

HONESTY WITHOUT TRUTH: LIES, ACCURACY, AND THE CRIMINAL JUSTICE PROCESS

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Focusing on “lying” is a natural response to uncertainty but too narrow of a concern. Honesty and truth are not the same thing and conflating them can actually inhibit accuracy. In several settings across investigations and trials, the criminal justice system elevates compliant statements, misguided beliefs, and confident opinions while excluding more complex evidence. Error often results. Some interrogation techniques, for example, privilege cooperation over information. Those interactions can yield incomplete or false statements, confessions, and even guilty pleas. Because of the impeachment rules that purportedly prevent perjury, the most knowledgeable witnesses may be precluded from taking the stand. The current construction of the Confrontation Clause right also excludes some reliable evidence—especially from victim witnesses—because it favors face-to-face conflict even though overrated demeanor cues can mislead. And courts permit testimony from forensic experts about pattern matches, such as bite-marks and ballistics, if those witnesses find their own methodologies persuasive despite recent studies discrediting their techniques. Exploring the points of disconnect between honesty and truth exposes some flaws in the criminal justice process and some opportunities to advance fact-finding, truth-seeking, and accuracy instead. At a time when “post-truth” challenges to shared baselines beyond the courtroom grow more pressing, scaffolding legal institutions, so they can provide needed structure and helpful models, seems particularly important. Assessing the legitimacy of legal outcomes and fostering the engagement necessary to reach just conclusions despite adversarial positions could also have an impact on declining facts and decaying trust in broader public life.

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INTRODUCTION

Identifying and coping with lying has become a central focus of public discourse. And the institutions of criminal justice provide a natural setting in which to evaluate the effects of that priority. In a setting where advocates dispute issues within a formal set of rules and resolving epistemic uncertainty is the stated goal, we can look closely at the role of “honesty” in discovering “truth.” And it turns out that acquiescence to law enforcement, honest mistakes, and sincere but misguided beliefs can all generate enduring errors. A binary approach to the value of evidence also tends to exclude the more nuanced and challenging testimony that might offer a more complete picture of events.

Critically evaluating the systematic premium on “not lying” helps explain why errors persist. Even when an eyewitness identification is manipulated, a jailhouse snitch’s testimony induced, or a suspect’s confession coerced, police and prosecutors uncritically accept the evidence as accurate because they view it as usefully candid. And, after a conviction, it is virtually impossible to clarify a statement, to recant successfully, or to overcome faulty forensic evidence. Moreover, during trials, the arcane rules surrounding credibility determinations may silence essential testimony. Defendants are often precluded from testifying because they can be impeached with any prior convictions in order to alert jurors to their potential to commit perjury. Out-of-court statements by unavailable victims are also excluded because of a preoccupation with fact-finding as an in-person clash or confrontation.

Some of the ways in which we enforce honesty thus keep us from finding the truth. Bad-faith witnesses may tell outright lies, but good-faith witnesses will also make mistakes. Being honest—which generally means not intentionally stating falsehoods—seems a relatively simple proposition. There is a distinction, however, between “not lying” and “producing truth,” and it is one that criminal procedure often overlooks. Seeking accurate results through criminal investigation and adjudication is not simple at all. It requires costlier and more complex procedures than only identifying lies.

Of course, “truth” in adjudication refers neither to transcendence nor to the verifiable findings of a setting like a laboratory. Truth-seeking in court involves the culling and arranging of facts “in such a way as to allow conclusions,

decisions, agreements.”¹ Though adversaries may speak of “truth-telling” by individuals and of “wanting the truth” from witnesses on the stand,² rarely will a single source reveal the whole picture. One cannot see all that occurred before power corrupted, an intimate relationship soured, a corporate actor took an uncalculated risk, the chaos of a terrible accident unfolded, or violence welled up. The truth of these things is a liquid rather than a line. It cannot be told all at once or traced to one data point. It is not conveyed so much as collected and contained. What emerges from the adjudicative process is thus a substitute. The outcome stands for the truth, much as money is accepted as a substitute for value and calendars and clocks purport to measure the concept of time. Juries reach verdicts, judges enter convictions, and legal truth results.

I rely here on the same assumption that the law itself makes—that there is such a thing as facts, incomplete and imperfect, but also real and important. The formal result of adjudication does not capture the full substantive truth but aims for close correspondence. In the process, factfinders should conclude “of what is that it is, and of what is not that it is not,” with as much precision as possible.³ To do that, to reliably reach a verdict, requires broad engagement with data and testimony that increase knowledge. Regarding the process as too binary—too dependent on determining who has lied—can constrain inputs in a way that diminishes accuracy and narrows the aperture on “what happened.”

Lying and getting things wrong overlap to some extent, but their fundamental gear mechanisms are different. All lies are false, but not all falsehoods are lies. For one thing, some parties honestly make completely inaccurate statements. More than a quarter of Americans would tell you with great conviction that the sun orbits the earth.⁴ The lying eyes of good faith witnesses who identify perpetrators provide another example. One study concluded that fully three quarters of

¹ STEVEN LUBET, *NOTHING BUT THE TRUTH: WHY TRIAL LAWYERS DON'T, CAN'T, AND SHOULDN'T HAVE TO TELL THE WHOLE TRUTH* 196 (2001).

² See, e.g., *A FEW GOOD MEN* (Castle Rock Entertainment 1992).

³ This phrasing references Aristotle's correspondence theory of truth. Marian David, *The Correspondence Theory of Truth*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Fall 2016 ed.), <https://plato.stanford.edu/entries/truth-correspondence/#Bib> [<https://perma.cc/4MK2-PQMF>].

⁴ Eleanor Barkhorn, *What Americans Don't Know About Science*, *ATLANTIC* (Feb. 15, 2014), <https://www.theatlantic.com/education/archive/2014/02/what-americans-dont-know-about-science/283864/> [<https://perma.cc/6PW6-EHX2>].

wrongful convictions are connected to mistaken eyewitness identifications.⁵ Though they provide compelling testimony declaring that a defendant committed the crime, and believe what they say, many eyewitnesses are being honest without telling the truth. Moreover, the FBI analyst who claimed “100 percent” certainty when erroneously matching Oregon lawyer Brandon Mayfield’s fingerprints to a latent print at the site of the Madrid terrorist bombing could not have been more sincere at the time.⁶

Honesty can play a part in the search for legal truth but is not sufficient. And legal truth can capture true propositions external to the investigative and adjudicative processes, but it never includes the full factual truth of any event.⁷ This Essay considers how the definition, detection, and deterrence of dishonesty can occasionally widen the distance between legal and factual truth. Interrogation techniques designed to get suspects to talk can yield false and incomplete, albeit forthcoming, confessions. Impeachment rules aimed at precluding perjury often mean that the most knowledgeable witnesses cannot take the stand. The current construction of the Confrontation Clause right excludes some evidence because it privileges face-to-face confrontations even though demeanor cues can be profoundly misleading. And forensic experts can introduce subjective conclusions about pattern matches when they appear authoritative or find their own methodologies compelling. The sections that follow explore the potential for “true lies” and “honest inaccuracies” in each of these contexts, as well as the broader implications of recognizing a distinction between truth and honesty.

I

INTERROGATIONS AND THE FORTHCOMING SUSPECT

In some instances, interviewing suspects and obtaining their cooperation advances truth-seeking, but too often interrogations focus exclusively on a suspect’s perceived honesty and ignore critical information. Law enforcement

⁵ BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 48 (2011).

⁶ See David Stout, *Report Faults F.B.I.’s Fingerprint Scrutiny in Arrest of Lawyer*, N.Y. TIMES (Nov. 17, 2004), <https://www.nytimes.com/2004/11/17/politics/report-faults-fbis-fingerprint-scrutiny-in-arrest-of-lawyer.html> [<https://perma.cc/7ATD-7H8D>].

