the oath, our system unambiguously rejects material lies while 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,[4] the threat of prosecution for perjury and false statement,[5] evidentiary rules allowing for the impeachment of witnesses,[6] and strong norms requiring obedience to and compliance with legal rules.[7] These formal and informal truth-enforcing devices apply not just to witnesses but to all participants in the system. Jurors swear oaths to uphold the law,[8] attorneys are bound by oaths and codes of ethics requiring truthfulness,[9] and judges and other government actors are bound through their own oaths to uphold the law.[10]

Outside the courtroom, by contrast, our legal system tolerates

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[4] *See, e.g.*, FED. R. EVID. 603, Oath or Affirmation to Testify Truthfully (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.").

[5] *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)).

[6] *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 & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE, ¶ 609[02] (1988) (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).

[7] *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 that perceptions of legitimacy, in turn, have a significant effect on compliance); Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 382 (2001) (finding that "people'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").

[8] *See, e.g.*, People v. Hoffler, 53 A.D.3d 116, 119, 860 N.Y.S.2d 266, 271 (2008) ("The statutory requirement to administer an oath to insure 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.")

[9] *See, e.g.*, REVISED CODE OF WASHINGTON, ADMISSION TO PRACTICE R. 5 (West) (requiring attorneys to swear an oath in which they vow to represent clients using "only those means consistent with truth and honor" and "never seek to mislead the judge or jury by any artifice or false statement"); NEW HAMPSHIRE STATUTES, Title XXX, Ch. 311:6 (requiring admitted attorneys to swear or affirm that they "will do no falsehood, nor consent that any be done in the court"); ALA. CODE § 34-3-15 (requiring that attorneys swear or affirm that they will "use no falsehood"). 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," failing to disclose controlling legal authority, among other things. ABA MODEL RULES OF PROFESSIONAL CONDUCT § 3.3.

[10] For example, federal judges must swear an oath or affirmation before beginning to perform their duties. 28 U.S.C.A. § 453 (West) (requiring justices and judges to swear, "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." 28 U.S.C.A. § 951 (West).

and sometimes welcomes deception.[11] For instance, unlike European countries such as Germany, which prohibit lying to the accused during questioning,[12] American courts largely treat deceptive interrogation tactics as lawful so long as defendants have been previously advised of their Miranda rights.[13] 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.[14] Other forms of deception outside the courtroom, although not officially sanctioned, 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.[15]

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.[16] Yet, the practice of lying becomes far more problematic if it is formally prohibited by the very system in which it is taking place. Thus, this discussion of systemic lying takes as its focus practices that deviate from the standard of truthfulness 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

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[11] Of course, 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 AND TRUTHFULNESS (Princeton U. Press 2002).

[12] Jacqueline Ross, *Deceptive Interrogation in the United States and Germany*, 28 OXFORD J. L. STUD. 443 (2008) (citing Criminal Procedure Code of the Federal Republic of Germany § 136a).

[13] 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.

[14] People v. Thomas (N.Y. Ct. App. Feb. 20, 2014).

[15] *See, e.g.*, 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 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 extent to which prosecutors ignore their disclosure obligations); 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).

[16] 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." LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 19 (1979).

and truth-telling and the ways in which our ideas of truth and expectations for honesty are contingent upon social and cultural context.[17] 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 while under oath. This tracks the definition of perjury.[18] Yet, the legal system is also concerned with exposing deceptive testimony in the courtroom. Evidentiary rules aim at uncovering deception by witnesses by allowing for the introduction of prior inconsistent statements[19] as well as impeachment with convictions for crimes involving "a dishonest act or false statement."[20] 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."[21]

This Article is concerned both with exposing systemic lying in our system and with theorizing its presence and function in the law. To 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, white southern jury nullification post-Reconstruction, and finally the current widespread practice of police perjury to avoid the exclusionary rule. These examples are purposefully drawn from different legal areas and historic periods, including an early instance of systemic lying in the British system.

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[17] In politics, for example, lies are expected. As Hannah Arendt famously wrote, "no one has ever counted truthfulness as among the political virtues. Lies have always been regarded as necessary tools not only of the politician's and the demagogue's trade but also of the statesman's trade." Hannah Arendt, *Lying in Politics*, *in* CRISES OF THE REPUBLIC (Harcourt 1972). For a small sampling of other influential writing on truth, s*ee, e.g.*, SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (Vintage Books 1978); Alasdair MacIntyre, *Truthfulness, Lies, and Moral Philosophers: What Can We Learn from Mill and Kant? The Tanner Lectures on Human Values* (Princeton University, April 6 & 7, 1994); Bernard Williams, *Truth and Truthfulness, An Essay in Genealogy* (Princeton U. Press 2002); IMMANUEL KANT, THE METAPHYSICS OF MORALS; Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785, 1792-1805 (2007); Anita L. Allen, Lying to Protect Privacy, 44 Vill. L. Rev. 161, 16566 (1999).; TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIETAL CONSEQUENCES OF PREFERENCE FALSIFICATION (Harvard 1995).

[18] *See* 18 U.S.C.A. § 1621 (West) (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).

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

[20] F.R.E. 609(a)(2).

[21] See, e.g., State Bar of Michigan, Lawyer's Oath ("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 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.[22] 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, because it achieves a type of legitimacy that individual lies or underground deception lack, gaining purchase within the legal system even as it undercuts its bedrock, the notion that truth is paramount in the courtroom.

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

[22] *See* JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans.) (MIT Press 1995)

effect."[23] English criminal law in this period prescribed the death penalty for a broad range of crimes, many of them petty.[24] In the late eighteenth century, for example, grand larceny was defined in England as "stealing above the value of twelvepence."[25] Unlike petit larceny, which under statute was punishable by transportation, grand larceny was punishable by death. In short, the penal code mandated death for what amounted to trivial theft.

The twelvepence threshold for grand larceny originated in the tenth century.[26] Not surprisingly, across the centuries during which the threshold remained unchanged the value of a twelvepence lessened dramatically.[27] As Blackstone observed in his Commentaries, "'while every thing else was risen in its nominal value, and become dearer, the life of man had continually grown cheaper.'"[28] Juries squeamish at the idea of sentencing their compatriots to die 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 twelvepence limit. 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.[29]

Pious perjury used to avoid a capital sentence for a minor theft was both "commonplace" and open.[30] A number of factors account for this. The first and most important of those was the perceived moral necessity for avoiding death sentences in cases that jurors, judges and attorneys alike did not believe warranted them.[31] 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.[32] Thus, the choice was not between death and freedom, but

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[23] 1 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, 526 (London, 1948).

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

[25] Blackstone, *Commentaries*, Book IV, p. 239 ch. 17 (1765-69).

[26] *Id.*

[27] As Blackstone observed in his Commentaries, "'while every thing else was risen in its nominal value, and become dearer, the life of man had continually grown cheaper.'" Blackstone, *Commentaries*, Book IV, p. 239 ch. 17 (1765-69).

[28] *Id.*

[29] As Blackstone explained, this alteration was, in effect, perjury when jurors were sworn to give "a true . . . verdict, so help you God." Blackstone, *Commentaries*, Book IV, p. 239 ch. 17 (1765-69).

