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## New Legal Fictions

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# New Legal Fictions

PETER J. SMITH\*

*There was a time when judges routinely deployed legal fictions, which Lon Fuller famously defined as false statements not intended to deceive, in order to temper the disruptive effect of changes in legal doctrine. In an age of positive law, such classic legal fictions are significantly less common. But they have been replaced by new legal fictions.*

*In fashioning legal rules, judges rely with surprising frequency on false, debatable, or untested factual premises. At times, of course, such false premises simply reflect judicial ignorance. But there is an increasingly large body of empirical research available to judges, and more often than not judges' reliance on false premises is not the result of ignorance. Instead, judges often rely on false factual suppositions in the service of other goals.*

*In this Article, Professor Smith discusses a broad range of examples of "new legal fictions"—false factual suppositions that serve as the grounds for judge-made legal rules. The examples, drawn from diverse areas of doctrine, suggest a set of reasons, albeit generally unexpressed, why judges rely on new legal fictions. Sometimes judges rely on new legal fictions to mask the fact that they are making a normative choice. Other times, judges rely on new legal fictions to operationalize legal theories that are not easily put into practice. Still other times, judges deploy new legal fictions to serve functional goals and to promote administrability in adjudication. Finally, new legal fictions often serve a legitimating function, and judges rely on them—even in the face of evidence that they are false—to avoid what they perceive as delegitimizing consequences.*

*Judges rarely acknowledge that their ostensible factual suppositions are in fact new legal fictions, and they rarely articulate the reasons for relying on them. Even assuming one concludes that judges' apparent rationales for relying on them are valid, there is a serious question whether those rationales outweigh the general interest in judicial candor. After all, a general requirement of judicial candor—which permits the academy and the public to debate, criticize, and defend judges' grounds for decision—is essential to constraining judicial power. To be sure, whether any particular reason for judicial reliance on a new legal fiction is justified turns in part on an empirical judgment about the extent to which the new legal fiction actually achieves the end that the judge deployed it to achieve. But even when we can satisfactorily answer such empirical questions, we are still faced with a normative judgment about the relative desirability of candor and the goal served by dispensing with candor. Professor Smith concludes that the ends served by reliance on new legal fictions usually are not sufficient to overcome the presumption in favor of judicial candor, but that in rare cases dispensing with judicial candor might be justified.*

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\* Professor, George Washington University Law School. © 2007, Peter J. Smith. I am grateful for thoughtful comments from Tom Colby, Paul Butler, Chip Lupu, Dan Solove, Michael Abramowicz, Jenny Lyman, David Fontana, John Monahan, Brian Fitzpatrick, Barry Friedman, Rachel Barkow, Cristina Rodriguez, David Golove, and the participants in NYU's Colloquium on Constitutional Law.

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### INTRODUCTION

When the common law was the principal source of legal rules, judges routinely relied on legal fictions to mask the effects of legal change. The classic common law legal fiction treated as true a factual assertion that plainly was false, generally as a means to avoid changing a legal rule that required a particular factual predicate for its application.<sup>1</sup> Scholars divided on the utility and desirability of the legal fiction, but the device at least was the subject of frequent academic attention.

As the common law has waned as a source of legal rules, judges have relied on classic legal fictions with less frequency. But even in the age of positive law, judges often fashion new legal rules. And in so doing, they rely, with surprising frequency, on what I call “new legal fictions.” A judge deploys a new legal fiction when he relies in crafting a legal rule on a factual premise that is false or inaccurate. Scholars in every area of the law can identify examples of legal rules that are at least ostensibly based on false premises. Yet this common phenomenon is surprisingly undertheorized.

Consider the following examples. Ignorance of the law is not a defense because we presume that members of the public in a representative democracy are familiar with the law’s requirements.<sup>2</sup> Evidence that is inadmissible at trial for one purpose often is admissible for a different purpose because we presume that jurors can, when ruling at once on the multiple issues in a case, faithfully follow a limiting instruction and simply ignore evidence that they have seen with respect to some questions.<sup>3</sup> *Miranda* rights do not attach in many situations in which police confront and question individuals because we presume that oftentimes when police question individuals, the individuals will feel free to

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1. For example, courts often deemed trespassing children who were injured to be invitees (and thus entitled to a higher standard of care), even though the children were in no real sense invited on to the property. *See infra* Part II.A.

2. *See, e.g.*, *Cheek v. United States*, 498 U.S. 192, 199 (1991).

3. *See, e.g.*, *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985).

decline to answer or even to leave.<sup>4</sup> Many constitutional questions are answered, even if not exclusively, by referring to historical materials relevant to the Constitution's ratification because we presume that there is—and that it is possible to discern—one fixed, meaningful, singular, original understanding of the Constitution, even with respect to questions that the Framers did not consider at all.<sup>5</sup> We consult dictionaries and canons of construction when we attempt to give meaning to a statute because we presume that Congress was aware of and considered them when it enacted the statute.<sup>6</sup> Eyewitness testimony cannot generally be impeached by expert scientific evidence demonstrating that such testimony often is highly unreliable because we presume that jurors can competently assess the reliability of eyewitness testimony.<sup>7</sup>

These important premises that inform and shape doctrine in diverse areas of the law are all seriously flawed. Even before statutory law and administrative regulations spanned miles of shelf space in libraries, ordinary citizens were unlikely to know precisely what their legal rights and obligations were.<sup>8</sup> Modern psychology tells us that even sophisticated, well-educated jurors cannot ignore for one purpose evidence that is appropriately considered for another.<sup>9</sup> Few citizens—indeed, few lawyers—would truly feel free to leave, regardless of the circumstances, if they were questioned by police officers.<sup>10</sup> Legal realism, public choice theory, and linguistic theory teach that the notion of collective intent is a fiction, even putting aside the obvious problems of attempting to discern it from a fragmented and incomplete historical record for questions (not) considered more than two centuries ago.<sup>11</sup> Members of Congress often do not read the bills on which they are asked to vote, let alone consider the meaning of statutory terms in light of dictionary definitions and canons of construction.<sup>12</sup> Social scientists have demonstrated that eyewitness testimony often is unreliable and that both witnesses and jurors overestimate their abilities to determine its reliability.<sup>13</sup> Of course, for some—or perhaps all—of these examples, there is room for debate over whether in fact the premises are false. But together the examples suggest a broader, and perhaps more common, phenomenon than we

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4. See, e.g., *Stansbury v. California*, 511 U.S. 318, 322–25 (1994).

5. See, e.g., *Alden v. Maine*, 527 U.S. 706, 712–25 (1999) (relying extensively on ratification debates and *The Federalist Papers* to reach its conclusion that Article I “do[es] not include the power to subject nonconsenting states to private suits for damages in state courts”); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989).

6. See, e.g., *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 128 (1989) (consulting dictionaries); *FAIC Sec., Inc. v. United States*, 768 F.2d 352, 363 (D.C. Cir. 1985) (Scalia, J.) (utilizing canons of construction).

7. See, e.g., *United States v. Hall*, 165 F.3d 1095, 1107 (7th Cir. 1999); *State v. Coley*, 32 S.W.3d 831, 833–34 (Tenn. 2000).

8. See *infra* notes 121–23 and accompanying text.

9. See *infra* notes 72–73 and accompanying text.

10. See *infra* notes 115–17 and accompanying text.

11. See *infra* notes 135–39 and accompanying text.

12. See *infra* note 139 and accompanying text.

13. See *infra* note 80 and accompanying text.

would likely expect to find, and they at least suggest in the aggregate that we often base legal doctrine on false, debatable, or untested premises.

If nothing else, we can identify a new legal fiction only if we have some way to determine the validity of the factual premises on which judges rely in crafting legal rules. Although occasionally general knowledge or conventional wisdom alone can demonstrate a premise's falsity, usually we can confidently say that a premise is false only after measuring it against the results of existing empirical research. There is, to be sure, a lively debate among scholars over the appropriate role of empirical research in the formulation of legal rules.<sup>14</sup> But it is not my intention here to rehash the debate over the appropriate role of social science in legal decisionmaking. Rather, my principal aim is to demonstrate when and why judges rely on new legal fictions, and to consider when, if ever, the practice is appropriate. Although there are many reasons, I focus here on the six most common and important.

First and most straightforward, sometimes judges' suppositions simply turn out to be inaccurate, and the courts sometimes are open to abandoning the new legal fiction—and generally the legal rule for which it was a premise—when sufficient proof is offered to demonstrate its falsity.<sup>15</sup> In these cases, the new legal fiction is not intended to mask a normative choice but simply is based on a misunderstanding or misreading of empirical reality.

Second, judges often rely on new legal fictions because of the law's general imperviousness to social science and change. Courts have no formal or established mechanism for consideration of empirical research.<sup>16</sup> And even when the lessons of social science penetrate the sphere of judicial decisionmaking, the mechanisms for correcting legal rules tainted by new legal fictions are cumbersome and institutionally disfavored.

Third, judges' purported factual suppositions sometimes are devices, conscious or not, for concealing the fact that the judges are making normative choices in fashioning legal rules. There are many reasons, of course, why a judge might be reluctant to reveal that he is making such a normative choice—some of which are embraced by the other reasons discussed below that judges rely on new legal fictions. But sometimes judges have no justification for masking the normative choice other than the desire for obfuscation.

