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A Welfarist Perspective on Lies

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Should a Muslim employee who, in order to avoid discrimination, falsely stated in his job interview that he is Christian be fired for his dishonesty? Should a buyer of a tract of land who, before contracting, conducted an expensive investigation 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 in 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 nondisclosure is permitted, lies should also be tolerated, for otherwise the social goals sought by allowing nondisclosure are frustrated. With this as its starting point, this 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. This 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 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 because of 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 welfarist theory of 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 nondisclosure 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 nondisclosure is allowed, lying is prohibited.[2] We contend that this legal equilibrium is puzzling for two reasons. First, in many cases, the harm that nondisclosure 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

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).

2. *See infra* notes 32–34 and accompanying text.

avoid illegal discrimination—recognizing his right to lie if explicitly asked about his religion is inevitable, or so we argue.[3]

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 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.[4]

But suppose that the seller in our example explicitly asks the buyer whether he investigated the chances of finding mineral deposits on the land: How should the buyer be required to respond? If we take the social value of generating productive information argument seriously, then one possible conclusion is that the buyer should be permitted to falsely deny conducting an investigation, for again, he would otherwise 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.

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3. We do not argue that this conundrum always arises. In particular, there are many instances where nondisclosure with respect to certain items of information is justified only because the party possessing the information is unaware of its significance to the other party. In such cases, if the latter party explicitly asks regarding the information in question, disclosure is warranted and lying should be prohibited. For an illuminating recent paper that discusses and analyzes the law's different approaches to questions and answers that should or should not be asked or answered, see Adam M. Samaha & Lior Jacob Strahilevitz, *Don't Ask, Must Tell—And Other Combinations*, 103 CALIF. L. REV. 919 (2015). Samaha and Strahilevitz do not, however, discuss or suggest the permissibility of lies.

4. *See generally* Anthony T. 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 32 and accompanying text.

Yet in contrast to our conclusion, the law imposes an outright prohibition on lies in commercial negotiations. As a result, if the buyer in our example were to lie, the seller would be entitled to rescind the contract and even recover her losses.[5]

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 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 the law tolerate lying to avoid the risk of discrimination? Our claim is that often 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 nondisclosure 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.[6] 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 the prosecution abuse their interrogational powers by forcing the interrogee to incriminate himself.[7] 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.[8] We challenge this stance on anti-abuse lies, claiming that in certain well-defined sets 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.[9] In all such instances, the lies are instrumental to uncovering the truth; yet, while in some contexts the law permits truth-revealing lies, the law prohibits such lies in many other cases. We submit that this type of lie should be tolerated by the law in a broader range of situations.

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5. RESTATEMENT (SECOND) OF 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); E. ALLAN FARNSWORTH, CONTRACTS 252–54 (4th ed. 2004) (same).

6. *See infra* Part II.A.1.

7. *See infra* Part II.A.2.

8. *See infra* Part II.A.3.

9. *See infra* Part III.A.

The fourth and final category is cases of "*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 to spare him despair and distress in a hopeless situation.[10] 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 that he refuses for irrational reasons.[11] In this gray zone, nondisclosure—but not lying—is 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.[12] Indeed, although it is usually the patient who decides on his or her medical treatment, there might be exceptional circumstances that warrant other solutions.

In all our four categories of cases, lies have the potential to promote indisputable social goals: productive-information lies create important incentives to generate productive information; anti-abuse lies decrease the likelihood of the harmful abuse of people's rights; truth-revealing lies seek to uncover the truth; and paternalistic lies benefit the people to whom the lie is told. The promotion of social goals is a precondition—under our theory—for permitting lies. This condition, however, is not the sole criterion. 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 nonliars, 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 deny that he investigated the land, potential buyers of other tracts of land, who have not investigated the land, might have difficulty convincing sellers that they really have no information about the land. The reason is obvious: if lying in such circumstances is permitted, both buyers with positive information and buyers with no information about the tracts of land they are considering purchasing will tell the respective sellers that they have no 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, a rule permitting lying 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

10. *See infra* Part IV.A.1.
11. *See infra* Part IV.A.2.
12. *See infra* Part IV.A.2.

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, the more sophisticated the patients, the more this effectivity consideration gains force against allowing lying; 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 categories of lies we analyze in this Article do not exhaust all the types of lies that the law should tolerate, 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 necessarily 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.[13] Similarly, a merchant's puffing[14] or lies told in relation to contractual parties' reservation price[15] 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.

The theory we propose in this Article is welfarist: it does not account for deontological objections to permitting lies. We do, however, discuss at the end a possible objection that could be raised against our theory and which has a certain deontological flavor to it. Its underlying claim is that permitting lies even in narrow sets of cases might have spillover effects, for this could adversely affect both general moral and legal convictions against lying. Yet we assert that although this is a serious consideration to be taken into account, it does not undermine our main conclusions.

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13. 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 of 2005, 18 U.S.C.A. § 704(b) (West 2015).

14. *See, e.g.*, Cohen v. Koenig, 25 F.3d 1168, 1172 (2d. Cir. 1994) ("[S]tatements 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), ("Mere 'sales talk' and 'puffing' do not rise to the level of fraud . . . ."); 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).

15. *See, e.g.*, MODEL RULES OF PROF'L 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, Michael Moffitt & Nancy Welsh, *The Law of Bargaining*, 87 MARQ. L. REV. 839, 840–41 (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. NEGOT. L. REV. 83, 92 (2002) ("[I]t is acceptable for a lawyer to misrepresent a client's reservation price . . . .").

This 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 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.[16]

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.[17] 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.[18] 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 subject applicants to legal sanctions.[19] 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

16. It has been argued in the law and economics literature that under certain conditions, when there is no affirmative duty of disclosure but a prohibition on lying, sellers will voluntarily disclose all relevant information. *See generally* Sanford J. Grossman, *The Informational Role of Warranties and Private Disclosure about Product Quality*, 24 J.L. & ECON. 461 (1981).

17. *See infra* text accompanying notes 32–34.

18. *See infra* Part II.A.2.

19. *See infra* Part II.A.1.

or spare him anguish and despair, whereas straightforward lies—regardless of how paternalistic—are commonly prohibited.[20]

Why does the law's approach to lying differ so considerably from its 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.[21] Another explanation is consequentialist or, more specifically, welfarist in nature: permitting lies can dilute the truth signal of nonliars, 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.[22]

In this Part, we develop our welfarist theory of valuable lies, comprised of three stages. First, to make a prima facie case for permitting a lie in any given context, it is necessary to first identify any social value generated by the lie in question (beyond its value to the specific liar, which is self-evident). Second, if such a value is determined, it should be compared to the costs generated by the dilution of the truth signal sent by nonliars. Third, consideration should be given to 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 clear social value in lying in the particular context and ensure that this value cannot be reasonably attained without lying. Consider the following example:

> *Example 1. Mineral Deposits.* After conducting an expensive and thorough investigation, which has indicated a high likelihood of finding

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20. *See infra* Part IV.A.1.

21. *See* 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).

22. *See infra* Part I.B.3.

> 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?[23]

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.[24]

Kronman asserted that in negotiating a contract, there should be a duty to disclose only casually acquired information and not deliberately acquired information.[25] 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.[26] In order to preserve Buyer's ex ante 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

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23. For similar cases, see Caples v. Steel, 7 Or. 491 (1879) (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); Holly Hill Lumber Co. v. McCoy, 23 S.E.2d 372 (S.C. 1942) (same).

24. Kronman, *supra* note 4, at 13.

25. *Id.* at 33.