[30] GREENE, VERDICT ACCORDING TO CONSCIENCE 269 ("[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.")

[31] *See, e.g.*, Blackstone, *Commentaries*, Book IV, p. 239 ch. 17 (1765-69); GREENE at 282-88 (describing 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").

[32] *See*, Green at 276 (describing role of transportation as "as a safety valve where mercy was deemed appropriate").

rather between death and a punishment that at the time seemed consonant with the severity of the crime.

Following from the near-consensus that punishments should be mitigated was a degree of participation by actors within the system that, in turn, allowed pious perjury to become routinized. Pious perjury was practiced by judges and witnesses as well as jurors.[33] This involvement by so many legal actors reflects 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 trial."[34] At a time when it was still rare for the defendant to have his or her own attorney, judges were active questioners who did not hesitate to reveal their own points of view during trials.[35] In addition, jury instructions, while brief, were often "pointed and leading, if not coercive."[36] Finally, class differences between upper-class judges and lower middle-class jurymen meant that juries, once instructed, were inclined to come to "verdicts that largely accorded with the views of the bench."[37] 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 century.[38] This meant that juries rarely falsified facts in isolation and instead often were following 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. Those authorities, however, seemed just as convinced as lay juries that justice demanded a softening of the penalties imposed by eighteenth century criminal laws. As one reformer explained, the over-capitalization 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."[39] Judges were perhaps more willing participants in pious perjury because "most of the beneficiaries of mitigation suffered some substantial punishment."[40] That they were

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[33] GREENE at 267.

[34] *Id.*

[35] *Id.* at 271 (citing Langbein, Criminal Trial before the Lawyers 284).

[36] *Id.*

[37] *Id.*

[38] *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).

[39] Sir J. Newport, *reported in*, 3 Basil Montagu, Esq., *The Opinions of Different Authors Upon the Punishment of Death* 125 (1813).

[40] GREENE, VERDICT ACCORDING TO CONSCIENCE at 267.

[40] GREENE at 271 (citing LANGBEIN, CRIMINAL TRIAL BEFORE THE LAWYERS 284).

participants, however, is beyond dispute.[41]

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."[42] 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."[43] 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 Greene writes, "we can reasonably infer that most laymen believed that jury-based mitigation was a legitimate part of the administration of the criminal law."[44]

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. [45] Once the movement to reform the system of criminal sanctions succeeded, pious perjury faded away as a routine mechanism to systematically altering punishments. With the revision of criminal sanctions to align with the justice norms of the era, the need for systemic falsification of verdicts disappeared.[46]

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 in

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[41] Sir Thomas Fowell Buxton offers 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. Their ingenious solution was to alter the official record of conviction. After the word, "guilty," the magistrates added the words "of manslaughter." In this way, as Buxton explained, "the man was tried for stealing breeches, and convicted of Manslaughter." Thomas Fowell Buxton, Esq., Member of Parliament, Speech in the House of Commons: Severity of Punishment, 64 (May 23, 1821).

[42] Frances Jeffrey, Speech for the Defense (June 10, 1822) *in Trial of James Stuart, Esq., Younger of Dunearn, Before the High Court of Justiciary at Edinburgh* 147 (2d ed., Edinburgh 1822).

[43] Frances Jeffrey, Speech for the Defense (June 10, 1822) *in Trial of James Stuart, Esq., Younger of Dunearn, Before the High Court of Justiciary at Edinburgh* 147 (2d ed., Edinburgh 1822).

[44] GREEN, VERDICT ACCORDING TO CONSCIENCE at 310.

[45] Of course, in each individual case motives for mitigating would depend on circumstances. *See* GREENE at 2-88. Jury nullification was also practiced in cases involving political dissenters and cases dealing with laws that were themselves perceived as unfair. Still, the vast majority of this lying was caused by juries disagreeing with imposing capital punishment for theft. *Id.*

[46] *See* GREENE at 356 (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.").

the business of regulating 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."[47] Those offenses ranged from adultery, the exclusive grounds for divorce in states including New York[48] to drunkenness, abandonment, mental cruelty, cruel and inhuman treatment, or in the most lenient states, incompatibility.[49]

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. One attorney who led divorce reform efforts in New York explained that the divorce laws no longer reflected prevailing social mores. 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 does not materially affect the social or community status of the parties involved."[50] In other parts of the country, divorce itself had lost much of the social stigma and moral opprobrium that was once associated with it.[51] Indeed, in the post-World War era, many argued that divorce had become "a necessary and desirable social institution."[52]

Despite these changes in mores, divorce laws remained static and continued to require proof of fault. 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."[53] Couples either went to a state where they could more easily obtain a divorce, made a "fabricated statement of domiciliary intention" in order to gain citizenship in the state and then petitioned for divorce in that state, or they made out a case for divorce in their home jurisdiction by "perjuring themselves as to . . . the conduct of their spouses."[54] 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

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

[48] N.Y. Civ. Prac. Act § 1147. *See also* Richard Wels, *New York: The Poor Man's Reno*, 35 CORNELL L. Q. 303, 304-05 (1949-1950).

[49] Wels, *Poor Man's Reno* at 306.

[50] *Id.* at 307.

[51] Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966).

[52] Wadlington at 32. *See also* Henry S. Drinker, *Problems of Professional Ethics in Matrimonial Litigation*, 66 HARV. L. REV. 443, 444 ("[T]here can be no doubt that divorce is generally regarded with very much more complacency than before World War I.")

[53] Wadlington at 35.

[54] *Id.* at 85.

(seeking out-of-state or foreign divorces) or by staying at home and resorting to collusion and fraud."[55]

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.[56] These practices became an accepted and acknowledged feature of the U.S. divorce system.[57]

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 in a state with a less strict fault regime, such as residence for six weeks, falsely swear that 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?"[58] Affirmative answers would go unchallenged, "even if the plaintiff leaves Nevada the day after receiving a decree."[59] 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.

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 is required [to obtain a divorce] is 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)."[60] An industry arose involving private detective agencies who hired women who would "arrange to

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[55] Monrad G. Paulsen, "For a Reform of the Divorce Laws", New York Times, SM 12 (May 13, 1962)

[56] In 1960, for example, Alabama granted 17,035 divorces, which was a record high. The Alabama Health Department explained the numbers by citing the fact that "[t]he state's divorce laws have attracted many outsiders." According the Department, "a person may arrive, obtain a decree and leave the following day." Monrad G. Paulsen, "For a Reform of the Divorce Laws", New York Times, SM 12 (May 13, 1962).

[57] One scholar put the number of divorces obtained despite being in reality based on the prohibited ground of "mutual consent" at eighty to ninety percent. Henry S. Drinker, *Problems of Professional Ethics in Matrimonial Litigation*, 66 HARV. L. REV. 443, 446 (1953).