Fourth, new legal fictions often are devices for operationalizing legal theories. Proponents of textualism, for example, consult dictionaries, judicial precedent, and canons of construction when they interpret statutes, based on the assumption that members of Congress consult them as well when they draft and vote on proposed legislation. When pressed, textualists generally concede that these assumptions are likely false, but they defend them nevertheless as a way

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14. See *infra* Part I.B.

15. See, e.g., *United States v. Leon*, 468 U.S. 897, 928 (1984) (Blackmun, J., concurring).

16. See John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 485–88 (1986).

to operationalize a theory of judicial restraint.

Fifth, new legal fictions often serve functional goals and promote administrability in judicial process. For example, although many judges at this point undoubtedly are aware that eyewitness identifications often are unreliable, they continue to exclude expert testimony to that effect because admitting it would risk forcing mini-trials in the countless criminal cases that turn on eyewitness evidence—and would risk undermining a broad range of criminal prosecutions.

Sixth, new legal fictions often serve a legitimating function, and judges may preserve them—even in the face of evidence that they are false—if their abandonment would have delegitimizing consequences. What would it mean for public acceptance of the right to a trial by jury, for example, if courts declared that jurors generally are not competent faithfully to follow a judge's instructions about how the law limits their consideration of the evidence? Judges recognize that the law often serves an expressive function, and under certain circumstances they are willing to rely on new legal fictions if they will produce doctrine with positive expressive value. It may be debatable whether in fact the public would view the politico-legal system as any less legitimate if judges abandoned these new legal fictions. But if nothing else, judges' factual assumptions often reflect their aspirations for society and the law, even if those aspirations are unlikely to be realized.

There will of course be times when these justifications for relying on new legal fictions are persuasive. But there are reasons for caution nonetheless. When judges rely on new legal fictions, they generally do not acknowledge the falsity of their premises. Accordingly, unlike classic legal fictions—which, by definition, were not intended to deceive<sup>17</sup>—new legal fictions involve a lack of judicial candor. In the end, we must ask whether these justifications for the reliance on new legal fictions are sufficient. Even assuming that there is virtue in translating legal theory into practice and in harnessing the expressive force of the law, to justify the practice we must conclude that it outweighs the harm worked by the lack of judicial candor and transparency. Here, I tend to share David Shapiro's intuition that "candor is to the judicial process what notice is to fair procedure," and that "the fidelity of judges to law can be fairly measured only if they believe what they say in their opinions and orders."<sup>18</sup> The burden of justification, therefore, is on those who defend the practice of the new legal fiction.

To be sure, some scholars have argued that judicial transparency is not always desirable, some for reasons other than those suggested by the rationales described above for why judges rely on new legal fictions.<sup>19</sup> But I argue that the

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17. See *infra* Part II.A.

18. David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 750 (1987).

19. Charles Nesson, for example, has argued that judicial decisions based on probabilities—roughly the equivalent of empirical research in this context—might not be as acceptable as decisions whose grounds are largely hidden from the public. See Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1196 (1979). Guido Calabresi has argued

default preference should be for judicial transparency, which would tend to minimize the frequency of new legal fictions and is more consistent with the general urge to limit unconstrained judicial discretion in light of what Bickel famously called the “counter-majoritarian difficulty.”<sup>20</sup> Transparency in this context would require the judge to justify a premise in light of conflicting existing knowledge (whether based on empirical research or some other source), or to ground the legal rule in something other than the false premise. Judicial transparency helps us to determine whether a judicial choice is actually based on the judge’s normative preferences or instead is based on the judge’s factual suppositions. When judges do in fact craft legal rules based on purely factual suppositions—and are open about it—then we can check and, if necessary, urge change based on the correctness of their empirical conclusions. And when judges make clear that they are instead in fact deciding based upon normative preferences, we can more readily decide whether the normative choice is desirable, and whether it is one that we want judges to have authority to make.

## I. NEW LEGAL FICTIONS

### A. DEFINING THE PHENOMENON

A court deploys a new legal fiction when (1) the court offers an ostensibly factual supposition as a ground for creating a legal rule or modifying, or refusing to modify, an existing legal rule; and (2) the factual supposition is descriptively inaccurate. In most cases, the premise is false because empirical research has demonstrated that it is false, although occasionally the factual supposition so conflicts with general knowledge and conventional wisdom that it can be characterized as a new legal fiction even without reference to empirical research. To be a new legal fiction, the court must offer the factual supposition as a (or the) basis supporting the court’s normative choice among competing possible legal rules.

To illustrate what I mean by a new legal fiction, consider the example of expert testimony about the reliability of eyewitness identifications. Social science research has exhaustively demonstrated that eyewitness identifications often are unreliable, that most people grossly overestimate their and other people’s ability to make accurate eyewitness identifications, and that jurors are

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that candor is not always optimal when courts address tragic choices. *See infra* notes 188–90 and accompanying text. Meir Dan-Cohen has noted that the lack of “acoustic separation” between decision rules and conduct rules sometimes argues in favor of dispensing with candor. *See infra* note 123 and accompanying text. Others have argued that stare decisis might in some cases be a countervailing consideration, particularly when the factual assumptions supporting one legal rule have spilled over into other areas of the law. *See, e.g.,* *Barefoot v. Estelle*, 463 U.S. 880, 896–97 (1983) (rejecting social science research about predictions of future dangerousness in part because of stare decisis), *superseded by statute on other grounds*, 28 U.S.C. § 2253 (2000), *as recognized in* *Slack v. McDaniel*, 529 U.S. 473 (2000). I discuss these claims *infra* at Part IV.C.

20. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–17, 207 (2d ed. 1986).



disproportionately influenced by eyewitness testimony.<sup>21</sup> Courts in many jurisdictions, however, categorically do not admit expert testimony to explain the reliability of eyewitness evidence, and even in those jurisdictions in which such testimony is not categorically inadmissible, courts routinely decline to admit it. Courts have generally based the rule—whether categorical or presumptive—against such expert testimony on the premise that jurors are fully competent to assess the reliability of eyewitness evidence.<sup>22</sup> The rule's premise is a new legal fiction because (1) it is offered as a factual, rather than a normative, supposition, and (2) social science research demonstrates persuasively that it is false.<sup>23</sup>

To illustrate the phenomenon further, consider two categories of false premises that are *not* properly characterized as new legal fictions. The first category is when a court relies on one factual premise, which turns out to be or might be false, in order to support another *factual* conclusion. For example, assume that the outcome of a bench trial turns on whether the defendant's car ran a red light. The only evidence admitted on the question shows that another driver stopped at the intersection as the defendant's car went through the light. The court refuses to permit the defendant to offer evidence that the other driver stopped to pick up his glasses because that the evidence is hearsay. The court concludes, based on the indirect evidence, that the light was red, and then concludes (again, as a matter of fact) that the defendant ran the red light. If the defendant could demonstrate, with the excluded hearsay evidence, that the light in fact was not red, then the factual finding that the defendant ran a red light is based on a false factual premise. This is not an example of a new legal fiction because the false premise supports a factual, rather than a legal, conclusion.

The second category of false premises that is not embraced by the term new legal fiction is when a court, in the course of applying a legal rule defined by exogenous sources, explains the factual premise of that legal rule. A court asserts this form of false premise when the premise is actually embedded in a legal rule that the court did not create but simply must enforce. For example, consider the anticommandeering principle announced in *New York v. United States*<sup>24</sup> and *Printz v. United States*,<sup>25</sup> in which the Court held that Congress lacks authority to compel the states to enact, administer, or implement federal

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21. See *infra* notes 79–87 and accompanying text.

22. See *infra* note 78 and accompanying text.

23. To be sure, as explained *infra* at note 78 and accompanying text, some courts have claimed that the rule excluding expert testimony about eyewitness evidence is fundamental to a fair trial, see *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999); some courts have begun to question the rule in light of empirical research, see *State v. Cheatam*, 81 P.3d 830, 840 (Wash. 2003); and some courts (albeit very few) have acknowledged that the new legal fiction supports a rule advanced for functional reasons, notwithstanding the empirical realities, see *United States v. Hall*, 165 F.3d 1095, 1119–20 (7th Cir. 1999) (Easterbrook, J., concurring). But the majority of courts continue to rely on the new legal fiction that jurors, at least in the general run of cases, are capable of assessing the reliability of eyewitness evidence without the help of expert testimony. See *infra* note 77 and accompanying text.

24. 505 U.S. 144 (1992).

25. 521 U.S. 898 (1997).

directives.<sup>26</sup> The majority in both cases asserted that the original understanding was that such commandeering of state processes was impermissible because it might blur the lines of political accountability, leaving voters uncertain of whom to punish when unpopular federal programs are implemented by state authorities.<sup>27</sup> If we assume for present purposes that originalism is the appropriate methodology for interpreting the Constitution, and that the majority was correct in its view of the original understanding, then it is irrelevant that the Framers' fears about political accountability likely were overblown. One could argue, of course, that state officials are sufficiently savvy to inform voters—repeatedly and loudly—that the unpopular nuclear waste dump (to use the example from *New York v. United States*) is in their backyard courtesy of the federal government, and thus that the voters are likely to know whom to punish. But if commandeering is constitutionally precluded because the original understanding was that it is precluded, it does not matter that the original *justification* for the ban is logically or empirically questionable. In cases such as these—again, assuming agreement on constitutional interpretive methodology and on the proper application of that methodology to the case in question—the “premise” really is not the Court's at all but rather is embedded in the constitutional rule that the Court is bound to enforce, and the Court presumably cannot substitute its own competing premise to serve as the basis for a contrary rule.<sup>28</sup>

If one believes that judges simply interpret the law, then one might conclude that all factual premises that judges announce are simply embedded in the law itself, and that the question whether the premises are “correct” is irrelevant. If one believes, for example, that the Constitution itself answers the question whether statutes must be interpreted solely according to their text, and originally did so based on the assumption that legislators consult dictionaries when they draft statutory language, then it is beside the point whether legislators in practice actually do so.<sup>29</sup>

But I start from the premise that this is a facile, or at least incomplete, view of the judicial role.<sup>30</sup> Sometimes, of course, judges very consciously *make* law,

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26. See *Printz*, 521 U.S. at 933–35; *New York*, 505 U.S. at 149.