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

overheard, say, while riding the bus—it should be disclosed to Seller because this would not affect the incentive to generate valuable information.[27]

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 nondisclosure is typically 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.[28] 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.[29] 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.[30] The case for nondisclosure is especially compelling when the information is both productive and deliberately acquired. Accordingly, in Example 1, no duty should be imposed on Buyer to disclose information about the high likelihood of finding minerals on Seller's land.[31]

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27. *See* Kronman, *supra* note 4, at 14.

28. *See* ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 357–59 (6th ed. 2012) (distinguishing between productive and redistributive information and explaining the relevance of that distinction to disclosure law); *see also* Jack Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, 61 AM. ECON. REV. 561 (1971).

29. COOTER & ULEN, *supra* note 28, at 357 (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 26.

30. For the argument that, under certain conditions, a contractual party will fully disclose all the information he possesses even without an affirmative duty of disclosure, see generally Grossman, *supra* note 16. Obviously, in many cases, this does not hold.

31. This is not to say that applying a nondisclosure 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 unnecessarily increase 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

2. The Case for Lying

Under prevailing law, nondisclosure is allowed in cases represented by Example 1.[32] The prevailing rule in all legal systems, however, is that inducing a contract by lying is fraud,[33] and the deceived party is, therefore, entitled to rescind the contract and recover for her losses.[34] Yet our claim is that a mere right not to disclose information is not sufficient for securing the buyer's entitlement to 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.[35] As a result, buyers with

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search for information, and the seller's superior ability to mine minerals would, therefore, be meaningless.

An additional consequence of nondisclosure 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 could do it at a lower cost. This concern disappears if we assume search costs for nonexpert sellers to be prohibitively high.

For the argument that in cases represented by Example 1, sellers are often on notice that the buyer has (positive) information about the land and therefore buyers share profits with sellers, see Melvin A. Eisenberg, *Disclosure in Contract Law*, 91 CALIF. L. REV. 1645, 1689–90 n.93 (2003).

32. *See, e.g.*, Holly Hill Lumber Co. v. McCoy, 23 S.E.2d 372, 376–77 (S.C. 1942) ("[N]o 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) OF CONTRACTS § 161 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.").

33. Puffing and lying about the parties' respective reservation prices are the exceptions. *See supra* text accompanying notes 14–15.

34. *Holly Hill Lumber Co.*, 23 S.E.2d at 378 ("[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) OF 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 5, at 252–54 (same).

35. In most of the law and economics literature, fraud is considered to be inefficient. *See*, *e.g.*, COOTER & ULEN, *supra* note 28, at 361 (explaining that the economic reason for not enforcing a contract made by fraud is to save the parties the costs of verifying material information); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 330 (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). *But see* Randy E. Barnett, *Relational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty To Disclose, and Fraud*, 15 HARV. J.L. & PUB. POL'Y 783 (1992); Michael J. Borden, *Mistake and Disclosure in a Model of Two-Sided Informational Inputs*, 73 MO. L. REV. 667 (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); Saul

no 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.

Another possible solution is that professional buyers who want to acquire land to mine minerals employ third parties (intermediaries or straw men)[36] to buy the land for them without revealing the information they possess to those third parties. A seller would then either not know that she is dealing with an agent of the actual buyer or, alternatively, even if she did know, the agent would have nothing to disclose about the land's potential since he would have no such information. This solution would not necessarily work, however, if the seller could identify the agent as an intermediary. Given this possibility, a professional buyer with no information about the land's mining potential would always prefer to directly approach the seller and identify himself as a potential buyer lacking information about the land. Thus, sellers would know that only buyers with positive information would use third parties as intermediaries and would charge a higher price whenever they identify the agent as an intermediary.

A third possible solution to the problem would apply to buyers who are repeat players. Such buyers (typically professional buyers) might find it rewarding in the long run to adopt a policy—known to potential sellers—of giving a "no comment" response to any questions they are asked about the land's potential. Thus, regardless of whether the buyer has positive information about the land, he would explicitly refuse to divulge any information, and the seller would not be able to infer anything from this refusal. While this solution might work for repeat-player buyers, it is not clear whether such a "no comment" policy could persist over a long period of time and whether it would be appealing enough to sellers to have the desired effect.

Since the first two solutions are not satisfactory and the third solution has limited application, permission to lie emerges as another possible solution. Such permission should be supported by a rule prescribing the unenforceability of a contractual statement by a buyer that he has no information about the potential of the land in

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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); Emily Sherwin, *Nonmaterial Misrepresentation: Damages, Rescission, and the Possibility of Efficient Fraud*, 36 LOY. L.A. L. REV. 1017, 1023 (2003) (arguing that low-level fraud "should not result in markedly inefficient exchanges" and may even "help to overcome bargaining impasses").

36. *See* Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 5 (2006) (arguing against the excessive use of the eminent domain power to overcome holdout problems and explaining that, at least for private parties, these holdout problems can be avoided by using secret buying agents).

question or undertaking to reimburse the seller for the land's enhanced value if mineral deposits are found. Otherwise, the goal of permitting a lie would be frustrated.[37]

If the law instead retains its strict prohibition on lying, 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.[38]

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. Moreover, at times, the mere knowledge that the prospective buyer is a mineral mining expert could signal to the seller that there is a good chance of finding minerals on her land. In such circumstances, it may be essential for the buyer to lie about his identity in order to profit from the information he acquired. Although permitting lies would dilute the truth signal of uninformed buyers, as we show in Part I.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 of 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 the 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 lie ("silence-based remedy"). Under this remedy, a buyer would be allowed to retain the property he has purchased but would have to compensate the seller for the difference between the actual contractual 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. 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.

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37. It can be expected that all (sophisticated enough) sellers would require such an undertaking and would not sell their land without it. *Cf.* Grossman, *supra* note 16 (explaining how warranties for product quality allow sellers to distinguish themselves as good-type sellers and avoid pooling themselves together with bad-type sellers).

38. Or at least they will have less than optimal incentives to generate such information, since they will have to share at least some of their profits with sellers. *See* Eisenberg, *supra* note 31, at 1689–90 n.93 (arguing that in cases represented by Example 1, buyers share profits with sellers).

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, counterfactually, 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 lied and denied having any information about the land, damages under the no-information-based remedy would amount to zero, since the actual contractual price is the same as what would have been the asking price had the seller possessed no information about the land. If instead he 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 (which is, of course, higher than the actual contractual price in the former scenario when the seller denied having any information about the land) 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 decision, *Basic, Inc. v. Levinson*.[39] In this case, Basic made public statements falsely denying rumors that it was engaged in merger negotiations with another company.[40] 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 depressed prices due to the misleading statements about the negotiations.[41]

The Court implicitly acknowledged the social interest in encouraging firms to engage in a search for information about potential merger transactions by entitling Basic to give a "no comment" response to analysts and journalists inquiring about rumors of such negotiations.[42] 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.[43]

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39. 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. The U.S. Supreme Court recently upheld *Basic*'s rulings in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014).

40. *See Basic*, 485 U.S. at 227.

41. *Id.* at 228.

42. *Id.* at 239 n.17.

43. *Id.* at 249. For a critique of this decision, see Jonathan R. Macey & Geoffrey P. 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 case, the "old fashioned 'no comment'" response is not sufficient); *see also* Ian Ayres, *Back to* Basic*s: Regulating How*

The *Basic* decision did not clarify how damages should be measured in such a class action. According to one approach, the *Basic* plaintiffs would be entitled 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.[44] In contrast, under the no-information-based remedy, 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; 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.

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 discussing the possibility of establishing a default rule which permits lying).

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

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 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. Therefore, they would not be adversely affected by the rule permitting lies.