[58] Monrad G. Paulsen, "For a Reform of the Divorce Laws", New York Times, SM 12 (May 13, 1962)

[59] *Id.*

[60] Wels at 316.

be found in bed in the same room as the newly arrived defendant."[61] The industry was profiled in a 1949-1954 report of the New York County District Attorney describing "a woman who played the role of a correspondent in scores of arranged hotel raids."[62] Another report that looked at testimony in divorce cases between 1929-1933 identified a "surprising state of undress in which the defendant and co-respondent are generally found."[63] A smaller study looking at 104 undefended divorce cases in New York revealed that "close relationships" existed between the defendant and witnesses for the complainant in 81 of those cases.[64] 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."[65]

Judges presiding over divorce cases were aware that perjury was routine. One New York Supreme Court Judge described the prototypical divorce case as follows: "[s]he is always in a sheer pink robe. It is never blue – always pink. And he is always in his shorts when they catch him."[66] 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 co-respondents, 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."[67] 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"[68] were accepted "despite the fact that in many cases the court is probably not actually deceived."[69]

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[61] *Id*.

[62] Monrad G. Paulsen, For a Reform of the Divorce Laws, New York Times, SM 12 (May 13, 1962)

[63] *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 in 55 cases; the male appeared in underwear in 119 cases and the female appeared in a negligee in 67 cases).

[64] 36 COLUM. L. REV. at 1130-31 & n. 66 (citing statistics compiled by John J. Golluban from divorce transcripts in 1929).

[65] Monrad G. Paulsen, For a Reform of the Divorce Laws, New York Times, SM 12 (May 13, 1962)

[66] NY. Herald Tribune, Oct 1, 1965.

[67] Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 COLUM. L. REV. 1121, 1130-31 & n. 67 (1936) (noting that one survey of 408 cases found that 173 were served within 3 days of the alleged adultery).

[68] 118 N.Y. Supp. 801 (2d Dep't 1909).

[69] Drinker, *Problems of Professional Ethics in Matrimonial Litigation*, 66 HARV. L. REV. 443, 448

Speed of proceedings was another hallmark of pre-divorce reform cases. In California, the average uncontested divorce proceeding occupied less than ten to fifteen minutes, despite the fact that 'the uncontested divorce purports to preserve the adversary process in form."[70] Rather than making an "honest inquiry into fault adversarily proven in order to arrive at the truth," however, most judges focused on "more pressing problems of property settlement, alimony, and child custody."[71] 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 perjury are no longer countenanced in court."[72] A Connecticut attorney arguing in favor of divorce reform described the current law as "demeaning to the judiciary and to clients" because of the frequency of obvious perjury in fault-based divorce cases.[73] In Boston, one couple even went to court to sue for the right to a "no-fault" divorce. 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."[74] 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 witnesses have been rehearsed in their parts by the attorney."[75] Another reformer observed: "sometimes the rehearsal [was] almost too letter-perfect."[76] The sheer pink robe and the shorts cited by the New York judge as ubiquitous features of fault divorce cases show how "thinly concealed behind the masks of the courtroom players" were the fabrications.[77] During a discussion on divorce reform in Boston, a Massachusetts judge acknowledged that "lawyers under the present situation must be in an embarrassing position. They're

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(1953).

[70] Walker, *Beyond Fault: An Examination of Patterns of Behavior in Response to resent Divorce Laws*, 10 J. FAM. L. 267, 284 (1971)

[71] *Id*. Of course, some judges did object to the frauds being perpetrated in their courtrooms. A Missouri judge, for example, 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." Monrad G. Paulsen, For a Reform of the Divorce Laws, New York Times, SM 12 (May 13, 1962). Similarly, a court in Alabama on its own motion set aside a 1954 divorce decree between two New Yorks because of the fraud perpetrated upon the Alabama courts by the parties' false assertion that they were domiciled in Alabama. *Id*.

[72] Barbara Carlson, "Panelists Back No-Fault Divorce At Bar Association Discussion", The Hartford Courant, p. 9 (Oct. 3, 1972).

[73] *Id*.

[74] Margo Miller, "Couple ask court to let them divorce without charges against one another", Boston Globe p. 7 (May 25, 1973).

[75] Kay, *A family Court: The California Proposal*, 56 CALIF. L. REV. 1205, 1219 (1968).

[76] *Id*.

[77] *Id*.

supposed to be an officer of the court but also have the responsibility to do their best for a client."[78] 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.[79]

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 in part "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."[80] 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.[81] 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 prior laws" completed the major argument for reform.[82] 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.[83]

C. Jury Nullification and the Post-Reconstruction South

The story of jury nullification beginning in the post-Reconstruction south is familiar.[84] White juries routinely convicted black defendants accused of crimes against whites or exonerated

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[78] Ellen Pfeifer, "Law panel discusses no-fault divorce bill", Boston Globe p. 3 (Jan 29, 1972).

[79] At times, attorneys went too far even for lenient courts. *See, e.g.*, Matter of Gale, 75 N.Y. 526 (1879) (disbarring a new york lawyer who had played the part of the co-respondent in a divorce case).

[80] Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 17 (1990).

[81] Stone, *Moral Judgments and Material Provision in Divorce*, 3 FAM. L.Q. 371, 371 (1969).

[82] Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79, 91-97 (1991) (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 (1978). In addition, divorce proceedings are still, by many accounts, the site of false testimony. As one scholar puts it, "there 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, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. at 105 (1991). Nonetheless, shifting from a regime in which all parties collude in lies into 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.

[83] Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. at 82-91 (1991) (discussing history of the adoption of no-fault divorce laws in the U.S.).

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

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. "[S]tate judicial systems [were] composed entirely of white sheriffs, white prosecutors, white juries, and white judges."[85] Grand juries who refused to hand down indictments were also key players. In the words of Gunnar Myrdal, "[i]t 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."[86]

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.[87] Well-known cases – Emmett Till[88] and the Scottsboro boys[89] 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 just 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.[90]

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

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[85] RICHARD KLUGER, SIMPLE JUSTICE 64 (Vintage 1977).

[86] GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 523 (New York 1944).

[87] 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 second, "all white juries reacted with severity to black defendants charged with violence against whites, convicting them in disproportionate numbers." ABRAMSON, WE, THE JURY at 110.

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

[89] The Scottsboro boys were black teenagers accused of raping two white teenage girls on a train in Alabama in 1931. After an initial trial and appeal, one of the alleged victims admitted fabricating the rape story during a retrial. Nevertheless, the all-white jury convicted all of the defendants. The case was tried three times and all three times, guilty verdicts were handed down despite the recantation by one of the victims. Only once was there a black jury-member. *See* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (Rev'd ed. 2007).

[90] GEORGE C. WRIGHT, RACIAL VIOLENCE IN KENTUCKY, 1865-1940, 54 (1990).

to believe that colored men have no civil and political rights that white men are bound to respect."[91] Thus, in a sense, white jurors "understood the law to permit white violence"[92] even though such an interpretation was "not constitutionally plausible after the Civil War and the Fourteenth Amendment."[93] Indeed, even Ku Klux Klan members freely "acknowledged their willingness to disobey the law as jurors in defense of one another."[94] 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."[95]

Thus, this group of white southern nullifiers were acting not out of confusion about the letter of the law, but because they "fe[lt] and believe[d], morally, socially, politically, or religiously, that it is not murder for a white man to take the life of a negro with malice aforethought."[96] As the Freedmen's Bureau commissioner in Mississippi and Louisiana wrote of the post-emancipation South:

> Wherever I go . . . I hear 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.[97]

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."[98] The short-lived Black Codes, which prescribed a separate set of laws applicable only to blacks were a result of these attitudes.[99] 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

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[91] 3 Cong. Rec. 1795 (1875) (Statement of Sen. Morton).