27. See *Printz*, 521 U.S. at 918–25; *New York*, 505 U.S. at 160–66. I have oversimplified for purposes of this example. It is not clear, for instance, whether the Court invoked the political accountability rationale in *New York* and *Printz* as part of the original understanding, or instead as a post-hoc justification based upon political theory.

28. See Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 2 (1998) (“Nothing pretentious enough to warrant the name of theory is required to decide cases in which the text or history of the Constitution provides sure guidance.”).

29. See, e.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 56–105 (2001).

30. See David L. Faigman, “Normative Constitutional Fact-Finding”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 543 (1991) (“The Constitution's many broad prescriptions must be interpreted in accordance with various external guides.”). Indeed, the notion that judges do not make the law, but instead simply find, discover, or declare it, is a formalistic notion that has itself been described as a colossal legal fiction. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 202 (1985); Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB.

acting in a common law fashion, and in these cases it is plain that the judges have a choice in what sort of assumptions to make. But even in those cases that are not plainly exercises of judicial lawmaking authority, the judges must look to sources other than the governing law—whether it be the Constitution, a statute, a rule, or something else—to provide meaning and to craft legal rules. In these cases, too, the judges make policy judgments, and they often do so based on factual suppositions that they themselves must make.<sup>31</sup>

This is not to say that the judges are unbounded in their authority to choose their premises and craft legal rules, for at least sometimes—and perhaps often—another authority will have made the choice for the court. When the Constitution, a statute, or another source that carries with it the force of law itself embodies a particular premise, courts are generally not free to disregard it.<sup>32</sup> And in such cases, the elaboration of the factual premise for the rule that the court is bound to enforce does not constitute a new legal fiction, even if the premise is descriptively inaccurate. But experience suggests that these disputes—particularly if they are of constitutional dimension—are relatively rare,<sup>33</sup> if for no other reason than that people tend not to litigate cases with obvious answers.<sup>34</sup>

Regardless of the frequency with which such cases arise, they are not my concern here. Instead, I am interested in cases in which a court has some (even if not unbounded) freedom to craft legal rules, and in which the court exercises that freedom by asserting an ostensibly factual premise as a ground for the legal rule it creates. In this sense, new legal fictions are justificatory devices and thus are worthy of close scrutiny by commentators. After all, even those who believe that judges ought to have broad discretion to fashion legal rules tend to think

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POL'Y 155, 155–56 (1994); cf. Louise Harmon, *Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 57 (1990) (“We are too steeped in the tradition of legal realism to be shocked by an accusation that judges make changes in the law.”).

31. Cf. Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 880 (1986) (“Despite the best efforts of interpretivists, originalists, and self-proclaimed strict constructionists, . . . constitutional law as we know it—and as it has been from the start—demonstrates quite clearly that even our written ‘authentic form of words’ requires additional criteria of construction and interpretation. . . . We lack any rule of recognition to distinguish constitutional truth from constitutional fiction.”).

32. *But cf.* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 46 (1988) (“[S]tatutes ought to be responsive to today’s world. They ought to be made to fit, as best they can, into the current legal landscape.”); William N. Eskridge Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (arguing that statutes should be interpreted in light of their present context).

33. See Faigman, *supra* note 30, at 607 (“Obviously, the text sometimes dictates particular results and original intent might occasionally do the same. These occurrences are rare, however, and in general the importance of the several sources of interpretation lies in the dynamic they create between the Court, the Constitution, and society.”).

34. See, e.g., Posner, *supra* note 28, at 2 (“No theory is required to determine how many Senators each state may have.”). And, of course, it would be surprising to find litigation on that question. Cf. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 16 (1984) (arguing that because cases that are not close in merit settle, the cases ultimately resolved by adjudication are closer and more difficult).

that judges ought to provide coherent and satisfactory justifications for their choices.<sup>35</sup> But when judges offer new legal fictions, the justification is presumptively problematic because it is by definition false.

B. THE ROLE OF SOCIAL SCIENCE IN THE FORMULATION OF LEGAL RULES

To identify a new legal fiction, it is usually necessary to refer to empirical research; after all, it is often difficult to claim that a factual supposition on which a legal rule is based is false without reference to some other measure of descriptive reality. But although many commentators take for granted that social science is an appropriate source for courts to consider in formulating legal rules,<sup>36</sup> there is in fact a lively debate among scholars over whether empirical research is relevant to the formulation of legal rules at all. Most prominently, Ronald Dworkin has argued that empiricism—or, in his terms, facts—should play no role in determining constitutional rules.<sup>37</sup> He argues that when courts determine legal rules they make “interpretive judgments,” which “locate[] a particular phenomenon within a particular category of phenomena by specifying its meaning within the society in which it occurs” and are based on “shared understandings that reinforce each other and cannot change in the way in which independently described behavior, of the sort that figure in statistical correlations, can change.”<sup>38</sup> Dworkin contrasts interpretive judgments with “causal judgments,” which “assert a causal connection between two independently specifiable social phenomena” and are the grist of social scientists.<sup>39</sup> Unlike causal judgments, interpretive judgments “study society and its practices in the same way that ordinary judgments of adjudication—the kind of judgments judges make in hard cases all the time—study standard legal materials.”<sup>40</sup> In Dworkin’s view, interpretive judgments are entirely normative, wholly aside from what facts might tell us.<sup>41</sup>

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35. See, e.g., Robert Leflar, *Honest Judicial Opinions*, 74 Nw. U. L. REV. 721, 740 (1979).

36. See, e.g., Monahan & Walker, *supra* note 16, at 477–78.

37. See generally Ronald Dworkin, *Social Sciences and Constitutional Rights—The Consequences of Uncertainty*, 6 J.L. & EDUC. 3 (1977).

38. *Id.* at 3–4, 6; cf. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L.J. 137, 157, 159–66 (1990) (concluding that the “Court’s failure to accord any role to psychology in its trial law decisions may be due to their fundamentally incompatible normative systems”).

39. Dworkin, *supra* note 37, at 3.

40. *Id.* at 6. Dworkin argues that in making such judgments, judges attempt to distill the community’s legal norms. See RONALD DWORIN, *LAW’S EMPIRE* 225–26 (1986) (“According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”).

41. Dworkin has similarly argued that to the extent that constitutional rules involve individual rights, the rights serve as trumps and thus leave no room for balancing against other interests; and if there is no room for balancing, there is generally no need for empirics to tell us the relative weight to accord to various interests. See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* xi (1977); see also George P. Fletcher, *The Nature and Function of Criminal Theory*, 88 CAL. L. REV. 687 (2000) (arguing against balancing rights of criminal defendants against other interests).

At the other extreme, Richard Posner argues that empiricism ought to replace normative analysis in constitutional law.<sup>42</sup> He argues that the “big problem in constitutional law today . . . is not lack of theory, but lack of knowledge—lack of the very knowledge that academic research, rather than the litigation process, is best designed to produce.”<sup>43</sup> Posner bemoans that most constitutional theory today is normative; as a result, he argues, “constitutional theory, while often rhetorically powerful, lacks the agreement-coercing power of the best natural and social science.”<sup>44</sup> He argues that “one thing that we may hope for through the application of the methods of scientific theory and empirical inquiry to constitutional law is the eventual accumulation of enough knowledge to enable judges at least to deal sensibly with their uncertainty about the consequences of their decisions.”<sup>45</sup> Posner’s analysis of recent cases makes clear that he would prefer something like pure cost-benefit analysis in answering constitutional questions, with the relevant values in the calculus supplied by empirical research.<sup>46</sup>

Others, such as Tracey Meares,<sup>47</sup> Bernard Harcourt,<sup>48</sup> Deborah Jones Merritt,<sup>49</sup> and Michael Dorf,<sup>50</sup> have urged a “third path” between empiricism and interpretivism that recognizes that “interpretive judgments are central to constitutional decision-making” but asserts that such judgments cannot “be made in an empirical vacuum.”<sup>51</sup> According to this view, courts’ normative choices—interpretive judgments, in Dworkin’s terms—are influenced by descriptive considerations.<sup>52</sup> Meares and Harcourt argue that “[j]udicial decisions that address the relevant social science and empirical data are more transparent in that they expressly articulate the grounds for factual assertions and, as a result, more clearly reflect the interpretive choices involved in criminal procedure decision-

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42. See generally Posner, *supra* note 28.

43. *Id.* at 3.

44. *Id.*

45. *Id.* at 22.

46. Posner criticizes *United States v. Virginia*, 518 U.S. 515 (1996), and *Romer v. Evans*, 517 U.S. 620 (1996), for failing to draw on empirical research to balance competing interests. See Posner, *supra* note 28, at 12–18.