The second group of buyers, for their part, would be interested in buying the land for purposes other than mining minerals. To purchase the 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 transactions. Note, however, that the higher price that sellers would demand would reflect the fact that under Regime A, compared to a regime prohibiting lies, 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 lies-prohibiting 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, no problem would arise in most cases: professional buyers typically purchase land where the likelihood of mineral deposits is greater 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.[45] However, nonprofessional buyers, who tend not to investigate the mineral potential of land they wish to purchase, would be adversely affected by a rule permitting lies: they would

45. There could, nonetheless, be cases in which the land has multidimensional potential, for example, of having gold and coal deposits. In such circumstances, a professional buyer could, after conducting an investigation, discover that there is a low likelihood of gold deposits but uncover no new information about coal deposits. The professional buyer might still be interested in purchasing the land (for the likelihood of finding coal on the land), but under a rule permitting lies, he will not be able to reliably convey the information to the seller that the chances of gold deposits on the land are low.

pay an inflated price for the land. The reason for this is that the seller would assume a certain probability of the buyer's having conducted an investigation and discovering a high likelihood of mineral deposits on the land and to be withholding that positive information from her, the seller. If, however, the seller knows that this particular buyer is nonprofessional, she would realize that the chances that the buyer made a costly investigation into the potential for mineral deposits are quite low and, therefore, would not set an inflated price.

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 nonprofessional 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.[46] 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 her costs to investigate her land's potential would most likely 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 case in which anti-abuse lies are told. In John's case, he lied so as to avoid the risk of being discriminated against on

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46. One way of doing so would be for the buyer to offer to the seller that they incorporate into the contract a statement by the buyer that he has no information about the land's potential or that he will reimburse the seller for the enhanced value of the land if mineral deposits are found subsequent to the purchase. As we have explained above, however, such contractual terms should be unenforceable. *See supra* text accompanying note 37.

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.[47]

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.[48] Moreover, it causes no harm to nondiscriminating employers and employees.[49]

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

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47. There are many other cases where deception could be used to protect people's rights against infringers. The IP field, in the context of the copyright-infringing downloading of songs on peer-to-peer networks, is illustrative in this respect. Copyright holders fought back by creating bogus copies of the content and flooding these networks with the copies so as to increase the frustration costs of obtaining high-quality music files. *See, e.g.*, Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 582–87 (2003) (reviewing the Recording Industry Association of America's efforts to fight music file-swapping networks by uploading inferior and incomplete copies); Doug Lichtman & David Jacobson, *Anonymity a Double-Edged Sword for Pirates On-Line*, CHI. TRIB., Apr. 13, 2000, at N25 (suggesting that the music industry should fight online music piracy by flooding the Internet with decoy files containing instead of the requested songs a taped recording of the artists explaining to fans why piracy is hurting them). This deception technique might be socially valuable.

48. *Cf.* DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW 93 (1994) (arguing for the potential desirability of laws that "keep[] the employer from responding adversely upon discovering that an applicant had lied" and proposing "[a] law forbidding employers from retaliating against workers who lied").

49. *But see infra* text accompanying note 65. Note that sometimes employers might ask an employee about her religion for good reason: to accommodate her special needs or perhaps even to implement an affirmative action plan. We maintain that those employers would be able to communicate their good intentions to the employee, who, in turn, would volunteer the sought after information about her religion.

employment contract;[50] 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[51] (or other unlawful reasons[52]). This can be relevant to two types of cases. The first is when an employer finds out about an employee's misrepresentation and this triggers the termination of the employment.[53] The second 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 employee's misrepresentation.[54]

In *Johnson v. Honeywell Information Systems, Inc.*, the plaintiff argued that in firing her, the employer had violated Michigan's antidiscrimination law and that this was therefore wrongful discharge.[55] The 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 by falsely stating that she had a college degree and exaggerating her prior work experience.[56] 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

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50. 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 In re* Enter. Wire Co. & Enter. Indep. Union, 46 Lab. Arb. Rep. (BNA) 359 (1966) (Daugherty, Arb.) (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).

51. 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 of 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, sex, or national origin. 42 U.S.C. § 2000e-2 (2012).

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

53. *E.g.*, Lavat v. Fruin Colnon Corp., 597 N.E.2d 888, 897 (Ill. App. Ct. 1992) (upholding the employer's decision to fire an employee upon discovery that he had falsified his education information).

54. Some courts have held that such misrepresentations can serve as the basis for dismissing the employee. *See, e.g.*, Leahey v. Fed. Express Corp., 685 F. Supp. 127, 128 (E.D. Va. 1988) ("[J]ust cause for termination may include facts and circumstances not known to the employer."); Village of Oak Lawn v. Human Rights Comm'n, 478 N.E.2d 1115, 1118 (Ill. App. Ct. 1985) (holding that a potential employee's misrepresentation, which was discovered by the employer only after it refused to hire her and a discrimination charge was filed, can serve as a legitimate, nondiscriminatory reason for refusing to employ her). 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." (citation omitted)).

55. 955 F.2d 409, 411 (6th Cir. 1992), *abrogated by* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995).

56. *Id.* at 411–12.

the measuring of the candidate for employment; and the employer must have relied on the false information in making its hiring decision.[57] The court affirmed the district court's decision in favor of the employer on the plaintiff's wrongful discharge claim, regardless of whether she had been illegally discriminated against.[58] 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;[59] 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.[60] Moreover, other courts have denied wrongful termination claims, holding that the mere fact that an employee lied about facts material to her employment disqualified her for the job.[61]

However, in contexts unrelated to illegal discrimination, some courts have shown tolerance toward employees who, to avoid putting themselves at risk of not being hired, concealed (by lying) from their employers that they were union organizers or supporters.[62]

Finally, the U.S. Supreme Court had the opportunity to address the question of "whether an employee discharged in violation of the Age Discrimination in Employment Act of 1967 is barred from all relief when, after her discharge, the employer discovers evidence of wrongdoing that, in any event, would have led to the

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57. *Id.* at 414 (citing Churchman v. Pinkerton's, Inc., 756 F. Supp. 515, 520 (D. Kan. 1991)).

58. *Id.* at 415–16.

59. *E.g.*, Milligan-Jensen v. Mich. Technological Univ., 975 F.2d 302, 305 (6th Cir. 1992) (holding that because of the employee's fraud, the question of whether he was fired because of discrimination is irrelevant).

60. *E.g.*, Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 371 (7th Cir. 1993) (allowing damages to the employee for unlawful discrimination, but reducing those damages due to the employee's misrepresentation); Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1184 (11th Cir. 1992) (holding that "if a fee is ultimately awarded, then the after-acquired evidence would affect the amount"), *vacated & reh'g en banc granted*, 32 F.3d 1489 (11th Cir. 1994), *and aff'd in part*, 62 F.3d 374 (11th Cir. 1995).

61. *See* Williams v. Boorstin, 663 F.2d 109, 118 (D.C. Cir. 1980) (holding that the lying itself—as to the plaintiff's legal education—disqualified him from employment at the Library of Congress); Village of Oak Lawn v. Human Rights Comm'n, 478 N.E.2d 1115, 1117 (Ill. App. Ct. 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.").

62. See *Hartman Bros. Heating & Air Conditioning, Inc. v. NLRB*, 280 F.3d 1110, 1112–13 (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. *Id.* at 1113. But since the issue was not raised at trial, the court did not consider its applicability in the case at hand. *Id.* In *Leiser Construction, L.L.C. v. NLRB*, the Tenth Circuit held that not disclosing information to a potential employer about union membership is legitimate. 281 F. App'x 781, 789 (10th Cir. 2008) (citing *Hartman Bros. Heating & Air Conditioning, Inc.*, 280 F.3d at 1112).

employee's termination on lawful and legitimate grounds."[63] The Supreme Court held that in the case at hand the discharge was unlawful, although the wrongful behavior of the employee should limit his remedies against the employer. The Court clarified that "[w]here an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."[64]

The rules that emerge from the case law, and in particular from the Supreme Court decision, seem to weigh in favor of John the Muslim lawyer in our example. 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 allow 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 employment. This would be less effective, however, than permitting 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.