[92] Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U.CHI. L. REV. 1133, 1184 (2011).

[93] Bressler at 1188.

[94] James Forman, *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 921. (2004).

[95] Cong Globe App, 42d Cong., 1st Sess 196 (Apr 6, 1871) (Rep Snyder).

[96] Nancy J. King, *Silencing Nullification Advocacy inside the Jury Room and outside the Courtroom*, 65 U. CHI. L. REV. 433, 466 (1998).

[97] LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 364 (Vintage 1979) (quoting Col. Samuel Thomas, Asst. Commissioner, Bureau of Refugees, Freedmen, and Abandoned Lands, to Gen. Carl Shurz, Sept. 28, 1865 in 39 Cong., 1 Sess., Senate Exec. Doc. 2).

[98] *Id.* at 364.

[99] *Id.* at 370.

racist justice system. Southern jury members, judges, sheriffs and prosecutors accordingly 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.

Foreseeing that "all-white juries would be instruments of racial oppression,"[100] 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. The Act also made it a crime for state or federal officials to discriminate on the basis of race in selecting jurors. 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 that they rarely served in several other states, including Florida, Louisiana, Mississippi, Missouri, South Carolina, and Virginia.[101] Still later, in 1940, a Carnegie Foundation study found that "the vast majority of rural courts in the Deep South . . . made no pretense of putting Negroes on jury lists, much less calling or using them in trials."[102]

In addition, even once the Supreme Court belatedly began to enforce anti-discrimination 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."[103] 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.[104]

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 lying that arises in contexts not poisoned by animosity towards the rule of law.

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[100] GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 253-72 (AMS Press 1969).

[101] *Id.*

[102] GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 549-50 (Harper, 2d ed. 1962) (quoting Arthur Raper, Race and Class Pressures 79, 80 (1940 (unpublished manuscript).

[103] JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 109 (BasicBooks 1994).

[104] *See* AMBRAMSON, WE, THE JURY at 108-112 for a brief outline of this history.

As Darryl Brown has observed in his work on the wider practice of jury nullification, all-white juries themselves were composed in violation of the law.[105] Among other factors, this leads him to question whether this practice belongs in the broader category of jury nullification.[106] Brown is also skeptical that 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."[107] Despite his reservations, Brown concludes that these factors do not disqualify southern white jury nullification from being classified under the broader category. Instead, he argues that they have important implications for those who would seek to reign in the practice. 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.[108]

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 it may be a mistake to attempt to draw conclusions about jury nullification, broadly conceived, from the history of white southern jury nullification. Rather than a practice best evaluated in light of theories of jury nullification, southern white jury nullification makes more sense 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, southern white jury nullification caused a "collapse of the rule of law" precisely because it occurred consistently over time with the open participation of many legal actors.[109] The case is complicated by the pervasive race-based distortions in the legal system. Nevertheless, it stands as an example, and a cautionary one, 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

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

[106] *Id.*

[107] *Id.* at 1195.

[108] *Id.*

[109] *Id.* at 1194.

was a moral affront to commit crimes against blacks. 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. 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."[110] 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 in cases of the same type, they 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, southern white jury nullification functioned as a law-making as well as 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, with multiple actors colluding to violate their oaths to uphold the law because of a strongly-felt belief, however repellant, 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 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.[111] 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 southern white 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

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[110] *Id*. at 1193.

[111] *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 (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, Ra*ce 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").

eradicate it.

D. Testilying

The exclusionary rule has been a feature of American constitutional jurisprudence since at least 1914.[112] 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.[113] 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. It is largely credited with introducing an era in which police fabricate probable cause for warrantless searches and lie about it in exclusionary rule hearings, a practice dubbed "testilying" by members of the N.Y.P.D.[114]

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. It requires the cooperation of prosecutors and police officers and of judges willing to ignore obvious falsehoods in the courtroom. There is evidence 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.[115] In its purest form, as opposed to its corrupt form in which evidence is fabricated,[116] testilying is understood to be done for a rationale that is

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

[113] 367 U.S. 643 (1961).

[114] N.Y. City Comm'n to Investigate Allegations of Police Corruption and Anti-Corruption Proc. of the Police Dep't at 36 (July 7, 1994) (Milton Mollen, Chair) [Hereinafter Mollen Commission].

[115] *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."). Of course, 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.

[116] 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," New York Times p. A1 (March 20, 2013). That

intertwined with the goals of a justice system – to ensure that the truth of the underlying criminal conduct is revealed by evidence that might otherwise be suppressed. Finally, it is an open practice in the criminal justice system which 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 narcotics cases in New York 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.[117] 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.[118]

Around the same time, Irving Younger, who at various times served as a prosecutor, judge and law professor, reported similar observations. Younger wrote that after *Mapp*, "police made the great discovery that if the defendant drops the narcotics on the ground, after which the policeman arrests him, the search is reasonable and the evidence is admissible."[119] He hypothesized that because police couldn't ensure that defendants actually would drop the drugs or otherwise expose them without being searched, they had begun to lie during hearings in order to avoid the suppression of the drug evidence.[120] Younger's 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. In a 1967 article with the headline, "Ex-U.S. Aide Links Police to

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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. No physical evidence connected him to the crime and all of the witnesses in the case had signed statements recanting their testimony. The original investigation by police, "according to investigators and legal documents, broke rule after rule" and including coaching a witness before a lineup, bribing other witnesses with visits to prostitutes, improper questioning of the suspect, and a failure 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.*at A22. Nevertheless, he sent the case to the jury without any hint of that worry. *Id.*

Yet, these forms of corruption are distinct from testilying, which is done in order to 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 in fact found contraband in possession of the defendant.

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

[118] *Id.*

[119] Irving Younger, "The Perjury Routine" The Nation, May 3, 1967, p. 596.

[120] *Id.*

Perjury,"[121] Younger asserted that police perjury to avoid the exclusionary rule was widely recognized, and claimed he was simply exposing something that "[e]very lawyer who practices in the criminal courts knows . . . is commonplace."[122]

Thus, very soon after the incidence of police perjury seems to have ballooned in response to *Mapp*, testilying 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 as well as being openly discussed in both scholarly and public forums. 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," Younger wrote, "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."[123]

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 shop talk term, "testilying," for the practice of telling lies to avoid the exclusionary rule.[124] After hundreds of interviews, 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."[125]

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.[126] Although finding that many of the previous studies were "skewed" by the researcher's initial premise, the 1998 authors wrote that the "costly effect of the exclusionary rule that emerges from the [previous] studies is that it has encouraged police officers to falsify their reports and their testimony."[127] 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

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[121] Sydney E. Zion, "Ex-U.S. Aide Links Police to Perjury", New York Times, May 14, 1967, p. 112.
[122] *Id.*
[123] Irving Younger, "The Perjury Routine" The Nation, p. 596-97 May 3, 1967.
[124] Mollen Commission at 36.
[125] *Id.*
[126] 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).
[127] *Id.* at 710.

police officer deception."[128]

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.[129] One study conducted by Melanie Wilson in the District of Kansas addresses the question whether judges are complicit in police perjury.[130] 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."[131] Even when the balance of the evidence clearly favored the defendant, judges in Kansas continued to find in favor of the government. Wilson concludes that if Kansas is representative, "trial judges will reject even defendants' strongest proof about 78% of the time."[132] Over forty years after Irving Younger wrote about police perjury, Wilson's study indicates "that judges habitually accept the policeman's word."[133]

Wilson also found that "criminal defendants rarely assert in court pleadings or hearings that police have lied."[134] She offers no firm explanation for this, but her hypotheses suggest that defense attorneys contribute to the persistence of testilying by advising clients not to challenge police credibility.[135] 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 judicial recognition of police dishonesty is so uncommon that it will rarely advance the defendant's cause to assert police lies."[136]

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 L.A. 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 rule is the lack of good faith on the part of the judiciary

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[128] Id. at 735.