⁷ See, e.g., William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 336–37 (1995) (“As each successive stage of the criminal process is carefully considered, there is only slight interest in and consideration of an accused’s factual innocence.”).

agents want suspects to talk but have a preconceived notion of what they will say. They tend to ask questions only after they have concluded that a suspect is guilty.⁸ In fact, many police officers confidently assert that they “do not interrogate innocent people.”⁹ Nor do they test competing hypotheses once they have recorded a witness statement consistent with the theory of the case or extracted a confession that will ensure an efficient clearance rate.¹⁰ Overcoming silence and prompting speech—sometimes even planting a false script to be repeated—takes precedence over actually investigating what happened.

These encounters enforce a version of honesty that really consists of compliance and cooperation. Law enforcement agents confuse the thing they are doing—making suspects speak—with the thing they really want, which is accurate information. They draw the target around the hit they get and assume a confession is reliable in every case because they want what they are hearing to be true and stop seeking the truth itself. Common practices that can undercut accuracy include guilt-assuming inquiries, prolonged interrogations,¹¹ proffering false inculpatory evidence,¹² tainting interrogations with non-public information, and suggesting an exit strategy in exchange for a suspect’s willingness to follow the script.¹³ Many of these problematic techniques date back to the 1960s and the wide adoption of the police manual authored by Inbau and Reid.¹⁴ The manual advises maintaining cramped and isolated interview rooms and applying psychological pressures to elicit statements.¹⁵ It replaced true custodial violence—the physically coercive tactics that were known as the “third degree”¹⁶—but it substituted new forms of procedural violence.

⁸ See Saul M. Kassir, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOLOGIST 215, 216 (2005) (describing the process an officer uses to determine whether a person is a suspect or witness, and thus, whether the officer should more thoroughly interrogate that person).

⁹ *Id.*

¹⁰ See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 316.

¹¹ See Lisa Kern Griffin, *Silence, Confessions, and the New Accuracy Imperative*, 65 DUKE L.J. 697, 699 (2016).

¹² See George C. Thomas III, *Regulating Police Deception During Interrogation*, 39 TEX. TECH L. REV. 1293, 1296–1301 (2007).

¹³ See DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 198 (1991).

¹⁴ FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* (5th ed. 2011).

¹⁵ See *id.* at 88 (describing how to elicit a “full response” from a suspect).

¹⁶ See RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 62–64 (2008).

Although the Supreme Court recognized and critiqued the manual's instructions for soft coercion as long ago as the 1966 *Miranda* decision,¹⁷ the basic protocols for interacting with suspects have changed little over the past fifty years.¹⁸

This remains the case despite a well-documented connection between interrogation techniques and wrongful convictions. The West Memphis Three, the Norfolk Four, and the Central Park Five, for example,¹⁹ are all notorious cases in which young, vulnerable, and disadvantaged defendants were irreparably damaged by their own false confessions. Poorly educated and mentally unstable defendants are especially susceptible to agreeing with law enforcement's version of events in order to end the ordeal of questioning.²⁰ Their plight has become more visible as more law enforcement agencies record interrogations, and serialized true crime stories also make that footage accessible to the public. In the recent documentary series, *The Confession Tapes*, police induce false confessions by commanding that suspects "say it and be done with it," insisting that they "open their minds" and "come around," and suggesting that they just "close their eyes" and repeat what police have told them.²¹ Suspects deny responsibility for hours on the recordings but eventually succumb to the narratives that law enforcement agents advance.

Some suspects wrongly assume that the adjudicative process will later confirm their innocence, but for others, the admissions are "coerced-internalized" confessions, and they become convinced that they *must* have committed the crime.²² One episode of *The Confession Tapes* shows a defendant, confronted with an array of false evidence against him, concluding "I guess I might have did it then."²³ The Netflix

¹⁷ *Miranda v. Arizona*, 384 U.S. 436, 448–58 (1966).

¹⁸ See DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 121–22, 311 n.11 (2012).

¹⁹ See, e.g., TOM WELLS & RICHARD A. LEO, THE WRONG GUYS: MURDER, FALSE CONFESSIONS, AND THE NORFOLK FOUR (2008).

²⁰ Saul M. Kassin, *A Critical Appraisal of Modern Police Interrogations*, in INVESTIGATIVE INTERVIEWING: RIGHTS, RESEARCH AND REGULATION 207, 216 (Tom Williamson ed., 2006).

²¹ *The Confession Tapes: The Labor Day Murders* (Netflix Sept. 8, 2017).

²² See, e.g., Kassin, *supra* note 20, at 207 (discussing the prevalence and risks of false confessions in criminal proceedings).

²³ *The Confession Tapes: A Public Apology* (Netflix Sept. 8, 2017); Andrew Knapp, *Wesley Myers "Broken" After Admitting for 2nd Time to North Charleston Killing He Insisted He Didn't Commit*, POST & COURIER (Oct. 8, 2017), https://www.postandcourier.com/news/wesley-myers-broken-after-admitting-for-nd-time-to-north/article_717aa5c2-a874-11e7-bcce-bf50eea5ada5.html

documentary *Making a Murderer* similarly portrays Brendan Dassey—sixteen years old and with an IQ in the mid-seventies—accepting his involvement in a murder in slow motion after hours of detectives pleading with him, planting information, and persuading him that he will not face punishment for telling them “what [they] already know.”²⁴

It was once inconceivable that innocent people would confess to crimes. But now it is undeniable that they do,²⁵ often because of this single-minded focus on whether suspects are forthcoming and apparent indifference to the accuracy of what they say. Reforms, such as non-confrontational interviews and prohibitions on police lying, could change that. But they seem unlikely until seeking information (truth) becomes more important than obtaining a confession (perceived honesty). A first step would be for courts and law enforcement to recognize the potential distinction between those two things.

II

IMPEACHMENT AND THE DEFENDANT WITNESS

Part of the leverage police and prosecutors use to make defendants more forthcoming pretrial comes from the silencing effect of impeachment rules at trial. When suspects become trial defendants, they are no longer encouraged to speak. In fact, because of concerns that they *will* lie, evidentiary rules tend to preclude their testimony altogether. The federal rules of evidence have a stated purpose: “ascertaining the truth and securing a just determination.”²⁶ To achieve that end, the rules tend to favor the admission of evidence and factfinders’ receipt of information. One of the most controversial rules, however, has the opposite effect and constrains potential testimony by defendants. All testifying witnesses—including criminal defendants—may face questioning about their past felony convictions.²⁷ Any crime, the reasoning goes, portends a willingness to violate the social contract, and thus a propensity

[<https://perma.cc/4M63-QRLD>].

²⁴ *Making a Murderer: Indefensible* (Netflix Dec. 18, 2015); see Dassey v. Dittman, 201 F.Supp.3d 963, 967 (E.D. Wis. 2016), *aff’d*, 860 F.3d 933 (7th Cir. 2017), *vacated*, 877 F.3d 297 (7th Cir. 2017) (en banc).

²⁵ See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 901 (2004) (describing challenges to the “conventional wisdom that innocent people are never convicted in the American criminal justice system”).

²⁶ FED. R. EVID. 102.

²⁷ FED. R. EVID. 609.

to commit perjury as well.²⁸ About a million criminal defendants pass through the criminal justice system every year, and all but 25,000 of them say almost nothing to anyone in court apart from entering a guilty plea.²⁹ Yet engagement with defendants may provide the best opportunity to determine what happened in any case.

Until the late nineteenth century, defendants were not examined under oath so as not to force the choice of “self-accusation, perjury, or contempt.”³⁰ Jurors, it was thought, would never believe an interested party anyway, and allowing them to testify only endangered the important “presumption that all sworn evidence is truthful.”³¹ This limitation has been lifted, along with the common-law prohibition against felons offering testimony.³² But the prospect of impeachment has virtually the same effect.

Journalists have a norm—or at least they used to—against labeling individuals liars across contexts.³³ There is no such norm in court. Witnesses get called liars all the time. According to the logic of the impeachment rules, there is such a thing as just “being a liar,” and jurors ought to know when any “liar” is testifying. Of course, the reasoning fails at several points. Because of the breadth of the criminal code and the prevalence of plea bargaining resolutions, past felony convictions do not necessarily signal knowing violations of legal norms.³⁴ And even past crimes involving clear intent and express acts of dishonesty will not necessarily predict lying under oath. Social psychology long ago moved beyond the trait theory on which the rule’s rationale depends and recognized

²⁸ See Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 301 (2008).