A possible argument against our proposal is that permitting lying might undermine other means of combating employment discrimination. For example, employees who are discriminated against can bring an employment discrimination action against the employer under Title VII of the Civil Rights Act of 1964. For two reasons, this is a better means—it can be argued—of fighting discrimination than allowing employees to use the self-help remedy of lying. First, Title VII suits benefit all discriminated-against employees (and society at large) and not only those who choose to lie. Second, and relatedly, some employees, even if at risk of being discriminated against, would find it offensive and even humiliating to lie about their religion, race, or other traits that are the reason for employers' discriminatory practices and would either choose not to lie or to lie and endure emotional harm. Such employees would not face this hard choice of whether or not to lie if lies are prohibited and Title VII suits are the only available remedy. Allowing lies—continues the argument—could

63. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 354 (1995).
64. *Id.* at 362–63.

decrease employees' incentive to file Title VII suits because lying might be the easiest (although not the socially optimal)—solution for many employees. Likewise, permitting lying might also dampen the urgency of educating employers (and others) against discriminating: it keeps discrimination below the surface instead of bringing it out onto the table and directly fighting it.

Yet we suggest that the availability of other means—in particular, Title VII suits—should not preclude permitting lies. Firstly, Title VII is underenforced,[65] and allowing lying could, in many circumstances, be a more effective means of fighting discrimination. Secondly, there is no reason to assume that permitting lies and Title VII suits are mutually exclusive alternatives rather than cumulative means for achieving the same goal. Indeed, our claim is that once a person is *entitled* to withhold information from others, and someone nevertheless tries to force him to reveal it to her, the bearer of the information is entitled to self-help or, more accurately, self-defense, which sometimes can effectively be implemented only by lying about the contents of the information.[66]

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 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."[67] Courts read this clause as establishing a constitutional right against self-incrimination, permitting any person (including

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65. *See generally* George Rutherglen, *Private Rights and Private Actions: The Legacy of Civil Rights in the Enforcement of Title VII*, 95 B.U. L. REV. 733 (2015).

66. Compare this to the "Don't Ask, Don't Tell" policy that was prevalent within the U.S. military forces with respect to gay people and abolished in 2011. The Supreme Court refused to hear a constitutional challenge to the policy. Pietrangelo v. Gates, 556 U.S. 1289 (2009), *denying cert. to* Cook v. Gates, 528 F.3d 42 (1st Cir. 2008). It could have been argued that had a candidate for military service been asked about his sexual orientation, he would have been entitled to lie. For a thorough discussion of this and the law's similar approaches to undesirable questions and answers, see Samaha & Strahilevitz, *supra* note 3.

67. U.S. CONST. amend. V.

suspects, witnesses, and defendants) to remain silent and refuse to respond to questions, either before or during trial, when the answers could incriminate them.[68]

To guarantee this right, criminal courts are prohibited from drawing adverse inferences from the fact that a suspect has refused to answer questions during the police interrogation[69] or from a defendant's refusal to testify in court.[70] 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.[71] 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 could be counted against him.[72] This restriction on the right to silence is mostly applicable to testimony in court[73] and not to police interrogations.[74]

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68. Miranda v. Arizona, 384 U.S. 436, 467 (1966) ("[T]he 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).

69. Doyle v. Ohio, 426 U.S. 610, 618 (1976) ("[I]t 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."). 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) ("[T]he Fifth Amendment is not violated when a defendant who testifies in his own defense is impeached with his prior silence." (citing Raffel v. United States, 271 U.S. 494 (1926))).

70. Griffin v. California, 380 U.S. 609, 615 (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"). Other courts and commentators 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 on drawing adverse inferences 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"); 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).

71. *Griffin*, 380 U.S. at 615.

72. Rogers v. United States, 340 U.S. 367, 373 (1951) ("[W]here 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.").

73. Brown v. United States, 356 U.S. 148, 156 (1958) ("[Petitioner] 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."); 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.").

74. Miranda v. Arizona, 384 U.S. 436, 475–76 & n.45 (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).

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."[75] 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 would 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.[76] Daniel Seidmann and Alex Stein have offered an innovative rationale for the right to silence: that this right in fact protects the innocent.[77]

Yet no court or scholar, 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,[78] with only one important but narrow exception, which is the "exculpatory no" defense. A number of U.S. courts accepted this defense,[79] which "prevents the government from punishing an individual for giving a false negative answer in response to a government inquiry if a truthful affirmative answer

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75. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964), *abrogated by* U.S. v. Balsys, 524 U.S. 666 (1998) (holding that *Murphy* was based on flawed historical reasoning); s*ee 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 the greater evil of the abuse of government power and the recurrence of brutal interrogation mechanisms); Vincent Martin Bonventre, *An Alternative to the Constitutional Privilege Against Self-Incrimination*, 49 BROOK. 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); 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).

76. 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. 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.*, Ronald J. Allen, Miranda*'s Hollow Core*, 100 NW. U. L. REV. 71 (2006) (attacking the many suggested justifications offered for the right and claiming that it lacks a coherent rationale); David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986) (same); 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 (1999) (same).

77. Seidmann & Stein, *supra* note 75. We discuss their theory in detail in Part II.B.2 and explain its relevance to our arguments.

78. *See, e.g.*, Bryson v. United States, 396 U.S. 64, 72 (1969) ("Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." (footnote omitted)).

79. *See, e.g.*, Moser v. United States, 18 F.3d 469, 473–74 (7th Cir. 1994), *abrogated by* Brogan v. United States, 522 U.S. 398 (1998); United States v. Taylor, 907 F.2d 801, 805 (8th Cir. 1990), *abrogated by Brogan*, 522 U.S. 398; United States v. Equihua-Juarez, 851 F.2d 1222, 1224 (9th Cir. 1988), *abrogated by Brogan*, 522 U.S. 398.

would have incriminated the individual, or if the individual reasonably believed that a truthful affirmative answer would have been incriminating."[80] This defense, however, was eventually rejected by the Supreme Court.[81]

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.

Assume that the purpose of the right to silence is to promote free will and personal dignity by preventing the police from forcing suspects to incriminate themselves with their own words.[82] Arguably, since the decision to remain silent—as well as to selectively refuse to answer specific questions—can function as a signal of guilt, it can also result in self-incrimination, which violates free will and personal dignity and which—according to this theory—the right to silence is aimed at protecting. Thus, to bolster 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.

Yet as we show further on in our discussion,[83] 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. And if it is allowed at all, it should be restricted to exceptional cases only.

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[84]—not to get vaccinated and instead to free ride on people who do get vaccinated. The doctor also

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80. United States v. Harrison, 20 M.J. 710, 711 (A.C.M.R 1985) (citing United States v. Eighteen Thousand Three Hundred Fifty Dollars ($18,350.00) in U.S. Currency, 758 F.2d 553 (11th Cir. 1985)). This defense served as an exception to 18 U.S.C. § 1001 (1982) (fraud and false statements).

81. *Brogan*, 522 U.S. at 404 (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. *See supra* text accompanying note 75.

83. *See infra* Part II.B.2.

84. 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.

> 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?[85]

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.[86] 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 producing the public good. As a result, without government intervention, many public goods whose production is efficient are not created.[87] 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,[88] such governmental

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85. *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.*, 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.