[129] Melanie D. Wilson, *Improbable Cause: A Case for Judging Police by a More Majestic Standard*, 15 BERKELEY J. CRIM. L. 259, 273 (2010).

[130] *Id.*

[131] *Id.* at 308.

[132] *Id.*

[133] *Id.* at 277 (citing Younger).

[134] *Id.* at 273.

[135] *Id.* at 288.

[136] *Id.*

and law enforcement officers in enforcing the rules."[137] 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."[138] In 1985, an article titled, "The System Covers Up for Police Perjurers" was featured in major U.S. newspapers.[139] That article echoed the argument that prosecutors, judges and police work together to admit perjured testimony by the police in suppression hearings. It reported on a speech in which Boston defense attorney, Michael Avery, charged "there is a conspiracy to protect police officers who commit perjury."[140] 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."[141]

Testilying gained national attention during the O.J. Simpson trial, which highlighted the broader problem of police lying[142] and also illustrated the subsidiary problem of police testilying. The case involved blatant lies at an exclusionary hearing by the police who had searched the Simpson home without a warrant and recovered the infamous bloody glove. 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.[143] 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."[144] Scholars argued that police perjury was key to the prosecution's failure and prosecutors around the country had trouble finding jurors who were not mistrustful of the police.[145]

The Simpson trial may have influenced public perceptions of the police but it had no discernable effect on the practice of testilying.

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[137] Letter from Rudolph Pearl, The Totalitarian Danger of Allowing Improper Evidence, Los Angeles Times, B4, Sept. 29, 1973.

[138] *Id.*

[139] Nat Hentoff, The System Covers Up For Police Perjurers, Hartford Courant, D11, Sept. 19, 1985.

[140] *Id.*

[141] *Id.*

[142] 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.

[143] Transcript of Ruling Denying Motion to Suppress Evidence, L.A. Times, July 8, 1994, at A25.

[144] Paul Butler, *When Judges Lie*, 91 MINN. L. REV. at 1796.

[145] Alan Dershowitz, "Police Perjury Destroyed the Simpson Prosecution", Buff News, Oct 7 1995 at 3B.

Both public excoriations of a system that tolerates testilying and scholarly investigation of the practice continue apace. The 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.[146] Also, and significantly, there are typically no repercussions for police who lie or for the prosecutors who put them on the stand. 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 officer."[147] 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. Instead, even when they have every reason to disbelieve officers, judges routinely admit evidence that from a legal perspective clearly should be excluded.[148]

II. TOWARDS 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 has recurred over time and in different contexts yet has significant common features that it deserves theoretical attention. This section 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

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[146] *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.").

[147] Peter Keane, "Why Cops Lie," San Francisco Chronicle (March 15, 2011)

[148] Melanie D. Wilson, *Improbable Cause: A Case for Judging Police by a More Majestic Standard*, 15 BERKELEY J. CRIM. L. 259, 301 (2010) (citing empirical study in District of 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").

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 extra-legal means have been lauded for their ability to produce normatively desirable ends. This section 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, it suggests that we should not be complacent in the face of systemic lying. Whether we like or dislike the substantive outcomes it 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, it 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."[149] In the legal context, Robert Cover articulated this phenomenon as the need to confront "inconsistency among consciously held and articulated principles."[150] The actors in the legal system confront a "moral-formal" dilemma.[151] Here, the systemic liars' understanding of what would be just in a particular cases 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."[152]

Under Cover's framework, dissonance-reducing behaviors are likely to arise in situations in which actors "must choose among closely balanced, inconsistent alternatives."[153] The actors have strong

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[149] LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (Stanford U. Press 1957).

[150] ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 227 *note (Yale Univ. Press 1975).

[151] *Id.* at 197.

[152] *Id.*

[153] *Id.* at 227.

reasons to choose formal compliance with the law and equally strong reasons to refuse to comply in order to achieve a just outcome. Cover addresses the dilemma that antislavery judges faced when asked to enforce fugitive slave laws. He explains that judges experienced a conflict between their obligation to "apply[] legal rules impersonally" and their self-image as "moral human being[s]."[154] When confronted with an ordinary case involving some cognitive dissonance, the judge might without too much trouble choose "role fidelity" and uphold the law. 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."[155] 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.[156]

Cover's cognitive dissonance study reveals not "judicial civil disobedience,"[157] as he had advocated in previous work, but its opposite, judicial formalism accompanied by rhetoric that increased the "moral comfort" of the judges.[158] 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 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,"[159] systemic lying reduces dissonance between legal and moral norms through the more subtle, yet more compromising act of falsehood.

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[154] *Id*. at 228.

[155] *Id*.

[156] *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.").

[157] Cover's theory in Justice Accused has been contrasted with the forceful call to action in his earlier essay, Robert M. Cover, Book Review, *Atrocious Judges: Lives of Judges Infamous As Tools of Tyrants and Instruments of Oppression by Richard Hildreth, New York: 1856*, 68 COLUM. L. REV. 1003, 1007 (1968), in which he called for judges to "simply refuse to follow law or authority and set resisters [to the Vietnam war] free."

[158] 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.

[159] Cover, *Atrocious Judges*, 68 COLUM. L. REV. at 1007.

Before turning to the problems with resolving dissonance through falsehood, it is worth unraveling more fully how the "moral-formal"[160] dilemmas described in the case studies are ameliorated through systemic lying. Although systemic lying is a product of cognitive dissonance, as described by Cover, it differs from the fugitive slave example, in which judges were the primary actors,[161] 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,"[162] 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 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.[163] 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 in Part I argued to his jury, they could take comfort in knowing the practice was "quite

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[160] *See* COVER, JUSTICE ACCUSED at 197-98.

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

[162] *Id.* at 229.

[163] *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 theory that in context of political decision-making, aggregate decision-making is better than individual decision-making).

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."[164]

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.[165] 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 any judgment about the substance of the practice. Sunstein argues that this is an important caveat to the idea that there is invariably wisdom in crowd decision-making. Crowds can move in perverse directions by their inclination to follow the leader.[166] Although any given instance of systemic lying reflects a group reaction to dissonance between legal norms and moral norms, there may thus be a diminution in the degree to which subsequent actors re-assess 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 one form of "moral-formal" conflict. The case studies suggest that, at a minimum, it may arise when the law has lagged behind evolving moral beliefs, when the law changes ahead of those beliefs, or when the system confronts a particularly difficult question, such as a so-called "dirty harry" problem or the need to balance constitutional and crime-fighting imperatives.[167] 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 that were more in line with popular beliefs. 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. For juries composed of white southerners in the

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[164] Frances Jeffrey, Speech for the Defense (June 10, 1822) *in Trial of James Stuart, Esq., Younger of Dunearn, Before the High Court of Justiciary at Edinburgh* 147 (2d ed., Edinburgh 1822).

