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Valuable Lies

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VALUABLE LIES

Ariel Porat and Omri Yadlin

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

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VALUABLE LIES

Ariel Porat & Omri Yadlin[*]

Should a Muslim employee who falsely stated in his job interview that he is Christian in order to avoid discrimination be fired for his dishonesty? Should a buyer of a tract of land who conducted an expensive investigation before contracting that revealed a high likelihood of mineral deposits be subject to liability for fraud because he told the seller he knew nothing about the land's mineral potential before purchase? Is a doctor violating her legal duties toward her patient if she convinces him to get vaccinated on the pretext that it is in his best interest when it is instead in the public interest? In all of these cases, and many others, parties are allowed not to disclose material information to an interested party but not to lie about the same information.

This article makes the argument that in many contexts, where non-disclosure is permitted lies should also be tolerated, for otherwise the social goals sought by allowing non-disclosure are frustrated. With this as its starting point, the article develops a theory of valuable lies, discussing the conditions under which lies should be permitted. It analyzes the main impediments to allowing lies, the most important of which being the risk that permitting lies would impair truth-tellers' ability to reliably convey truthful information. The article applies the theory to various fields, including contract law, tort law, medical malpractice, criminal law and procedure, and constitutional law. It concludes by proposing changes to the law that will allow telling valuable lies in well-defined categories of cases.

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INTRODUCTION

John, a Muslim lawyer, applies for a position at a law firm. During his job interview, he is asked about his religion and falsely states that he is Christian. The firm hires him. A few weeks later, John's lie is discovered, and he is fired. The firm claims that he was fired not due to his religion but

because of his dishonesty. Assume that under prevailing law, terminating an employment contract is allowed for just cause only. Did the firm act legally, then?

The purpose of this article is to explore the law's approach to lying in various fields and develop a theory of valuable lies. The theoretical framework we propose explains why, under certain conditions, the law tolerates lies. More importantly, we suggest that lying should be more broadly permissible than is currently the case under the law.

Much has been written about the duty to disclose information: contractual parties must disclose material information to each other before contracting; doctors must disclose information about the risks of treatment they administer to their patients; witnesses must disclose information when testifying in court; merchants must disclose information about their products to consumers; and firms must disclose material information about their business to investors. Disclosure, however, is not always required. In many circumstances, the law allows individuals, as well as firms, to withhold information even when non-disclosure might adversely affect other people's interests. In contrast, a right to lie has been almost completely rejected in the case law,[1] and this is rarely questioned by legal scholars. Even where non-disclosure is allowed, lying is prohibited. We contend that this legal equilibrium is puzzling for two reasons. First, in many cases, the harm that non-disclosure inflicts on other parties is the same as the harm caused by an affirmative lie. Second, in many instances, the right *not* to disclose information is almost meaningless if not accompanied by a right to lie. Thus, to return to the example we opened with, if John is permitted by law not to disclose his religion to his potential employer—in order to avoid illegal discrimination—recognizing his right to lie if explicitly asked about his religion seems inevitable.

We begin the article by identifying four categories of cases in which lies, even if harmful to some individuals, could be beneficial to society at large. After presenting these categories, we outline our proposed theory for determining which lies are socially valuable and which are not. The first category of cases, involving "*productive-information*" lies, refers to instances in which lying is necessary for generating productive information. A classic example, which is extensively discussed in the literature on disclosure duties, is that of a potential buyer of a tract of land who conducts an expensive investigation into the likelihood of mineral deposits on the land and discovers the chances to be high. He does not disclose this information to the seller and buys the land for a price that does not reflect the high likelihood of mineral deposits. The question that arises here is whether the buyer breached a duty of disclosure toward the seller

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[1] For exceptional cases, see Saul Levmore, *A Theory of Deception, and Then of Common Law Categories*, 85 TEX. L. REV. 1359 (2007) (presenting a few exceptional cases where courts have tolerated deception and arguing that in these cases, deception can be justified by cost-benefit rationale).

and whether the latter is entitled to rescind the contract. The answer commonly given to this question in the legal literature is that subjecting such a buyer to a duty to disclose the results of his investigation would discourage him from conducting such an investigation to begin with, because he would not be able to reap its benefits. More important, however, is that his investigation generates information that is socially beneficial or productive, for it can facilitate the efficient use of the land and increase social welfare. Therefore, to encourage the buyer to initiate such an investigation, he should be allowed to withhold its results from the seller.[2]

But suppose that the seller in our example explicitly asks the buyer whether he investigated the chances of finding mineral deposits on the land and what emerged from this investigation: How should the buyer be required to respond? If we take the social value of generating productive information argument seriously, then the unavoidable conclusion is that the buyer should be permitted to either falsely deny conducting an investigation or else lie about its results, for again, otherwise, he would never invest in acquiring the information to begin with. Note that restricting the buyer to a "no comment" response would not be of any avail to the buyer, because the seller would likely interpret such a response as indicative of a high likelihood of mineral deposits, and the buyer would still be deprived of the profits of his acquired information. Moreover, sometimes the mere knowledge that the buyer is a mineral mining expert could signal to the seller that there are good chances of finding minerals on her land. In such a case, the buyer's only option for profiting from his information is to conceal his identity and, if necessary, lie about it.

Yet in contrast to our proposed understanding of the need to allow lying in such contexts, the law imposes an outright prohibition on lies in commercial negotiations. As a result, if the buyer in our example were to lie about either the likelihood of mineral deposits on the land or his identity, the seller would be entitled to rescind the contract and even recover her losses.[3] We argue that the law's stance on lying is both inefficient and inconsistent. We suggest several innovative solutions to this paradigmatic case, which, if adopted, would restore both efficiency and consistency in the law.

The second category of cases we identify involves *"anti-abuse" lies*. Consider again the example of John the Muslim lawyer. It is universally accepted that an employee is not under any legal duty to disclose his or her

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[2] Anthony Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978) (arguing that when information is deliberately acquired by a buyer, there should be no duty of disclosure). For the prevailing contract law approach on this matter, see *infra* note 27 and accompanying text.

[3] RESTATEMENT (SECOND) CONTRACTS § 164(1) (1981) (in order to make a contract voidable, the party's manifestation of assent must be induced by the other party's misrepresentation that is either fraudulent or material); ALAN FARNSWORTH, CONTRACTS 252-54 (4th ed. 2004) (same).

religion, sexual orientation, race, or any other personal characteristics that are irrelevant to the employment, even if (and, even more, especially if) his or her employer is interested in this information. But what if the only way to keep these personal details private is to lie about them? Should lying in order to avoid the risk of discrimination be tolerated by the law? Our claim is that the only way to take religion (and like attributes) off the employment table is to allow employees or potential employees to lie about it.

But how far should the law go in order to prevent potential discrimination? For example, should the law allow an employee to give a false name since his true name reveals he is a Muslim? The more general question is whether lying can be justified when the liar's goal is to conceal information from someone in order to prevent the latter from abusing other people's rights and when non-disclosure is clearly allowed by the law. Interestingly, the law is not always clear as to the extent to which anti-abuse lies are permissible. While a few courts have been sympathetic to lying in the context of employment discrimination, others have ruled against employees in such circumstances.[4] In other contexts, the law has taken an even less sympathetic approach to anti-abuse lies. For example, the Fifth Amendment, as interpreted by the courts, allows defendants, suspects and witnesses to remain silent in order to avoid self-incrimination, but does not permit lying for the same purpose, even when the police or prosecution abuse their interrogational powers by forcing the interrogee to incriminate himself.[5] Similarly but in a different context, doctors who administer vaccinations to their patients are not required to inform them that it is in their best interest not to be vaccinated and instead free-ride on (in other words, abuse) others who do get vaccinated but they are strictly prohibited by law to lie to their patients in order to convince them to get vaccinated.[6] We challenge this stance on anti-abuse lies, claiming that in certain well-defined set of cases, they should be tolerated.

The third category of cases—which involves what we call "*truth-revealing lies*"—is when a lie is told to generate the truth. Examples of truth-revealing lying are cases in which the police lie during a criminal interrogation and attorneys lie in cross-examining witnesses.[7] In these contexts, the lies are aimed at extracting valuable information from someone who is trying to conceal that information. Another example is a lie disseminated by a victim of defamation aimed at undermining his defamer's credibility.[8] In such cases, the victim's defensive lie is intended to cast doubt on the reliability of the false information spread by the defamer and thereby generate truth. In all such instances, the lies are instrumental to uncovering the truth; yet, while in some contexts, the law

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[4] *Infra* Part II.A.1.
[5] *Infra* Part II.A.2.
[6] *Infra* Part II.A.3.
[7] *Infra* Part III.A.1.
[8] *Infra* Part III.A.2.

permits truth-revealing lies, they are prohibited in the majority of cases. We submit that this type of lie should be tolerated by the law in a broader range of situations.

The fourth and final category is cases o*f paternalistic lies*, which most typically arise in the context of the doctor-patient relationship. One example of such a case is the doctor who lies to her patient about his medical condition so as to reduce his stress and anxiety or spare him despair and distress in a hopeless situation.[9] Such lies can often have a therapeutic effect, in that they can increase a patient's chances of recovery. Another example of paternalistic lying is when a doctor lies to her patient in order to persuade him to undergo a medical procedure that is clearly in the patient's best interests, but he refuses the treatment for irrational reasons.[10] In this gray zone, non-disclosure—but not lies—are often tolerated by the law. We argue that sometimes even lies should be permitted in this context, especially when essential for a patient's recovery.[11] Indeed, although it is usually the patient who decides on his or her medical treatment, there might be exceptional circumstances that warrant other solutions.

The four categories of cases we discuss do not exhaust all types of lies that either are or should be tolerated by the law. The justification for some cases of lying is self-evident and warrants no further discussion. For example, the potential victim of a crime is more than encouraged to lie—often even encouraged to act violently—toward an actual or potential aggressor in self-defense. For the purposes of the present article, these are not "interesting" cases, not only because the benefits of lying overwhelmingly exceed the harms, but also since such lies impose no any negative effects on third parties nor generate any harm to societal interests.[12] Indeed, what characterizes all cases in the four categories presented above are the possible effects of lying, both negative and positive, on others, beyond the liar and the person lied to. We maintain that these external effects are crucial in determining when lying should be permitted by the law. Understanding these effects is fundamental to our theory of valuable lies.

Indeed, we assert that valuable lies—i.e., those that the law should tolerate—must be in the service of at least one social goal. The types of lies in our four categories of cases meet this condition: productive-information lies create important incentives to generate productive information; anti-abuse lies decrease the likelihood of the harmful abuse of people's rights;

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[9] *Infra* Part IV.A.1.
[10] *Infra* Part IV.A.2.
[11] *Id*.
[12] Theoretically, there could, nonetheless, be some third-party effects: if victims of crime are allowed to lie, criminals will never believe them and might inflict, in certain cases, more harm on them. Such an argument, however, is highly speculative and strong counter-arguments easily come to mind.

truth-revealing lies seek to uncover the truth; and paternalistic lies benefit the people to whom the lie is told. This condition albeit necessary for determining whether a lie is socially valuable and should be permitted, is not the sole consideration. There are two further considerations to be taken into account in evaluating the social desirability of a lie.

The first consideration is whether *allowing lying in a given case could dilute the truth-signal of non-liars*, thereby adversely affecting truth-tellers as well as those to whom they convey information. This can be illustrated with the example of the buyer who discovered a high probability of mineral deposits on the land he is considering purchasing: if it is permissible for him to lie, potential buyers of other tracts of land, who discover a low likelihood of finding minerals, might have difficulty conveying this negative information to the sellers. The reason is obvious: if lying in such circumstances is permitted, both buyers with positive information and buyers with negative information about the pieces of land they are considering purchasing will tell the respective sellers that they have negative information about the land, and sellers might therefore be unable to distinguish between truth-tellers and liars. Consequently, some efficient transactions between truth-telling buyers and sellers will be prevented.

The second consideration is whether lying would be ineffective in achieving its social goal because the deceived party can verify the information and detect the lie. If such verification is a realistic option, there is often no sense in permitting lying, since it generates no benefits and only costs. To illustrate, let us return to the doctor who lies to her patient about the vaccinations in fact serving the goal of protecting third parties. In this case, the first consideration points to the undesirability of allowing lying: it could adversely affect the credibility of truth-telling doctors, thereby reducing the extent to which vaccinations are taken by patients, even when a particular vaccination is in a patient's best interests. Moreover, a rule permitting lying in this context would lead some patients to seek a second opinion or information from other sources, such as medical books, which they may regard as more trustworthy. Many of these patients would eventually refuse vaccination if it does not serve their self-interest, and the social goal of lying would be frustrated. Assuming many patients would behave like this, permitting a doctor to lie here would be ineffective: it would only add verification costs and produce no benefits. Ironically, this effectivity consideration gains force, against allowing lying, the more sophisticated the patients; the less sophisticated a patient, the more he or she will mistakenly believe the doctor's advice, and the more successful lying will be in achieving its goal.

The article proceeds as follows. In Part I, we lay out our theory of valuable lies, based on the considerations for and against permitting lying, and apply it to cases of productive-information lies. We focus on this type of lie in our analysis because the duty to disclose the information that it generates has received the greatest amount of attention in the legal

literature, yet the question whether the law should recognize a right to lie about the contents of such information has been almost completely ignored. Parts II, III, and IV apply our theory to anti-abuse lies, truth-revealing lies, and paternalistic lies, respectively. Each part offers an account of the law's stance on the relevant category of lies and then considers an alternative understanding and approach based on our theory of valuable lies. Our analysis provides a normative basis for evaluating the law's treatment of lying in all legal fields. The Conclusion wraps-up the discussion and summarizes our proposals for changes to the law to allow for valuable lies in certain circumstances and contexts.

I. A THEORY OF VALUABLE LIES AND PRODUCTIVE INFORMATION

A. In General

A recurring question in many legal fields is whether one person has a duty to reveal information to another. Most notably, in contractual contexts, courts are often called upon to delineate the scope of the duty of disclosure between parties negotiating a contract. On the one hand, more disclosure increases the chances of the parties' decisions to enter into the contract and the contract itself being efficient. On the other hand, it is often argued that the contractual parties are entitled to reap the benefits of information they possess and, therefore, should not be required to share it with the other party.

While the case-law is divided over the question of the scope of the duty of disclosure, there is near-consensus that lies in negotiations are impermissible.[13] The same distinction between a failure to reveal information (omission) and lies (commission) is made in other areas of the law as well. In criminal proceedings, defendants, suspects, and witnesses are all entitled to refrain from answering questions if it could incriminate them, whereas lying to avoid similar self-incrimination is not permitted.[14] In employment law, job applicants are not required to disclose personal details that are not relevant to performing the job they are applying for, but lying about those same details could be subject to legal sanctions.[15] Another example is the law's tolerance of a doctor's failure to disclose full information to her patient in order to protect him from his own irrational choices or spare him anguish and despair, whereas straightforward lies—regardless of how paternalistic—are commonly prohibited.[16]

Why does the law's approach to lying differ so considerably from its

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[13] *Infra* text accompanying notes 27-28.
[14] *Infra* Part II.A.2.
[15] *Infra* Part II.A.1.
[16] *Infra* Part IV.A.1.

treatment of a failure to reveal information? One reason is anchored in deontological morality: lies are considered immoral per se, whereas the failure to reveal information is not. Moreover, lying is commission, whereas a failure to reveal information is omission, and this distinction matters for deontological morality.[17] Another explanation is consequentialist or, more specifically, welfarist in nature: permitting lies can dilute the truth-signal of non-liars, namely, truth-tellers will find it harder, at times impossible, to distinguish themselves from liars. This could adversely affect both truth-tellers and those to whom they convey information.