47. See Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Process—and Three Answers*, 2002 U. ILL. L. REV. 851.

48. See Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733 (2000).

49. See Deborah Jones Merritt, *Constitutional Fact and Theory: A Response to Chief Judge Posner*, 97 MICH. L. REV. 1287 (1999).

50. See Michael Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4 (1998).

51. Meares & Harcourt, *supra* note 48, at 735.

52. For example, in *United States v. Leon*, the Court created a good-faith exception to the exclusionary rule. 468 U.S. 897 (1984). Whether to create such an exception—indeed, whether to apply an exclusionary rule at all—is a question that requires a normative judgment about the relative importance of the competing interests in individual rights and law enforcement. That judgment, however, can be influenced by empirical research about the extent to which such an exception might encourage police misconduct. See *id.* at 918–21 (assuming that the exception is unlikely to produce police misconduct); *id.* at 928 (Blackmun, J., concurring) (arguing that the holding might change if empirical research demonstrates that the Court’s assumption is inaccurate).

making.”<sup>53</sup> Merritt likewise argues that “empirical knowledge is most useful in unmasking the theoretical assumptions that undergird constitutional law, in focusing those theories, and in contributing to a multidimensional view of society that informs the substance of constitutional law.”<sup>54</sup> Similarly, Dorf maintains that “[t]o say that empirical propositions cannot logically entail normative ones is not to say that empirical facts are irrelevant to normative questions,” and he urges the Court to join judicial pragmatism with increased reliance on social science and empirical studies in constitutional decisionmaking.<sup>55</sup>

Others have suggested that empirical evidence might “corrupt[] decisionmaking in the criminal law arena in ways that undermine how we typically conceptualize the proper operation of the criminal justice system.”<sup>56</sup> Charles Nesson, for example, has argued that perception sometimes is more important than reality, and that judgments sometimes are more acceptable if they rely on complex and hidden decisionmaking processes.<sup>57</sup> Nesson’s approach is generalizable to the conclusion that “even rigorous, generalizable empirical studies must give way to preserve our existing system because such studies center on averages rather than particular cases.”<sup>58</sup> Yet, as Tracey Meares has argued, Nesson’s conclusion is itself empirically contingent: it is far from clear that the public would view as more legitimate a system that continued to operate without transparency if the “errors” of the system (for example, racial bias or wrongful convictions) “were demonstrated in bold relief.”<sup>59</sup>

Still others have expressed caution about the courts’ capacity to evaluate empirical evidence.<sup>60</sup> Courts, after all, are limited by the case and controversy requirement, and arguably are not competent to serve as referees for disputes

53. Meares & Harcourt, *supra* note 48, at 735; *see also id.* at 793 (“By addressing social science data, the Court would articulate more explicitly the values of interest . . . This, in turn, would make more transparent the interpretive choices that underlie the balancing of liberty and order interests.”); *accord* Meares, *supra* note 47, at 873.

54. Merritt, *supra* note 49, at 1287.

55. Dorf, *supra* note 50, at 37.

56. Meares, *supra* note 47, at 857.

57. *See* Charles R. Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1368–69 (1985); Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1196–97 (1979).

58. Meares, *supra* note 47, at 862; *cf.* Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1337 (1971) (“[T]he costs of attempting to integrate mathematics into the factfinding process of a legal trial outweigh the benefits.”).

59. Meares, *supra* note 47, at 863 (discussing *McClesky v. Kemp*, 481 U.S. 279 (1987), as an example); *see id.* at 865–66 (suggesting that social psychology research indicates that the public would have greater respect for the system—and thus greater respect for law—if the system operated more, not less, transparently); *see also* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1608–09 (2005) (arguing that in the context of eyewitness identifications, DNA analysis and other accuracy-enhancing developments have undermined the “obscuring of the periodic disconnect between resolution and truth”).

60. *See, e.g.*, *Basic Inc. v. Levinson*, 485 U.S. 224, 253 (1988) (White, J., joined by O’Connor, J., concurring in part and dissenting in part) (“[W]ith no staff economists, no experts schooled in the ‘efficient-capital-market hypothesis,’ no ability to test the validity of empirical market studies, we are

over social science principles. Indeed, there is a long history of ambiguity over how “courts should obtain social science data” and “evaluate what they have obtained.”<sup>61</sup> Yet if courts are to make factual assumptions, they ought at least to ground those assumptions in, well, fact. To the extent that this is easier said than done, Monahan and Walker have provided a roadmap, urging courts to treat social science research not as fact but rather as “social authority,” which would be roughly equivalent to precedent in a common law system.<sup>62</sup>

Courts’ actual experience with social science has been uneven at best. Although judges have begun to cite social science research more often in their decisions,<sup>63</sup> it is still substantially more common to find legal scholars relying on social science research as a basis for attacking judicial decisions.<sup>64</sup> Indeed, judges still often ignore social science research in formulating legal rules, and when they have not ignored it, they have been just as likely to be hostile towards it as to cite it favorably.<sup>65</sup>

I share the view that social science has a role to play in the formulation of legal rules. But there are some caveats. Social scientists have of course not

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not well equipped to embrace novel constructions of a statute based on contemporary microeconomic theory.”).

61. See Monahan & Walker, *supra* note 16, at 485–88. It is unclear whether parties should present legislative facts “via expert witnesses at a hearing or include them in briefs,” *id.* at 485, and whether “a court should independently search for scientific research when it appears relevant to the decision but has not been presented by the parties,” *id.* at 486.

62. *Id.* at 488. Although Monahan and Walker acknowledge that social science research is similar to fact in that “both concern the way the world is,” *id.* at 489, they argue that it also is similar to law in that “both produce principles applicable beyond particular instances,” *id.* at 490. Of particular salience here, they argue that “[l]ike social science, law, particularly court decisions in a common-law system, derives from specific empirical events (the facts of a case), but speaks more broadly. . . . A decision takes on the mantle of legal authority in subsequent litigation precisely to the extent that the decision transcends the people, situation, and time present in the original case.” *Id.* at 490–91. They propose a series of “judicial management procedures” to guide courts—and limit courts’ discretion—in relying on social science research. *Id.* at 494–515.

63. See Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1108–10 (1997) (noting that, since 1991, “there has been a substantial and continuing increase in the Court’s citation of nonlegal sources”). This is a fairly recent phenomenon. See Tanford, *supra* note 38, at 139 (stating that as of 1988, “not a single Supreme Court majority opinion ha[d] relied even partly on the psychology of jury behavior to justify a decision about the proper way to conduct a trial”).

64. See, e.g., Tanford, *supra* note 38, at 138.

65. See, e.g., Gray v. Mississippi, 481 U.S. 648, 679 (1987) (Scalia, J., dissenting) (same issue); Lockhart v. McCree, 476 U.S. 162, 169–73 (1986) (dismissing studies demonstrating that death-qualification procedures produce juries biased in favor of the prosecution at the guilt determination phase); Ballew v. Georgia, 435 U.S. 223, 246 (1978) (Powell, J., concurring). Justice Felix Frankfurter once said, “If that is a settled constitutional doctrine, then I do not care what any . . . professor in sociology tells me.” ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952–55, at 65 (Leon Friedman ed., 1969). See generally James R. P. Ogloff, *Two Steps Forward and One Step Backward: The Law and Psychology Movement(s) in the 20th Century*, in TAKING PSYCHOLOGY AND LAW INTO THE TWENTY-FIRST CENTURY 1, 4–11 (James R. P. Ogloff ed., 2002) (arguing that the legal profession’s relationship with social science has vacillated between integration and isolation); Tanford, *supra* note 38, at 140–41 (“[T]he Justices consistently ignore, distort and display hostility towards the empirical research, preferring to trust their own intuitions.”).

investigated every controversial factual question relevant to the formulation of future legal rules or the modification of current ones. Accordingly, even assuming that judges can use social science to ground their interpretive judgments, there will be many important questions for which no body of social science research exists. Judges will not generally be able to defer resolution of difficult questions simply because the litigation calendar has moved more quickly than the research calendar. And even when there is such a body of evidence, it will not always point uniformly in the same direction. Social science does not purport to provide definitive answers even to those thorny questions that researchers choose to consider. Courts (and law), on the other hand, generally must. It is perhaps inevitable, therefore, that judges will sometimes be forced to rely on their intuitions in crafting legal rules, and that those intuitions sometimes will turn out to have been mistaken. I also am not particularly optimistic that anytime soon judges will succeed in neutrally relying on social science, especially when empirical research conflicts with their normative commitments. There is a substantial risk that judges will manipulate social science research to achieve predetermined ends,<sup>66</sup> just as judges have been accused of doing with precedent, history, and other ostensibly constraining sources of authority.<sup>67</sup>

At a minimum, however, we can expect there to be a substantial number of questions—both questions of first impression and questions that the courts are invited to revisit—for which there is a uniform and substantial body of research. It is in these cases that we will be most able to spot new legal fictions, and then to decide whether the courts are justified in their continued reliance on them.