[165] *See* CASS SUNSTEIN, A CONSTITUTION OF MANY MINDS 119-124 (2009); *See also* ADDRIAN VERMUELE, LAW AND THE LIMITS OF REASON at 147 (2009) (discussing pathologies that impair group decision-making).

[166] SUNSTEIN, WHY SOCIETIES NEED DISSENT 122-124 (2006).

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

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. Despite its moral repugnance, this 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 lay people charged with carrying it out.

Finally, in testilying, we see a contemporary example of consensus among legal actors that justice is served by oath-breaking.[168] 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 escape punishment. Although the idea that we might privilege competing policy goals over the quest to convict the guilty is deeply embedded in our legal system,[169] 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.[170] 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."[171] Chief Justice Roberts recently 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."[172] The Chief Justice went on to observe that releasing those defendants "offends basic concepts of the criminal justice system,"[173] a comment 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.

While 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.[174] With no less a figure than the Chief Justice

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[168] See, e.g., Christoher 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").

[169] *See, e.g.*, spousal and other evidentiary privileges, special relevance rules.

[170] 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. (forthcoming 2014) at 17-21.

[171] People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

[172] Herring, 129 S. Ct. at 701.

[173] *Id.*

[174] Columbia study. ("Police behavior seldom exceeds the limits of community approved standards. When a community protests, claiming that police patrol practices exceeded acceptable limits, it is not necessarily demanding strict compliance with constitutionally mandated procedures. Instead, the

suggesting that it is antithetical to justice to let a guilty defendant go free, it is not surprising that testilying 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.[175] 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. Proponents of these informal practices have argued that the process of legal elaboration can productively involve not just rigid adherence to jurisdictionally-sound laws[176] 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 Federalist's call for ratifying conventions as a "revolutionary break with existing rules" that nonetheless "represented a breakthrough for democratic ideals."[177] 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 by a few individual state courts" has the capacity not only to promote dialogue with their own state legislatures, but to inform and motivate legislative action more broadly.[178] 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

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community may only be asking that the police be more selective in deciding whom to line against the wall.")

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

[176] 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." 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. Antonin Scalia, Of Democracy, Morality and the Majority, Address at Gregorian University (May 2, 1996), in 26 Origins 82, 89 (1996).

[177] 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 (1989).

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

correct legal response conflicts with the correct moral response."[179]

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."[180] 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."[181] Yet, the rhetorical device of the legal fiction itself has inspired the same argument in its favor. Sir Henry Maine wrote that "at a particular stage of social progress," legal fictions "are invaluable expedients for overcoming the rigidity of the law."[182] Blackstone argued that such fictions could be "highly beneficial and useful" because "no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law."[183]

Superficially, systemic lying seems akin to the deft use of a legal fiction or the refusal to follow a statutory rule that is "out of phase."[184] It 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 of verdicts against nonviolent African-American lawbreakers.[185] 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."[186] According to his theory, black jurors have a "legitimizing function" in a legal system that had historically excluded them, making their decision to nullify a particularly powerful tool to promote change.[187] 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 "sending black jurors a message" that they should "consider the evidence presented at trial" in light of the racial discrimination inherent in the

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[179] Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785, 1792-1805 (2007) (describing instances when judges "subvert" legal mandates based on moral beliefs and advocating such subversion).

[180] GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 166 (1982).

[181] *Id.*

[182] Sir Henry Maine, *Ancient Law*, in THE PROBLEMS OF JURISPRUDENCE 371 (L. Fuller ed. 1946).

[183] 3 BLACKSTONE, COMMENTARIES *43.

[184] CALABRESI, A COMMON LAW at 166.

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

[186] *Id.* at 708.

[187] *Id.* at 714.

system.[188] Thus, Butler makes it clear that in his vision, systemic nullification of certain verdicts by 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"[189] – 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.[190] 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."[191] 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 – who, by her nature as innocent and facing criminal charges, has already been systemically abused once – to risk, against her will, an uncertain trial with a significant downside."[192] Citing the system's strong aversion – grounded in what he believes to be an "antiquated truth-seeking ideal"[193] – 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.[194] The false admission would be "'another means of bending law to promote function, form, and sometimes even fairness.'"[195]

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 the 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 to be made for the exercise of discretion not to prosecute conscientious draft offenders in part because there was a strong case "for changing the law in their

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[188] *Id.* at 684-690 (describing controversy over 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).

[189] *Id.* at 691.

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

[191] *Id.*

[192] *Id.* at 1159.

[193] *Id.* at 1171.

[194] *Id.* at 1170-74.

[195] *Id.* at 1174 (quoting Aviam Soifer, Reviewing Legal Fictions, 20 Ga. L. Rev. 871, 875 (1986)).

favor."[196] 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. And unlike the other two cases studies examined here, both also anticipated legal reforms that validated the moral position of the systemic liars.

Of course, the case of white southern jury nullification is not so easily accommodated by the justifications that have been advanced for nullification practices. 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, it did not adjust the law in a way that was later validated through reform. Dworkin might distinguish the case of the southern white nullifiers in the same way that he addresses the difference between conscientious draft objectors and segregationists who "sincere[ly] and ardent[ly] believed "that the civil rights laws and decisions [were] unconstitutional."[197] According to Dworkin, the difference between the two cases has to do with whether the law at issue reflects a "judgment that someone has a moral right to be free from certain injuries."[198] Therefore, 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."[199]

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.[200] It certainly applies to white southern jury nullification, which without 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 was expressed by the eighteenth century penal code. Further, it is difficult to say where this 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

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[196] Ronald Dworkin, *Civil Disobedience* 206 *in* TAKING RIGHTS SERIOUSLY (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).

[197] *Id*. at 208

[198] *Id*.

[199] *Id*. at 213.

[200] *Id*.

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 – 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[201] – did not exist in pre-reform divorce statutes.

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, inconsistently applied, and they can be deployed for ill as well as for good.[202] Those arguments are relevant

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[201] *Id.* at 216.

[202] *See, e.g.*, Steven M. Warshawsky, Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy, 85 Geo. L.J. 191, 219 (1996) (arguing that democratic legitimacy problems, unreviewability, and justice deficits inhere in jury nullification); Richard St. John, License to Nullify: The Democratic

to systemic lying, but their contours are not markedly different in this context than in others in which they continue to be discussed. Rather than rehash them, this section is focused 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.[203] 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.[204] If we accept the premise that it is at times right to lie to prevent the miscarriage of justice,[205] 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.[206] This section is concerned not with foreclosing the possibility that systemic lying may be a morally correct response to certain situations, but with identifying the costs 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 that system of checks and balances, but also because it undermines the appearance of procedural fairness, which is an important key to legitimacy and obedience to the law.

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and Constitutional Deficiencies of Authorized Jury Lawmaking, 106 Yale L.J. 2563 (1997) (describing democratic legitimacy problems inherent in jury nullification).