The concern over diluting the truth-signal is a key factor in the almost-general prohibition of lying, as well as its exceptions, under prevailing law. This concern is a serious consideration when determining whether a new exception to the prohibition should be recognized. Moreover, there seems to be a correlation between this concern and the remedy, or sanction, imposed on liars: the harsher the sanction on lying, the stronger the truth-signal of parties who choose not to lie, but at the same time, the lower the chances that the lie will be told and achieve its social goal. Thus, even in cases where the law prohibits lying, it may still impose intermediate remedies to balance out the benefits of lying and the costs of diluting the truth-signal.[18]

The goal of this article is to propose a theory of valuable lies, comprised of three stages. To make a prima-facie case for permitting a lie in any given context, it is necessary to first identify the value generated by the lie in question beyond its value to the liar. If such a value is determined, it should be compared to the costs generated by the dilution of the truth-signal sent by non-liars. The third stage of our theory is the consideration of whether lying would, in fact, be effective in achieving the goal for which it should arguably be permitted. If lying emerges to be ineffective in this respect, then there is no reason to permit it, but rather quite the contrary: prohibiting lying would save the costs of distinguishing between liars and truth-tellers that other parties would be forced to incur.

In the discussion in the following sections, we elaborate on these three components of our theory, applied to productive-information lies.

B. Productive Information Lies

In our theory, the first step to recognizing a right to tell lies in any of the four categories of cases is to identify a social value in lying in the particular context and ensure that this value cannot be reasonably attained without lying. Consider the following example:

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[17] EYAL ZAMIR & BARAK MEDINA, LAW, ECONOMICS, AND MORALITY 282-83 (2010) (describing and criticizing the law's rigid distinction between deception by commission and deception by omission).

[18] *Infra* Part I.B.3.

> *Example 1. Mineral Deposits*. After conducting an expensive and thorough investigation, which has indicated a high likelihood of finding minerals on a specific tract of land, Buyer makes an offer to Seller to purchase the land. Seller asks Buyer if he has any information regarding the likelihood of mineral deposits on the land, and Buyer responds that he has no such information. Seller accepts Buyer's offer. Once she discovers Buyer's lie, however, she seeks to rescind the contract. Is she entitled to do so?[19]

1. Types of Information

Before discussing the question of whether lying in the above example should be permitted, two distinctions must be made: the first, between "deliberately acquired information" and "casually acquired information" and, the second, between "productive information" and "redistributive information." As we will show below, with deliberately acquired productive information, lying could generate social value.

The first distinction was originally proposed by Anthony Kronman over thirty years ago. According to Kronman,

> the term "deliberately acquired information" means information whose acquisition entails costs which would not have been incurred but for the likelihood, however great, that the information in question would actually be produced… If the costs incurred in acquiring the information… would have been incurred in any case—that is whether or not the information was forthcoming—the information may be said to have been casually acquired.[20]

Kronman asserted that in negotiating a contract, there should be a duty to disclose only casually acquired information and not deliberately acquired information.[21] Our example, where information was deliberately acquired, can clarify why: Buyer's investigation into the likelihood of finding minerals was deliberate and expensive, and had he been duty-bound to disclose the results of this investigation to Seller, he would have never conducted it in the first place.[22] In order to preserve Buyer's ex-ante

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[19] For similar cases, see Holly Hill Lumber Co. v. McCoy, 201 S.C. 427 (S.C. 1942) (buyer did not disclose the existence of valuable mineral deposits on the land, which was unknown to seller, and the court upheld buyer's behavior, emphasizing that buyer did not lie); Caples v. Steel, 7 Ore. 491 (Ore. 1879) (same).

[20] Kronman, *supra* note 2, at 13.

[21] *Id*. at 33.

[22] At first glance, one might think that the buyer in our example would have incentives to conduct the investigation in order to avoid a bad deal. But in fact, if Buyer knew that he would be required to disclose everything to Seller, assuming he were interested in buying the land only for its potential mineral deposits, he would not be interested in the transaction

incentives to acquire it, the law should enable him—following Kronman's argument—to realize the benefits of this information by allowing him to withhold it from Seller. However, were this information casually acquired—for example, had Buyer learned about the high likelihood of mineral deposits from a conversation he overheard, say, while riding the bus—it should be disclosed to Seller because this would not affect the incentive to generate valuable information.[23]

Note that obligating Buyer to disclose casually-acquired information to Seller runs the risk of Buyer forgoing the transaction and keeping the information to himself. As a result, the information would be wasted and no use made of it, to society's detriment. This problem would be resolved were Buyer exempt from a duty to disclose, since he would then enter into the transaction with Seller and make use of the information he acquired. Nonetheless, the case for non-disclosure is stronger with regard to deliberately acquired information.

Under the *second distinction*, between productive and redistributive information, a duty of disclosure is justified for the latter but not the former.[24] Information is redistributive when it transfers value from one party to another, without creating any social value. In contrast, information is productive when it creates social value. When information is redistributive, any costs incurred in acquiring it are a waste; if subject to a duty of disclosure, a buyer would have no incentive to acquire the redistributive information in the first place, and efficiency would be enhanced.[25] To understand this, consider a variation of our mineral deposits example, in which the information about the high likelihood of mineral deposits is available to the public, but for some reason, the government prohibits any mining on the land. Suppose that Buyer incurs costs investigating the likelihood of the government permitting mining on the land in the near future and discovers the chances of this to be high. Although this is deliberately acquired information according to Kronman's definition, it is merely redistributive, and therefore, Buyer should be obliged to disclose it to Seller.

In sum, the law should encourage the generation only of productive information, by not imposing on the party that acquires the information a duty to disclose it to the other party. The case for non-disclosure is especially compelling when the information is both productive and deliberately acquired. Accordingly, in Example 1, no duty should be

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to begin with, since he could not profit from it.

[23] Kronman, *supra* note 2, at 14.

[24] ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 294-96 (2012) (distinguishing between productive and redistributive information and explaining the relevance of that distinction to disclosure law).

[25] *Id*. at 295 (explaining that investing in redistributive information wastes resources). Arguably, the buyer would have some incentives to make sure he does not enter into a losing contract. *But see supra* note 22.

imposed on Buyer to disclose information about the high likelihood of finding minerals on Seller's land.[26]

2. The Case for Lying

Under prevailing law, non-disclosure is allowed in cases represented by Example 1.[27] The prevailing rule in all legal systems, however, is that inducing a contract by lying is fraud and the deceived party is, therefore, entitled to rescind the contract and recover for her losses.[28] Yet our claim is that a mere right not to disclose information is not sufficient for securing the buyer's entitlement in the productive information he deliberately acquired, since the seller, knowing the buyer is under no duty of disclosure, will simply ask him to reveal his information.[29] As a result, buyers with no

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[26] This is not to say that applying a non-disclosure rule to cases of productive information would not be cost-free: sellers who are better than buyers at mining minerals might sell their land to buyers for a low price because they are unaware of the potential of mineral deposits on the land. Those same buyers would then sell the land back to the previous owner, or to a new buyer who is better at mining minerals than the original buyer, which would increase unnecessarily transaction costs. Note, however, that if the buyer is the better searcher of information, as we assume, a duty of disclosure could mean that neither the buyer nor the seller would search for information, and the seller's superior ability to mine minerals would, therefore, be meaningless.

An additional consequence of non-disclosure would be the duplicative costs of search: some sellers, knowing they cannot trust buyers, would engage in their own search for information, even if buyers can do it at a lower cost. This concern disappears if we assume search costs for non-expert sellers to be prohibitively high.

[27] *See, e.g.*, Holly Hill Lumber Co. v. McCoy, 201 S.C. 427, 437-38 (S.C. 1942) ("no duty rests upon the vendee to disclose facts which he may happen to know advantageous to the vendor, facts concerning the thing to be sold which would enhance its value or tend to cause the vendor to demand a higher price, and the like; so that failure to disclose would not be a fraudulent concealment"); RESTATEMENT (SECOND) CONTRACTS § 161(b) cmt. d. (1981) ("In many situations, if one party knows that the other is mistaken as to a basic assumption, he is expected to disclose the fact that would correct the mistake, … [But a] buyer of property, for example, is not ordinarily expected to disclose circumstances that make the property more valuable than the seller supposes.").

[28] *Holly Hill Lumber Co.*, 201 S.C. at 440 ("[I]t is agreed that an informed vendee must limit himself to silence in order to escape the imputation of fraud. If in addition to the party's silence there is any statement, even in word or act on his part, which tends affirmatively to a suppression of the truth, or to a withdrawal or distraction of the other party's attention or observation from the real facts, the line is overstepped, and the concealment becomes fraudulent."); RESTATEMENT (SECOND) CONTRACTS § 164(1) (1981) (in order to make a contract voidable, the party's manifestation of assent must be induced by the other party's misrepresentation that is either fraudulent or material); FARNSWORTH, *supra* note 3, at 252-54 (same).

[29] In most of the law and economics literature, fraud is considered to be inefficient. *See, e.g.*, STEVEN SHAVELL, THE FOUNDATIONS OF LAW AND ECONOMICS 329-30 (2004) (arguing that fraud is socially undesirable because efforts to carry it out and detect it are a waste and it may also lead to inefficient transactions); COOTER & ULEN, *supra* note 24, at 298-99 (explaining that the economic reason for not enforcing a contract made by fraud is to save the parties the costs of verifying material information). *But see* Saul Levmore, *Securities and Secrets: Insider Trading and the Law of Contracts*, 68 VA. L. REV. 117, 139-40 (1982) (arguing for an "optimal dishonesty" rule that would allow lies in cases analogical to Example 1). *See also* Emily Sherwin, *Nonmaterial Misrepresentation: Damages, Rescission, and the Possibility of Efficient Fraud*, 36 LOY. L.A. L. REV. 1017, 1023-24

information will declare that they have no information, and buyers who refuse to say anything (with a "no comment" response) will be exposed as informed buyers who know the high likelihood of finding minerals on the land for sale.

Arguably, the law could solve this problem by prohibiting sellers from asking questions about productive information and prohibiting buyers from disclosing productive information. This solution, however, would encounter a serious enforcement problem: if the buyer has no such information, he will declare that he is uninformed, knowing that the seller lacks any incentive "to report" that the buyer has violated the prohibition on such disclosure. As a result, only informed buyers will keep silent, thereby signaling their status—as informed—to sellers.

If the law retains its strict prohibition on lying, then, there is no reason not to impose a duty to disclose productive information: either way, sellers will eventually identify informed buyers, so why not save parties communication costs? Indeed, with or without a duty of disclosure, buyers will lack incentive to generate productive information under a legal rule prohibiting lying.

Alternatively, if the law recognizes the social interest in encouraging potential buyers to generate productive information, it should also recognize the right of such buyers to lie about the productive information they have acquired. Sometimes lying that they have no information, even if they have positive information, would suffice; sometimes—like when the seller knows the buyer has acquired information—a lie regarding the contents of the information would be necessary. Although permitting lies would dilute the truth-signal of uninformed buyers, as we show in Section C below, in productive information cases, there is almost no social interest in the strength of this signal.

3. Remedies

Rather than depriving deceived sellers from a remedy against buyers who lied to them, the law could maintain its current reluctance to tolerate lies but, at the same time, tailor the remedy to take into account our productivity argument.

One possible option would be to allow the seller to collect damages that would put her in the position she would have been in had the buyer kept silent rather than lying ("silence-based remedy"). Under this remedy, a buyer would be allowed to retain the property he has purchased but have to compensate the seller for the difference between the actual contractual

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(2003) (arguing that low-level fraud should not result in markedly inefficient exchanges and may even help in overcoming bargaining impasses); Michael J. Borden, *Mistake and Disclosure in a Model of Two-Sided Informational Inputs*, 73 MO. L. REV. 667, 667-705 (2008) (discussing both Kronman's and Levmore's arguments and proposing a rule that requires minimal truthful disclosure in response to generalized questions from sellers).

price and what would have been the asking price had *the buyer kept silent*. The rationale of this remedy is straightforward: since the buyer was entitled to refrain from disclosing the truth by remaining silent, the seller should be neither better-off nor worse-off than what she would have been had the buyer remained silent.[30] The difficulty with this remedy in our context, however, is that if the buyer's silence would, indeed, have revealed the truth, he would have to pay the seller damages in an amount equal to the profit he made from the information he acquired. As a result, the buyer will have no incentive to search for productive information to begin with.

Another possibility is to allow the seller to collect damages that would put her in the position she would have been in had the buyer kept silent and had the seller, counter-factually, not been able to derive any information from that silence ("no-information-based remedy"). In one important respect, the rationale for this remedy is similar to the silence-based remedy: both are based on the buyer's entitlement to remain silent. But there is also an important difference between them: whereas the silence-based remedy focuses only on the buyer's entitlement to refrain from disclosing the truth by remaining silent, the no-information-based remedy is grounded also on the seller's disentitlement to infer any information from the buyer's silence. This latter remedy could potentially apply to cases of productive information, particularly if the information was deliberately acquired. Thus, if Buyer in Example 1 were to have lied and denied having any information about the land, damages under the no-information-based remedy would amount to zero. If instead he were to have lied by claiming he had negative information about the land (a low likelihood of mineral deposits), when in fact he had positive information (a high likelihood of mineral deposits), damages would amount to the difference between the actual contractual price and what would have been the asking price had the seller possessed no information about the land.

The distinction between the different remedies can be illustrated by the landmark Supreme Court *Basic v. Levinson* decision.[31] In this case, Basic made public statements falsely denying rumors that it was engaged in merger negotiations with another company. Following Basic's announcement that it had signed a merger agreement, a class action was brought against the company and some of its directors by Basic shareholders who had sold their stock at what they claimed to be artificially

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[30] Note that according to a more extreme remedy, damages are measured by the difference between the contractual price and the price that would have been set by the seller *had the buyer revealed* the truth. Clearly, under this rule, buyers in cases represented by Example 1 would not engage in any search for productive information.

[31] 485 U.S. 224 (1988). The *Basic* decision is famous mainly for its adoption of the fraud-on-the-market theory, which opened the door to class action suits against publicly held companies that disseminate false information. Recently, twenty-five years after *Basic*, the U.S. Supreme Court granted a petition for writ of certiorari to reexamine the validity of this theory. *Halliburton Co. v. Erica P. John Fund, Inc., f/k/a Archdiocese of Milwaukee Supporting Fund, Inc*., 2013 WL 4855972 (2013).

depressed prices due to the misleading statements about the negotiations.