### C. EXAMPLES OF NEW LEGAL FICTIONS

In this section, I discuss several examples of new legal fictions. Reasonable minds can disagree over whether each of the examples is a new legal fiction. Indeed, I have intentionally chosen some examples for which the extent of the

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66. See, e.g., *Ballew*, 435 U.S. at 231–39 (relying on social science research to declare unconstitutional a five-member jury in a criminal case); David Kaye, *And Then There Were Twelve: Statistical Reasoning, the Supreme Court, and the Size of the Jury*, 68 CAL. L. REV. 1004, 1024–34 (1980) (criticizing the Court's treatment of social science research in *Ballew*); compare *Witherspoon v. Illinois*, 391 U.S. 510, 517–18 (1968) (holding that a statute that permitted a juror who opposed the death penalty in all cases to be challenged for cause in a capital case did not violate the Constitution on the ground that juries so constituted would be more prone in favor of conviction at the guilt stage, but noting that its decision partially reflects the “tentative and fragmentary” nature of current social science data on the issue), with *Lockhart*, 476 U.S. at 169–73 (rejecting post-*Witherspoon* studies demonstrating that death qualification procedures produce juries biased in favor of the prosecution at the guilt determination phase); see also Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 467–70 (2006) (arguing that judges generally are skeptical about empirical studies that conflict with their basic view of the world); Tanford, *supra* note 38, at 151.

67. See, e.g., Peter J. Smith, *Federalism, Instrumentalism, and the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 906, 948–54 (2006) [hereinafter Smith, *Instrumentalism*]; Peter J. Smith, *The Marshall Court and the Originalist's Dilemma*, 90 MINN. L. REV. 612, 617–18 (2006) [hereinafter Smith, *Originalist's Dilemma*]; Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 224–25 (2004) [hereinafter Smith, *Sources*].



falsity of the premise is the subject of intense controversy—such as the fraud-on-the-market theory—to spark discussion about the appropriate definition of the term new legal fiction. Unfortunately, it is impossible in a project such as this to give the complete treatment to each example that would be required to assess thoroughly whether it involves a new legal fiction. I offer the following examples, instead, to illustrate better what I mean by the phenomenon of the new legal fiction, and to provide context for the discussion that follows about the reasons why judges so frequently rely on them.

I have grouped the examples loosely by category: new legal fictions involving false premises about cognitive processes; new legal fictions involving false premises about individual beliefs; and new legal fictions involving false premises about legislative processes and institutional relationships. In so categorizing the examples, I am mindful that each category raises distinct considerations that are relevant both as a matter of definition and to the discussion that follows about the rationale for, and desirability of, reliance on new legal fictions.

### 1. Cognitive Processes

*a. Limiting Instructions for Jurors.* When evidence that is inadmissible nevertheless is introduced before the jury, the judge will instruct the jury to disregard it.<sup>68</sup> Similarly, when evidence is admitted for certain purposes but not for others, the judge will instruct the jurors that they may consider it only for the valid purposes.<sup>69</sup> Courts have used so-called “limiting instructions” in these two circumstances for many years, and they have repeatedly defended the practice against challenges by asserting the “crucial assumption” that “jurors carefully follow instructions.”<sup>70</sup>

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68. See FED. R. EVID. 105. For example, if evidence that has been illegally obtained and is incriminating to the defendant is introduced notwithstanding a timely invocation of the exclusionary rule, the court will instruct the jury to disregard the evidence. See, e.g., *Zafiro v. United States*, 506 U.S. 534, 539 (1993).

69. For example, a court may not admit evidence of the defendant’s prior crimes “in order to show action in conformity therewith,” but may admit such evidence as proof of motive, opportunity, intent, and the like. See FED. R. EVID. 404(b); *United States v. Danzey*, 594 F.2d 905, 914 (2d Cir. 1979).

70. *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985); accord *Weeks v. Angelone*, 528 U.S. 225, 234 (2000); *United States v. Olano*, 507 U.S. 725, 740 (1993); *Parker v. Randolph*, 442 U.S. 62, 73 (1979) (plurality opinion) (“A crucial assumption underlying [the] system [of trial by jury] is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed.”). See generally ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 73–74 (1970). There have, to be sure, been occasional expressions of doubt about the premise that jurors can follow limiting instructions, but they have been the exception, not the rule. See, e.g., *United States v. Delli Paoli*, 229 F.2d 319, 321 (2d Cir. 1956) (Hand, J.); *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932) (Hand, J.) (describing the instruction on the limited use of hearsay as a “recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody’s else”); cf. *United States v. Martinez*, 14 F.3d 543, 551 (11th Cir. 1994) (challenging assumption when jurors displayed a willingness to disregard instructions); *Mitchell v. Gonzales*, 819 P.2d 872, 877–78 (Cal. 1991) (relying on empirical studies to conclude that pattern jury instruction on proximate cause was confusing and conceptually misleading).

“Given the nature of jury instructions a criminal defendant’s access to justice depends in large part upon jurors understanding their instructions.”<sup>71</sup> Yet a large body of social science research conducted over the past twenty years demonstrates that jurors’ abilities to follow limiting instructions are, at best, limited.<sup>72</sup> Indeed, the research suggests that limiting instructions not only are ineffective, but also that they sometimes produce a “backfire effect”—that is, “jurors pay greater attention to information after it has been ruled inadmissible than if the judge had said nothing at all about the evidence and allowed jurors to consider it.”<sup>73</sup>

The presumption that jurors can understand and follow limiting instructions

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In only one context has the Court seriously challenged the premise that jurors can understand limiting instructions. In *Bruton v. United States*, 391 U.S. 123, 126 (1968), the Supreme Court concluded that it was unrealistic to assume that jurors can disregard the incriminating confession of a codefendant in assessing the guilt of a defendant. But even in this context, the Court has backtracked, narrowly construing *Bruton* in *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (relying on the presumption that juries follow instructions). *But see* *Gray v. Maryland*, 523 U.S. 185, 195 (1998) (limiting *Richardson*’s limitation of *Bruton*). *See generally* Judith L. Ritter, *The X Files: Joint Trials, Redacted Confessions and Thirty Years of Sidestepping Bruton*, 42 VILL. L. REV. 855, 862–82 (1997) (tracing the evolution of the *Bruton* doctrine).

71. Judith L. Ritter, *Your Lips Are Moving . . . But the Words Aren’t Clear: Dissecting the Presumption that Jurors Understand Instructions*, 69 MO. L. REV. 163, 195 (2004).

72. *See* Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL’Y & L. 677, 686 (2000); Laurence J. Severance & Elizabeth Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC’Y REV. 153, 176 (1982); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 47 (1985). For a comprehensive review of people’s limited ability to ignore information, *see generally* INTENTIONAL FORGETTING: INTERDISCIPLINARY APPROACHES (Jonathan M. Golding & Colin M. MacLeod eds., 1998); LAWRENCE S. WRIGHTSMAN ET AL., PSYCHOLOGY AND THE LEGAL SYSTEM 323–24 (3d ed. 1994). *But see* *Free v. Peters*, 12 F.3d 700, 705–06 (7th Cir. 1993) (Posner, C.J.) (questioning whether the studies, most of which are based on test subjects, validly replicate a courtroom experience); 1 WEINSTEIN’S FEDERAL EVIDENCE §105.03(1) (Joseph M. McLaughlin ed., 2005) (arguing that limiting instructions are effective). There is also a substantial body of evidence that jurors have difficulty understanding pattern jury instructions. *See, e.g., Mitchell*, 819 P.2d at 877 (presenting social science studies revealing that jurors commonly do not understand terms of art like “proximate cause”); J. Alexander Tanford, *Law Reform by Courts, Legislatures, and Commissions Following Empirical Research on Jury Instructions*, 25 LAW & SOC’Y REV. 155, 157, 164–67 (1991); Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1086–99 (2001).

73. Lieberman & Arndt, *supra* note 72, at 689. Researchers have offered several theories to explain the backfire effect, including (1) “belief perseverance,” which suggests that “once individuals form a belief, the belief becomes highly resistant to change and influences how they perceive and construct future information,” *id.* at 691; (2) “hindsight bias,” which leads a person who knows the outcome of a particular event to overestimate the likelihood that the outcome would have occurred, *id.* at 692; (3) “reactance theory,” which posits that “when individuals perceive that their ability to perform ‘free behaviors’ is threatened, they become psychologically aroused” and respond by reacting to the perceived constraint (here, the limiting instruction), *id.* at 693; and (4) “ironic processes of mental control,” which describes the phenomenon whereby “any effort at mental control involves a combination of an active, conscious operating process that searches for thoughts indicative of the desired mental state and a more unconscious monitoring process that searches for indicators of unsuccessful mental control,” *id.* at 697.

thus plainly seems to be a new legal fiction. Indeed, Judge Easterbrook has effectively recognized it as such, noting that the presumption is in practice “a rule of law—a description of the premises underlying the jury system, rather than a proposition about jurors’ abilities and states of mind.”<sup>74</sup> Because “the ability of jurors to sift good evidence from bad is an axiom of the system,” he argues, “courts not only permit juries to decide these cases but also bypass the sort of empirical findings that might help jurors reach better decisions.”<sup>75</sup>

*b. The Reliability of Eyewitness Testimony.* It is commonplace at trial for parties to offer, and judges to allow, eyewitness testimony, either to describe events that the witness viewed or to identify a person whom the witness observed.<sup>76</sup> The traditional view, expressed by John Wigmore and others, was that jurors have the requisite expertise to assess the reliability of eyewitness testimony.<sup>77</sup> Accordingly, until recently courts always—and even recently courts almost always—exclude expert testimony about the reliability of eyewitness evidence.<sup>78</sup> Yet “[v]irtually all of the pertinent studies since 1932 have pin-

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74. *Gacy v. Welborn*, 994 F.2d 305, 313 (7th Cir. 1993) (Easterbrook, J.); *accord* *Thomas v. Peters*, 48 F.3d 1000, 1009 (7th Cir. 1995) (Easterbrook, J., concurring).