Carnerie, *supra*. This approach was not adopted by the court in *Reyes*. *Id.* (noting that the court held manufacturer liable for damages resulting from failure to warn).

86. *See* Doren D. Fredrickson, Terry C. Davis, Connie L. Arnold, Estela M. Kennen, Sharon G. Humiston, J. Thomas Cross & Joseph A. Bocchini, Jr., *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"); John C. Hershey, David A. Asch, Thi Thumasathit, Jacqueline Meszaros & Victor V. Waters, *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, Note, *Protecting the Herd: A Public Health, Economics, and Legal Argument for Taxing Parents Who Opt-Out of Mandatory Childhood Vaccinations*, 21 S. CAL. INTERDISC. L.J. 437, 463–66 (explaining the free-riding problem with vaccination and suggesting to tax those who refuse it).

87. *See* 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); 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).

88. Zucht v. King, 260 U.S. 174, 176–77 (1922) (dismissing a suit challenging city ordinances that make vaccination a prerequisite for attending school); Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905) (holding that a compulsory smallpox vaccination for

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.[89]

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 and could be consistent with medical ethics.[90] 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.[91]

However, doctors are often, in fact, motivated by concern for public health, which does not necessarily coincide with their patients' best interests.[92] In the case of vaccinations, for example, doctors are not 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.[93] Given this, then, why does the law not take the further step of

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adults who are fit subjects of vaccination is constitutional); *see also* Parmet, *supra* note 86, at 78–81 (explaining the policy of compulsory vaccination while presenting some exemptions that states provide from the vaccination requirement); Sara Mahmoud-Davis, Note, *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." (footnote omitted)).

89. Another alternative is to pay patients for getting vaccinated. This might, however, be quite costly to administer.

90. *See infra* Part IV.A.

91. 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 Fed. Reg. 23,192, 23,192–94 (Apr. 18, 1979) [hereinafter Belmont Report] (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).

92. Carnerie, *supra* note 85, at 56 (arguing that the doctrine of informed consent is "fraught with exceptions and 'gray areas'"); *id.* at 77–78 (noting that "in 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" (footnote omitted)).

93. 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 86, at 109–10 (reviewing this public health authority approach but arguing that the positive effects of vaccinating for others should be explained to parents and might encourage, rather than dissuade, them to vaccinate their children).

permitting doctors to lie in this context? When lying is prohibited but nondisclosure is permitted, the more sophisticated patients—those who know to ask the "right" questions—are better off and the less sophisticated patients are worse off.[94]

In practice, doctors not only withhold information from their patients in order to serve the public interest but also sometimes lie, and the law seems to tolerate this. The use of placebos[95] in clinical drug trials best exemplifies this. Doctors will usually inform the patients participating in the trials that there is some likelihood that they will be given a placebo.[96] 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 she does not know even if she does so as not to harm the integrity of the trial?[97] 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 nonexperimental settings, so as to increase the placebo effect.[98]

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94. 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.

95. A "placebo concurrent control" is defined 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." 21 C.F.R. § 314.126(b)(2)(i) (2014).

96. Adam J. Kolber, *A Limited Defense of Clinical Placebo Deception*, 26 YALE L. & POL'Y REV. 75, 79 (2007) ("[R]esearch subjects are almost always informed that they may receive placebos. Such research does not involve deception. By contrast, in the clinical context, patients are rarely told that they are receiving placebos because doing so would reduce the therapeutic value of the proposed treatment."); Robert J. Levine, *The Use of Placebos in Randomized Clinical Trials*, IRB: A REVIEW OF HUMAN SUBJECTS RESEARCH, Mar.–Apr. 1985, at 1, 1 (noting that in a placebo-controlled randomized clinical trial, each prospective subject is told his or her chances of receiving an inert substance).

97. The FDA generally requires that placebo-controlled studies be double-blind: in order to neutralize bias on both sides, neither the patient nor the doctor-investigator knows what the patient is receiving. Nancy K. Plant, *Adequate Well-Controlled Clinical Trials: Reopening the Black Box*, 1 WIDENER L. SYMP. J. 267, 272 (1996). There are cases, however, where doctors do know whether or not they are administering the placebo. *See* Sharona Hoffman, *The Use of Placebos in Clinical Trials: Responsible Research or Unethical Practice?*, 33 CONN. L. REV. 449, 454 (2001) (explaining the "blinding" and "double blinding" methods of randomized placebo-controlled clinical trials).

98. Levine, *supra* note 96, at 1 (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). Some researchers argue that deceptive placebo administration, where subjects are led to believe that they are receiving an active drug, is significantly more effective than the double-blind method. *See* Irving Kirsch & Lynne J. Weixel, *Double-Blind Versus Deceptive Administration of a Placebo*, 102 BEHAV. NEUROSCIENCE 319, 322–23 (1988) (noting that, in the same placebo experiment with double-blind and deceptive instructions, researchers found that only deceptive administration produced significant results).

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.[99] Prior consent is often mandatory for patients to participate in clinical trials, [100] which generally increase their probability of recovering or surviving. The understanding between the patient and doctor conducting the trial, which sets out the "rules of the game," makes nondisclosure 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. Indeed, if, in Example 3, it had been not the patient's doctor but health officials who had lied to him, in order to ensure public health, most of us would tend to tolerate such conduct.[101] In other contexts as well, it could be argued that public authorities should be permitted to use deceptive tactics to promote social welfare.[102]

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99. *But see* Belmont Report, 44 Fed. Reg. at 23,194 (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 not as obvious); Hoffman, *supra* note 97, at 484–87 (arguing that the informed-consent process in clinical trials is often severely flawed, that human subjects often do not meaningfully exercise their autonomy, and that some investigators even resent informed-consent requirements in these situations).

100. Hoffman, *supra* note 97, at 482 (arguing that patients choose to participate in clinical trials involving placebo control "even when they are clearly informed that there is a fifty-fifty chance that they will not receive active treatment").

101. *See* Ruth R. Faden, *Ethical Issues in Government Sponsored Public Health Campaigns*, 14 HEALTH EDUC. Q. 27 (1987) (discussing health campaigns sponsored by the government and making the subtle distinction between persuasion and manipulation for promoting public health); *see also* Nurit Guttman, *Ethical Dilemmas in Health Campaigns*, 9 HEALTH COMM. 155 (1997) (discussing the conflict between respecting people's autonomy and the public good in health campaigns); Lynn T. Kozlowski & Richard J. O'Connor, *Apply Federal Research Rules on Deception to Misleading Health Information: An Example on Smokeless Tobacco and Cigarettes*, 118 PUB. HEALTH REP. 187, 191 (2003) ("Public health needs can sometimes override individual needs and rights; 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." (footnote omitted)). *But see* Parmet, *supra* note 86, at 109–10 (arguing for honest vaccination campaigns by governments).

102. One example is when government officials fear that if they admit that a bank run is occurring they will make it worse. The question that arises is whether they should be permitted to lie. Another example is when the government wants to buy land for development purposes and conceals these plans from sellers in order to prevent holdouts. Again, the question arises whether lies should be permitted in these circumstances. In practice, it is usually very difficult for the government (as opposed to private parties) to hide its development plans. *See* SHAVELL, supra note 35, at 125 n.23 ("[G]overnment is often unable to keep its plans quiet (indeed, the

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 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

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plans may have come about through a public decisionmaking process) . . . ."); Kelly, *supra* note 36, at 31–32 (arguing that "unlike private projects, government projects are almost always subject to the transparency of democratic deliberations" and that "even when the government is able to keep its projects secret, the combination of secret land acquisitions and the need to buy off holdouts raises a significant danger of corruption between government officials and existing owners").