The Court acknowledged the social interest in encouraging firms to engage in a search for information about potential merger transaction and, therefore, ruled that Basic had not been under any duty to disclose its involvement in merger negotiations. Hence, it held, Basic was entitled to give a "no comment" response to analysts and journalists inquiring about rumors of such negotiations. However, the Court also held that once Basic had decided to speak on the matter, it became subject to a duty to tell the truth and was not allowed to falsely deny the rumors.[32]

The *Basic* decision did not clarify how damages should be measured in such a class action. The most commonly applied remedy in a fraud case of this type is the "out of pocket" measure of damages, which would entitle the *Basic* plaintiffs to the difference between the price at which they sold their stock and the hypothetical market price of the stock had Basic told the truth about the merger negotiations.[33] Under the no-information-based remedy, in contrast, which recognizes Basic's right to keep silent (instead of revealing the truth), the plaintiffs would be awarded only the difference between the price at which they sold their stock and its hypothetical market price had Basic given a "no comment" response to inquiries about the merger negotiations and had the public inferred no information from that response. Accordingly, the *Basic* plaintiffs would be entitled to no more than the difference between the price at which they sold their stock and the hypothetical market price of that stock had the public known nothing about the merger negotiations.

The advantage of the no-information-based remedy is that, on the one hand, it prohibits all forms of lying, yet on the other hand, it incorporates the social interest in encouraging generation of productive information.

C. Dilution of the Truth-Signal

In evaluating the desirability of allowing lies in each of the categories of cases discussed in this article, it is not sufficient to look simply at the social value created by lying in these situations, but rather, the harms caused by permitting these lies must also be weighed. The dilution of the truth-signal is the main harm that should be considered in this context;

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[32] For a critique of this decision, see Jonathan Macey & Geoffrey Miller, *Good Finance, Bad Economics: An Analysis of the Fraud-on-the Market Theory*, 42 STAN. L. REV. 1059, 1091 (1990) (arguing that "management should be allowed to deny rumors which it knows to be correct and even to make affirmative misstatements if doing so is necessary to protect aggregate share value", and explaining that in this kind of cases, the old fashioned "no comment" response is not sufficient). *See also* Ian Ayres, *Back to Basics: Regulating How Corporations Speak to the Market*, 77 VA. L. REV. 945, 948-50 (1991) (arguing that corporations should be allowed to lie in some cases, such as Basic, and suggesting to establish a default rule which permits lying, while allowing the parties to contract around it).

[33] *See e.g.*, William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. PENN. L. REV. 69, 84-93 (2011) (explaining in detail how out-of-pocket damages are calculated in fraud-on-the-market cases).

indeed, broad permission to lie would adversely affect both truth-tellers and the parties transacting with them.

It is for this reason that lies should be allowed in a narrow and well-defined set of cases, where even if the permission to lie dilutes the truth-signal, the harm will be more than offset by the social value generated by the lies. In this section, we analyze the effect of permitting productive-information lies on the truth–signal.

Consider again Example 1, and assume that Buyer is allowed to lie in order to conceal from Seller the information he acquired about the potential for mineral deposits on Seller's land. Presumably, this would affect potential buyers who lack information about the particular tract of land they are seeking to buy or else know the chances of finding minerals to be low. These buyers, the argument goes, would not be able to reliably convey their ignorance or negative information to sellers. Consequently, the parties might fail to reach an agreement, and an efficient transaction would be prevented.

To assess this concern, we will distinguish between two legal regimes: *Under Regime A*, an informed Buyer is permitted to lie and deny he has any information about the land's mining potential. *Under Regime B*, an informed Buyer is permitted to lie and say that there is a low potential for finding mineral deposits on the land, even though he knows that potential to be high.

We will begin with Regime A. Two possible groups of truth-tellers can be imagined in our context: the one comprising professionals who have investigated the land's potential and learned that the chances of finding minerals there are low, and the second, comprising potential buyers who have not investigated the land's potential, since their expertise and the costs of such an investigation make it inefficient for them to do so. The members of the *first group* would likely never become the buyers in our context. Professionals typically buy land where the likelihood of mineral deposits is higher than expected by the general public. Thus, if they learn that the chances of finding minerals on the land for sale are lower than expected by the general public, they will likely refrain from purchasing the land. Furthermore, if they can reliably convey the negative information to the owner of the land, the latter will prefer selling the land to uninformed buyers.[34] More importantly, even if these professional buyers wanted to buy the land, they would be able to reliably convey the negative information to the seller because in Regime A, they are not allowed to lie about the contents of their information; they are only allowed to falsely deny that they are in possession of such information.

The *second group* of buyers, for their part, would be interested in buying the land for purposes other than mining minerals. To purchase the

[34] Unless this information is available to other potential buyers, the seller would not be able to sell the land for its original price before the investigation takes place.

land, they would be required to pay a price that reflects a certain probability that they have positive information about the land that they are withholding from the seller. As a result, sellers would demand a higher price for their land, and many buyers might forego efficient transactions. Note, however, that the higher price that sellers would demand would reflect the fact that under Regime A, compared to a regime of full disclosure, there is a higher probability that professionals will search for and find minerals on the land. Under Regime A, therefore, the value of the land is, indeed, higher than under a full–disclosure regime. The fact that sellers and buyers would not be able to reach an agreement on price does not necessarily imply, then, that Regime A frustrates *efficient* transactions.

Regime B is a bit trickier. Under this regime, buyers who investigated the likelihood of mineral deposits on the land are not only permitted to deny that they made such an investigation but are also allowed to lie and state to the seller that their investigation showed there to be a low likelihood of mineral deposits. Such a lie could be required if the seller learned about the buyer's investigation and explicitly asked him about its results. If such a lie were permitted, it would adversely affect truth-tellers who conducted investigations on the land and discovered a low likelihood of finding minerals. Under a rule prohibiting lies, these buyers would successfully convey the information they acquired to the seller and pay a price discounted to reflect the low chances of mineral deposits. Under Regime B, however, these truth-telling buyers would not receive such a discount, because the seller would not believe them. Note, however, that with professional buyers, as we explained earlier, no problem would arise, since if they find out that the chances of finding minerals on the land are low (i.e., lower than the chances predicted by the publicly available information), they will likely search for a different piece of land to purchase. And as under Regime A, in Regime B as well, a non-professional buyer who did not investigate the land's potential would have to pay an inflated price for the land: the seller would assume a certain probability of the buyer's having conducted an investigation and discovering a likelihood of mineral deposits on the land and to be withholding that positive information from her, the seller.

In sum, lying in productive information cases represented by Example 1 will dilute the truth-signal of truth-telling buyers. This would have practically no effect on professional buyers. It would, however, impact non-professional buyers, but only when sellers suspect them of withholding information about the land that they in fact do not have.

D. Effectiveness and Costs of Defense

Another consideration against a rule allowing socially valuable lies is that *lying is often ineffective* in achieving its intended (valuable) goals. Specifically, the "deceived" party, knowing that she cannot trust the liar's words, could take costly measures to verify the information provided to her

by the liar and detect the lie. Similarly, truth-tellers could take costly steps to distinguish themselves as truth-tellers, indirectly enabling other parties to detect liars. If this is all likely to occur, there is no sense in permitting lies: first, many lies will often fail to attain their desirable goals; second, parties will often incur costs to detect lies, to distinguish between liars and truth-tellers, and to acquire information that has already been acquired by the other party to the transaction.

How does this consideration apply to Example 1? Arguably, if Seller knows that Buyer is allowed to lie either about the potential of mineral deposits on the land or with regard to his identity as a mineral mining expert, she might incur costs to make sure she does not sell valuable land at too low a price. This scenario, however, is a very unlikely one: Seller in this example is not a professional searching for information about mineral potential, and most likely her costs to investigate her land's potential would exceed the expected benefit of acquiring that information. Therefore, lies in cases represented by Example 1 can be expected to be effective in realizing their goal and not to entail excessive costs of defense.

II. ANTI-ABUSE LIES

This Part of the article now turns to develop the notion that there are situations in which people should be allowed to lie in order to avoid or prevent the abuse of their own rights or those of others. Our example of John the Muslim lawyer, which opened this article, is representative of one type of cases in which anti-abuse lies are told. In John's case, he lied so as to avoid the risk of being discriminated against on the basis of his religion. Should such a lie be permitted by the law? Another case of anti-abuse lying arises in the criminal law context: defendants, suspects, and witnesses are all entitled to remain silent when at risk of self-incrimination. Should they be allowed also to lie in order to avoid this risk? A third context is cases in which lies are told to protect the rights of third parties from abuse by others. Our paradigmatic example of such situations is the doctor who tells her patient that a certain vaccine serves his best interest, when in fact it is for the protection of others (just as vaccinating others protects this patient). In all of these cases, we examine arguments for and against a tolerant approach to lying.

A. The Prima-Facie Case and the Law

1. Discrimination

The prima-facie case for permitting lies is easy to ground in cases represented by the example of John the Muslim lawyer: lying about religion, race, gender, or other personal characteristics that are irrelevant to employment is the most effective mechanism for minorities to avoid illegal discrimination. Moreover, it causes no harm to non-discriminating

employers and employees.

There appears to be no straightforward instance in the case-law of an employee who lied about his or her religion, race, or gender and was later fired due to that lie. The courts have, however, addressed in many instances the matter of whether an employee's misrepresentation of his or her credentials or qualifications or work history when applying for the job constitutes legal cause for firing him or her. This issue can arise under both just cause and at will rules. Under a just cause rule, the question is whether the misrepresentation amounts to just cause for terminating the employment contract;[35] under an at-will rule, the question is whether the termination is legal because of the misrepresentation, even if it was motivated by illegal discrimination[36] (or other unlawful reasons[37]). This can be relevant to two types of cases. The one is when an employer finds out about an employee's misrepresentation and this triggers the termination of the employment.[38] The second type of case is when an employer terminates the employment for reasons unrelated to any misrepresentation, but in the course of preparing its response to the employee's wrongful dismissal claims, uncovers the latter's misrepresentation.[39]

In *Johnson v. Honeywell Information Systems, Inc.*, the plaintiff argued that in firing her, the employer had violated Michigan's anti-discrimination law and that this was therefore wrongful discharge.[40] The

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[35] Even if misrepresentation is generally considered just cause for termination, it might be deemed unjust if applied by the employer in a discriminatory manner. *See* Enter. Wire Co. v. Enter. Indep. Union, 46 Lab. Arb. Rep. (BNA) 359 (1966) (presenting seven tests for determining just cause for termination, including the test of equal treatment: the employer has to apply all rules, orders, and penalties evenhandedly and without discrimination to all employees).

[36] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973) (holding that in an employment discrimination suit under Title VII of the Civil Rights Act, 1964, a plaintiff "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision"). Title VII of the Civil Rights Act prohibits wrongful discharge based upon race, religion, gender, age, or national origin.

[37] *See* Charles J. Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, 124 MONTHLY LAB. REV. 3 (2001) (discussing unlawful reasons for firing employees under the employment-at-will rule).

[38] Lavat v. Fruin Colnon Corp., 232 Ill. App. 3d 1013, 1027 (Ill. App. 1992) (upholding the employer's decision to fire an employee upon discovery that he had falsified his education information).

[39] Some courts have held that such misrepresentations can serve as the basis for dismissing the employee. *See*, *e.g.*, Oak Lawn v. Human Rights Com., 133 Ill. App. 3d 221, 225 (Ill. App. 1985) (holding that a potential employee's misrepresentation, which was discovered by the employer only after he refused to hire her and a discrimination charge was filed, can serve as a legitimate, nondiscriminatory reason for refusing to employ her); Leahey v. Fed. Express Corp., 685 F. Supp. 127, 128 (D.C. E. Va. 1988) ("just cause for termination may include facts and circumstances not known to the employer"). Other courts have taken the opposite view, *see, e.g.*, Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 369 (7th Cir. 1993) ("A discriminatory firing must be decided solely with respect to the known circumstances leading to the discharge ... , The after discovered alternate reason comes too late.").

[40] 955 F.2d 409 (6th Cir. 1992).

defendant employer, in turn, argued that the plaintiff had been dismissed due to her unsatisfactory work performance; moreover, it was claimed, she had lied on her employment application eight years earlier in falsely stating that she had a college degree and exaggerating her prior work experience.[41] The appellate court held that not all misrepresentations qualify as just cause for terminating the employment, and to do so, the following criteria must be met: the false information must have been material; it must have related directly to the measuring of the candidate for employment; and the employer must have relied on the false information in making its hiring decision.[42] In the matter at hand, the court concluded, these conditions had been met, and it affirmed the first instance court decision in favor of the employer and against the plaintiff's wrongful discharge claim, regardless of whether she had been illegally discriminated against.[43] Some courts have followed the same rule, holding that where there is misrepresentation, the question of discrimination is irrelevant to determining whether there has been wrongful termination;[44] other courts have awarded damages to employees if they proved that they had been fired due to illegal discrimination, but reduced the amount to account for the misrepresentation.[45] Moreover, other courts have held on occasion that the mere fact that an employee lied about facts material to her employment disqualified her for the job and, accordingly, denied the claim of wrongful termination.[46] However, in contexts unrelated to illegal discrimination, some courts have shown tolerance towards employees who, by lying, concealed from their employers when being hired that they are union organizers or supporters, which put them at risk of not being hired.[47]

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[41] *Id*. at 411.
[42] *Id*. at 414.
[43] *Id*. at 415.
[44] Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302 (6th Cir. 1992) (holding that because of the employee's fraud, the question of whether he was fired because of discrimination is irrelevant); Sarvis v. Vermont State Coll., 772 A.2d (Ver. 2001) (applying the same rule to non-disclosure by an employee regarding his prior criminal convictions).
[45] Kristufek v. Hussmann Foodservice Co., *supra* note 39 (allowing damages to the employee for unlawful discrimination, but reducing those damages due to the employee's misrepresentation); Wallace v. Dunn Const. Co., Inc., 968 F.2d 1174 (11th Cir. 1992) (same).
[46] *See* Oak Lawn v. Human Rights Com., 133 Ill. App. 3d 221, 224 (Ill. App. 1985) ("Trustworthiness, reliability, good judgment, and integrity are all material qualifications for any job, particularly one as a police officer. Her lying from the beginning disqualified her from consideration for the position and made her an unfit employee for the Oak Lawn Police Department."); Williams v. Boorstin, 663 F.2d 109 (D.C. Cir. 1980) (holding that the lying itself—as to the plaintiff's legal education—disqualified him as an employee at the Library of Congress).
[47] See *Hartman Bros. Heating & Air Conditioning v. NLRB*, 280 F.3d 1110 (7th Cir. 2002), where the court decided that lying to hide union activities should not be sanctioned, since the employer should not refuse to hire an employee for this reason, and therefore the information about union activities is immaterial. The court noted, however, that information about union activities could have some (legitimate) value for the employer who might want to keep an eye on a worker whose allegiance implies that he will not do full-time work. But since the issue was not raised at trial, the court did not consider its applicability in the case

The rules that emerge from the case–law, therefore, seem to weigh in favor of John, the Muslim lawyer, in our example. This would certainly be the outcome under the *Johnson* criteria:[48] the false information John provided to the law firm about his religion did not relate to measuring him for employment there, and the firm did not rely, or was not entitled to rely, on this false information in making its hiring decision. If the employer is discriminatory and admits that religion matters in its hiring decisions, then it is probably John's religion, rather than his dishonesty, that motivated the firm's decision to fire him. To be sure, the mere fact that John lied should not disqualify him for being hired as a lawyer. As we explained above, such lies serve minorities to protect themselves from discrimination. Therefore, the law firm's decision to fire John for lying should be considered unlawful and cannot constitute a legal basis for terminating his employment.