75. *Gacy*, 994 F.2d at 313. There are occasional hints that judges who rely on the premise believe that it is the premise underlying the constitutional right to a jury trial. *See, e.g., id.* (acknowledging empirical research; “[y]et for all of this, courts do not discard the premises of the jury system, postulates embedded in the Constitution and thus, within our legal system, unassailable.”). To the extent that judges assert the premise in this fashion, it is not a new legal fiction within my meaning here. *See supra* Part I.A. But such assertions typically are made conclusorily and in passing. The extent and contours of the right to a jury trial, moreover, are sufficiently murky that judicial elaboration of the right tends to involve something much more akin to common law decisionmaking—and thus judicial creation of legal rules—than to simple judicial application of predetermined rules that rely on exogenously defined premises. *See, e.g., Markman v. Westview Instruments, Inc.* 517 U.S. 370, 376–78 (1996).

76. *See, e.g., Watkins v. Sowders*, 449 U.S. 341, 347 (1981) (concluding that eyewitness identification is no different from other kinds of testimony, and that jurors will be presumed to be able to assess accurately the reliability of eyewitness identification); *see also* *United States v. Owens*, 484 U.S. 554, 564 (1988).

77. *See* John H. Wigmore, *Professor Munsterberg and the Psychology of Testimony*, 3 U. ILL. L. REV. 399 (1909).

78. In federal court, the question whether to admit expert testimony is now governed by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). *See* *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141–42 (1999) (applying the *Daubert* framework to all expert testimony). Although expert testimony is not per se excluded under the *Daubert* framework, trial judges routinely exercise their discretion to exclude the evidence, and courts of appeals routinely affirm. *See* *United States v. Hall*, 165 F.3d 1095, 1108 (7th Cir. 1999); *United States v. Smith*, 156 F.3d 1046, 1053 (10th Cir. 1998); *United States v. Brien*, 59 F.3d 274, 274–78 (1st Cir. 1995); *cf.* *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999) (concluding that expert testimony “intrudes too much on the traditional province of the jury to assess witness credibility”). This is the case notwithstanding the fact that some social scientists have endeavored specifically to satisfy judicial concerns under *Daubert* by demonstrating that the available body of research plainly is sufficiently accepted, reliable, and applicable. *See* Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 PSYCHOL. PUB. POL’Y & L. 909, 914–47 (1995). There have been some exceptions, but they have tended to turn on the particularly compelling facts of the cases. *See* *United States v. Mathis*, 264 F.3d 321, 342 (3d Cir. 2001) (weapons focus); *United States v. Hines*, 55 F. Supp. 2d 62, 72 (D. Mass. 1999) (cross-racial identification).

In some states, such evidence is still per se inadmissible. *See, e.g., State v. Coley*, 32 S.W.3d 831, 838

pointed eyewitness misidentification as the single most pervasive factor in the conviction of the innocent.<sup>79</sup> Indeed, in the last few decades, social scientists have produced a substantial body of virtually unequivocal data that challenges the presumption that jurors are competent to assess the reliability of eyewitness testimony.<sup>80</sup> In addition, studies have demonstrated that jurors do not understand the factors that influence the reliability of eyewitness testimony,<sup>81</sup> and that jurors consistently overestimate the accuracy of such testimony,<sup>82</sup> particularly when the witness asserts it confidently.<sup>83</sup> Some researchers have argued that eyewitness testimony itself should be excluded in some cases because it is so likely to be unreliable,<sup>84</sup> and most researchers have argued that expert testimony

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(Tenn. 2000); *State v. Trevino*, 432 N.W.2d 503, 520 (Neb. 1988). In others, the trial judge now has discretion to exclude the testimony, and appellate courts regularly affirm such decisions. *See, e.g.*, *State v. Cheatam*, 81 P.3d 830, 842 (Wash. 2003); *People v. Lee*, 750 N.E.2d 63, 67 (N.Y. 2001); *Commonwealth v. Francis*, 453 N.E.2d 1204, 1210 (Mass. 1983). Cases permitting introduction of expert testimony about the reliability of eyewitness testimony remain very rare. *See, e.g.*, *State v. Chapple*, 660 P.2d 1208, 1220 (Ariz. 1983).

79. Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 358 (2006).

80. *See, e.g.*, ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 8–19 (1979); ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 4-1 (3d ed. 1997); A. DANIEL YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 228 (1979); Carolyn Semmler, Neil Brewer & Gary L. Wells, *Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification Confidence*, 89 J. APPLIED PSYCHOL. 334, 334 (2004); Gary L. Wells et al., *Distorted Retrospective Eyewitness Reports as Functions of Feedback and Delay*, 9 J. EXPERIMENTAL PSYCHOL. APPLIED 42, 51 (2003); Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 765 (1995).

Researchers have identified several reasons why eyewitness identifications are unreliable: individuals are subject to a “forgetting curve,” by which memory fades rapidly with time; the encounter that the witness seeks to describe often was brief; stress and anxiety during the encounter generally leads the witness to narrow his focus (for example, to a weapon that the suspect held, a phenomenon known as “weapons focus”); personal expectations influence observation, so identifications after events with which the witness is generally unfamiliar often are unreliable; cross-racial identifications reflect an “own-race bias”; subsequent influences, such as leading questions and giving repeated descriptions of the event, taint memory; and “unconscious transference occurs when a witness identifies an individual because the individual looks familiar” (such as when the witness has previously seen the suspect’s photo). *See* Suzannah B. Gambell, *The Need to Revisit the Neil v. Biggers Factors: Suppressing Unreliable Eyewitness Identifications*, 6 WYO. L. REV. 189, 196–202 (2006); *see also* Edmund S. Higgins & Bruce S. Skinner, *Establishing the Relevance of Expert Testimony Regarding Eyewitness Identification: Comparing Forty Recent Cases with the Psychological Studies*, 30 N. KY. L. REV. 471, 481–85 (2003); Medwed, *supra* note 79, at 358–60; Jennifer L. Overbeck, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts*, 80 N.Y.U. L. REV. 1895, 1897–1903 (2005).

81. *See, e.g.*, BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 173–77 (1995)

82. *See id.* at 179.

83. The research demonstrates, however, that there is little or no correlation between witness confidence and the accuracy of the witness’s account. *See, e.g.*, CUTLER & PENROD, *supra* note 81, at 95; LOFTUS & DOYLE, *supra* note 80, at §1-3; Robert K. Bothwell et al., *Correlation of Eyewitness Accuracy and Confidence: Optimality Hypothesis Revisited*, 72 J. APPLIED PSYCHOL. 691 (1987).

84. *See* Ralph Norman Haber & Lyn Haber, *Experiencing, Remembering and Reporting Events*, 6 PSYCHOL. PUB. POL'Y & L. 1057, 1091–92 (2000) (recommending that eyewitness testimony be excluded if: (1) there is no corroborating testimony, unless the circumstances suggest a greater

about its unreliability should be admitted in many,<sup>85</sup> if not all,<sup>86</sup> cases involving eyewitness testimony. Yet not only do most courts routinely exclude expert testimony about the reliability of eyewitness evidence, but most courts also generally do not instruct jurors on the unreliability of eyewitness testimony, regardless of whether expert testimony was admitted.<sup>87</sup>

To be sure, it may well be more difficult for courts to apply the *Daubert* standard to social science, as opposed to “hard” science, research.<sup>88</sup> But in practice courts have not been reluctant to admit behavioral science evidence, particularly in cases that involve “syndromes” and future dangerousness, even though such evidence arguably often does not satisfy the standard of scientific validity.<sup>89</sup> Evidence about the reliability of eyewitness testimony, in contrast, is the “form of social science evidence which is most solidly based in ‘hard’ empirical science” and is “firmly rooted in experimental foundation, derived from decades of psychological research on human perception and memory as well as an impressive peer review literature.”<sup>90</sup> Although empirical research has had an effect on the ways that law enforcement personnel administer identification procedures, such as suspect lineups and photo arrays,<sup>91</sup> efforts to apply social scientists’ findings to trial procedures have met with only modest success.<sup>92</sup> The presumption that jurors can competently assess the reliability of

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likelihood of reliability; (2) the witness’s account was possibly tainted by suggestive procedures; (3) the witness was exposed to post-event information; or (4) the testimony is the product of a “fleeting glance”).

85. See Leippe, *supra* note 78, at 948.

86. Haber & Haber, *supra* note 84, at 1093.

87. See Marder, *supra* note 66, at 468–69 (arguing that judges continue to believe that “seeing is believing,” and that jurors can assess the accuracy of eyewitness testimony).

88. See *United States v. Hall*, 93 F.2d 1337, 1342 (7th Cir. 1996) (“Social sciences in general, and psychological evidence in particular, have posed both analytical and practical difficulties for courts attempting to apply FRE 702 and *Daubert*.”).

89. See Mark S. Brodin, *Behavioral Science Evidence in the Age of Daubert: Reflections of a Skeptic*, 73 U. CIN. L. REV. 867, 882–91 (2005); see also *Barefoot v. Estelle*, 463 U.S. 880 (1982), *superseded by statute on other grounds*, 28 U.S.C. §2253 (2000), as recognized in *Slack v. McDaniel*, 529 U.S. 473 (2000). For further discussion, see *infra* notes 94–99 and accompanying text.