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 that, if forced to speak, many would lie.[103] 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: a regime without the right to silence and a regime that allows lying to avoid self-incrimination.[104]

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. First, we maintain that lies should be prohibited outright if they directly incriminate innocent third parties and should not be allowed to be supported by falsified documents. Second, 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, even though this is legally plausible.[105]

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.

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103. Seidmann & Stein, *supra* note 75 (explaining that while the right of silence does make it harder to convict some guilty defendants, its positive anti-pooling effect justifies its recognition). For criticism, see Stephanos Bibas, *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); Van Kessel, *supra* note 68 (same).

104. 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, *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").

105. In the past, several courts allowed the exculpatory "no" defense, but it was eventually rejected by the Supreme Court. *See supra* text accompanying notes 80–81.

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 their doctors are telling the truth.[106] More generally, patients' trust in doctors will diminish, and doctors will be less effective in helping them. These concerns arise, to a certain degree, even under current law, which does not oblige doctors to disclose to their patients that getting vaccinated would not serve their self-interests; but the dilution of doctors' truth signals would intensify were they allowed also to lie to their patients. These concerns are quite concrete and troubling. We therefore suggest that lying should be permitted in only a set of *very* constricted and well-defined circumstances so that patients will know that in *almost* all cases they are not at risk of being misled by their doctors. We discuss below the more general problem of lying spillovers as a possible general objection to our theory.[107]

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 should not be relevant 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 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

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106. Fredrickson et al., *supra* note 86, at 436–37 (showing that communication and trust between doctors and parents affect parents' decisions whether to have their children vaccinated); Parmet, *supra* note 86, at 97–100 (explaining the importance of trust and informed consent for allowing successful vaccination of a population and for promoting public health).

107. *See infra* Conclusion.

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 doctors' advice in general and in the case of vaccinations in particular: 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;[108] every patient derives at least some medical benefit from the vaccination (even if accompanied by a risk); and arguably 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

A. The Prima Facie Case and the Law

Lying can be instrumental in revealing the truth by extracting valuable information from people who are illegally, or undesirably, concealing that information. Consider the following example:

> *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 tells the suspect that his friend 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?[109]

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108. Dorit Rubinstein Reiss, *Vaccines, School Mandates, and California's Right to Education*, 63 UCLA L. REV. DISC. 98, 112 (2015) ("All the diseases we vaccinate against carry substantial risks, which far outweigh vaccines' small risks.").

109. For similar cases, see, for example, Holland v. McGinnis, 963 F.2d 1044, 1051 (7th Cir. 1992), in which police lied to a rape suspect about the existence of a witness against him,

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[110] and is commonly deemed legal in court,[111] although presenting falsified documents to suspects is considered an illegitimate mean of interrogation.[112]

Consequently, police interrogators often lie to suspects during interrogation about the existence of incriminating evidence or witnesses[113] or about an accomplice who allegedly confessed and placed the blame on the suspect.[114] Under prevailing law, a confession given by suspects in response to such lies is admissible in court,[115] despite

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and Wilson v. Commonwealth, 413 S.E.2d 655, 657 (Va. Ct. App. 1992), in which police lied to a suspect about being identified by the victim in a lineup.

110. *See* Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168, 1206–08 (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); Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 34–41 (2010) (arguing that truth-exposing lies, as opposed to lies that distort the truth, have positive effects and should be allowed). 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 Roppé, 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, 141 (1997) (suggesting to constrain only those interrogation methods that are likely to elicit false confessions and that do not substantially undermine law enforcement interests).

111. *See, e.g.*, United States v. Russell, 411 U.S. 423, 434 (1973) ("Nor does it seem particularly desirable for the law to grant complete immunity from prosecution to one who himself planned to commit a crime, and then committed it, simply because government undercover agents subjected him to inducements which might have seduced a hypothetical individual who was not so predisposed."); Sherman v. United States, 356 U.S. 369, 372 (1958) (reversing defendant's conviction based on the entrapment defense but explaining that the government merely allowing a suspect to commit a crime does not constitute entrapment).

112. *E.g.*, State v. Cayward, 552 So. 2d 971, 975 (Fla. Dist. Ct. App. 1989) (affirming trial court's suppression of a confession that was induced by presenting fabricated laboratory reports to the suspect and explaining why this method should be prohibited); Roppé, *supra* note 110, at 761–62 (explaining the importance of forbidding the use of falsified documents in police interrogations for deterrence of police misconduct).

113. *See supra* note 109; *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).

114. *See, e.g.*, United States v. Petary, 857 F.2d 458, 460–61 (8th Cir. 1988) (affirming denial of motion to suppress statements given after 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).

115. Holland v. McGinnis, 963 F.2d 1044, 1051 (7th Cir. 1992) (holding that police lie did not render suspect's confession involuntary); *Petary*, 857 F.2d at 460 (same); Wilson v.

more and more research indicating the rate of false confessions to be very high.[116] The law also allows the police to use undercover agents to gather evidence, an activity that also involves extensive lying.[117]

Lawyers, however, are not allowed to lie to witnesses in cross-examination, and in both civil and criminal proceedings litigants are not permitted to lie in their pleas and responses to the court,[118] even if this is done in an attempt to extract valuable information from the other side.[119] Why is 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

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Commonwealth, 413 S.E.2d 655, 657 (Va. Ct. App. 1992) (same).

116. *See* 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"); Talia Fisher & Issachar Rosen-Zvi, *The Confessional Penalty*, 30 CARDOZO L. REV. 871, 875–77 (2008) (explaining that research has shown that a considerable number of confessions are in fact false and often lead to wrongful convictions).

117. *See, e.g.*, Lewis v. United States, 385 U.S. 206, 206–07 (1966) (holding 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.").

118. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1), (3) (2013) (forbidding an attorney from making false statements of fact to a tribunal or offering 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(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."); s*ee 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 (2006) ("[B]y 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 . . . .").

119. 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 the opposing counsel's consent. MODEL RULES OF PROF'L CONDUCT R. 4.2 & cmt. 4 (2013); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1) (1980). 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).

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.[120] 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.[121]

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. This proposal could be limited to bench trials, as opposed to jury trials, since there is a greater risk of causing confusing in the latter than in the former. Thus, at least in a bench trial, 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.[122]

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.[123] A similar case is a reporter, who gains access to eye clinics by pretending to be a patient, investigating grave complaints made by patients of the clinics.[124] Another example is a food critic who reviews restaurants while presenting

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120. *See* Wilson, *supra* note 110, 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).

121. 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. *See infra* Part III.C.

122. 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 the lie can be used in a number of cross-examinations.

123. 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 upheld the reporters' liability for disloyalty toward the employer and for trespass. *Id.* at 516, 518. But the court denied the plaintiff's claim for reputation damages, due to the lack of actual malice on the defendants' part. *Id.* at 522–24.

124. In *Desnick v. ABC, Inc.*, 44 F.3d 1345 (7th Cir. 1995), television reporters used undercover surveillance by test patients at eye clinics. The court dismissed the plaintiffs' claim of trespass. *Id.* at 1352–53. The court also rejected the plaintiffs' fraud claim: "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." *Id.* at 1355.

himself as a patron.[125] 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.[126] In other cases, "testers," pretending to belong to a minority group and looking for a job or to rent an apartment, are commonly sent by the government to employers or landlords so as to expose discriminatory behavior.[127] Should such deceptive action—which has clear social value—be permitted by the law? And what about psychologists who conduct experiments on human beings: Should they be allowed to deceive participants—as they often do—as part of the research and only at the end reveal the truth (or not)?[128] We argue for an affirmative answer to the two questions (at least in some cases).