Note that instead of permitting John and similarly situated employees to lie, the law could simply prohibit employers from asking job applicants about their religion or other personal traits and characteristics that are immaterial to their employment. This would be less effective, however, than sanctioning lies: even if employers were to refrain from asking such questions, those employees who would expect to be treated favorably by discriminatory employers would voluntarily convey information about such irrelevant traits and characteristics to employers, even if not asked. Consequently, only (or mainly) employees who are at risk of discrimination (for example, Muslims) would remain silent and be subject to negative treatment from discriminatory employers. Moreover, prohibiting employees from volunteering irrelevant personal information to employers would be unenforceable and, therefore, ineffective.

2. Self-Incrimination

Consider the following example:

> *Example 2: Lying to the Police*. A police interrogator asks a suspect being interrogated whether he owns the weapon used in the crime under investigation. If the suspect invokes the Fifth Amendment and refuses to answer, it will signal to the police that he is, indeed, the owner. The police might consequently decide to invest resources—in costly DNA testing, for example—to try to connect the suspect to the gun and eventually produce sufficient evidence to convict him. Anticipating this possibility in advance, the suspect lies to the interrogator and states that the gun does not

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at hand. *See also* Leiser Constr., LLC v. NLRB, 281 Fed. Appx. 781 (10th Cir. 2008) (holding that not disclosing information to a potential employer about union membership is legitimate, citing *Hartman Bros. Heating & Air Conditioning*, *id*).

[48] *Supra* note 40.

> belong to him. As a result, the police release the suspect. Later, the police discover that the suspect lied, although it also becomes apparent that someone else had stolen the gun from him and committed the crime. The former suspect is now brought to trial for perjury. Should he be convicted for lying to the police?

The Fifth Amendment provides that "no person shall be compelled in any criminal case to be a witness against himself."[49] Courts read this clause as establishing a constitutional right against self-incrimination, permitting any person, including suspects, witnesses, and defendants to remain silent and refuse to respond to questions, either before or during trial, when the answers could incriminate them.[50]

To guarantee this right, courts are prohibited from drawing adverse inferences from the fact that a suspect has refused to answer questions during the police interrogation[51] or from a defendant's refusal to testify in court.[52] In order to minimize the effect of such silence on the jury, the prosecution is not even allowed to comment on the fact that the defendant chose to remain silent.[53] However, a suspect or defendant who chooses to answer questions relating to a specific issue is not allowed to refuse to answer other questions relating to the same issue, and any such refusal

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[49] U.S. CONST. amend. V.

[50] Miranda v. Arizona, 384 U.S. 436, 467 (1966) ("the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves"). *See also* Gordon Van Kessel, *Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Silence*, 35 IND. L. REV. 925, 926-28 (2002) (reviewing the recent reinforcement of the right to silence and its guarantees).

[51] Doyle v. Ohio, 426 U.S. 610, 617 (1976) ("it would be fundamentally unfair and a deprivation of due process ... to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial"). The justification for this rule is that suspects might misunderstand the Miranda warnings as an assurance that silence will not be used against them in any way. That is not to say, however, that such a rule is mandated by the Fifth Amendment itself. *See* Jenkins v. Anderson, 447 U.S. 231, 235 (1980) ("the Fifth Amendment is not violated when a defendant who testifies in his own defense is impeached with his prior silence").

[52] Griffin v. California, 380 U.S. 609, 614 (1965) (holding that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt"); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 18 (9th ed. 2012) ("The Supreme Court has construed this provision [the Fifth Amendment] to imply that the government cannot require a criminal defendant to take the witness stand, cannot invite a jury to draw adverse inferences from a defendant's refusal to testify, and cannot in any other way compel the defendant to disclose potentially incriminating facts about the case."). Others have raised questions about the effects of these rules, *see, e.g.*, Baxter v. Palmigiano, 425 U.S. 308, 319 (1976) (noting that a decision that was based on the prohibition to draw adverse inference from silence, while rooted in the Fifth Amendment, "has little to do with a fair trial and derogates rather than improves the chances for accurate decisions"); The Honorable Edwin Meese III, *Promoting Truth in the Courtroom*, 40 VAND. L. REV. 271, (1987) (arguing that the Miranda rules, as well as Griffin, Doyle, and other "truth-defeating doctrines," impede the search for truth and are in no sense required by the Constitution).

[53] *Griffin*, 380 U.S. at 609.

could be counted against him or her.[54] This restriction on the right to silence is mostly applicable to testimony in court[55] and not to police interrogations.[56]

It is commonly asserted that the right to silence promotes fairness, privacy, individualism, free will, and personal dignity, while at the same time preventing torture, inhumane treatment, and "the cruel trilemma of self-accusation, perjury or contempt."[57] Another rationale, first proposed by William Stuntz is that without a right to silence, lying to avoid self-incrimination would be a natural and even reasonable choice and perjury should be excusable. The right to silence provides a sufficient alternative to lying and therefore enables the prohibition on perjury and prevention of its negative effects.[58] Daniel Seidmann and Alex Stein have offered an

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[54] Rogers v. United States, 340 U.S. 367, 373 (1951) ("where criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details"); United States v. Davenport, 929 F.2d 1169, 1174-75 (7th Cir. 1991) ("Having voluntarily given the agent their version of the events, the Davenports forfeited their privilege not to answer questions concerning that version."); *Miranda*, 384 U.S. at 475-76 (clarifying that "there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated").

[55] Fitzpatrick v. United States, 178 U.S. 304, 315 (1900) ("while no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts"); Brown v. United States, 356 U.S. 148, 156 (1958) (a witness "could not take the stand to testify in her own behalf and also claim the right to be free from cross-examination on matters raised by her own testimony on direct examination").

[56] Miranda v. Arizona, 384 U.S. 436, 475-76 n.104 (1966) (explaining that the limitations on the ability to answer only some of the questions are mostly relevant to a witness in court and not to the interrogation stage).

[57] Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964). *See also* Ullmann v. United States, 350 U.S. 422, 428 (1956) (holding that while the right to silence might occasionally protect the guilty, it is aimed at preventing a greater evil, which is the abuse of government power and the recurrence of brutal interrogation mechanisms); Vincent Martin Bonventre, *An Alternative for the Constitutional Privilege Against Self-Incrimination*, 49 BROOKLYN L. REV. 31, 51-64 (1982) (reviewing policies of mercy, privacy, and fairness and arguing that they provide compelling justifications for preserving the right to silence); Gordon Van Kessel, *supra* note 50, at 929 (reviewing the conventional justifications for the right to silence and rejecting them); Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 435-36 (2000) (pointing to the civil-libertarian values that are commonly used to support the right to silence).

[58] William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227 (1988). Yet, the right to silence does have its critics. Jeremy Bentham argued that the right to silence only helps the guilty, because only they exercise it, JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 241 (M. Dumont ed., Fred B. Rothman & Co. ed. 1981) (1825). Modern critics argue that the right lacks a coherent rationale and that all its defenders have failed to offer a convincing justification. *See, e.g.*, David Dolinko, *Is There a Rationale for the Right Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986) (attacking the many suggested justifications offered for the right and claiming that it lacks a coherent rationale); Michael S. Green, *The Privilege's Last Stand: The Privilege Against Self-Incrimination and the Right to Rebel Against the State*, 65 BROOK. L. REV. 627, 628 (1999) (same); Ronald J. Allen, *Miranda's Hollow Core*, 100 NW. U.L. REV. 71 (2006) (same).

innovative rationale for the right to silence: that this right in fact protects the innocent.[59]

Yet no one, to the best of our knowledge, has suggested reading the Fifth Amendment as permitting lying—as opposed to remaining silent—in order to avoid self-incrimination. Is there basis to a prima-facie claim that lies in cases represented by Example 2 create social value and should thus be tolerated? The answer to this question will vary depending on the rationale adopted for the right against self-incrimination and its accompanying right to silence. The traditional justifications for these rights could support such a claim.

Assume that the right to silence is intended to prevent torture, inhumane treatment, and the need to choose between self-accusation, perjury, and contempt that the state (by way of the police, prosecution, and courts) might impose on suspects, defendants, or witnesses.[60] Arguably, since the decision to remain silent—as well as to selectively refuse to answer specific questions—could, at times, function as a signal of guilt, it could also provoke the torture and inhumane treatment of the person keeping silent. Thus, on the assumption that the right to silence is aimed at constraining the government from engaging in the noted types of undesirable conduct—which is at the essence of the constitutional right against self-incrimination—the right to keep silent should be supported by an even more powerful right, namely, the right to lie in response to certain incriminating questions when silence does not suffice as protection.

Thus, in Example 2, if the suspect were to refuse to answer the police interrogator's questions, this would signal to the police that he has something to hide regarding his connection to the weapon used in the crime. This signal would encourage the police to invest more resources in investigating the suspect's involvement in the crime and to perhaps even subject him to inhumane treatment. Indeed, the police have no reason to mistreat suspects who cooperate, but might be thus motivated by a suspect's choice to remain silent. Silence, therefore, "invites" inhumane treatment and could lead a suspect to eventually incriminate himself. Accordingly, lying is often the only reasonable option for a suspect to avoid both inhumane treatment and self-incrimination.

Yet as we show further on in our discussion,[61] under alternative, more compelling justifications for the right to silence, a constitutional right to lie during interrogation would create externalities that could lead to the conclusion that such a right, even if it generates some social value, would yield more harm than benefit.

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[59] Seidmann & Stein, *supra* note 57. We discuss their theory in detail in Section C and explain its relevance to our arguments.
[60] *Infra* text accompanying note 57.
[61] *Infra* Part II.B.2.

3. Free-Riding

Thus far, all the lies we have discussed serve the self-interest of the liar. We now turn to focus on cases in which the liar's goal is to protect third parties from abuse, in particular through free-riding, by the deceived party. Example 3, below, illustrates such cases:

> *Example 3: Vaccination*. A patient asks his doctor whether he should get vaccinated against polio. The doctor knows that given that a certain proportion of the population either already is or will be vaccinated against the disease, and given the risks of the vaccine, it is in her patient's best interest—from a medical perspective[62]—not to get vaccinated and instead free-ride on people who do get vaccinated. The doctor also knows that if all doctors were to give their patients sincere advice that takes into account only the patients' self-interest, too many people would not get vaccinated and public health would be at risk. Should the doctor be allowed to lie to her patient and thereby persuade him to get vaccinated?[63]

The value of lying to the patient in Example 3 is straightforward: vaccinations create a public good that might not be produced if doctors are not allowed to lie as in this example.[64] A public good is characterized by its producer's inability to exclude others from consuming it. Thus, people tend to free-ride on the producer's investment and refuse to share the costs of

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[62] From a broader perspective, taking the vaccine could still serve the patient's interest: avoiding the vaccine could trigger social condemnation, which many patients would not be indifferent to.

[63] *See* Fran Carnerie, *Crisis and Informed Consent: Analysis of a Law-Medicine Malocclusion*, 12 AM. J.L. & MED. 55, 78 (1986). The author presented here an amicus curiae brief prepared by the Conference of State and Territorial Epidemiologists in the case of *Reyes v. Wyeth Labs, Inc.*, 498 F.2d 1264 (5th Cir. 1974), in which "[a]uthorities argued that the risk of vaccine-induced polio should not be communicated to the recipients precisely because it might cause some people to refuse vaccination. Since officials thought that the success of the entire disease prevention program would be endangered, they opted to withhold the risk disclosure, a policy which was consistent with the practice of clinic physicians who administered the vaccine." This approach was not adopted by the court in *Reynes*.

[64] *See* John C. Hershey, *The Roles of Altruism, Free Riding, and Bandwagoning in Vaccination Decisions*, 59 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 177, 178 (1994) (explaining the free-riding problem in the context of vaccinations); Wendy E Parmet, *Informed Consent and Public Health: Are They Compatible When It Comes to Vaccines?*, 8 J. HEALTH CARE L. & POL'Y 71, 74-75 (2005) (same); Christine Parkins, *Protecting the Herd: A Public Health, Economics, and Legal Argument for Taxing Parents Who Opt-Out of Mandatory Childhood Vaccinations*, 21 S. CAL. INTERDIS. L.J. 437, 463-66 (explaining the free-riding problem with vaccination and suggesting to tax those who refuse it); Doren D. Fredrickson et al., *Childhood Immunization Refusal: Provider and Parent Perceptions*, 36 FAM. MED. 431, 436 (2004) (noting that "some non-immunizing parents are aware that their children may be at lower risk if most other children in the community are immunized").

producing the public good. As a result, without government intervention, many public goods whose production is efficient are not created.[65] Public health is one such public good, and vaccination programs are one way of promoting and securing this public good. While the state could compel people to get vaccinated if public health is at risk,[66] such governmental intervention could be either politically infeasible or too costly to enforce. An alternative, it could be argued, is to permit doctors to deceive their patients when free-riding is a major impediment to promoting public health.

Currently, the law does not allow doctors to lie to their patients even if the lies would be paternalistic and serve the patients' best interests. In our discussion of paternalistic lies in Part IV, we point out how in certain rare instances, permitting such lies to be told by doctors could be accommodated by the law as well as consistent with medical ethics.[67] But for the present, we focus on lies aimed at protecting third parties or the public at large, which are clearly not tolerated by the law. The main reason for the resistance to such lies is the conception that lying to a patient is a breach of trust and violation of the Hippocratic Oath: most patients believe that the sole consideration that their doctor takes, and should take, into account when treating or advising them is their best interest.[68]

However, doctors are often, in fact, motivated by concern for public health, which does not necessarily coincide with their patients' best interests.[69] In the case of vaccinations, for example, doctors are not

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[65] Ariel Porat, *Private Production of Public Goods: Liability for Unrequested Benefits*, 108 MICH. L. REV. 189 (2009) (explaining why efficient public goods are often not created and offering solutions); Daphna Lewinsohn-Zamir, *Consumer Preferences, Citizen Preferences, and the Provision of Public Goods*, 108 YALE L.J. 377 (1998) (explaining the nature of public goods and the potential free-riding problem that may prevent their creation).

[66] Jacobson v. Massachusetts, 197 U.S. 11, 15 (1905) (holding that a compulsory smallpox vaccination for adults who are fit subjects of vaccination is constitutional); Zucht v. King, 260 U.S. 174, 176 (1922) (dismissing a suit challenging city ordinances that make vaccination a prerequisite for attending school). *See also* Parmet, *supra* note 64, at 78-81 (explaining the policy of compulsory vaccination while presenting some exemptions that states provide from the vaccination requirement); Sara Mahmoud-Davis, *Balancing Public Health and Individual Choice: A Proposal for a Federal Emergency Vaccination Law*, 20 HEALTH MATRIX 219, 244 (2010) ("In a nationwide or multi-state emergency where time is limited to inoculate the population, permitting individuals to claim an exemption based on their personal moral, ethical, or philosophical beliefs would likely: (1) seriously risk vaccination rates falling below the herd immunity threshold; and (2) jeopardize the efficiency of vaccine distribution by overtaxing limited resources to process exemption requests.").