²⁹ See Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1458 (2005).

³⁰ *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964).

³¹ George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575, 625 (1997).

³² See *id.* at 656–58.

³³ See, e.g., Reed Richardson, *Mainstream Media Still Won’t Tell the Truth About Trump’s Lies*, SALON (Nov. 30, 2017), <https://www.salon.com/2017/11/30/mainstream-media-still-wont-tell-the-truth-about-trumps-lies/> [<https://perma.cc/BH6Z-S9QV>] (“Within the stilted framework of mainstream news ‘objectivity,’ the simple act of calling out ‘lies’ or ‘lying’ by a politician—especially a president—is now taboo. . . . [T]he use of these words to identify a documented falsehood is now considered controversial, partisan, inflammatory, unfair.”).

³⁴ See Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1995 (2016).

the influence of situational pressures.³⁵ Moral conduct in one particular scenario does not portend an identical response in a different one. The rules of evidence largely preclude prosecutors from drawing an inference from character to conduct.³⁶ Yet pointing to a witness's general lack of integrity remains a permissible way to discredit testimony.

The practice purports to equip jurors with a tool to discern dishonesty. It is a blunt instrument, however, and one they do not particularly need. Of course, guilty defendants will “choose to testify about anything that might improve their chances and about which they might imagine they can be persuasive,” and for all of them “acquittal is the overriding, intensely desired, goal.”³⁷ Frankly, jurors know that, and in some jurisdictions, they also get an instruction urging special caution with a defendant's testimony.³⁸ As one might anticipate, jurors rarely rely on convictions as evidence of credibility. The experimental work on Federal Rule of Evidence 609 suggests instead that prior convictions impact perceived likelihood that the defendant committed the charged offense.³⁹ Empirical data on testifying defendants also reveals that past crimes like perjury are not the most damaging to their chances of acquittal. Rather, the more similar a prior crime is to the crime charged, the more perilous it is to testify.⁴⁰

Of course, many defendants are best advised to stay silent throughout trial, but some need and want to participate. A defendant witness “vindicate[s] her view of justice as against the views of others.”⁴¹ Even if the testimony involves some dissembling, that introduces a “culturally productive” contradiction⁴² when the jury then weighs it against other evidence and determines whether the witness's memory, judgment, and descriptive powers are fallible and whether the

³⁵ See Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 964 (2006).

³⁶ See FED. R. EVID. 404(a).

³⁷ H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 813 (1993).

³⁸ See Sixth Cir. Pattern Crim. Jury Instructions § 7.02B (updated as of Dec. 20, 2017); Pattern Crim. Jury Instructions of the Seventh Cir. § 3.01 (2012 ed.).

³⁹ See John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 486, 490 (2008).

⁴⁰ See Ric Simmons, *An Empirical Study of Rule 609 and Suggestions for Practical Reform*, 59 B.C. L. REV. 993, 1013 (2018).

⁴¹ Norman W. Spaulding, *The Artifice of Advocacy: Perjury and Participation in the American Adversary System*, in LAW AND LIES: DECEPTION AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM 81, 139 (Austin Sarat ed., 2015).

⁴² See *id.* at 138.

story has credibility. Moreover, lying that does occur will often follow truthful revelations.⁴³ Defendant testimony may be imperfect, but it is also available, efficient, and a unique source of information. And sorting through any omissions, exaggerations, or shadings implicates exactly the set of skills jurors supposedly bring to the courtroom. Yet concern with a defendant's complete honesty often precludes any testimony at all. The rule thus privileges lie prevention over a truth-seeking opportunity.

Nor is accuracy the only thing at stake—fairness to the defendant also suggests the need for some space within which to construct a counter-narrative. As the Supreme Court has recognized, the defendant “above all others may be in a position to meet the prosecution’s case.”⁴⁴ A defendant bearing witness has more impact than the testimony of “the police, of informants, of co-defendants, and of expert witnesses.”⁴⁵ Without testifying, defendants stand little chance of persuading a jury.⁴⁶ Because alerting jurors to prior criminal conduct increases the chances of a guilty verdict, a defendant with criminal history effectively cannot testify.

The rule not only codifies a stereotype about felons but also imposes further collateral consequences of past convictions. Defendants are more likely to bargain away their trial rights and plead guilty if a criminal record will keep them off the stand. Testifying also impacts a defendant's subsequent reintegration,⁴⁷ and the chance to hear from a defendant can enable understanding and recovery for victims as well. Letting people tell their stories, even horrible ones, can fuel reconciliation. Penalizing defendants so that they will never do so represents a poorly-reasoned decision. It reveals all the criminal conduct in a defendant's past that may or may not suggest a tendency to lie rather than encourage testimony that can offer the most complete, and ultimately the most truthful picture of the events surrounding the crime charged.⁴⁸

⁴³ See Evelyne Debey, Jan De Houwer & Bruno Verschuere, *Lying Relies on the Truth*, 132 COGNITION 324, 331 (2014).

⁴⁴ *Ferguson v. Georgia*, 365 U.S. 570, 582 (1961).

⁴⁵ Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1370 (2009).

⁴⁶ See Barbara Allen Babcock, *Introduction: Taking the Stand*, 35 WM. & MARY L. REV. 1, 12 (1993).

⁴⁷ See Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 873 (2016).

⁴⁸ See Dan Simon, *Criminal Law at the Crossroads: Turn to Accuracy*, 87 S.

III

CONFRONTATION AND THE SUBSTANCE OF STATEMENTS

A different form of credibility concern—one grounded in the constitutional right to “confront” the evidence against you—has sometimes silenced victim witnesses too. Cross-examination has taken on new significance in contemporary trials, as the salience of the oath requirement has declined. When it was widely believed that lying under oath meant eternal damnation, there was no real need for veracity cues or tests.⁴⁹ But courts now seek to both inform and equip jurors to identify “liars” while observing their testimony, and that includes the complaining witnesses for the prosecution.

The Confrontation Clause of the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”⁵⁰ Evidentiary rules already exclude many statements made by out-of-court speakers, but there are exceptions based on the necessity or reliability of particular hearsay evidence. The Supreme Court formerly interpreted the Confrontation Clause to allow the use of evidence that fell within well-established exceptions to the hearsay ban or otherwise possessed “indicia of reliability.”⁵¹ In a series of cases beginning in 2004, the Court expanded the constitutional requirement and declared that all witnesses must be available for cross-examination if their out-of-court statements constitute “testimonial” ones offered against a defendant.⁵² Accounts by victims that would otherwise fit within hearsay exceptions fall into that category, including statements under oath in formal settings like the grand jury.

Among the hundreds of defendants exonerated by DNA evidence in recent decades, there is not one whose wrongful conviction rested on “unconfronted hearsay,” which is regularly excluded by the current construction of the rule announced in *Crawford*. Meanwhile, flawed eyewitness testimony, false confessions, and faulty forensics are rarely screened out because they contain perceived indicators of honesty. In other words, we are preferring evidence that

CAL. L. REV. 421, 438 (2014).

⁴⁹ See Frederick Schauer, *Can Bad Science Be Good Evidence? Neuroscience, Lie Detection, and Beyond*, 95 CORNELL L. REV. 1191, 1194 (2010).

⁵⁰ U.S. CONST. amend. VI.

⁵¹ *Ohio v. Roberts*, 448 U.S. 56, 65–66 (1980).

⁵² *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004).

clearly causes wrongful convictions and excluding statements jurors have shown themselves well equipped to evaluate.

To find out what happened, the best source will often be a direct witness, testifying live, under oath, and subject to cross-examination. In fact, that is all the more reason to have rules that allow criminal defendants to testify. But what about when a witness has died, or disappeared, or now refuses to talk? When the firsthand account is not available, sometimes the earlier statement constitutes the only source of information, and sometimes it has been tested in ways that reinforce its accuracy. Yet the definition the Court now uses to determine which statements fall into the testimonial category sets aside reliability and focuses exclusively on the significance of a performative opportunity to confront witnesses in person.