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125. Saul Levmore explains the source of the common intuition that a restaurant critic's deceit and apparent trespass is to be forgiven. Levmore, *supra* note 1, at 1366 ("[T]he overwhelming majority of restaurants would agree in advance to an undercover visit by a critic masquerading as a mere patron."). For a similar fact pattern in a different context, see *Am. Transmission, Inc. v. Channel 7 of Detroit, Inc.*, 609 N.W.2d 607 (Mich. Ct. App. 2000). A volunteer for a consumer advocacy group pretended to be a customer at several transmission repair shops. *Id.* at 609. The volunteer collaborated with a reporter who aired a story about dishonest practices the volunteer encountered. *Id.* The court held that the plaintiffs had failed to prove that defamatory implications were materially false, and that the plaintiff consented to the reporter's presence on their premises. *Id.* at 611, 614.

126. 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.

127. Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers To Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REFORM 403, 412–13 (1993) (reviewing the use of testers to uncover hiring discrimination and arguing that the use of testers could help root out discriminatory practices). Others argue that the courts should not allow lawsuits that are based on the experiences of employment testers. *See, e.g.*, Michael Bowling, Note, *The Case Against Employment Tester Standing Under Title VII and 42 U.S.C. § 1981*, 101 MICH. L. REV. 235 (2002) (arguing that employment testers cannot satisfy the standing requirements to pursue suits under either Title VII or § 1981).

128. Rachel Croson argues that psychologists should be permitted to deceive participants:

> [P]sychology experiments that attempt to differentiate psychological theories about reasoning compare thought processes when subjects believe one thing or another. Thus, the practice of deceiving the subjects about the state of the world, the existence of other subjects, or other features of the experiment is a valuable tool that can be used to differentiate the theories. . . .
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> . . . Generally, an economic journal will not publish an experiment in which deception was used, while in psychology journals deception is commonplace and accepted.

Rachel Croson, *Why and How To Experiment: Methodologies from Experimental Economics*, 2002 U. ILL. L. REV. 921, 944–45 (2002).

B. Dilution of the Truth Signal

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.[129] 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 might 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.[130] Alternatively, the police might realize that some degree of lying is a better strategy. In the latter event, the police would allow interrogators to lie, trying to 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.[131]

This analysis also holds in the context of lies told by prosecutors to witnesses being cross-examined: if prosecutors were permitted by the law to tell such lies, 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.[132]

There would be a different outcome with lies told by actors—even if they are repeat players—who externalize the costs of their lies to others, such as defense lawyers. They could have a socially excessive inclination to lie while 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

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129. *See* Young, *supra* note 110, 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 . . . .").

130. We are aware that our assumption might be too strong: some interrogators or even their immediate supervisors might well be tempted to use deceptive techniques in their interrogations, thereby externalizing costs—in terms of dilution of the truth signal—to other interrogators.

131. 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.

132. Although we acknowledge that our internalization assumption might be too strong. *See supra* note 130.

over other litigants, which, in itself, would generally be seen as undesirable,[133] perhaps explaining the absolute prohibition on lying in court.[134]

C. Effectiveness and Costs of Defense

Would truth-revealing lies be effective in attaining the goal they are 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.[135] 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.[136] 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.[137] 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.[138] 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.[139]

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

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133. *See* Saul Levmore & Ariel Porat, *Asymmetries and Incentives in Plea Bargaining and Evidence Production*, 122 YALE L.J. 690 (2012) (identifying, explaining, and criticizing asymmetries between the prosecution and defendants created by criminal procedure law).

134. For further explanation, see *infra* Part III.C.

135. 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).

136. *Id.* at 1922.

137. *Id.* at 1926–28.

138. If the antideception rules in civil litigation are abolished, incentives to hire lawyers by all parties will be very high. For more on this argument, see *id.* at 1919.

139. Moreover, the costs of precautions mostly fall on repeat players, who, in criminal cases, are often professional criminals. *Id.* at 1928. Therefore, such costs might often be deemed a social gain rather than a social cost, which strengthens the argument. *Id.*

interrogations. Still, there is one qualification to be made: as we have suggested, short-lived lies in cross-examination should be allowed.[140] 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 civil or criminal.

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 5. 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?[141]

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.[142] In several jurisdictions, this approach is supported by

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140. *See supra* text accompanying note 122.

141. For a similar fact pattern, see *Arato v. Avedon*, 858 P.2d 598 (Cal. 1993). In this case, doctors did not disclose the pancreatic cancer patient's very low statistical life expectancy. *Id.* at 600. The patient underwent treatment and died one year later. *Id.* at 601. The court ruled that disclosure of life expectancy in this case had not been mandatory. *Id.* at 611. 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.

142. *See, e.g.*, 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); *see also* Allan H. McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 597 (1959) (noting the argument that when a patient is likely to have a severe reaction to disclosure of his or her condition, full disclosure might be deemed wrongful). *But see* COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, AM. MED. ASS'N, CEJA REPORT 2-A-06: WITHHOLDING INFORMATION

statutory law.[143] Accordingly, some courts will allow a doctor not to inform a terminally ill patient of his exact statistical life expectancy when it might strip him of any hope.[144] 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.[145] Borderline cases are possible, however. First, there are cases in which it is unclear whether the terminally ill patient who asks the doctor about his 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 he 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.[146] 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* he 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.[147]

Another type of case where lies might have therapeutic effects is when doctors use placebos in treatment (i.e., nonexperimental) contexts and conceal this from the patient. Here, too, lies should be tolerated, for otherwise an important means of medical treatment would not be possible.[148]

FROM PATIENTS (THERAPEUTIC PRIVILEGE) (2006) (limiting the authority of doctors to withhold information from patients). The report states, "Withholding medical information from patients without their knowledge or consent is ethically unacceptable. Physicians should encourage patients to specify their preferences regarding communication of their medical information, preferably before the information becomes available." *Id.* at 5. Moreover, disclosure may not be avoided (unless a patient requests not to be informed of certain information) but only delayed under certain circumstances. *Id.*

143. *E.g.*, N.Y. PUB. HEALTH LAW § 2805-d(4)(d) (McKinney 2012).

144. *See, e.g.*, *Arato*, 858 P.2d at 607–08.

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

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

147. *See, e.g.*, *Arato*, 858 P.2d at 600 (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). This kind of question, however, could have adverse effects on patients' trust in their doctors. *Cf.* Kolber, *supra* note 96, at 98, 124 (raising a similar concern with respect to "placebo deception").

148. Kolber, *supra* note 96, at 124–27 (arguing for allowing deception in such cases, emphasizing that it should occur only in rare circumstances since otherwise all patients will have more reason to suspect that they receive placebo); *id.* at 126 ("The more often therapeutic

2. Manipulative Paternalistic Lies

Consider the following example:

> *Example 6. 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 by saying that she will be given only saline intravenously and not blood, and Patient agrees to this. Did Doctor commit a tort or violate medical ethics?

Under the informed-consent doctrine, in its modern form, doctors are obliged to disclose "material information about the nature of any proposed medical procedure."[149] The extent of the disclosure required is determined mostly by an objective materiality standard, referring to the information that a physician can reasonably expect a patient would want to consider in deciding whether to undergo the treatment.[150] 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.[151] 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 nondisclosure when the doctor feared that the patient would make an unwise or irrational decision if he were to receive full information.[152] Needless to say, straightforward lies—as in Example 6—are prohibited outright.[153] Thus, prevailing law would likely hold Doctor in Example 6 liable for battery. But should that be the law?