[67] *Infra* Part IV.A.

[68] BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH, REPORT OF THE NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, 44 FR 23192, 23192-23194 (Dep't of Health, Educ. & Welfare Apr. 18, 1979) (explaining the ethical principles of respect for persons and beneficence, which require that physicians respect patients' autonomy and maximize their potential benefits while minimizing their risks).

[69] Fran Carnerie, *supra* note 63, at 77-78 (arguing that the doctrine of informed consent is fraught with exceptions and "gray areas" and noting as one of the reasons for this that "in

required by law to disclose to their patients that it is in their best interest to free-ride on other patients and refuse to get vaccinated.[70] Given this, then, why does the law not take the further step of permitting doctors to lie in this context? When lying is prohibited but non-disclosure permitted, the more sophisticated patients—those who know to ask the "right" questions—are better off and the less sophisticated patients are worse off.[71]

In practice, doctors not only withhold information from their patients in order to serve the public interest, but they also sometimes lie, and the law seems to tolerate this. Best exemplifying this is the use of placebos in clinical drug trials.[72] Doctors will usually inform the patients participating in the trials that there is some likelihood that they will be given a placebo.[73] But what if a patient asks the doctor directly during the course of treatment whether he is receiving a placebo? Should the doctor say that he does not know even if he does so as not to harm the integrity of the trial?[74] An inaccurate answer will often promote the public good at the expense of the patient's good. Indeed, commentators have noted that doctors often resort to deception in administering placebos to patients in non-experimental settings, so as to increase the placebo effect.[75]

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the realm of public health ... physicians have subordinated individual values to the perceived greater utilitarian goals of public health, as is the case with quarantine laws, public water fluorination and vaccination against infectious disease"); Julie Leask et al., *Communicating with Parents about Vaccination: A Framework for Health Professionals*, 12 BMC PEDIATRICS 154 (2012), http://www.biomedcentral.com/1471-2431/12/154 (indicating that in administering vaccinations, doctors should take into account both their patients' interests as well as the public interest).

[70] This might explain why the information provided by public health authorities regarding vaccines highlights mostly individualist considerations for being vaccinated, without mentioning the benefits to the public, even though the latter are often the main reason why the government requires vaccinations. *See* Parmet, *supra* note 64, at 109 (reviewing this public health authorities' approach, but arguing that the positive effects of vaccinating for others should be explained to parents, and might encourage, rather than dissuade, them from vaccinating their children).

[71] Yet if lying were permitted, many sophisticated patients would have alternate ways of finding out the truth and would not be misled by their doctors' deceptive advice. *See infra* Part II.C.

[72] *See* 21 C.F.R. § 314.126(b)(2)(i) (1999), defining placebo control as follows: "The test drug is compared with an inactive preparation designed to resemble the test drug as far as possible. A placebo-controlled study may include additional treatment groups, such as an active treatment control or a dose-comparison control, and usually includes randomization and blinding of patients or investigators, or both."

[73] Robert J. Levine, *The Use of Placebos in Randomized Clinical Trials*, 7 IRB 1, 1 (1985) (noting that in a placebo-controlled randomized clinical trial, each prospective subject is told his or her chances of receiving an inert substance.

[74] *See* Nancy K. Plant, *Adequate Well-Controlled Clinical Trials: Reopening the Black Box*, 1 WIDENER L. SYMP. J. 267, 272 (1996) (noting that the FDA generally requires that placebo-controlled studies be double-blinded as well: neither the patient nor the doctor-investigator knows what the patient is receiving, in order to neutralize bias on both sides).

[75] Robert J. Levine, *The Use of Placebos in Randomized Clinical Trials*, 7 IRB 1, 1 (1985) (noting that when using placebos in medical practice, doctors wish to produce a strong placebo effect and, therefore, use deception; but when using placebo-control in a clinical trial, the investigator's interest is usually to minimize the placebo effect, so as to prove the superiority of the active treatment, and therefore deception will be minimized).

There is a substantive difference in the doctor's deception of the patient in the placebo context and the vaccination context, however. In the case of placebos, the patient typically consents to participate in the trial as well as to the risk that he will receive a placebo. Arguably, he also takes on the risk that he might be deceived, if necessary, to prevent him from knowing whether he received the experimental drug or placebo.[76] Prior consent is often mandatory for patients to participate in clinical trials, which generally increase their probability of recovering or surviving.[77] The understanding between the patient and doctor conducting the trial, which sets out the "rules of the game," makes non-disclosure and even lying to the patient in the event that he receives a placebo more tolerable than doctors' deceit in the context of vaccinations. Accordingly, perhaps in the case of vaccinations as well, a patient's prior agreement to, or at least prior awareness of the possibility of his doctor lying would make the lies tolerable. Specifically, an agreement between the doctor and her patient stipulating that under certain, well-defined conditions, the doctor's loyalty is not limited only to the patient but extends to others as well or, more broadly, to public health might legitimize lies like the one described in Example 3. As an analogy, it is certainly not uncommon for doctors to be required in times of emergency to decide which patient among many to treat, even if this will be to the detriment of some. The justification for lying in the vaccination case is an extension of the rationale for the unavoidable choice in emergency situations: doctors should not promote their patients' interests without due regard for the interests of other patients—even if not their *own* patients. Indeed, if, in Example 3, it had been the health officials who had lied to the patient, and not his doctor, most people would not find it questionable that the authorities set promoting public health as their primary goal and thus lie to potential free-riders.[78]

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[76] *But see* Sharona Hoffman, *The Use of Placebos in Clinical Trials: Responsible Research or Unethical Practice?*, 33 CONN. L. REV. 449, 484-87 (2001) (arguing that the informed consent process in clinical trials is often severely flawed, that "human subjects often do not exercise their autonomy in a meaningful way either because they are given insufficient information or because they do not comprehend the data they receive," and that some investigators even resent informed consent requirements in these situations); Belmont Report, *supra* note 68, at 23194 (explaining that in most research cases, human subjects must participate voluntarily, although in some situations, such as participants who are prisoners, the applicability of this principle is notas obvious).

[77] Hoffman, *supra* note 76, at 482-83 (arguing that patients choose to participate in clinical trials involving placebo control because they believe that they will benefit from participating, "even when they are clearly informed that there is a fifty-fifty chance that they will not receive active treatment").

[78] *See* Ruth R. Faden, *Ethical Issues in Government Sponsored Public Health Campaigns*, 14 HEALTH EDUC. BEHAV. 27 (1987) (discussing health campaigns sponsored by the government and making the subtle distinction between persuasion and manipulation for promoting public health). *See also* Lynn Kozlowski & Richard O'Connor, *Apply Federal Research Rules on Deception to Misleading Health Information*, 118 PUB. HEALTH REP. 187, 191 (2003) ("Public health needs can sometimes override individual needs and rights.

B. Dilution of the Truth-Signal

A certain social value to permitting lying is apparent in all the cases of anti-abuse lies discussed in the preceding section. But as with the other categories of lies, the crucial question here is the impact of legally authorizing these anti-abuse lies on the truth-signal. As the discussion below will show, lies intended to prevent discrimination dilute the truth-signal, but in a way that increases, rather than decreases, the social value of lying. This is not the case with regard to lies told to protect people from self-incrimination or to prevent free-riding. In these two types of cases, the dilution of the truth-signal is genuinely vexing, and therefore, if lying is to be permitted at all in such cases, the line between permissible and impermissible lies must be carefully drawn.

1. Discrimination

If job candidates are permitted to lie about immaterial personal characteristics, truth-telling candidates will find it more difficult to convey information to their potential employers. In particular, if Muslims were allowed to lie about their religion, employers would not believe non-Muslim candidates when they say that they are not Muslim.

This outcome is not a concern but a virtue, however: the goal of legitimizing lying when there is potential for discriminatory treatment by an employer is to make it harder—ideally impossible—for those employers to distinguish between liars (for example, Muslims who pretend to be non-Muslims) and truth-tellers (for example, non-Muslims who want to identify themselves as such). The more crucial question, of whether these lies would be effective in realizing their goal, is considered in Section C below.

2. Self-Incrimination

Things are much more complicated with lies represented by Example 2 (Lying to the Police). If defendants, suspects, and witnesses were allowed to lie in order to avoid self-incrimination, truth-tellers would find it more difficult to convey information to the court, prosecution, and police, which could lead to more false convictions. As Example 2 illustrates, a right to lie in such cases might, in fact, protect some innocent suspects whose silence would be interpreted as incriminating by the police. However, the advantage in preventing a certain amount of false convictions by permitting

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This should happen, though, only under well-defined circumstances. Disinformation should not, however, be employed unless the standards for research ethics can be met. In practice, this will almost certainly mean that deception has no ethical place in the public health toolkit."); Nurit Guttman, *Ethical Dilemmas in Health Campaigns*, 9 HEALTH COMMUN. 155 (1997) (discussing the conflict between respecting people's autonomy and the public good in health campaigns). *But see* Parmet, *supra* note 64, at 109-10 (arguing for honest vaccination campaigns by governments).

lying may be more than offset by the increase in the risk of false conviction due to this right to lie.

Interestingly, as Seidmann and Stein have pointed out, the absence of a right to silence would also dilute the truth-signal. Under such a legal regime, many guilty people who remain silent under the current rule would lie; there would consequently be a lower ratio between truth-telling and lying defendants or suspects. This is grounded on the realistic assumption that the proportion of guilty people among those who invoke the right to silence is relatively high, and if forced to speak, many would lie.[79] Thus, under the present regime, which recognizes the right to silence but not a right to lie, the truth-signal of those who choose to speak is stronger than under either of the alternatives: namely, a regime without the right to silence and a regime that allows lying to avoid self-incrimination.[80]

Our conclusion is that lies that are told to avoid self-incrimination entail substantial costs in terms of the dilution of the truth-signal, which could often adversely affect the innocent. We therefore propose that only in a very narrow set of cases should lies to avoid self-incrimination be tolerated. Specifically, such lies should be permitted when a question is asked with the sole purpose of inducing the defendant, suspect, or witness to incriminate him or herself by keeping silent, so that lying is the only way to avoid self-incrimination. It could be hard to identify such questions either ex ante or ex post, and if this difficulty cannot be overcome, an outright prohibition on such lies would, of course, be justified. We contend, however, that some such questions could, nonetheless, be thus identified. In extreme cases, if the police or a prosecutor asks a suspect whether he committed the crime under investigation, answering "no" should not constitute perjury even if it is later proven that the suspect did in fact commit the crime. Indeed, it seems to be common practice not to charge convicted defendants with perjury simply for having proclaimed their innocence.[81]

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[79] Stein & Seidmann, *supra* note 57 (explaining that while the right of silence does make it harder to convict some guilty defendants, its positive anti-pooling effect makes it "as justified as any other rule of criminal procedure and evidence that reduces the rate of erroneous convictions by increasing the rate of erroneous acquittals"). For criticism, see Stephanos Bibas, *Response: The Right to Remain Silent Helps Only the Guilty*, 88 IOWA L. REV. 421 (2003) (criticizing the Seidmann and Stein theory and pointing out some of its weaknesses); Gordon Van Kessel, *supra* note 50 (same).

[80] Note, however, another argument to support permitting lies: under the current rule, which prohibits lying, some innocent defendants and suspects choose to remain silent, fearing that they will be trapped into giving self-incriminating answers. Given a right to lie, some of them will be encouraged not to keep silent and instead cooperate with the police and prosecution. *Cf.* Peter Arenella, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System: Foreword: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1250 (1996) (arguing that an innocent defendant might choose to remain silent in cases where "a jury might not find his account plausible even if it was the truth").

[81] "The 'exculpatory no' defense prevents the government from punishing an individual for giving a false negative answer in response to a government inquiry if a truthful affirmative answer would have incriminated the individual, or if the individual reasonably believed that

Finally, note that there could be intermediate options between the two extremes of penalizing lying to avoid self-incrimination and complete legitimation of such lies. For example, courts could be permitted to draw negative inferences from lies—even if told to avoid self-incrimination—but telling these lies would not constitute an offense in itself.

3. Free-Riding

Allowing doctors to lie to their patients gives rise to the risk that patients will ignore their doctor's advice even when the latter is telling the truth.[82] This concern arises, to a certain degree, even under current law, which allows doctors to refrain from disclosing to their patients that getting vaccinated would not serve their self-interests; the dilution of doctors' truth-signal would intensify were they allowed also to lie to their patients. However, if lying were permitted in a set of very narrow and well–defined circumstances, patients would know that in *almost* all cases they are not at risk of being misled by their doctors. Under such a regime, the benefits of lying might exceed its costs.

C. Effectiveness and Costs of Defense

Allowing lying to avoid discrimination, such as in the Muslim lawyer example, could motivate discriminatory employers (and some non-Muslim employment candidates) to take costly measures to ensure that only non-Muslims are hired. Arguably, these measures would enable discriminatory employers to implement their discriminatory policies. Therefore, it would seem that permitting such anti-abuse lies would only increase overall costs and would not reduce discrimination.

But, we argue, this is not necessarily so. *First*, under a legal regime in which employees are allowed to lie about personal characteristics that are irrelevant to their employment, some discriminatory employers will abstain from their discriminating practices in order to avoid the costs of such conduct. For those employers, the right to lie would be effective and achieve its goal. *Second*, while some discriminatory employers would still choose to shoulder the costs of discriminating (which do not arise in a

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a truthful affirmative answer would have been incriminating." United States v. Harrison, 20 M.J. 710, 711 (U.S. Army Court of Military Review 1985). This defense served as an exception to 18 U.S.C. § 1001 (1982) (Fraud and False Statements), but was later rejected by the Supreme Court in *Brogan v. United States* (522 U.S. 398, 404 (1998) (rejecting the "exculpatory no" defense and holding that 18 U.S.C. § 1001 covers any false statement, including a "no" response, and that "neither the text nor the spirit of the Fifth Amendment confers a privilege to lie").

[82] Doren D. Fredrickson et al., *Childhood Immunization Refusal: Provider and Parent Perceptions*, 36 FAM. MED. 431, 436-37 (2004) (showing that communication and trust between doctors and parents affect parents' decisions whether to have their children vaccinated); Parmet, *supra* note 64, at 97-100 (explaining the importance of trust and informed consent for allowing successful vaccination of a population and for promoting public health).

regime prohibiting lies), these costs should be considered a legitimate sanction for their discrimination, which makes it less rewarding.

In the context of lies to avoid self-incrimination (Example 2), it might also be argued that they are ineffective and only lead to greater costs for all parties involved. It would be costlier for the prosecution, as well as the courts, to verify the authenticity of testimonies, while at the same time, innocent suspects and defendants would incur higher costs to substantiate their innocence. And if the eventual outcome is that all lies will be detected, then there will be no value to permitting them, for this would do nothing more than increase overall costs. However, the overall costs will not be increased if the category of legitimate lies is restricted, as suggested earlier, to untruthful responses to questions from the police that can be easily identified as intended to lead to self-incrimination (asking whether the suspect committed the crime, for example).