The requirement that defendants “look an accuser in the eye” precludes admission of hearsay assertions if they tend to accuse or have the capacity to condemn. If a victim’s statement is testimonial—even when it is made to a first responder, medical professional, social worker, counselor, friend, or family member—then it may be inadmissible. That can lead to silencing victims when their only available statements come after the most fearful encounters, including in domestic violence scenarios. When a witness is available, in-court testimony ought to be required. But what about when it is not possible? In that case, the preference for confrontation in the form of a verbal duel or ritual staring contest does silence victims.

One example comes from a 2008 Wisconsin case in which Mark Jensen was convicted of murdering his wife Julie by poisoning her with antifreeze.⁵³ He claimed she committed suicide, but the strongest evidence against him was a letter she gave to a neighbor before her death describing her terror and her certainty that Mark was intent on killing her. “I am suspicious of Mark’s behaviors,” she wrote, “[and] fear for my early demise.” The letter also disclaimed any intention to commit suicide because of her love for her children. The jurors who convicted Mark in his first trial saw the letter and commented later that it was a “clear road map” to his conviction.⁵⁴ The letter’s admission, however, was a Confrontation Clause violation that later jeopardized the

⁵³ See *State v. Jensen*, 794 N.W.2d 482, 490 (Wis. Ct. App. 2010).

⁵⁴ See Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 284 (2013).

verdict. To be sure, any such document has some self-impeaching qualities, and the jury might have seen it as consistent with Mark's claim that Julie was despondent about an affair and plotted to kill herself and frame him as revenge. Factfinders, however, could readily observe the letter's defects even without Julie on the witness stand. Its exclusion illustrates misplaced confidence in confrontation itself as a test of deception.

What the Court has called the "irreducible literal meaning"⁵⁵ of confrontation—which is to stare a witness down—actually serves only a limited purpose. Justice Scalia regarded his opinions on the Confrontation Clause as his most significant legacy.⁵⁶ In them, he repeatedly referenced "something deep in human nature" that requires the "essential" physical presence of an accusing witness.⁵⁷ While the fairness dimensions of confrontation hold up to scrutiny, its role in assuring reliability does not. Looking at someone does not help to detect deception and might even hinder it. As the experimental evidence indicates, "ordinary observers do not benefit from the opportunity to observe nonverbal behavior in judging whether someone is lying."⁵⁸ Moreover, "there is little correlation between people's confidence in their ability to detect deception and their accuracy."⁵⁹

In fact, almost every non-verbal cue of dishonesty is subject to conflicting interpretations.⁶⁰ Both blinking too much and not blinking supposedly indicate lying. The same goes for staring and avoiding eye contact, talking too fast and choosing words too deliberately, having inconsistencies in a narrative and keeping the story straight, smiling and frowning, and fidgeting and sitting rigidly still. Showing obvious nerves, sweating, slumping, and eye-darting—clinical studies suggest—are as likely to be the result of the stress of the courtroom situation as of effortful lying.⁶¹ Accordingly,

⁵⁵ See *Coy v. Iowa*, 487 U.S. 1012, 1015–19 (1988).

⁵⁶ See Marcia Coyle, *Antonin Scalia's "Profound" Influence on the Supreme Court*, NAT'L L.J. (Feb. 14, 2016), <https://www.law.com/nationallawjournal/almID/1202749718827/?sreturn=20180119171453> [<https://perma.cc/67XE-SG5U>].

⁵⁷ *Coy*, 487 U.S. at 1017.

⁵⁸ Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1088 (1991).

⁵⁹ Adam J. Kolber, *Will There Be a Neurolaw Evolution?*, 89 IND. L.J. 807, 837 (2014).

⁶⁰ See, e.g., Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 176–77 (2011).

⁶¹ See Margaret Talbot, *Duped*, NEW YORKER (July 2, 2007), <https://www.newyorker.com/magazine/2007/07/02/duped>

cross-examination has the potential to mask truth, as well as reveal it. Occasionally, it will highlight unmistakable signs of falsehood, but it can also make honest witnesses appear hesitant, confused, or defiant, and thereby mislead the factfinder to reject truthful evidence.

Popular culture perpetuates the myth that confrontation will yield a smoking gun or telltale sign. Countless magazine articles list techniques for identifying the liars in your social and professional circles with behavioral cues. The television series *Lie to Me* popularized the theory of detecting deception through observing micro-expressions. Recent books, like *Liespotting*, promise to reveal the “single most dangerous expression to watch out for in business and personal relationships.”⁶² And, in *Spy the Lie*, “former CIA officers teach you how to detect deception” by observing behavior.⁶³ This concept surfaces as well in just about every police manual. Seventy-eight percent of police officers report that they make veracity judgments based on nonverbal cues like “gaze aversion.”⁶⁴ Nonverbal cues work in some contexts—detecting social status, appraising sexual desire, recognizing personality traits—but they do not reliably signal deception.

The most useful confrontation in terms of arriving at the larger truth in a case has more to do with getting answers than just asking questions. Some out-of-court statements excluded by the Confrontation Clause—especially written ones or recorded testimony—provide a much richer opportunity to test the substance of proffered facts for inconsistencies and contradictions. It takes more effort to evaluate substance than to observe behavior, but it yields more information.⁶⁵ And that opportunity is what the Confrontation Clause broadly guarantees: a criminal defendant’s right “to know, to examine,

[<https://perma.cc/3N27-AVCR>] (“People who are afraid of being disbelieved, even when they are telling the truth, may well look more nervous than people who are lying.”).

⁶² The author concludes that the danger signal emerges from any expression of “contempt,” which could appear in a “wrinkle in the nose, eye rolling, or a raised nostril combined with a curled upper lip.” PAMELA MEYER, *LIESPOTTING: PROVEN TECHNIQUES TO DETECT DECEPTION* 68 (2010). These expressions—like, apparently, any other asymmetrical gesture—are described by Meyer as masks because “[n]atural truthful gestures typically occur evenly on both sides.” *Id.* at 60.

⁶³ PHILIP HOUSTON, MICHAEL FLOYD & SUSAN CARNICERO, *SPY THE LIE* (2013).

⁶⁴ Aldert Vrij, *Nonverbal Detection of Deception*, in *FINDING THE TRUTH IN THE COURTROOM: DEALING WITH DECEPTION, LIES, AND MEMORIES* 163, 165 (Henry Otgaar & Mark L. Howe eds., 2018).

⁶⁵ See Chris William Sanchirico, *Evidence, Procedure, and the Upside of Cognitive Error*, 57 *STAN. L. REV.* 291, 335 (2004).

to explain[,] and to rebut” the evidence against her.⁶⁶ Well-documented statements can be verified given other evidence and context. Several experiments have demonstrated that transcripts are superior to live testimony when it comes to making credibility judgments.⁶⁷ Recorded statements actually eliminate the distracting and distorting nonverbal data and underscore verbal content. Moreover, out-of-court statements are more likely to be unprepared and unrehearsed. Of course, firsthand witnesses are better than secondhand ones, when they are available. And, of course, some unique secondhand testimony presents real dangers of unfairness or inaccuracy. But a secondhand account that supplements other evidence may be preferable to denying the factfinder information altogether, and in too many cases, the idea that all statements must be tested by adversarial combat excludes them.

The prohibition persists because confrontation, as Justice Scalia redefined it, is a formal rather than a functional process.⁶⁸ To be faced down and to appear forthcoming satisfies the standard, while the quality of the information obtained and its relationship to accuracy is irrelevant.⁶⁹ Accordingly, a witness on the stand and in the chair, even with no memory of the relevant events, meets the constitutional requirement.⁷⁰

Although the Confrontation Clause plays an important role in excluding statements that may have been influenced by government actors, it does not make trials more accurate—or ultimately more truthful exercises—to silence victim witnesses whose statements contain essential information and whose motivations can be assessed from the record.⁷¹ Mistakenly

⁶⁶ Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 402 (1959).

⁶⁷ See, e.g., Charles F. Bond, Jr. & Bella M. DePaulo, *Individual Differences in Judging Deception: Accuracy and Bias*, 134 PSYCHOL. BULL. 477, 483 (2007).

⁶⁸ See *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (Thomas, J., concurring in part and concurring in judgment) (stating that the Confrontation Clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner”).