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deception is used, the less effective it will be."). For a discussion of deception and placebos in the consumer context, see *FTC v. QT, Inc.*, 512 F.3d 858 (7th Cir. 2008). The defendant contended that fraud was essential to enable a placebo effect. *Id.* at 862. The court acknowledged "the possibility that a vague claim—along the lines of 'this bracelet will reduce your pain without the side effects of drugs'—could be rendered true by the placebo effect," *id.* at 862–63, but concluded that "the placebo effect cannot justify fraud in promoting a product," *id.* at 863.

149. DAN B. DOBBS, THE LAW OF TORTS 653 (2000). 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.*, N.Y. PUB. HEALTH LAW § 2805-d(2) (McKinney 2012); 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) (McKinney 2009).

150. DOBBS, *supra* note 149, at 655 (2000) (explaining the older medical standard of disclosure and the newer materiality standard of disclosure).

151. Cobbs v. Grant, 502 P.2d 1, 7–8 (Cal. 1972) (noting the majority trend and setting the boundaries between negligence and battery claims in cases of medical nondisclosure).

152. *See, e.g.*, Canterbury v. Spence, 464 F.2d 772, 789 (D.C. Cir. 1972) (rejecting the paternalistic argument as a defense for nondisclosure); Culbertson v. Mernitz, 602 N.E.2d 98, 103–04 (Ind. 1992) (same).

153. *E.g.*, Willis v. Bender, 596 F.3d 1244, 1260 (10th Cir. 2010) ("In any event, one would be hard pressed to argue a reasonable physician of like training would lie to a patient in

To fully understand the problem, we should consider first the alternatives available to Doctor in Example 6. In most jurisdictions, in extreme situations where a patient refuses a life-saving treatment for nonmedical reasons, the doctor can apply to the court to decide whether treatment should be forced on the noncooperative 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,[154] and some courts support this view on the basis of the state's legitimate interest in the preservation of life.[155] Other courts, however, will hold that a patient's autonomy supersedes any other consideration[156] 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 her death.[157] 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,[158] possibly even without prior court approval.[159]

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obtaining consent.").

154. *E.g.*, United States v. George, 239 F. Supp. 752, 754 (D. 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).

155. *E.g.*, John F. Kennedy Mem'l Hosp. v. Heston, 279 A.2d 670, 673 (N.J. 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). *Heston* was later overruled by *In re Conroy*, 486 A.2d 1209, 1224 (N.J. 1985), where the court held that the patient's "interest in freedom from nonconsensual invasion of her bodily integrity would outweigh any state interest in preserving life or in safeguarding the integrity of the medical profession," *id.* at 1226.

156. *E.g.*, Norwood Hosp. v. Munoz, 564 N.E.2d 1017, 1023–24 (Mass. 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).

157. *E.g.*, Lane v. Candura, 376 N.E.2d 1232, 1235–36 (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. *Id.* at 1234. The court ruled that the patient was legally competent, and therefore the law protected her right to make even such a seemingly irrational decision. *Id.* at 1235–36.

158. *E.g.*, Application of President & Dirs. of Georgetown Coll., Inc., 331 F.2d 1000, 1008–09 (D.C. 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, 551 N.E.2d 77, 82 (N.Y. 1990) (noting that a Jehovah's Witness's refusal to receive a blood transfusion is not considered a suicidal act justifying intervention).

159. *See, e.g.*, N.Y. PENAL LAW § 35.10(4) (McKinney 2009) ("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."). In general, the right of a terminally ill patient to receive a physician's assistance in committing suicide is not protected by the Constitution, as the Supreme Court held in *Washington v. Glucksberg*, 521 U.S. 702 (1997). However, it is currently legal to provide such assistance in the states of Oregon, Washington, and Vermont. Oregon Death with Dignity Act, OR. REV. STAT. §§ 127.800–.995 (2013); Washington Death

No court, however, will permit a doctor to lie to a patient about his condition: once a patient has asked a direct question, the doctor is required to answer honestly.[160] 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 might be claimed that doctors should 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—so the argument goes—they should not be obligated to provide patients with a truthful explanation about the nature of the procedure.[161] A similar argument can be made with regard to those jurisdictions that require prior court approval for forced treatment but, in emergency situations, allow court approval to be applied for retroactively.[162] 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 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

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with Dignity Act, WASH. REV. CODE ANN. § 70.245 (West 2011); Patient Choice and Control at End of Life Act, VT. STAT. ANN. tit. 18, §§ 5281–92 (Supp. 2014). It is also legal in Montana by court decision. Baxter v. State, 224 P.3d 1211 (Mont. 2009).

160. *E.g.*, Willis v. Bender, 596 F.3d 1244, 1259 (10th Cir. 2010) ("[R]equiring physicians to honestly answer a patient's questions is a bright-line rule not subject to conflicting interpretations."). 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, e.g.*, Nicoleau v. Brookhaven Mem'l Hosp. Ctr., 607 N.Y.S.2d 703, 704 (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).

161. A possible counterargument is that forcing treatment on patients is less harmful to their dignity than deceiving and manipulating them to receive a treatment they actually do not want.

162. *See supra* note 149.

his condition (even if he has requested this information)[163] and when a patient's chances of recovery will be harmed if he knows the truth about his condition.[164]

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 is to create precisely these costs, which, from a social perspective, are in fact benefits.

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 5 (The Terminally Ill Patient) and 6 (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.[165] Furthermore, in some cases, there would be patients who would prefer to be deceived—those who ask but do not really want to know[166]—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 from a welfarist perspective 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

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163. *See supra* text accompanying note 146.

164. *See supra* text accompanying notes 146–147.

165. 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 approval, to forcibly administer blood transfusions.

166. *See supra* text accompanying note 146.

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, *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 the law 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 lie 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 1. Valuable lies

	Prima facie	Dilution of the truth signal	Effectiveness
I. Productive-information lies	Yes	Only for nonprofessional 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	Yes	Sometimes	Yes, especially in police interrogations
IV. Paternalistic lies			
A. Mere paternalistic lies	Yes	Mostly no	Mostly yes
B. Manipulative paternalistic lies	Yes	Mostly no	Mostly yes

A general objection that could be raised against our theory of valuable lies is that permitting lying could have spillover effects: it might adversely affect the moral, social, and legal norms of telling the truth. Note the difference between this objection and the dilution of the truth signal consideration: whereas the latter relates to the inability of truth tellers to convey information, the former is concerned with the impact on the general norm of truth telling.

Yet this objection to our theory is not persuasive. First, in many of the cases in which we suggest that lies should be tolerated by the law, the liar would be protecting herself from an attempt by the other party to extract information that the liar is entitled to withhold (consider, for example, productive-information lies and some of the anti-abuse lies). This rationale for the permission to lie underlies the distinction between these cases from those in which lying serves other, illegitimate goals. Exactly as the allowance of "self-defense" in tort and criminal law should not be interpreted as license to make broad use of force, allowing lies as a means of avoiding an illegitimate attempt to extract information should not be interpreted as broad permission to tell lies.

Second, with regard to the category of paternalistic lies, it is important to realize that allowing "white lies," which serve the interest of the "victim" of the lie, is not akin to allowing self-serving lies. Accordingly, permitting doctors to lie to patients in very narrow, well-defined sets of cases, in the patients' interests, would not affect the general norm of truth telling.

Third and finally, lying is a social practice that has not been invented by us in this Article. Moreover, there are plenty of contexts in which the law already tolerates lying, for example, when no tangible harm has been done. The law's recognition of a few more categories of lies—socially valuable lies—would, therefore, not radically alter people's general attitude toward either truth telling or lying. Or so we believe.