90. Brodin, *supra* note 89, at 889–90.

91. See *Brown*, *supra* note 59, at 1593, 1617. Almost thirty years ago, the Court recognized that eyewitness identifications can be tainted by suggestive influences. See *Stovall v. Denno*, 388 U.S. 293, 301–02 (1967) (holding that unnecessarily suggestive eyewitness identification can violate due process); *United States v. Wade*, 388 U.S. 218, 236–37 (1967) (holding that the defendant is entitled to counsel at post-indictment lineup). However, the Court subsequently limited the drive to impose more procedural safeguards on identification procedures. See *Manson v. Brathwaite*, 432 U.S. 98, 114 (1976) (asserting that “[r]eliability is the linchpin in determining the admissibility of identification testimony,” and that unnecessarily suggestive identification does not violate due process if it is otherwise sufficiently reliable); *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972) (announcing a test for determining when an eyewitness identification violates due process); John C. Brigham et al., *Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues*, CT. REV., Summer 1999, at 17, available at <http://aja.ncsc.dni.us/courtrv/cr36-2/CR36-2Brigham.pdf>.

92. See *Overbeck*, *supra* note 80, at 1904–07.

eyewitness testimony thus is a new legal fiction.<sup>93</sup>

*c. Predictions of Future Dangerousness.* Testimony by psychiatrists and psychologists about “future dangerousness” is routinely admitted, even after *Daubert*, in capital cases, civil commitments, and proceedings to commit sexually dangerous persons.<sup>94</sup> Numerous studies have suggested, however, that such evidence, particularly when based on “clinical prediction,”<sup>95</sup> often—and perhaps even usually—is inaccurate or unreliable.<sup>96</sup> When it addressed whether such evidence should be admissible, the Court acknowledged the empirical evidence<sup>97</sup> but asserted that it was “unconvinced, . . . at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case.”<sup>98</sup> In light of the empirical evidence, the Court’s supposition that experts can accurately predict future dangerousness, and that jurors will competently assess the reliability of those predictions, appears to be a new legal fiction.<sup>99</sup>

*d. Fraud on the Market and the Rational Economic Actor.* New legal fictions about cognitive processes are present in diverse areas of the law. Although

93. As with limiting instructions, there are occasional hints that judges rely on the presumption that jurors can assess eyewitness testimony because they believe that it is an exogenously defined premise of the right to a jury trial. *See, e.g.*, *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973); *State v. Helterbridle*, 301 N.W.2d 545, 547–48 (Minn. 1980). For the reasons stated *supra* note 75, however, such assertions tend not to undermine the claim that the court is relying on a new legal fiction.

94. *See Barefoot*, 463 U.S. at 896–99.

95. *See* JOHN MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* 47–49 (1981); John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 405–07 (2006).

96. *See* John Monahan, *Scientific Status*, in 1 *MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY* § 9-2.0 (David L. Faigman et al. eds., 2002); *see also* Mark D. Albertson, *Can Violence Be Predicted? Future Dangerousness: The Testimony of Experts in Capital Cases*, CRIM. JUST., Winter 1989, at 18–20; Erica Beecher-Monas & Edgar Garcia-Rill, *Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World*, 24 CARDOZO L. REV. 1845 (2003); *cf.* Ellen Marcus & Irene M. Rosenberg, *After Roper v. Simmons: Keeping Kids out of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151, 1180 (2005). *But cf.* Mark D. Cunningham & Thomas J. Reidy, *Don’t Confuse Me with the Facts: Common Errors in Violence Risk Assessment at Capital Sentencing*, 26 CRIM. JUST. & BEHAV. 20, 22–23 (1999) (“No systematic empirical study of the frequency or content of expert testimony at capital sentencing, whether asserting a high or low probability of acts of future criminal violence, is available.”); Brodin, *supra* note 89, at 888–89; Mitzi Dorland & Daniel Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision-Making*, 29 LAW & PSYCHOL. REV. 63 (2005); Eugenia T. LaFontaine, *A Dangerous Preoccupation with Future Danger: Why Expert Predictions of Future Dangerousness in Capital Cases Are Unconstitutional*, 44 B.C. L. REV. 207 (2002); Jack F. Williams, *Process and Prediction: A Return to a Fuzzy Model of Pretrial Detention*, 79 MINN. L. REV. 325, 343–44 (1994).

97. *Barefoot*, 463 U.S. at 896–99 & n.7 (discussing Dr. Monahan’s testimony, supporting an amicus brief filed by the American Psychiatric Association, demonstrating that two out of three predictions of future dangerousness are inaccurate).

98. *Id.* at 901.

99. Recent research, however, indicates that “actuarial prediction of violence” may succeed where clinical predictions of future dangerousness failed. *See* Monahan, *supra* note 95, at 408–27.

reliance is an element of a securities fraud claim, a plaintiff may create a presumption of reliance merely by showing that a corporate manager made a misleading statement.<sup>100</sup> In establishing such a presumption, the Court<sup>101</sup> relied on the “fraud-on-the-market theory,” which holds that “in an open and developed securities market, the price of a company’s stock is determined by the available material information regarding the company and its business,” and that “[m]isleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.”<sup>102</sup> The Court argued that the presumption is “supported by common sense,” “probability,” and then-recent empirical studies on the efficient-capital-market hypothesis,<sup>103</sup> which holds that “the market price of shares traded on well-developed markets reflects all publicly available information.”<sup>104</sup>

In the years since the Court relied on the efficient-capital-market hypothesis, however, scholars have increasingly cast doubt on the descriptive accuracy of the robust version of the theory. The theory is premised on traditional economic principles, including the principle that “all human behavior involves participants who seek to maximize their utility.”<sup>105</sup> In the last few decades, however, scholars of behavioral economics have endeavored to show that actual human behavior is characterized by “bounds” that limit the extent to which people actually and effectively pursue utility maximization.<sup>106</sup> Scholars have applied behavioral economics to investor behavior in particular, finding many examples of investor irrationality.<sup>107</sup> In addition, scholars in the field of behavioral

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100. *Basic Inc. v. Levinson*, 485 U.S. 224, 245–50 (1988).

101. Three Justices recused themselves in *Basic*. Although only four Justices agreed with this section of the opinion, *see id.* at 225, the lower courts have consistently applied the rebuttable presumption. *See* William O. Fisher, *Does the Efficient Markets Theory Help Us Do Justice in a Time of Madness?*, 54 EMORY L.J. 843, 857–71 (2005) (discussing how lower courts have applied the *Basic* presumption).

102. *Basic*, 485 U.S. at 241–42 (citation omitted). The presumption accordingly is that “persons who had traded [the shares in question] had done so in reliance on the integrity of the price set by the market,” and that “because of [defendants’] material misrepresentations [the] price had been fraudulently depressed.” *Id.* at 245.

103. *Id.* at 246 & n.24; Fisher, *supra* note 101, at 850 (“The fraud-on-the-market theory rests on the hypothesis that well-developed securities markets are ‘efficient.’” (citation omitted)).

104. *Basic*, 485 U.S. at 246; *see* Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984).

105. Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476 (citing GARY BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (1976)).

106. The three conventional limits to the rational, utility-maximizing economic actor of traditional economics are bounded rationality, which “refers to the obvious fact that human cognitive abilities are not infinite”; bounded willpower, which refers to the fact that “human beings often take actions that they know to be in conflict with their own long-term interests”; and bounded self-interest, which refers to the fact that most people “care, or act as if they care, about others, even strangers, in some circumstances.” Jolls, Sunstein & Thaler, *supra* note 105, at 1476–79.

107. *See* Stephen Bainbridge, *Mandatory Disclosure: A Behavioral Analysis*, 68 U. CIN. L. REV. 1023, 1026–27 (2000) (exploring the implications of behavioral economics for mandatory disclosure); Jill E. Fisch, *Regulatory Responses to Investor Irrationality: The Case of the Research Analyst*, 10

finance, a subdiscipline of behavioral economics, have produced significant evidence that markets are affected by the biases that affect individual behavior.<sup>108</sup> Empirical evidence has substantially undermined the strong version of the efficient-capital-markets hypothesis.<sup>109</sup>

To be sure, behavioral economics and behavioral finance are relatively new fields and have generated some controversy.<sup>110</sup> But there is an increasingly large body of empirical work that suggests, at a minimum, that the assumption of the Court in *Basic*—that is, that investors are purely rational economic actors and that securities markets function efficiently—might be a new legal fiction.<sup>111</sup>

LEWIS & CLARK L. REV. 57, 59 (2006); David A. Hoffman, *The “Duty” To Be a Rational Shareholder*, 90 MINN. L. REV. 537, 548 (2006); Donald Langevoort, *Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation*, 97 NW. U. L. REV. 135, 136 (2002) (considering how cognitive biases may influence the structure of securities regulation); cf. Robert Prentice, *Whither Securities Regulation? Some Behavioral Observations Regarding Proposals for its Future*, 51 DUKE L.J. 1397, 1414–16 (2002) (discussing irrationality of organizations).

108. Lawrence A. Cunningham, *Behavioral Finance and Investor Governance*, 59 WASH. & LEE L. REV. 767, 769 (2002).

The discipline of behavioral finance rests on two foundations. The first holds that a substantial amount of stock pricing is performed by investors who do not accurately perceive underlying business values and hence produce prices that do not reflect those values. . . . The second holds that even those investors who do accurately perceive underlying business values will not always step in to offset the sentiments of those who do not because they face risks too great for such an undertaking.