⁶⁹ See Joyce Plotnikoff & Richard Woolfson, “*Kicking and Screaming*”: *The Slow Road to Best Evidence*, in CHILDREN AND CROSS-EXAMINATION: TIME TO CHANGE THE RULES? 21, 22 (John R. Spencer & Michael E. Lamb eds., 2012) (“[C]ross-examination aims not at accuracy or best evidence but at persuading witnesses to adopt an alternative version of events or discrediting their evidence.”).

⁷⁰ *United States v. Owens*, 484 U.S. 554, 560 (1988).

⁷¹ See David Alan Sklansky, *Confrontation and Fairness*, 45 TEX. TECH. L. REV. 103, 108 (2012).

regarding cross-examination as an assurance of honesty has resulted in some poor sorting of testimony. The durable myth of demeanor as a lie detection tool persists, despite its potential to distort, and that myth can also impede truth-seeking by supporting the exclusion of some necessary and reliable witness statements.

IV

FORENSIC FACTS AND FALSE PRECISION

A related truth-seeking issue has arisen with regard to forensic testimony, which at first seems like the one form of evidence from which we might expect empirical clarity. With evidence that is supposedly scientific, we might worry less about accuracy, but recent developments suggest that we should actually worry more. A frequently quoted line attributed to Mark Twain reminds us that “it isn’t what you don’t know that gets you into trouble but what you know for sure that just ain’t so.” A version of that quotation served as the on-screen epigraph to two recent films: *The Big Short*,⁷² which exposes the economic fallacies that drove the recent financial crisis, and *An Inconvenient Truth*,⁷³ which documents the effort to raise awareness of scientific facts about climate change. It was sourced to Mark Twain in both places, but Twain did not say it.⁷⁴ The instability of both content and context calls to mind one of the most powerful “broken system” stories about criminal justice in recent years: the discovery that while many methods have been presented as scientifically certain, they just were not so.

For decades, and with respect to some techniques for almost a century, courts have allowed expert testimony about superficial pattern matches that link known samples to data collected in criminal investigations. The standard by which the courts measure the reliability of this expertise—codified in Federal Rule of Evidence 702 and known as the *Daubert* standard—continues to place particular weight on whether other experts in the field rely on similar methodologies. That is, whether it is “generally accepted”⁷⁵ and “peer reviewed.”⁷⁶

⁷² THE BIG SHORT (Paramount Pictures 2015).

⁷³ AN INCONVENIENT TRUTH (Paramount Classics 2006).

⁷⁴ Nineteenth century humorist Josh Billings seems to have originated the saying. JOSH BILLINGS, EVERYBODY’S FRIEND, OR JOSH BILLING’S ENCYCLOPEDIA AND PROVERBIAL PHILOSOPHY OF WIT AND HUMOR 286 (1874) (“I honestly beleave it iz better tew know nothing than two know what ain’t so.”).

⁷⁵ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 584 (1993).

⁷⁶ *Id.* at 594; *see also* FED. R. EVID. 702.

Within professional communities of interest, however, an honest commitment to the validity of expert analysis turns out to have little to do with its truth or reliability. Experts who make their livings or their reputations with the same technique—members of the Association of Firemark and Toolmark Examiners, for example—may share a sincere belief that a method works, but they are often mistaken. Moreover, they may profit handsomely from purveying the expertise even when they have doubts about its utility. These Associations have internal publications as well, and ones that are often cited to support the peer-review factor. But publishing there amounts to “talk within congregations of true believers” and does not allow the critical review and disinterested assessment that the *Daubert* Court envisioned.⁷⁷

Although firearm and toolmark analysts have long stated that their discipline has “near-perfect” accuracy, the most recent studies indicate a high false-positive rate. Missing context for forensic testimony also matters. Experts can testify honestly that a certain gun could have fired a bullet or that a particular screwdriver could have made the pry marks on a door. But they cannot make that assertion to the exclusion of *other* guns or tools. So, they can testify to something that is plenty precise as far as it goes but hazards inaccuracy by leaving out the larger picture.⁷⁸ It would be the equivalent of stating that an alleged perpetrator’s DNA was found at the scene of a crime without explaining that the suspect actually lives in the house.

Fingerprint analysis further illustrates the way in which labels conveying reliability tend to stick. Another guild of forensic examiners claims the ability to match latent prints from a crime scene to identified samples, with a high degree of certainty. For the most part, courts admit fingerprints because they have always admitted fingerprints; they consider them the archetype of reliability because they have been used as evidence for roughly 100 years.⁷⁹ Prints do display some distinctive ridge patterns from the loops and arches of the human fingertip, but there is no science supporting

⁷⁷ David H. Kaye, *How Daubert and Its Progeny Have Failed Criminalistic Evidence and a Few Things the Judiciary Could Do About It*, 86 *FORDHAM L. REV.* 1639, 1645 (2018).

⁷⁸ See, e.g., Michael J. Saks & Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 *SCIENCE* 892, 895 (2005) (concluding that traditional forensic identification sciences rely on untested assumptions and semi-informed guesswork).

⁷⁹ See Nancy Gertner, *Commentary on the Need for a Research Culture in the Forensic Sciences*, 58 *UCLA L. REV.* 789, 790 (2011).

conclusions about how likely or unlikely particular sets of features are to repeat in different individuals. Moreover, the most common fingerprinting method has no standard test protocols and relies on subjective assessments of similarities. When experts testify to matches, however, courts have been “unable to muster the most minimal grasp of why a standardless form of comparison might lack evidentiary reliability or trustworthiness.”⁸⁰

Courts continue to permit such testimony despite a shattering National Academy of Sciences report in 2009 that concluded that the forensics based on what’s called “pattern matching” or “feature comparison” fall well short of scientific standards. The discredited techniques include handwriting analysis, bite-marks, ballistics, footwear and tire impressions, tool marks, voice prints, microscopic hair comparison, blood spatter, textile fibers, and burn patterns in arson cases.⁸¹ None of it is supported by scientific validity, or at least there has not been sufficient scientific testing to validate its reliability.⁸² A subsequent 2016 report by the President’s Council of Advisors on Science and Technology (PCAST) further enumerated the lack of validation studies and the urgent need for reform in forensic analysis and testimony.⁸³

That is not to say that pattern comparison is irrelevant across the board—it just is not as scientific as it purports to be. As the PCAST report details, empirical studies do not establish that these methods are repeatable, reproducible, and accurate.⁸⁴ They do not yield a binary “match” or “non-match” because choices factor heavily into the analysis. Prosecutors may present them as unassailable, but they rely on subjective human judgment about which features to compare and how to determine if they are sufficiently similar. In some cases, factfinders could even receive the data, hear a basic explanation, make comparisons, and draw conclusions about the probabilities themselves.

⁸⁰ Erin Murphy, *Neuroscience and the Civil/Criminal Daubert Divide*, 85 *FORDHAM L. REV.* 619, 624 (2016).

⁸¹ *See* COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY., NAT’L RESEARCH COUNCIL, *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* 189 (2009).

⁸² *Id.* (concluding that “[l]ittle rigorous systematic research has been done to validate” these “basic premises and techniques” of forensic pattern matching).

⁸³ *See* PRESIDENT’S COUNCIL OF ADVISORS ON SCI. & TECH., EXEC. OFFICE OF THE PRESIDENT, *FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS* 86–120 (2016) (noting observed false positive rates that render these methods scientifically unreliable).

⁸⁴ *Id.*

In its reasoning, the *Daubert* Court recognized that science is a process rather than a collection of facts, and that the explanations it offers about the world are subject to further testing and refinement. The *Daubert* rule that followed from the opinion, however, does not do enough to exclude unreliable expert testimony, and it is now widely regarded as too vague to support accurate screening.⁸⁵ In practice, trial judges rarely reject forensic testimony offered by prosecutors in criminal cases, and it takes decades for scientific advances to find acceptance and expression in court. And, although appellate courts may closely screen scientific evidence admitted by trial judges in civil cases, they almost never overturn rulings on forensics in criminal cases.