[203] Our approach to deceptive interrogation practices provides one example of our openness to deception. *See, e.g.*, Jacqueline Ross, *Deceptive Interrogation in the United States and Germany*, 28 OXFORD J. L. STUD. 443 (2008) (citing Criminal Procedure Code of the Federal Republic of Germany § 136a).

[204] *See, e.g.*, Butler, *When Judges Lie*, 91 MINN. L. REV. at 1822-23 (acknowledging lying as a "moral cost" but arguing in favor of judicial subversion of the law in limited circumstances). *See also* Part II.C., *supra*, for a discussion of practices that involve deception yet are seen as positive for the legal system.

[205] *See* Immanuel Kant, *On A Supposed Right to Lie From Altruistic Motives in* CRITIQUES OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY 346-51 (Lewis White Beck, trans.) (U. Chicago Press 1949) (arguing that there is a categorical imperative to tell the truth even when it seems that a lie would save a life).

[206] As Tom Tyler observes in explaining his decision to focus on procedural justice and its relationship to perceived legitimacy as opposed to outcome favorability, "[b]ecause there is no single, commonly accepted set of moral values against which to judge the fairness of outcomes . . . such evaluations are difficult to make." TOM R. TYLER, WHY PEOPLE OBEY THE LAW 109 (2006).

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.[207] 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.[208] Without the ability to distinguish and rely on truth, members of society could no longer make judgments about reality.[209] Such a society, according to Bok, would collapse.[210]

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 is explicit in its embrace of 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 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."[211]

Of course, this does not suggest that no lying can be tolerated or even "what kinds of lies should be prohibited."[212] Bok contends that "in any situation where a lie is a possible choice, one must first seek truthful alternatives."[213] As the preceding sections 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 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

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[207] BOK, LYING at 19.
[208] *Id.*
[209] *Id.* at 20.
[210] *Id.*
[211] *Id.* at 33.
[212] *Id.*
[213] *Id.*

coherence and factual accuracy, any practice through which participants lie repeatedly in violation of a sworn duty destabilizes the system. When the lying involves judges and attorneys who are themselves "officers of the court" and 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. As discussed in the previous section, scholars, including Professors Butler and Bowers have publicly called for forms of systemic lying.[214] Although Butler's proposal, in particular, proved controversial,[215] both he and Bowers deserve credit for openly discussing the possibility that systemic lies might be the remedy for systemic injustice. As this exploration of systemic lying has shown, it is not far-fetched to suggest that a practice that amounts to systemic lying might be a tool for responding to various forms of systemic injustice. In response to those elisions, this section will briefly explore two other practices that have been elided with systemic lying. While these other practices 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 does systemic lying.

The legal fiction provides a useful first counterpoint because it helps elucidate why lying under oath is an important feature of systemic lying. In making the claim that the system should permit false guilty pleas, Professor Bowers elides the legal fiction with the systemic lie. He argues that this proposal would simply create a species of legal fiction to address dissonance between popular mores and the law.[216] Bowers is able to make this claim because legal

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[214] Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995); Josh Bowers, Punishing the Innocent, 156 U. Pa. L. Rev. 1117, 1121 (2008).

[215] *See, e.g.*, Andrew D. Leipold, T*he Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 108 (1996).

[216] Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. at 1171 ("False pleas are only less truthful than . . . other fictions by degree").

fictions suffer from definitional infirmities. Nonetheless, legal fictions by any definition, while they are 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]"[217] 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."[218] In addition, as Fuller pointed out, it seems unlikely that judges have the intent to deceive when they employ a legal fiction because opinions are published and read by other judges, attorneys and anyone else with an interest, making it "a little difficult to see how the supposed deceit could actually succeed."[219]

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,[220] 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.[221] 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 contrast to systemic lying. Much of the scholarly discussion of jury nullification has not offered a clear definition of terms. Darryl Brown, for example, adds any type of jury refusal to follow the law into the nullification mix.[222] By most accounts, however, jury nullification happens whenever "a jury votes to acquit a defendant despite the fact that the defendant is guilty

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[217] LON FULLER, LEGAL FICTIONS 11 (1967).

[218] *Id.* at 22

[219] *Id.* at 57,

[220] Jeremy Bentham, *A Comment on the Commentaries*, in A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 59 (1977).

[221] See, e.g., 28 USC § 453, "Oaths of justices and judges," which prescribes the following oath for federal judges: "I, XXX XXX, 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 XXX under the Constitution and laws of the United States. So help me God."

[222] *See, e.g.*, 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 (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."); U.S. v. Thomas, 116 F.3d 606, 614 (2d Cir. 1997) (observing that "'nullification' can cover a number of distinct, though related, phenomena, encompassing in one word conduct that takes place for a variety of different reasons).

under the letter of the law."[223] 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.[224] There is also general agreement that jury nullification occurs for one of several reasons. The jury may believe that the law itself is unjust.[225] The jury may decide that applying the law in a particular case would be wrong.[226] Or, the jury may conclude that the punishment would be too harsh if it were to convict in a given case.[227] 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.[228]

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.[229] The reality is, however,

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

[224] *See, e.g.*, United States v. Thomas, 116 F.3d 606, 614 (2d Cir. 1997) (defining jury nullification as "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. DISTRICT COURT JUDGES 225 (4th ed. 1996, rev. 2000)); M. KADISH & S. KADISH, DISCRETION TO DISOBEY 50-62 (1973) (outlining arguments that jury nullification violates jurors' obligation to decide cases in accordance with instructions and evidence).

[225] *See, e.g.*, Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1178 (1997) (describing category of nullification in which "jurors simply refuse to enforce a valid (although in their minds unjust) statute").

[226] *Id.* at 1183 (identifying jury nullification in cases "in which a just law seems unjustly applied").

[227] *See, e.g.*, Barkow, *Ascent of the Administrative State*, 121 HARV. L. REV. at 1340; United States v. Thomas, 116 F.3d 606, 614 (2d Cir. 1997) (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").

[228] The Zenger case provides a classic example of jury nullification. Trial of John Peter Zenger, 9 Geo. 2 (1735), reprinted in 17 T.B. Howell, Cobbett's Complete Collection of State Trials 675 (London, T.C. Hansard 1816). Zenger was charged with seditious libel for publishing a newspaper critical of the New York governor. 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. JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 93 (Stanley Nider Katz ed., 2d ed. 1972).

[229] *Compare, e.g.*, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L.J. 677, 708 (1995) (arguing in favor of jury nullification to confront racial

that since the Supreme Court held in 1896 that juries do not have the power to find the law,[230] federal judges must instruct jurors to follow the law as articulated by the judge in jury instructions.[231] With the exception of two states with limited constitutional provisions allowing the jury to find law[232] 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 relation to the facts in controversy"[233] 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."[234] An attorney who hints of nullification to the jury can be sanctioned[235] and a judge who suggests it commits reversible error.[236] Those very real checks on cooperation by judges or attorneys mean that jury nullification, if it occurs,[237] 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. Lying that happens repeatedly for the same reason with the collaboration of actors who are responsible for policing the system for untruths has the capacity

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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.")

[230] Sparf v. United States, 156 U.S. 51 (1895).