A different conclusion arises in the vaccination case (Example 3). As explained, if doctors were allowed to lie in such situations, there would be many patients who would find other sources of information to verify their doctor's advice, perhaps simply searching the internet or sometimes taking more costly measures. These efforts could often be successful, and the goal of allowing doctors to lie would thus be frustrated. Moreover, patients who are "successful" in their verification attempts will often be a more sophisticated and, likely, wealthier population of patients, which could raise distributive justice concerns.

We propose, therefore, that doctors should be allowed to lie for the good of the public health only if the lie is effective: namely, only if the costs that most patients must incur to detect their doctor's lie are greater than the benefits they derive from detecting that lie. When this condition is met, verification costs are necessarily eliminated. This tends to be typical in the context of a doctor’s advice: a patient's medical profile is usually a factor in determining his best interest, and therefore detecting his doctor's lie would often entail significant cost (i.e., an internet search would not be sufficient). Moreover, most vaccines pose an extremely low risk to those being vaccinated; every patient derives at least some medical benefit from the vaccination (even if accompanied by a risk); and a certain extent of social stigma usually attaches to people who resist getting vaccinated and free-ride on others. Therefore, patients generally would derive little benefit from detecting their doctor's lie.

III. TRUTH-REVEALING LIES

Lying can be instrumental in revealing the truth in two central ways. *First*, they can be used to extract valuable information from people who are illegally, or undesirably, concealing this information. *Second*, lies can be used to shake the reliability of liars who disseminate false and harmful information. In this Part, we discuss these two contexts of truth-revealing lies, first making the prima-facie case for lying, then discussing its impact

on the truth-signal, and, lastly, considering the effectiveness of permitting such lies to be told.

A. The Prima-Facie Case and the Law

1. Extracting Information

The following example illustrates how lies can trigger the generation of information that might otherwise not be uncovered.

> *Example 4. Lying to a Suspect*. A police interrogator asks a suspect whether he is the owner of the weapon used in the crime under investigation. The suspect knows that if he confirms ownership of the weapon, his chances of conviction are high. He therefore falsely denies any connection to the weapon. The interrogator then shows the suspect fake testimony supposedly given by his friend, indicating that the latter admitted that the weapon is the suspect's property. The suspect is convinced that denying ownership of the weapon is futile and therefore confesses not only to owning it but also to committing the crime. Is his confession admissible given that it was generated by a lie?[83]

It is common practice for the police to manipulate suspects in order to extract valuable information from them. Lying is often the most effective tactic for this and is commonly deemed legal in court.[84]

Consequently, police interrogators often lie to suspects during

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[83] For similar cases, see Holland v. McGinnis, 963 F.2d 1044, 1051 (7th Cir. 1992) (police lied to a rape suspect about the existence of a witness against him); Wilson v. Commonwealth, 13 Va. App. 549, 555 (1992) (police lied to a suspect about being identified by the victim in a line-up).

[84] *See* Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 34-40 (2010) (arguing that truth-exposing lies, as opposed to lies that distort the truth, have positive effects and should be allowed); Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168 (2001) (arguing that the value of deceptive interrogation tactics outweighs their costs and that there is no reason to single them out from other causes of wrongful conviction). Others believe that such lies should be forbidden or at least restricted. *See* Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 476 (1996) (arguing that police lying may impede evidence-gathering by creating distrust and suspicion, which reduce cooperation, and by extracting false confessions, while at the same time diminishing the integrity of the police and criminal justice system as a whole); Laura Hoffman Roppe, *Comment, True Blue? Whether Police Should Be Allowed to Use Trickery and Deception to Extract Confessions*, 31 SAN DIEGO L. REV. 729 (1994) (arguing that police deception deprives the suspect of the fundamental fairness of the justice system, leads to false confessions, and undermines public trust in the police and judicial system). Others suggest a more balanced approach between these two perspectives. *See, e.g.*, Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 111 (1997) (suggesting to constrain only those interrogation methods that are likely to elicit false confessions and to consider the vulnerability of the specific suspect).

interrogation about the existence of incriminating evidence or witnesses[85] or about an accomplice who allegedly confessed and placed the blame on the suspect.[86] Under prevailing law, a confession given by suspects in response to such lies is admissible in court,[87] despite more and more research indicating the rate of false confessions to be very high.[88] The law also allows the police to use undercover agents to gather evidence, an activity that also involves extensive lying.[89]

Lawyers, however, are not allowed to lie to witnesses in cross-examination[90] and in both civil and criminal proceedings litigants are not permitted to lie in their pleas and responses to the court, even if this is done in an attempt to extract valuable information from the other side.[91] Why is

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[85] *See supra* note 83. *See also* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 279 (1996) (noting that in 30% of the interrogations observed, the detective began the interrogation session by confronting the suspect with false evidence).

[86] United States v. Petary, 857 F.2d 458, 460 (8th Cir. 1988) (FBI agents lied to a kidnapping suspect in order to get a confession, telling him that his partner was in the process of confessing and would probably put full blame on him).

[87] *See supra* notes 83, 86.

[88] *See* Talia Fisher & Issachar Rosen-Zvi, *The Confessional Penalty,* 30 CARDOZO L. REV. 871, 872 (2008) (explaining that research has shown that a considerable number of confessions are in fact false and often lead to wrongful convictions); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 921 (2004) (suggesting that "interrogation-induced false confession may be a bigger problem for the American criminal justice system than ever before ").

[89] Lewis v. United States, 385 U.S. 206 (1966) (finding evidence admissible when a federal agent, who lied about his identity and asked to purchase narcotics, was invited into the defendant's home, where an unlawful narcotics transaction was consummated); Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 778 (1997) ("Undercover work is by definition deceptive. It normally involves outright lies … [I]n playing such roles, lying is inevitable and extensive.").

[90] MODEL RULES OF PROF'L CONDUCT R. 3.3 (2013) (forbidding an attorney from making false statements of fact to a tribunal or offer false evidence); *id.* R. 3.4(e) ("A lawyer shall not ... in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."); *id.* R. 8.4 (it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"). *See also* Tory L. Lucas, *To Catch a Criminal, to Cleanse a Profession: Exposing Deceptive Practices by Attorneys to the Sunlight of Public Debate and Creating an Express Investigation Deception Exception to the ABA Model Rules of Professional Conduct*, 89 NEB. L. REV. 219 (2010) (reviewing attorneys' use of certain deceptive tactics and arguing that the ABA Model Rules should allow attorneys to use deception as part of an investigation but not in court). *But see* Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771, 781-82 (2006) ("by considering the larger legal context of the lawyer's role ... there are circumstances in which a lawyer can ethically make a false statement of fact to a tribunal").

[91] In civil litigation, different rules are applied to prevent the use of deceptive tactics by the litigants, represented by attorneys. Perhaps the most prominent such rule is that precluding attorneys from communicating, or causing another to communicate, with other represented parties without obtaining counsel's consent. Model Code of Professional Responsibility DR 7-104(A)(1) (1980); Model Rules of Professional Conduct Rule 4.2 (1992). The rule prevents lawyers from taking advantage of another lawyer's client and renders most deceptive tactics ineffective. For a discussion of this rule, see Ernest F. Lidge III, *Government Civil Investigations and the Ethical Ban on Communicating with Represented Parties*, 67 IND. L.J. 549, 560 (1992).

lying to suspects during police interrogations mostly considered legal but lying in court not? An intuitive justification for this rule is that lying to the court constitutes contempt of court. This rationale, taken by itself, is not sufficiently convincing, at least not for a general prohibition on lying in court proceedings. Take, for example, the case of lies told by an attorney in cross–examination, which are short-lived: the purpose of such lies is to trap the witness who is giving false testimony, whether intentionally or unwittingly, and soon thereafter—sometimes in the space of minutes—expose the lie and reveal the truth. It could even be argued that this "temporary" act of lying is not actually a lie. Thus, an attorney's use of a lie as a truth-revealing tactic during cross-examination should not be considered contempt of court, for it is no more than an instrument for eliciting the truth from a liar.

Another possible objection to allowing lying in court is that if lawyers and litigants were permitted to do so without sanction, they would be able to quite easily insert self-serving lies into the evidence presented to the judge and jury, which in no way serves the end of revealing the truth.[92] Thus, allowing lies, even if limited to the context of cross-examinations, could backfire and in fact undermine, rather than promote, the exposure of the truth.[93]

Given this concern, then, we propose that the law permit lies to be told by litigants and attorneys in court, but if, and only if, the lies are revealed as such quickly enough by the liar, so that the court's function of exposing the truth is not compromised. Thus, for example, a lawyer would be permitted to lie to a witness she is cross-examining if she discloses the truth before the witness steps down from the stand.[94]

In addition to police interrogations and courtroom proceedings, there are other contexts in which lies could have a truth-revealing effect and where a question arises as to whether lying should be permitted. One such situation would be the case of a journalist who is investigating the sanitary conditions in the meat department of a certain supermarket and, to gain access to the store, pretends he is interested in a job there and is hired.[95] A similar case is a reporter investigating grave complaints made by patients

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[92] *See* Wilson, *supra* note 84, at 34 (distinguishing truth-exposing lies from lies that distort truth and arguing why the first type should be allowed whereas the second should be forbidden).

[93] Another reason for prohibiting lies in court, as opposed to police interrogations, relates to the different degrees of effectiveness of lies in the respective contexts. We consider this issue at *infra* Part III.C.

[94] There could be exceptions to this rule: if there is more than one witness, for example, it may be justified to wait to reveal the lie so that it can be used in a number of cross-examinations.

[95] In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), reporters gained employment in the plaintiff's supermarkets by misrepresentation and secretly videotaped unwholesome food handling practices. The court found the reporters liable for disloyalty towards the employer and for trespass, but denied the plaintiff's claim for reputation damages, due to the lack of actual malice on the defendants' part.

of eye clinics who gains access to the clinics by pretending to be a patient.[96] Another example is a food critic who reviews restaurants while presenting himself as a patron.[97] In all three cases, should the lies be tolerated as truth-revealing or should the liars be considered trespassers by the law? Saul Levmore, discussing these and other cases, suggests that a loose cost-benefit analysis could justify some of the deceptions.[98]

2. Undermining the Credibility of False Information

Lies can also be used to undermine the credibility of false information. Such lies can be characterized as defensive lies. Example 5, below, illustrates how these lies operate.

> *Example 5. Countering Defamation*. Plaintiff, a journalist, publishes in her newspaper that Defendant, a candidate for a high-ranking position in a large firm, sexually harassed one of his employees. Although this is false, Defendant does not have enough time to effectively refute the item before the firm's board of directors decides on whether to appoint him or someone else to the position. Defendant therefore issues a statement to the press that not only did the sexual harassment never take place, but Plaintiff was actually paid by Defendant's adversaries to frame him. This accusation is in fact a lie, intended to undermine Plaintiff's personal credibility and the credibility of her false accusation about Defendant. Plaintiff sues Defendant for defamation. Should the court rule in her favor?[99]

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[96] In *Desnick v. ABC*, 44 F.3d 1345, 1355 (7th Cir. 1995), television reporters used undercover surveillance by test patients at eye clinics. The court dismissed the plaintiffs' claim of trespass, holding, "If the broadcast itself does not contain actionable defamation, and no established rights are invaded in the process of creating it … then the target has no legal remedy even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly."

[97] Levmore, *supra* note 1, at 1366 (explaining the source of the common intuition that a restaurant critic's deceit and apparent trespass is to be forgiven: "the overwhelming majority of restaurants would agree in advance to an undercover visit by a critic masquerading as a mere patron"). *See* also Am. Transmission, Inc. v. Channel 7, 609 N.W.2d 607, 609 (Mich. Ct. App. 2000) (reporters pretended to be customers at transmission repair shops and then aired a story about dishonest practices that they encountered. The court held that plaintiffs had failed to prove that defamatory implications were materially false, and that plaintiff consented to reporter's presence on their premises).

[98] Levmore, *supra* note 1, at 1374 ("The theory… is that deception is tolerated where the social benefits of deception exceed the costs, taking into account alternative remedies that can deter deception and reduce its costs"). Levmore has not, however, discussed the problem of the dilution of the truth-signal or, moreover, the effectiveness of such lies if permitted.

[99] For a case with similar circumstances, see Mencher v. Chesley, 193 Misc. 829 (N.Y 1948), in which a company executive issued a statement to the press regarding the grounds for dismissing the chairman at the same company. The dismissed chairman responded by publicly declaring that the executive was a Communist and that he used his position to remove the chairman.

The question here is whether a "defensive lie" defense will be recognized in such circumstances. People whose rights are infringed by others can sometimes react aggressively, even violently, and then later, when sued for their conduct, successfully claim self-defense. In our example, however, things diverge from the classic self-defense scenario in a few respects. *First*, it is unclear from the details of the example whether Plaintiff committed an actionable wrong against Defendant.[100] *Second* and more importantly, the lie published by Defendant is an indirect act of self-defense: it is aimed at damaging Plaintiff's reputation and thereby shake the credibility of the claim she made against Defendant. The lie thus created collateral damage—the dissemination of false information to the public—which is typically absent in self-defense cases.[101]

The Restatement (Second) of Torts has recognized a self-defense privilege for a person who has been defamed and responds with a "counterattack" against the defaming party.[102] The courts, however, are cautious in accepting this defense and have set two conditions for it to apply. *First*, the defense is applicable only if the counterattack was conducted without malice, out of the sincere belief that the facts attributed to the defaming party are true.[103] This condition is not met in our example,

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[100] The standard of liability under defamation law varies across states. Most states impose liability where a private person was defamed with malice or negligence. *See* RESTATEMENT (SECOND) OF TORTS § 580B (1977) ("One who publishes a false and defamatory communication concerning a private person... is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them."). In our example, Plaintiff might be at least negligent and, therefore, possibly liable. The fact that she is a reporter is relevant to the application of the negligence standard (*id*. cmt. g). A different standard, requiring actual malice, is generally applied only in cases of defamation of public officials or public figures (and sometimes when the matter involved was of public or general concern). *See* New York Times Co. v. Sullivan, 376 U.S. 254, 278-80 (1964) (establishing the "actual malice" standard for public officials); RESTATEMENT (SECOND) OF TORTS § 580A.

[101] In other cases of self-defense, third parties might be injured, but this is mere coincidence. With self-defense lies, however, the effect on third parties is in fact the aim of the defensive lie.

[102] RESTATEMENT (SECOND) OF TORTS § 594 cmt. k (1977) ("Defense against defamation: A conditional privilege exists under the rule stated in this Section when the person making the publication reasonably believes that his interest in his own reputation has been unlawfully invaded by another person and that the defamatory matter that he publishes about the other is reasonably necessary to defend himself. The privilege here is analogous to that of self-defense against battery, assault or false imprisonment... Thus the defendant may publish in an appropriate manner anything that he reasonably believes to be necessary to defend his own reputation against the defamation of another, including the statement that his accuser is an unmitigated liar.").