To accommodate the competing languages of science and law, the *Daubert* rule emphasizes flexibility about how to assess reliability.⁸⁶ Over time, that flexibility has meant too much emphasis on the measures that are most familiar to courts, like precedents that have accepted particular techniques or the training, experience, and qualifications of experts. “Each ill-informed decision becomes a precedent binding on future cases.”⁸⁷ Most courts functionally apply the pre-*Daubert* standard from *Frye*, which rewards the sincerity of the proponent’s belief in the value of the evidence. They even regard past testimonial descriptions of accuracy as an “implicit history of testing.”⁸⁸ Here the preference for honesty manifests itself as an affinity for recognizing authority.

Experts who are convincing, commanding, or just honestly committed to a methodology are thus permitted to testify even when their testimony does not meet the standards of rigor, reliability, and accuracy that *Daubert* purports to require.⁸⁹ And they are too often allowed to state that their methodologies definitively establish that a defendant was present at a crime scene, when they may be relying on assumptions and making

⁸⁵ See Kaye, *supra* note 77, at 1642.

⁸⁶ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 594 (1993); see also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999).

⁸⁷ Harry T. Edwards, Senior Circuit Judge, U.S. Court of Appeals for the District of Columbia Circuit, Reflections on the Findings of the National Academy of Sciences Committee on Identifying the Needs of the Forensic Science Community (Feb. 3, 2014), <http://www.law.nyu.edu/sites/default/files/EdwardsSpeechtoNCFCS.pdf> [<https://perma.cc/5FUS-VHVV>].

⁸⁸ See *United States v. Mitchell*, 365 F.3d 215, 241 (3d Cir. 2004).

⁸⁹ See *United States v. Crisp*, 324 F.3d 261, 278 (4th Cir. 2003) (Michael, J., dissenting) (critiquing reliance on the “dogged certainty” of fingerprint examiners to admit their testimony).

estimations that can produce error rates comparable to the false identifications made by lay eyewitnesses.

Moreover, using scientific vocabulary to state conclusions that may be imprecise or contain motivated reasoning might be truth-hindering in a broader sense. A recent study estimated that intuitive error rate measurements for scientific experts range from 1 in 100,000 to 1 in 10,000,000.⁹⁰ And experiments involving jury simulations reveal that an expert's credentials and confidence matter more than the substance of scientific testimony to the jury's assessment of credibility. Meanwhile, about 60% of the documented wrongful convictions have occurred in cases that involved this sort of identification or feature-comparison evidence.⁹¹ This is a serious misalignment between assumptions about forensic expertise and its tested reliability. Recognizing that the sincere commitment of forensic experts does not necessarily yield accurate testimony could at least widen the avenues to challenge it, with ample alternative explanations, probing questioning, competing experts, and careful assessments of suspect methodologies by courts.

V

THE APPEAL OF LIE DETECTION

To overcome some of the conceptions of honesty that cause error, we have to understand where they originated. They intersect, as it happens, with a longstanding and still-evolving challenge to *Daubert*: lie detection itself. The possibility of an accurate and scientific way to identify deception has been discussed since the early 1900s. And it has contributed to the notion that lying or not lying is a binary distinction, and that the right procedure can expose whether the lever has moved. A 1907 *New York Times* article predicted that “[a] few years hence, no innocent person will be kept in jail, nor, on the other hand, will any guilty person cheat the demands of justice.”⁹² That still has not happened, of course. Lie detection has thus far been almost universally excluded from trials because of its high error rate and potential to mislead the jury (although a

⁹⁰ See Jonathan J. Koehler, *Intuitive Error Rate Estimates for the Forensic Sciences*, 57 JURIMETRICS J. 153, 153 (2017).

⁹¹ Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 9 (2009).

⁹² *Invents Machine for “Cure of Liars”: Professor Munsterberg Experiments to Reduce Knowledge of Truth to a Science*, N.Y. TIMES (Sept. 11, 1907), cited in GEOFFREY C. BUNN, *THE TRUTH MACHINE: A SOCIAL HISTORY OF THE LIE DETECTOR* 100 (2012).

suspect's willingness to submit to polygraphs can be deemed relevant evidence of state of mind).

Developing technologies like functional magnetic resonance imaging (fMRI) might change the status of lie detection in court. Conventional polygraph tests, which fail the *Daubert* test for reliability, measure external stress responses and rely on a few measures of arousal. fMRI uses thousands of data points per subject and looks for cognitive processes inside the brain that indicate the effort and intent to deceive.⁹³ As it proceeds through further testing and validation, fMRI poses closer and closer questions under *Daubert* and might ultimately meet the standard for admission and be a regular subject of expert testimony. If detecting lies ever looks more like DNA testing than demeanor assessments, that will raise new questions about the place of lie detection in the larger search for truth.

The allure of lie detection by any method begins with the adversarial system to which we are committed. It stresses testimony by the parties rather than an inquisitorial process in which the courts take a more active role in investigation. In theory, truth emerges in an adversarial system from the market forces of conflict and competition at trial and not just from some neutral inquiry into what happened.⁹⁴ But in practice, adversarial process is “error-prone in a world of unequal resources.”⁹⁵ Inquisitorial systems have deeper institutional competencies in determining historical facts and an explicit mandate to identify ground truths.⁹⁶ In contrast, adversarial trials are uniquely and sometimes entirely reliant on the reports of witnesses rather than primary investigation by the trier of fact. Accordingly, they feature this “structured process for the determination of the credibility of strangers, many of whom will, for one reason or another, try to deceive those who rely upon their word.”⁹⁷ That process emphasizes honesty and depends on internal rather than external validity, which can confound truth-seeking.

The substance of criminal law further reinforces these

⁹³ See Martha J. Farah et al., *Functional MRI-based Lie Detection: Scientific and Societal Challenges*, 15 NATURE 123 (Jan. 20, 2014), <https://www.nature.com/articles/nrn3665> [<https://perma.cc/SU94-U565>].

⁹⁴ See David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1690–91 (2009).

⁹⁵ Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 713 (2014).

⁹⁶ See, e.g., Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1588 (2005).

⁹⁷ Uviller, *supra* note 37, at 776.

structural choices by imposing broad liability for lies *about* offenses. There are approximately 4,000 federal crimes, and about 300 of them have something to do with deception, including perjury, the various obstruction offenses, and making false statements in investigations.⁹⁸ The criminal justice system not only sorts and labels liars but also sends messages about the prevalence of lying itself. From celebrity athletes to high-flying financiers, notorious defendants like Barry Bonds and Bernie Madoff have faced liability for lying.⁹⁹ And prosecutors have charged an expanding range of defendants with nothing but dishonesty in the context of an investigation. It was once thought unsporting to pursue a charge for lying *about* wrongdoing if the proof was not available on the underlying offense. But now lying charges are a common device to elicit cooperation, enforce governmental authority, or just expediently close a case. And the variations on liability for dishonesty in the criminal code mean that many suspects expose themselves to easy charges as soon as they engage with investigators.¹⁰⁰

The fundamental impenetrability of intent in a complex case makes these charges especially attractive. When liability turns on the wrongfulness with which a defendant acted, factfinders must “infer the mental state of a defendant they do not know as he acted in a way they did not see.”¹⁰¹ Prosecutors find it less demanding to assert that a defendant simply said something false, as that requires less “sift[ing] through the surface level of conduct for signals about internal mental processes.”¹⁰² When investigators regard a suspect’s lie as something observable, and courtroom rules supposedly “detect” dishonesty, factfinding appears to stand on much firmer ground.

That desire for certainty also helps explain the intense interest in detecting dishonesty well beyond the courtroom. Fascination with lying has its roots in the frustrations of the intersubjectivity divide. Between people and even those they

⁹⁸ 18 U.S.C. § 1001 (2018).

⁹⁹ See JAMES B. STEWART, *TANGLED WEBS: HOW FALSE STATEMENTS ARE UNDERMINING AMERICA: FROM MARTHA STEWART TO BERNIE MADOFF* 265, 363 (2011).

¹⁰⁰ See Eric Posner, *The Lying Game*, *NEW REPUBLIC* (May 29, 2011), <http://www.newrepublic.com/book/review/tangled-webs-james-stewart> [<https://perma.cc/JHS3-9ZMB>].

¹⁰¹ Francis X. Shen et al., *Sorting Guilty Minds*, 86 *N.Y.U. L. REV.* 1306, 1307 (2011).