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

[232] Maryland and Indiana both maintain a limited right for juries to find law. See Md. Const., art. Xxiii; Ind. Const., art. I, § 19 (1993).

[233] *See* New Hampshire Ch. 243, HB 416 (Approved June 18, 2012).

[234] KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 361 (Oxford U. Press 1987).

[235] ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 4-7.7 (3d ed. 1993) (prohibiting defense counsel from making arguments "which would divert the jury from its duty to decide the case on the evidence").

[236] *See, e.g.*, People v. Goetz, 73 N.Y.2d 751, 752 (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 the defendant concedes, is not a legally sanctioned function of the jury and should not be encouraged by the court.")

[237] 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, 1611 (2000-2001). In criminal cases, scholars have reached a similar conclusion. As the authors of one study attempting to get at the question empirically observed, "it 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 difficult for scholars to determine how often the practice occurs. 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, 1277 (2003). 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.

to replace truthfulness with lying, a tradeoff that is logically as well as functionally problematic. 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, it is easy to see how 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.[238]

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[239] and to use legally permissible and procedurally acceptable means in doing so, suggesting 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. That is problematic because it conveys the outward message that procedural protections are not absolute. It may also 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.[240] Since views about the legitimacy of the legal system predict compliance with legal rules, there is reason to believe that systemic lying will

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[238] 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," makes the argument that police lying has reached epidemic proportions. She contends that "the police shouldn't be trusted any more than any other witness" and "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." Michelle Alexander, "Why Police Lie Under Oath", Op-Ed, New York Times (Feb 2, 2013). In order to meet the arrest quotas that are the key to federal and other funding, she suggests, 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.

[239] 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.").

[240] Tyler, Why People Obey the Law at 108.

affect compliance with the law because it affects the perception of procedural fairness and thereby legitimacy.[241]

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 way that is clearly unsupported by its language, those checks may be silent, but they are not necessarily overriden. 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 this may depend on their assessment of the outcomes. In other contexts in which citizens come into contact with the criminal justice system, however, perceptions of procedural fairness have been found to affect perceptions of the legitimacy of the system more than other concerns, even the question whether the law itself is just.[242]

Those who have advocated for and against practices that amount to systemic lying have, not surprisingly, made arguments responding 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 away 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 John Stuart Mill would make the case, later in the century, that "social relationships . . . need to be sustained by mutual truth and credibility,"[243] the reformers argued that pious perjury threatened the very existence of the legal system.[244] Those seeking reform of U.S. divorce laws made similar claims, demanding reform

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[241] *Id*. at 62.

[242] *See*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 108 (2006).

[243] Alasdair MacIntyre, *Truthfulness, Lies, and Moral Philosophers: What Can We Learn from Mill and Kant? The Tanner Lectures on Human Values* (Princeton University, April 6 & 7, 1994).

[244] As one reformer put it, "when the public see twelve respectable men – in open court – in the face of day – 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 actually 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 at 63. *See also* 1 Jeremy Bentham, *Rationale of Judicial Evidence, Specially Applied to English Practice* 386 (1827) (excoriating Blackstone for the "flat contradiction in terms" inherent in calling any form of perjury "pious"); Lord Holland, Statement in the House of Lords Friday (May 24 1811) *in* 3 Basil Montagu, Esq., *The Opinions of Different Authors Upon the Punishment of Death* 125 (1813) (describing Romilly's argument that pious perjury was eroding the "certainty and regularity which ought always to characterize the laws of a free country").

in order "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."[245] 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.

Both Butler and Bowers, by contrast, claim that the system already lacks legitimacy in their areas of focus and that their proposals would be an improvement over existing bad practices in that area.[246] 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. Jury nullification, which by definition also involves oath violations, has not destabilized the system. Indeed, despite occasional unfavorable media coverage,[247] jury nullification is more often praised as an important safety valve in a system that cannot always provide perfect justice.[248]

Whether, despite its potential perils, 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.[249] The first is by allowing defendants to plead guilty to crimes they clearly did not commit.[250] And the second is by allowing defendants to enter guilty pleas to hypothetical crimes.[251] Both are ways to adjust sentences downward under the sentencing guidelines. Both are different from ordinary plea bargaining in that they do not involve adjusting the consequences of a plea by simply choosing from a list of crimes that do, in fact, describe the conduct of the defendant. Instead, they

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[245] Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 17 (1990).

[246] Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1121 (2008).

[247] To offer just one of many examples, 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. Nancy Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. MICH. J.L. REFORM 285, 296 (1999).

[248] *See, e.g.*, Jack Weinstein, *Considering Jury "Nullification"*, 30 AM. CRIM. L. REV. 239, 245 (1992-1993) (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"); Milton Heumann & Lance Cassak, *Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases*, 20 AM. J. CRIM. L. REV. 343, 386 (1983) (arguing that nullification is part of "the jury's role as the conscience of the democratic community").

[249] Two of the practices Bowers cites – courts allowing defendants to plead guilty to crimes they clearly did not commit in order to satisfy lesser charges and pleas to certain hypothetical crimes – are arguably examples of systemic lying. Bowers at 1170.

[250] *Id.*

[251] *Id.*

require multiple actors to acquiesce in an untruth under circumstances in which such falsehood is explicitly prohibited. These practices are happening, according to Bowers and others, because of the perception that in their absence, the combination of the criminal code and the sentencing guidelines will not allow for just sentences. 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?[252]

There are two ways to answer this. The first is that whether we think systemic lying in the plea bargaining context in the immediate term is worth the risks to the truth imperative and to legitimacy will depend on how we view sentencing laws and how we understand what is morally right in particular sentencing scenarios. The second is that as a long-term solution to any moral-formal dilemma, no matter how intractable, we should reject systemic lying. This is in part because of the potential for systemic lying to mask problems within the system and in doing so delay reforms. More importantly, however, it is because in the long run, the system cannot sustain systemic lying 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."[253]

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 in some cases. This Article cannot definitively answer how we get to what we might call systemic lying "tipping points" and move into

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[252] *See, e.g.*, Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 6-21 (2010) (describing 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 the criminal law in the form of testilying and dishonest pleas reinforces the notion, put forward by many, that the criminal law is experiencing a profound and multi-faceted crisis. *See, e.g.*, Randolph N. Stone, *Crisis in the Criminal Justice System: The Socio-Economic Struggle for Equality*," 8 HARV. BLACKLETTER J. 33 (1991) (arguing that the criminal justice system is 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 lead to systemic lying in this context. The issue of sentencing, in particular, has recently generated an improbable alliance between libertarian Republicans and the Democratic attorney general in favor of reform. Matt Apuzzo, "Holder and Republicans Unite to Soften Sentencing Laws, N.Y. Times, March 3, 2014 (describing "unlikely" alliance between Richard Holden and Rand Paul to promote sentencing reform). Whether those efforts will enable us to move beyond systemic lying in the plea context or others remains to be seen.

[253] BOK at 33.

some consensus that we should commit to resolving the problems that generate systemic lying. 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 undoubtedly play a role. What the case studies do suggest is that we will ultimately arrive at such points. 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.

III. 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 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 defend the integrity of our legal actors, of our courtrooms, and of our system of justice itself.