[103] *See* Dickins v. Int'l Bhd. of Teamsters, 171 F.2d 21, 24 (D.C. Cir. 1948) (holding that as result of plaintiff's defamatory statements, defendant had the "legal right to publish a reply which, even if it were false, was privileged unless the plaintiff proved the defendant knew it to be false or otherwise proved actual malice in the publication"); Novecon Ltd. v. Bulgarian-American Enter. Fund, 190 F.3d 556, 566 (D.C. App. 1999) (recognizing the self-defense privilege, which constitutes a complete defense to a claim of libel or defamation, but only in the absence of malice). Some courts would allow the claim of self-defense only as a partial defense that enables a reduction of damages but does not bar recovery altogether.

since Defendant intentionally conveyed false information about Plaintiff to the public—in other words, lied to the public. *Second*, the counterattack should relate to the facts constituting the defamatory statements and not other, unrelated facts.[104] At best, it is only questionable whether this condition is met in Example 5: on the one hand, Defendant's lie was intended to undermine the credibility of Plaintiff's defamatory statement, but, on the other hand, the lie also challenged Plaintiff's integrity, by presenting her as an unreliable and even corrupt journalist.[105]

We maintain that in certain circumstances, defensive lies like the lie told by Defendant in Example 5 should be permitted, albeit with considerable restraint. *First*, as with truth extracting-information lies, permitting lies that undermine false information runs the risk of blurring the line between permissible lies and prohibited lies. *Furthermore*, allowing lies in this type of case would encourage the dissemination of false information by interested parties and thereby externalize costs to the public, which might believe the false information. Certainly, Defendant's lie in Example 5 undermined the credibility of another lie, Plaintiff's lie, and that, in itself, is a virtue. At the same time, however, assuming Plaintiff acted in good faith, when Defendant disseminated false information also with regard to her credibility, he was misleading the public about Plaintiff's integrity in general. And *lastly*, allowing lies in situations represented by Example 5 could over-deter journalists or others from publishing valuable information in their possession. Thus, allowing defensive lies would obstruct free speech, to the public's detriment, and might even be unconstitutional.

These compelling objections to allowing defensive lies in cases illustrated by Example 5 all lead to the conclusion that they should be tolerated only in extreme situations, when the following conditions are met:

See Fleming v. Kane County, 636 F. Supp. 742, 749 (D.C. N. Dist. Ill. 1986) ("As Illinois law makes clear, however, proof of provocation would not bar recovery here—it would simply enter into the calculation of damages.").

[104] *See* Guenther v. Ridgway Co., 187 A.D. 593, 596 (N.Y. 1919) ("It is well settled that where a person is attacked in a newspaper he has the right to reply, and put his side of the controversy before the public. In this article Rice did not attempt to defend himself from the charges made against him, but made a counter attack in which libelous charges were made against the plaintiff not pertinent to the matters charged in the attack. Where this is done the replying party has exceeded his privilege, and it affords him no protection.").

[105] Some courts have been more flexible in allowing the "self-defense" privilege. *See, e.g.*, Collier v. Postum Cereal Co., 150 A.D. 169, 178 (N.Y 1912) ("It is a contradiction in terms to say that the one attacked is privileged only to speak the truth and not to make a counter attack, or that legitimate self-defense consists only in a denial of the charge or a statement of what is claimed to be the truth respecting its subject-matter. One in self-defense is not confined to parrying the thrusts of his assailant. Of course, the counter attack must not be unrelated to the charge, but surely the motives of the one making it are pertinent."); Mencher v. Chesley, 193 Misc. 829, 831 (N.Y 1948) ("Legitimate self-defense is not limited to a mere denial of the charge, but it may include a proper counterattack in the forum selected by the plaintiff."); Korndorffer v. Autumn Hills Convalescent Ctrs., 1994 Tex. App. LEXIS 2359, 18 (Tex. App. 1994) (same).

(1) the defamer lied and had no intention of exposing the truth; (2) the defensive lie told was the least-drastic lie that could effectively undermine the credibility of the defamatory statement; and (3) there was an urgent need to discredit the defamatory statement, and other legal means would not be effective. We propose that the person who disseminated the defensive lie should bear the burden of proving that all three conditions have been satisfied. The first condition is of utmost importance, and it imposes strict liability on the defensive liar: if it emerges that the defamer acted in good faith, the defensive liar will be precluded from claiming self-defense and will be liable for any harm suffered by the defamer.[106]

B. Dilution of the Truth-Signal

1. Extracting Information

With truth-revealing lies, like other categories of lies, there is a risk that permitting such lies will lead to difficulties in distinguishing truth-tellers from liars. This could adversely impact both truth-tellers and the parties to whom they convey information.

But is this risk a true concern in this category of cases? Arguably, if in situations like Example 4 (Lying to a Suspect), police were permitted to lie in interrogations to elicit the truth, suspects would never trust *any* police interrogator, liars and truth-tellers alike. Consequently, truth-telling police interrogators would often be frustrated in their interrogations because suspects would refuse to believe that the information shown to them is not false.[107] Yet it is our view that this concern is not significant, since if the law were to permit lying to interrogated suspects, the police would balance the costs and benefits of this practice and set its interrogation policy accordingly. As a repeat player, the police would realize that a truth-telling reputation will better serve its goals and, accordingly, prohibit its interrogators from lying to suspects and even publicize this policy. Alternatively, the police could allow interrogators to lie, but create an effective enough smokescreen to lead suspects to believe that all interrogators are truth-tellers. If this tactic is successful, the truth-signal of truth-telling interrogators will not be significantly diluted, even if interrogators are permitted to lie from time to time.[108]

This analysis also holds in the context of lies told by prosecutors to witnesses being cross-examined: if prosecutors were permitted by the law

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[106] With criminal liability, the law should probably be more constrained and require a certain degree of malice on the part of the defensive liar.

[107] *See* Young, *supra* note 84, at 476 ("[A] close look at how police investigate demonstrates that police lying can impede evidence gathering by generating distrust and suspicion which limit citizen cooperation.").

[108] If it were clear that the best strategy is not to lie, making lying illegal would help the police to convey that they don't lie.

to tell such lie, the prosecution would decide whether the costs of lying exceed its benefits and shape policy accordingly. With both prosecutorial lies and police interrogation lies, the public authority that decides whether or not to allow lying is the entity that internalizes the costs and benefits of lying—including the dilution of the truth-signal—and it makes its decision in accordance with that cost-benefit analysis.

There would be a different outcome with lies told by one-shot players, such as defense lawyers. They could have a socially excessive inclination to lie in cross-examining witnesses, since others bear the costs of the dilution of the truth-signal. Arguably, for this reason, only prosecutors should be allowed to lie in cross-examining witnesses. This, however, would give them a relative advantage over other litigants, which, in itself, would generally be seen as undesirable,[109] perhaps explaining the absolute prohibition on lying in court.[110]

2. Undermining the Credibility of False Information

In Example 5 (Countering Defamation), allowing defensive lies would dilute the truth-signal in two manners. *First*, there is the risk that at some point in the future, when Plaintiff is telling the truth, the public would be distrustful of her statements since her credibility has been shaken by Defendant's defensive lie. This risk is not of great concern so long as defensive lies are allowed in only narrow circumstances, as we have proposed. Thus, under our proposal, even if Plaintiff was not hired by Defendant's adversaries, her journalistic integrity should rightly be questioned in the future. Defendant's defensive lie would therefore impact her credibility in the right direction (even if for the wrong reason).

Second, people who defend themselves against defamatory statements without lying would also lose credibility: the public would doubt their truthfulness, knowing that they could be lying. This concern, albeit real, should not be overstated. Under our proposal, the defensive liar takes a risk that if the defamer acted in good faith, the defensive liar will be liable for defaming the defamer. Therefore, when the public—or those people to whom the defensive lie was conveyed—must decide whether a person who was defamed and defended himself lied, they will know that he has something to lose if he did tell a defensive lie and the defamer acted in good faith.

C. Effectiveness and Costs of Defense

Would truth-revealing lies be effective in attaining the goal they are

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[109] *See* Saul Levmore & Ariel Porat, *Asymmetries and Incentives in Plea Bargaining and Evidence Production*, 122 YALE L.J. 690 (identifying, explaining, and criticizing asymmetries between the prosecution and defendants created by criminal procedure law).
[110] For further explanation, see *infra* Part III.C.

intended for? When such lies are told to extract information the answer seems to be yes: interrogators and attorneys can use this tactic effectively to extract information from the deceived parties. Furthermore, these lies would not really burden the deceived parties with any costs of verification: suspects interrogated by the police and witnesses cross-examined in court who are withholding information essential to the administration of justice would bear no extra costs of social value if they are lied to.

There might be, however, a difference between the effectiveness of such lies in civil litigation and in criminal litigation. William Stuntz offered an innovative explanation for why police deception in criminal cases is allowed but deception in civil cases is not.[111] According to Stuntz, deceptive tactics contribute substantively to evidence-gathering in criminal investigations, for much of the essential information in these cases tends to be private, and witnesses are often unreliable or unwilling to testify. The police can obtain key pieces of information by using deceptive tactics, which are particularly effective in the first stage of an investigation. At this point a defense lawyer is unlikely to be involved yet, so there is a much lower risk that costly precautions will be taken by the suspect to avoid being trapped by the police. The process is quite different in civil cases: there are usually lawyers representing both sides from the very outset, who take precautions that dramatically reduce the effectiveness of deceptive tactics.[112] In sum, whereas lies are effective in exposing the truth in the early stages of criminal cases, they are likely to trigger costly precaution measures and be ineffective in civil cases.[113]

Stuntz's argument can be easily applied to justify a distinction between lies told in court—whether in criminal or civil litigation—and lies told in police interrogations. In either a civil or criminal trial, the chances of attorneys being involved are far higher than in police interrogations, and therefore lies in the former context would be far less effective than in the latter. Similarly, the costs of defense against lies would be higher in the context of court proceedings than in police interrogations. Still, there is one qualification to be made: as we have suggested, short-lasting lies in cross-examination should be allowed.[114] Such lies can be expected to be effective, since the attorney for the opposing side has only limited ability to defend" the interrogated witness against the effect of the cross-examining attorney's lies—far more so than in the other stages of the litigation, be it

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[111] William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903 (1993) (analyzing the doctrines that allow deceptive evidence-gathering in criminal cases and explaining why they are not applied in civil cases).

[112] If the anti-deception rules in civil litigation are abolished, incentives to hire lawyer by all parties will be very high. For more on this argument, see Stuntz, *supra* note 128, at 1919.

[113] Moreover, the costs of precautions mostly fall on repeat players, who, in criminal cases, are often professional criminals. Therefore, such costs might often be deemed a social gain rather than social costs, which strengthens the argument. *See* Stuntz, *supra* note 128, at 1928.

[114] *Supra* text accompanying note 94.

civil or criminal.

The effectiveness and costs analysis is more complex with regard to lies aimed at undermining the credibility of false information. Some defensive lies might fail to achieve their purpose if they are successfully refuted. But such refutation is not cost-free. If there is a high likelihood of refutation in most cases, it might be more desirable for the law to prohibit defensive lies outright and save the wasteful refutation costs.

IV. PATERNALISTIC LIES

The fourth and final category of cases is comprised of instances of paternalistic lying, namely, lies that are aimed at benefiting the party being deceived. We discuss here two subcategories of paternalistic lying: In the first, the lie is intended to improve the deceived person's well-being and does not impact his behavior. We call these "mere paternalistic lies." In the second context of paternalistic lying, the aim is also to improve the well-being of the deceived person but by influencing his behavior. We call these lies "manipulative paternalistic lies." While the law has demonstrated a certain extent of tolerance toward mere paternalistic lies, it is generally intolerant toward the manipulative form.

A. The Prima-Facie Case and the Law

1. Mere Paternalistic Lies

The following example illustrates a typical case of a mere paternalistic lie:

> *Example 6. The Terminally Ill Patient*. Doctor realizes that Patient is going to die within a few days and conveys this sad information to Patient's family. Patient asks Doctor what his chances of survival are, and Doctor answers that his chances are good. Did Doctor commit a tort or violate medical ethics?[115]

Most courts allow and even require doctors to limit disclosure in situations where full disclosure of the risks involved in a treatment to an apprehensive patient might adversely affect that patient's condition, cause psychological damage, or jeopardize the success of the treatment.[116] In

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[115] *See* Arato v. Avedon, 5 Cal. 4th 1172 (Cal. 1993). In this case, doctors did not disclose the pancreatic cancer patient's very low statistical life expectancy. The patient underwent treatment and died one year later. The court ruled that disclosure of life expectancy in this case had not been mandatory. Note, however, that in this case, unlike in our example, the doctors did not lie but merely avoided disclosure, and the patient's early death was only statistically anticipated.

[116] Allan H. McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 597 (arguing that when a patient is likely to have a severe reaction to disclosure of his or her

several jurisdictions, this approach is supported by statutory law.[117] Accordingly, some courts will allow a doctor not to inform a terminally ill patient of her exact statistical life expectancy, when it might strip her of any hope.[118] Lies, however, are not permitted in the same context: if a patient asks his doctor outright about her exact medical condition, the doctor is forbidden to lie.[119] Borderline cases are possible, however. *First*, there are cases in which it is unclear whether the terminally ill patient who asks the doctor about her medical condition *really* wants to know the truth. We believe that a doctor who lies when it is reasonable to assume that the patient, even if she asked for the truth, did not *truly* want to know the truth should be exonerated from liability, as long as the lie was intended to spare the patient sorrow and despair. In order to reasonably determine what the patient *really* wanted to know, the doctor should consult with the patient's closest family, assuming they are available.

Second, and more importantly, when lies could, with high probability, have a therapeutic effect, they should be more broadly tolerated. It has been well-established by scientific research that sorrow and despair can adversely affect a patient's physical, and not only emotional, condition.[120] In such circumstances, therefore, the general rule should be that doctors are allowed to lie to their patients, unless the patient indicated a clear preference to the contrary *before* she was diagnosed with a serious condition. Indeed, doctors occasionally request their patients to state in advance whether they want to be fully informed about their medical condition.[121]

2. Manipulative Paternalistic Lies

Consider the following example:

> *Example 7: A Blood Transfusion*. Patient is injured in a road accident and urgently requires a blood transfusion. However, she refuses the procedure for religious reasons. Doctor lies to Patient

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condition, full disclosure might be deemed wrongful); Woolley v. Henderson, 418 A.2d 1123, 1130 (Me. 1980) (when disclosure of possible risks may have such an adverse effect on the patient as to jeopardize therapy's success, full disclosure could constitute bad medical practice).

[117] *See, e.g.*, NY CLS Pub Health § 2805-d(4).

[118] *See, e.g., Arato* , 5 Cal. 4th at 1177.

[119] *See, e.g.*, Willis v. Bender, 596 F.3d 1244, 1259-60 (10th Cir. 2010) ("requiring physicians to honestly answer a patient's questions is a bright-line rule not subject to conflicting interpretations").

[120] Elad Neeman, Oded Zmora & Shamgar Ben-Eliyahu, *A New Approach to Reducing Postsurgical Cancer Recurrence: Perioperative Targeting of Catecholamines and Prostaglandins*, 18(18) CLIN. CANCER RES. 4895 (2012) (arguing that a patient's psychological condition could affect long-term cancer recurrence).