¹⁰² Samuel W. Buell & Lisa Kern Griffin, *On the Mental State of Consciousness of Wrongdoing*, 75 *LAW & CONTEMP. PROBS.* 133, 153 (2012).

know the best and love the most, there will always be a barrier.¹⁰³ No path leads directly into someone else's thoughts, and thus assurances of accurate expressions of the content of another's mind fill a basic need. Trusting others is essential to survival.¹⁰⁴ Navigating through the world requires communication, implicit trust in the information that is transmitted, and sustainable social relationships. A classic study of the 1960s surveyed participants on 555 different personality traits, and the one that rated 555th on the list was "liar."¹⁰⁵ Yet perceived honesty again suffices—in our "hypersocial" network of relationships, what feels forthcoming often rates as more satisfying than what rationality suggests is accurate.

Despite the evolutionary imperative to trust, lying seems to be everywhere.¹⁰⁶ It is ordinary human behavior and even a necessary stage of development. "By inventing deceptions and withholding information, children establish boundaries between self and others, test the limits of adult power and control, and move toward independent thought and action."¹⁰⁷ Adults then lie with ease and frequency, to both strangers and intimates. The consequences of lies range from devastating to benign, but there is no question that people lie a lot, for many reasons: job applicants seeking advantage, classmates and colleagues making excuses, potential romantic partners hoping to impress.¹⁰⁸

For all the interest in deception—across popular culture,

¹⁰³ See Joel Krueger, *Seeing Mind in Action*, 11 PHENOMENOLOGY & COGNITIVE SCI. 149, 149–51 (2012) (discussing the empirical problem of other minds and "the use of our own mental states to imaginatively simulate what another person is likely thinking and feeling"); see also Susan C. Johnson, *The Recognition of Mentalistic Agents in Infancy*, 4 TRENDS IN COGNITIVE SCI. 22, 22 (2000) ("Mental states, and the minds that possess them, are necessarily unobservable constructs that must be inferred by observers rather than perceived directly.").

¹⁰⁴ See Yudhijit Bhattacharjee, *Why We Lie: The Science Behind Our Deceptive Ways*, NAT'L GEOGRAPHIC (June 2017), <https://www.nationalgeographic.com/magazine/2017/06/lying-hoax-false-fibs-science/> [https://perma.cc/PX3P-TENB].

¹⁰⁵ Megan Garber, *The Lie Detector in the Age of Alternative Facts*, ATLANTIC (Mar. 29, 2018), <https://www.theatlantic.com/entertainment/archive/2018/03/the-lie-detector-in-the-age-of-alternative-facts/556685/> [https://perma.cc/UJR5-247A].

¹⁰⁶ Jessica Bennett, *The Truth Is, We're All Raging Liars*, NEWSWEEK (Aug. 25, 2009), <http://www.newsweek.com/truth-were-all-raging-liars-78965> [https://perma.cc/9SS2-JUDY].

¹⁰⁷ Jill Doner Kagle, *Are We Lying to Ourselves About Deception?*, 72 SOC. SERV. REV. 234, 238 (1998).

¹⁰⁸ Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CALIF. L. REV. 1515, 1518–19 (2009).

academic disciplines, and political discourse—we still know very little about it. Recent developments in the social sciences reveal how poorly deception is understood.¹⁰⁹ It is tricky to recreate clinically, and many of the published studies on its nature and frequency fail to replicate.¹¹⁰ It turns out that it is difficult to identify ground truths about lying itself, and it is not nearly as straightforward of a concept as the rules around it would suggest.

CONCLUSION

Because lying is both a pervasive act and a mysterious concept, entirely predictable but impossible to detect with precision, perhaps we should not regard it as so independently consequential. Part of the work of the criminal justice system is to make some determinations about who speaks honestly. In many cases, that sorting will also support accurate outcomes, but at times the focus on honesty enforcement will obscure larger and more significant truths. Rooting out lies and rewarding honesty are fine as far as they go, but they are not enough to maximize accuracy. It may be easier to tell whether someone has lied than whether all of the relevant information has been gathered, but getting things right remains the underlying value of the process. The most important purpose of investigations and trials transcends lie detection. Finding facts, adjudicating guilt, and even protecting the integrity of other public institutions require a new balance that privileges engagement.

Both the procedures discussed here and the substantive criminal law offer incremental opportunities to expand truth-seeking. I take the system we have as a given, recognizing both the power that law enforcement agents wield in investigations and the persistence of the adversarial process. But the limitations of common interrogation techniques, the costs of the impeachment and confrontation rules, and the failures of *Daubert* screening are increasingly apparent. Some interpretations of the lying offenses have also moved toward imposing liability for lying only when the statements in question introduce inaccuracy. Lying prosecutions can be both over- and under-inclusive. Some targets of obstruction

¹⁰⁹ See, e.g., ALBERT VRIJ, DETECTING LIES AND DECEIT: PITFALLS AND OPPORTUNITIES 1–2 (2d ed. 2008).

¹¹⁰ See Daniel Engber, *LOL Something Matters*, SLATE (Jan. 3, 2018), <https://slate.com/health-and-science/2018/01/weve-been-told-were-living-in-a-post-truth-age-dont-believe-it.html> [<https://perma.cc/9R5E-MQVN>].

cases do not merit prosecutorial resources,¹¹¹ and other cases narrow too quickly to proxy indictments when the underlying criminality is of significant public concern and should give rise to the substantive charges. A few recent decisions have shifted in the direction of recognizing that not all lies are equally deserving of criminal sanction. Cases concerning lies to get elected,¹¹² to claim unearned honors,¹¹³ and to obtain citizenship¹¹⁴ suggest that there is more to determining when dishonesty supports liability than the straightforward question whether someone has uttered a falsehood. A binary approach to “lying” has often masked vital evidence and silenced witnesses, and a more pluralistic conception of “truth” as the product of many voices and perspectives could help dislodge some longstanding sources of error.

Clarity about the distinction between telling lies and the status of empiricism is also vital because courts are now called upon to perform a broader repair function. The fundamental advantage of legal institutions is the background requirement of engagement. In court, opposing parties are required to “join issue,” and factfinders assess and reconcile their conflicting accounts and interpretations of events. Outside of the courtroom, the divisions in public life increasingly involve doubts about verifiable facts, and models for identifying and agreeing to them are more essential than ever. Official statements now seem so unreliable that there is little effort to correct falsehoods or assess their impact, and journalists have resorted to just counting how many thousands of times some governmental figures lie.¹¹⁵ The lies may mean less and less, but the crisis over shared facts matters.

The Oxford Dictionary’s 2016 word of the year was “post-truth,” which was defined as the “circumstances in which

¹¹¹ See John R. Emshwiller & Gary Fields, *For Feds, ‘Lying’ Is a Handy Charge*, WALL ST. J. (Apr. 9, 2012, 10:36 PM), <https://www.wsj.com/articles/SB10001424052702303299604577328102223038294> [<https://perma.cc/T2DM-RJVV>].

¹¹² See Susan B. Anthony List v. Driehaus, 814 F.3d 466 (6th Cir. 2016).

¹¹³ See United States v. Alvarez, 567 U.S. 709 (2012); see also Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2216 (2015) (“[T]here is no historical tradition in the United States of prosecuting the act of lying when that lie is unconnected to some other, legally cognizable harm . . .”).

¹¹⁴ See Maslenjak v. United States, 137 S. Ct. 1918 (2017).

¹¹⁵ See Glenn Kessler, Salvador Rizzo & Meg Kelly, *President Trump Has Made 3,001 False or Misleading Claims So Far*, WASH. POST (May 1, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/05/01/president-trump-has-made-3001-false-or-misleading-claims-so-far/?noredirect=on&utm_term=.8f27ecc69a02 [<https://perma.cc/Z5QV-73A9>].

objective facts are less influential in shaping public opinion than appeals to emotion and personal belief.”¹¹⁶ Even facts that consist of numbers—crime rates, climate data, economic indicators, trade deficits—do not stay stable across different communities of interest.¹¹⁷ The problem of entitlement to invented facts itself is not new. Ten years before “post-truth” was declared a pivotal concept, Merriam-Webster’s word of the year was “truthiness,” coined by comedian Stephen Colbert to describe “the quality of preferring concepts or facts one wishes to be true, rather than concepts of facts known to be true.”¹¹⁸ And even before that phrase entered the lexicon, political operatives spoke dismissively of the policy prescriptions favored by the “reality-based community.”¹¹⁹

Although the contested nature of ground truths did not suddenly emerge, it does seem newly urgent. The volume and influence of opinion over fact has increased. Empiricism and expertise no longer generate consensus,¹²⁰ and growing

¹¹⁶ Amy B. Wang, *Post-Truth Named 2016 Word of the Year by Oxford Dictionaries* (Nov. 16, 2016), WASH. POST, <https://www.washingtonpost.com/news/the-fix/wp/2016/11/16/post-truth-named-2016-word-of-the-year-by-oxford-dictionaries/> [<https://perma.cc/WLM9-EZ7Z>] (“It’s official: Truth is dead. Facts are passé.”).

¹¹⁷ See, e.g., William Davies, *How Statistics Lost Their Power—And Why We Should Fear What Comes Next*, GUARDIAN (Jan. 19, 2017), <https://www.theguardian.com/politics/2017/jan/19/crisis-of-statistics-big-data-democracy> [<https://perma.cc/XG9M-TGGQ>] (“They ought to provide stable reference points that everyone—no matter what their politics—can agree on. Yet in recent years, divergent levels of trust in statistics has become one of the key schisms that have opened up in western liberal democracies.”).

¹¹⁸ Sean Alfano, *The Truth of Truthiness*, CBSNEWS.COM (Dec. 12, 2006), <https://www.cbsnews.com/news/the-truth-of-truthiness/> [<https://perma.cc/G758-C97F>]; see also Yes, I’d Lie to You, ECONOMIST (Sept. 10, 2016), <https://www.economist.com/news/briefing/21706498-dishonesty-politics-nothing-new-manner-which-some-politicians-now-lie-and> [<https://perma.cc/U2S5-TP6Y>].

¹¹⁹ See Ron Suskind, *Faith, Certainty and the Presidency of George W. Bush*, N.Y. TIMES MAG. (Oct. 17, 2004), <http://www.nytimes.com/2004/10/17/magazine/faith-certainty-and-the-presidency-of-george-w-bush.html> [<https://perma.cc/MBB7-LLCR>]. Post-truth technology, including sophisticated digital manipulation of video, has made the slippery nature of objective facts still more acute. And the tethers come completely undone when the discussion turns to the “simulation hypothesis”—Elon Musk, for example, commented in 2016 that there is a “billion to one chance we’re living in base reality.” Olivia Solon, *Is Our World A Simulation? Why Some Scientists Say It’s More Likely Than Not*, GUARDIAN (Oct. 11, 2016), <https://www.theguardian.com/technology/2016/oct/11/simulated-world-elon-musk-the-matrix> [<https://perma.cc/XQ94-QYNR>].

¹²⁰ See Atul Gawande, *The Mistrust of Science*, NEW YORKER (June 10, 2016), <https://www.newyorker.com/news/news-desk/the-mistrust-of-science> [<https://perma.cc/3YG4-XGSZ>]; see also HARRY COLLINS, ARE WE ALL SCIENTIFIC EXPERTS NOW? 131 (2014) (“If we start to believe we are all scientific experts,

ambivalence about the nature of evidence itself is corroding democratic norms.¹²¹ Carefully establishing facts and reliably screening expertise in court could provide some counterweight to the denigration of science and data in post-truth discourse.¹²² Outside of the structured system of legal institutions, “the most grossly obvious facts can be ignored when they are unwelcome.”¹²³ Of course, the adversarial process causes some distortions, as do the cognitive biases of prosecutors, judges, and jurors, but the core commitment of investigation and adjudication is to identify objective truths.¹²⁴ And finding right answers is a “fundamental goal of our legal system.”¹²⁵

Courtrooms can also play a pivotal role in preserving democratic aspirations because—in contrast to fractured media environments and polarized political discourse¹²⁶—the ideas in question actually come into direct contact. Going to court means leaving the echo chamber. Adversaries have to sit in the same room. One has no choice but to recognize the standing of others and to respond to claims. Witnesses take oaths and must answer questions. Deliberately misleading the court has potential criminal consequences. Evidentiary rules

society will change: it will be those with the power to enforce their ideas or those with the most media appeal who will make our truths.”).

¹²¹ See Cary Funk & Lee Rainie, *Public and Scientist’s Views on Science and Society*, Pew Research Center (Jan. 29, 2015), <http://www.pewinternet.org/2015/01/29/public-and-scientists-views-on-science-and-society/> [<https://perma.cc/D9RT-RMXT>]; see also Julie Beck, *The Challenge of Fighting Mistrust in Science*, ATLANTIC (June 24, 2017), <https://www.theatlantic.com/science/archive/2017/06/the-challenge-of-fighting-mistrust-in-science/531531/> [<https://perma.cc/SM5Y-HDW7>]; GEOFFREY C. KABAT, TAKING DISTRUST OF SCIENCE SERIOUSLY (2017), <http://embor.embopress.org/content/embor/early/2017/05/30/embr.201744294.full.pdf> [<https://perma.cc/35Y6-3GY3>].

¹²² See TOM NICHOLS, THE DEATH OF EXPERTISE 216 (2017) (“[T]he collapse of the relationship between experts and citizens is a dysfunction of democracy itself.”).

¹²³ George Orwell, *London Letter*, 12 PARTISAN REV. 77, 80 (1945).

¹²⁴ See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 238–39 (1971).

¹²⁵ United States v. Havens, 446 U.S. 620, 626 (1980); see also *Tehan v. United States*, 383 U.S. 406, 416 (1966) (“The basic purpose of a trial is the determination of truth.”); Hannah Arendt, *Truth and Politics*, NEW YORKER, Feb. 25, 1967, at 84 (stating that in courts “contrary to all political rules, truth and truthfulness have always constituted the highest criterion of speech and endeavor”).

¹²⁶ See *Art of the Lie*, ECONOMIST (Sept. 10, 2016), <https://www.economist.com/news/leaders/21706525-politicians-have-always-lied-does-it-matter-if-they-leave-truth-behind-entirely-art> [<https://perma.cc/VXG9-H8WT>] (“Lies that are widely shared online within a network, whose members trust each other more than they trust any mainstream-media source, can quickly take on the appearance of truth.”).

endeavor to screen out illegitimate sources of expertise, and judges reject false claims of authority.¹²⁷ Neutral factfinders evaluate the quality of arguments and the consistency of assertions. Advocates present data, to which decision makers apply analytical thinking. And the process generates something agreed upon, or at least accepted, as a just conclusion.

Truth “is not an absolute or a relative, but a skill—a muscle, like memory—that collectively we have neglected so much that we have grown measurably weaker at using it.”¹²⁸ Courts can continue to exercise that muscle and build it up again. Facts can change minds in court, and courts could change minds about facts themselves. That will require listening—to what suspects are really saying, to what all sorts of witnesses want to reveal, and to data and science.

By addressing tensions between rules about honesty and broader goals involving accuracy in the criminal justice system, courts can better demonstrate epistemic competence in the face of complexity and uncertainty. They can model engagement with competing stories and many sources of information. They can insist on shared realities and accepted outcomes however strong adversary positions may be. By finding common baselines despite intense conflict—producing legitimate legal truth—courts could help restore reasoned public discourse about facts.

¹²⁷ See Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 497 (2000) (explaining that legal interpretation depends on judges distinguishing between “good and bad authority, privileged and nonprivileged authority, and authorities that rank higher or lower”).

¹²⁸ See Laura Miller, *Fakebook*, SLATE (Nov. 30, 2017), http://www.slate.com/articles/arts/books/2017/11/kevin_young_s_bunk_reviewed.html [<https://perma.cc/N5UM-66E2>] (reviewing KEVIN YOUNG, *BUNK: THE RISE OF HOAXES, HUMBUG, PLAGIARISTS, PHONIES, POST-FACTS, AND FAKE NEWS* (2017)).