[121] *See, e.g.*, Arato v. Avedon, 5 Cal. 4th 1172, 1176 (Cal. 1993) (patient filled out a questionnaire routinely given to new patients, which asked, among many other questions, whether he wished to be told the truth about his condition).

> by saying that she will be given only liquid intravenously and not blood, and Patient agrees to this. Did Doctor commit a tort or violate medical ethics?

Under the informed consent doctrine, doctors are obliged to disclose full and honest information to patients before administering any treatment to them.[122] The extent of the disclosure required is determined mostly by an objective materiality standard, referring to the information that a reasonable patient would want to consider in deciding whether to undergo the treatment.[123] The prevailing view is that a doctor who failed to disclose relevant information about the treatment will be liable for negligence if harm is done, and a doctor who administered a different treatment from what the patient consented to will be liable for battery.[124] Although courts might admit some limits on disclosure where the disclosure itself would have harmed the patient's condition, they do not accept a paternalistic reasoning for non-disclosure, when the doctor feared that the patient would make an unwise or irrational decision if she were to receive full information.[125] Needless to say, straightforward lies—as in Example 7—are prohibited outright.[126] Thus, prevailing law would likely hold Doctor in Example 7 liable for battery. But should that be the law?

To fully understand the problem, we should consider first the alternatives available to Doctor in Example 7. In most jurisdictions, in extreme situations where a patient refuses a life-saving treatment for non-medical reasons, the doctor can apply to the court to decide whether treatment should be forced on the non-cooperative patient. Some courts will order forced treatment on the theory that doctors cannot be compelled to disregard their professional standards and the dictates of their conscience by providing poor treatment that will result in a patient's death,[127] and some

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[122] In emergencies, when getting patients' informed consent is impractical, doctors are free to administer treatment immediately, even without the patient's consent. *See, e.g.*, New York Public Health Law § 2805-d(2); Woods v. Brumlop, 377 P.2d 520, 525 (N.M. 1962) ("An exception to the rule requiring a disclosure of the dangers of a treatment procedure, of course, is an actual emergency where the patient is in no condition to determine for himself."). In these situations, and for this purpose, a doctor may even use physical force, *see, e.g.*, N.Y. Penal Law § 35.10(5).

[123] DAN B. DOBBS, THE LAW OF TORTS 655 (2000) (explaining the older medical standard of disclosure and the newer materiality standard of disclosure).

[124] Cobbs v. Grant, 8 Cal. 3d 229, 239 (Cal. 1972) (setting the boundaries between negligence and battery claims in cases of medical non-disclosure).

[125] Canterbury v. Spence, 464 F.2d 772, 789 (Columbia Cir. 1972) (rejecting the paternalistic argument as a defense for non-disclosure); Culbertson v. Mernitz, 602 N.E.2d 98, 103 (Ind. 1992) (same).

[126] Willis v. Bender, *supra* note 119, at 1260 ("In any event, one would be hard pressed to argue that a reasonable physician of like training would lie to a patient in obtaining consent.").

[127] United States v. George, 239 F. Supp. 752, 754 (Dis. Conn. 1965) (ordering the administration of blood transfusions to a Jehovah's Witness , because doctors and hospitals cannot be forced to give bad medical treatment in the name of patient's right to free exercise of religion).

courts support this view on the basis of the state's legitimate interest in the preservation of life.[128] Other courts, however, will hold that patient's autonomy supersedes any other consideration[129] and that a patient's consent is a precondition to treatment even when refusal to undergo the treatment seems unwise or irrational and will result in his or her death.[130] Yet other courts will consider a patient's decision to refuse life-saving treatment as a decision to commit suicide, which could justify forced medical intervention,[131] possibly even without prior court approval.[132]

No court, however, will permit a doctor to lie to a patient about his or her condition: once a patient has asked a direct question, the doctor is required to answer honestly.[133] We argue that this rule should be reconsidered, at least in some jurisdictions.

Let us begin with jurisdictions that regard refusing life-saving treatments as attempted suicide. Under this rule, doctors are allowed to force patients to receive treatment, even without prior court approval. Given this rule, it is not clear why doctors should not be allowed to lie to patients when without lying, forcing treatment would be impossible, much harder, or more damaging to the patient. If in any event, doctors are permitted to administer treatment even against a patient's will, it is not clear why they should be obligated by law to provide patients with a truthful explanation about the nature of the procedure.

The same argument can be made with regard to those jurisdictions that require prior courts approval for forced treatment but, in emergency

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[128] John F. Kennedy Mem'l Hosp. v. Heston, 58 N.J. 576, 582 (1971) (ordering the administration of blood transfusions to a Jehovah's Witness, because the state, as well as the hospital and its staff, has a legitimate interest in preserving lives, which warrants treatment).

[129] Norwood Hosp. v. Munoz, 409 Mass. 116, 127 (1991) (holding that the right of a Jehovah's Witness not to receive a blood transfusion supersedes the interest of the hospital and state in preserving lives and that allowing her to make this decision does not undermine the ethical integrity of the medical profession).

[130] Lane v. Candura, 6 Mass. App. Ct. 377, 383 (Mass. App. Ct. 1978). In this case, an elderly patient who suffered from gangrene refused amputation, even though this decision would lead to her imminent death. The court ruled that the patient is legally competent, and therefore the law protects her right to make even such a seemingly irrational decision.

[131] Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1008 (Colum. Cir. 1964) (ordering the administration of a blood transfusion to a Jehovah's Witness and suggesting that prevention of suicide could be a relevant argument in states where attempted suicide is illegal). This view has been rejected by other courts, *see, e.g.*, Fosmire v. Nicoleau, 75 N.Y.2d 218, 227 (N.Y. Ct. App. 1990) (noting that a Jehovah's Witness's refusal to receive a blood transfusion is not considered a suicidal act justifying intervention).

[132] *See, e.g.*, N.Y. Penal Law § 35.10(4) (2013) ("A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious physical injury upon himself may use physical force upon such person to the extent that he reasonably believes it necessary to thwart such result.").

[133] *Supra* note 119. Also, if the doctor explicitly promised the patient that such a procedure will not be performed, courts will also consider this as a breach of contract, *see* Nicoleau v. Brookhaven Memorial Hosp. Ctr., 201 A.D.2d 544, 545 (N.Y. App. Div. 1994) (accepting the patient's breach of contract claim against the doctor, who had administered blood transfusions to the patient after explicitly promising not to do so).

situations, allow court approval to be applied for retroactively.[134] If courts allow doctors to administer forced treatment, there seems to be no reason for them to prohibit doctors from lying to patients when this would make treatment easier and safer for the patient. Thus, in any circumstances in which forced treatment is allowed by the law and lying to the patient is likely to increase the chances of the treatment's success and better serve his or her medical interests, lying should be tolerated by the law.

B. Dilution of the Truth-Signal

1. Mere Paternalistic Lies

If doctors are allowed to lie to patients in order to spare them sorrow and despair or to improve their chances of recovery, doctors may find it more difficult to convey true information to patients whose chances of recovery are high. Thus, a patient who has been diagnosed with cancer with high chances of recovery might suspect that his doctor is lying when she gives him this information. This patient would be better off knowing *with certainty* that his chances of recovery are high, as the doctor informed him.

Allowing mere paternalistic lies could, indeed, dilute doctors' truth-signal. Yet we believe that the risks will be diminished if such lies are allowed in special cases only: namely, when the patient can be assumed to prefer not to know the truth about her condition (even if she has requested this information)[135] and when a patient's chances of recovery will be harmed if she knows the truth about her condition.[136]

2. Manipulative Paternalistic Lies

With manipulative paternalistic lies, there will be no meaningful dilution of the truth-signal so long as the law permits these lies solely in exceptional situations in which it is clear that the patient is behaving extremely irrationally. Therefore, the majority of patients, who do not behave extremely irrationally, would not be affected by this rule. The costs of allowing manipulative paternalistic lies would be borne mostly by those same extremely irrational patients who would be manipulated by their doctor's lie and undergo medical treatment they are resisting. These costs, however, should be disregarded, since the goal of permitting these lies, to begin with, is to create precisely these costs, which, from a social perspective, are in fact benefits.

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[134] *Supra* note 122.
[135] *Supra* text following note 119.
[136] *Supra* text accompanying notes 120-121.

C. Effectiveness and Costs of Defense

Would paternalistic lies be effective in attaining their goals? In other words, would the lied-to parties be misled by the lies or detect them? We believe that paternalistic lies, especially in the medical field, would often succeed in going undetected. The simple reason is that at least in the cases represented by Examples 6 (The Terminally Ill Patient) and 7 (A Blood Transfusion), the patients are one-shot players, with no expertise in detecting lies in the very unordinary situation they are in. Even if some patients would suspect that they are being misled by their doctors, others would believe their doctors; and while the latter group of patients would benefit from the lie, the former group would bear only minimal costs.[137] Furthermore, in some cases, there would be patients who would prefer to be deceived—those who ask but do not really want to know[138]—and they would probably not put much effort into detecting lies.

CONCLUSION

Lies are generally harmful. The goal of this article was to identify those categories of cases where lies are socially valuable and should be permitted, perhaps even encouraged, by the law.

Productive information lies are essential for generating valuable information. In cases where such lies should be permitted under our theory, the deceived party is actually prevented from benefiting from the liar's efforts to acquire the productive information. Allowing one party to profit from productive information acquired by another party without adequate payment is tantamount to allowing the former to be unjustly enriched at the expense of the latter. Note that permitting such lies neither worsens nor improves the position of the deceived party relative to where he would have been had the liar not searched for the productive information in the first place.

Anti-abuse lies prevent the deceived party from abusing the liar or third parties. Anti-abuse lies are directed at potential infringers of the rights of the liar or others, and this is what makes them socially valuable. Along the way, however, the same anti-abuse lies might adversely affect innocent third-parties, a risk that must be taken into account in considering whether to recognize the legitimacy of such lies.

Truth-revealing lies contribute to the elicitation of the truth. This might sound paradoxical, since it implies that an untruth generates the truth. Therefore, to make the argument to permit such lies reasonable,

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[137] A counterargument is that at least with Jehovah's Witnesses, if doctors are allowed to lie to them, many would avoid coming to hospitals where they know they would be deceived. This concern arises, however, even if lying is prohibited but doctors are allowed, with or without court's approval, to forcibly administer blood transfusions.

[138] *Supra* text following note 119.

truth-revealing lies can be allowed only if they are short-lived or capable of refuting other, much more severe lies. With this category of cases, as well, the central risk to allowing lying is the potential adverse effects on third parties. Therefore, these lies should be only narrowly allowed and with clear boundaries.

Paternalistic lies arise mainly in medical contexts. While they might serve patients' interests, they could be considered an infringement on their autonomy. Sometimes, however, in exceptional cases, the benefits far exceed the costs—in some instances, they are even lifesaving—and any legal system should allow them in such circumstances.

We realize that permitting lying almost always dilutes the truth-signal. Furthermore, deceived parties might find ways to detect the lies and frustrate their intended goals. Certainly, these are all important considerations and concerns, and as we have demonstrated throughout the article, it does not suffice to show that a certain type of lies has social value. Rather, it is necessary to also ensure that permitting lying in the particular situation or context can be expected to be effective and that the costs—especially the dilution of the truth-signal—will not exceed the benefits. Indeed, in all four categories of cases identified in this article, lies—within the boundaries we have drawn—should be permitted and sometimes even encouraged.

In the table below, we summarize our analysis of the four categories of valuable lies, according to the criteria applied in the article.

Table: Valuable Lies

	Prima Facie	*Dilution of the Truth-Signal*	*Effectiveness*
I. Productive Information	yes	only for non-professional buyers, in limited circumstances	yes
II. Anti-Abuse Lies			
A. Discrimination	yes	yes, but in a socially desirable way	yes
B. Self-Incrimination	yes	yes	yes
C. Free-Riding	yes	sometimes	sometimes
III. Truth-Revealing Lies			
A. Extracting Information	yes	sometimes	yes, especially in police interrogations
B. Undermining the Credibility of False Information	yes	sometimes	yes
IV. Paternalistic Lies			
A. Mere Paternalistic Lies	yes	mostly no	mostly yes
B. Manipulative Paternalistic Lies	yes	mostly no	mostly yes

The categories of lies we have analyzed do not exhaust all types of lies, but they do represent those categories that we consider to be of special significance. Specifically, there are many lies that should not be punished by the law, not because of their social value, but due to the concern that penalizing these lies—even if they lack social value—adversely impacts desirable values and conduct. In this vein, the Supreme Court held unconstitutional a statute making false claim of receipt of a Medal of Honor a crime not because such a claim has any social value, but in order to protect First Amendment rights.[139] Similarly, a merchant's puffing[140] or lies told in relation to contractual parties' reservation price[141] are not necessarily valuable, but because it is difficult to distinguish them from truthful statements, penalizing them might have undesirable chilling effects on parties negotiating contracts.

We have opened this article with the argument that in many instances, the law should either impose a duty of disclosure coupled with a prohibition on lying or else allow parties to withhold information from other parties and lie about its contents. At the close of the article, we can conclude that in many circumstances, the law rightly allows non-disclosure but fails to complement this with permission to lie. This failing should be corrected. Courts and legislatures should acknowledge that lying is not always bad. The discussion of the categories of lies that we have focused on here could give pause to consider whether the almost general prohibition on lying, even when the lie adversely affects others, should be abandoned.

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[139] United States v. Alvarez, 132 S. Ct. 2537, 2543 (2012). The respondent falsely claimed that he had been awarded the Congressional Medal of Honor and was accused of violating the Stolen Valor Act, 18 U.S.C.S. § 704(b). The Supreme Court held that the Act was in violation of the First Amendment and therefore unconstitutional.

[140] *See, e.g.*, Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 163 (Tex. 1995) (holding that manager's statements that the building for sale was "superb," "super fine," and "one of the finest little properties in the city" were "puffing" or opinion rather than misrepresentation of fact); Cohen v. Koenig, 25 F.3d 1168, 1172 (2d. Cir. 1994) ("statements will not form the basis of a fraud claim when they are mere 'puffery' or are opinions as to future events"); Miller's Bottled Gas, Inc. v. Borg-Warner Corp., 955 F.2d 1043, 1051 (6th Cir. 1992), ("[m]ere 'sales talk' and 'puffing' do not rise to the level of fraud").

[141] MODEL RULES OF PROFESSIONAL CONDUCT R. 4.1 cmt. 2 (2013) (permitting lawyers to engage in certain forms of misrepresentation regarding "estimates of price or value placed on the subject of a transaction"); Russell Korobkin et al., *The Law of Bargaining*, 87 MARQ. L. REV. 839, 840 (2004) ("It is universally recognized that a negotiator's false statements concerning how valuable an agreement is to her or the maximum she is willing to give up or exchange in order to seal an agreement (the negotiator's 'reservation point,' or 'bottom line') are not actionable, again on the ground that such false statements are common and no reasonable negotiator would rely upon them."); Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOTIATION L. REV. 83, 92 (2002) ("it is acceptable for a lawyer to misrepresent a client's reservation price").

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