*Id.* at 769–70. On behavioral finance generally, see HERSH SHEFRIN, *BEYOND GREED AND FEAR: UNDERSTANDING BEHAVIORAL FINANCE AND THE PSYCHOLOGY OF INVESTING* (2002); ANDREI SHLEIFER, *INEFFICIENT MARKETS: AN INTRODUCTION TO BEHAVIORAL FINANCE* (2000); Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1, 7–18 (2003); Ronald J. Gilson & Reinier Kraakman, *The Mechanisms of Market Efficiency Twenty Years Later: The Hindsight Bias*, 28 J. CORP. L. 715 (2003); Prentice, *supra* note 107.

109. See, e.g., BRUCE I. JACOBS, *CAPITAL IDEAS AND MARKET REALITIES: OPTION REPLICATION, INVESTOR BEHAVIOR, AND STOCK MARKET CRASHES* 87 (1999); RICHARD H. THALER, *THE WINNER’S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* (1992); Kent Daniel et al., *Investor Psychology and Security Market Under- and Overreactions*, 53 J. FIN. 1839, 1865 (1998); Donald C. Langevoort, *Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited*, 140 U. PA. L. REV. 851, 917 (1992); Prentice, *supra* note 107, at 1409. This is not to say that markets are utterly irrational; most scholars believe that “markets exhibit at least weak-form efficiency, meaning that future price movements cannot be predicted solely on the basis of past prices.” Michael Abramowicz, *Information Markets, Administrative Decisionmaking, and Predictive Cost-Benefit Analysis*, 71 U. CHI. L. REV. 933, 935 n.10 (2004). But the more robust form of the hypothesis appears now to be in some doubt.

110. See, e.g., Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1552, 1560 (1998) (arguing that behavioral economics is not a “theory” but instead is “antitheoretical”); cf. Choi & Pritchard, *supra* note 108, at 71 (“We find the insights of behavioral theory provocative. It is unclear, however, what regulatory response is both necessary and plausible.”).

111. There is some indication in the Court’s opinion in *Basic* that the members of the plurality believed that the efficient-capital-markets hypothesis was in fact Congress’s premise in creating the statutory cause of action itself. See *Basic Inc. v. Levinson*, 485 U.S. 224, 246 (citing legislative history of SEC Act of 1934); see also *id.* at 246 (referring to hypothesis as Congress’s “premise”). If so, of course, then this is not a new legal fiction of the sort with which I am concerned here. See *supra* Part I.A (defining the term “new legal fiction”). But the Court’s opinion has more the feel of a common law decision, relying first on perceived economic realities, see *id.* at 242–44; second on “considerations of fairness, public policy, and probability, as well as judicial economy,” *id.* at 245; and third on “common sense and probability,” *id.* at 246. The references to Congress’s ostensible premise are in passing in the



## 2. Individual Beliefs

a. *Custodial Interrogation and Freedom to Leave.* Under *Miranda v. Arizona*<sup>112</sup> and its progeny, law enforcement officials must administer warnings before conducting a custodial interrogation.<sup>113</sup> Over time, the Court has clarified that an interrogation is custodial if, in light of the circumstances, a reasonable person would have felt that “he or she was not at liberty to terminate the interrogation and leave.”<sup>114</sup> It is difficult to test how a “reasonable” person would perceive a particular set of circumstances, but informal surveys of students and common sense tend to suggest that most people, including most lawyers,<sup>115</sup> do not feel free to leave when the police seek to ask them questions. Yet the Court’s rule about determining when a person is in custody for purposes of *Miranda* assumes not only that reasonable people often will perceive that they are “at liberty to terminate the interrogation and leave”<sup>116</sup> when they are questioned by the police, but also that they would feel free to do so under circumstances that most people likely would consider coercive.<sup>117</sup>

To be sure, the Court has on occasion found that a disputed interrogation was custodial.<sup>118</sup> But some of the most prominent cases were before the Court began

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Court’s discussion of these other justifications for its interpretive choice. *See id.* at 257–59 (O’Connor, J., dissenting) (discussing congressional intent).

112. 384 U.S. 436 (1966).

113. In *Miranda*, the Court explained that “custodial interrogation” meant “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Id.* at 444. “The *Miranda* decision did not provide the Court with an opportunity to apply that test to a set of facts.” *Yarborough v. Alvarado*, 541 U.S. 652, 661 (2004).

114. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995); *see also Stansbury v. California*, 511 U.S. 318, 322–25 (1994); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). The Court most recently has applied an objective test, which means that the Court has not considered the suspect’s particular circumstances in determining what a reasonable person would have done. *See Yarborough*, 541 U.S. at 666–67; *see also Peter B. Rutledge, Miranda and Reasonableness*, 42 AM. CRIM. L. REV. 1011, 1013, 1019–20 (2005) (explaining the “broad exclusionary” nature of the objective test).

115. Stephen Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 448 (1987) (“Even the sophisticated law professor or professional investigator, if he found himself suspected of crime, would be under considerable pressure to cooperate with the police, to try to get them on his side by telling what he knew or what he thought he could safely disclose, rather than standing confidently on his right to remain silent.”).

116. *Yarborough*, 541 U.S. at 663 (quoting *Thompson*, 516 U.S. at 112).

117. *See, e.g., Stansbury*, 511 U.S. at 320 (holding that a suspect was not in custody after the police knocked on his door at 11:00 p.m. and asked him to accompany them to the police station to answer questions about an investigation); *Berkemer*, 468 U.S. at 442 (holding that a suspect was not in custody when a trooper stopped him for a traffic violation); *Minnesota v. Murphy*, 465 U.S. 420, 430 (1984) (holding that a suspect, who was on probation, was not in custody when he was summoned to the office of his probation officer to discuss a “treatment plan” for his probationary term); *California v. Beheler*, 463 U.S. 1121, 1123–24 (1983) (holding that a suspect was not in custody when he “voluntarily agreed to accompany the police” to the stationhouse and was informed that he was “not under arrest”).

118. *See New York v. Quarles*, 467 U.S. 649, 655 (1984) (holding that an interrogation minutes after the suspect’s arrest by officers with guns drawn was custodial); *Orozco v. Texas*, 394 U.S. 324 (1969) (holding that an interrogation in the suspect’s bedroom at 4:00 a.m. was custodial); *Mathis v. United*

to apply an objective test,<sup>119</sup> and most of the cases are older. Even assuming it is still possible to satisfy the objective test and demonstrate custody in any circumstance other than the traditional arrest and trip to the stationhouse, it is difficult to argue that the Court's application of the test neatly corresponds to most people's perception of their freedom to leave an interrogation conducted by law enforcement officials.<sup>120</sup> The premise that reasonable people would feel free to leave when stopped and questioned by the police thus is a type of new legal fiction.

*b. Ignorance of the Law.* "The general rule that ignorance of the law or a mistake of law is no defense to a criminal prosecution is deeply rooted in the American legal system," and it is based at least in part on the premise that in a representative democracy the public is aware of the letter of the law.<sup>121</sup> Indeed, even doctrines designed to ease some of the unfairness of the application of the rule—such as the rule of lenity—are premised on the same notion.<sup>122</sup> Yet common sense and practical experience tell us that "[a]lmost the *only* knowledge of the law possessed by many people is that ignorance of it is no excuse."<sup>123</sup> Even if, as discussed below, the reasons for the rule that ignorance of the law is no excuse seem clear, the assumption that the public is aware of the law nevertheless is a type of new legal fiction.

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States, 391 U.S. 1 (1968) (holding that an interrogation of the suspect in jail for a different offense was custodial).

119. In *Orozco*, the Court applied a subjective test to determine the interrogating officer's intentions, a test that the Court implicitly rejected in *Berkemer*. Compare *Orozco*, 394 U.S. at 325 (relying on a subjective test), with *Berkemer*, 468 U.S. at 442 ("[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.").

120. Consider *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977), in which the Court based its conclusion that the suspect was not in custody in part on the fact that after the questioning, the suspect departed the police station "without hindrance." But subsequent events hardly demonstrate the reasonableness of the perception of freedom to leave at the beginning of and during the interrogation. Cf. *Shaugnessy v. United States ex rel. Mezei*, 345 U.S. 206, 220 (1953) (Jackson, J., dissenting) (disagreeing that immigrant held by immigration authorities at Ellis Island was not "detained" because "[i]t overworks legal fiction to say that one is free in law when by the commonest of common sense he is bound"). Appellate court decisions have applied the test in a similar fashion. See, e.g., *Garcia v. Singletary*, 13 F.3d 1487 (11th Cir. 1994) (holding that a prisoner was not in custody when questioned by prison guard).

121. *Cheek v. United States*, 498 U.S. 192, 199 (1991) (explaining that the rule is "[b]ased on the notion that the law is definite and knowable").

122. See, e.g., *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (discussing rule of lenity); cf. *Hess v. Pawloski*, 274 U.S. 352, 355–56 (1927) (assuming that an out-of-state motorist is aware of a state statute deeming driving in state to be consent for suit in state).

123. GLANVILLE WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 405 (1978) (emphasis added); see also Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 645–46 (1984) ("If one were to take a poll and ask about the legal significance of ignorance of law, most nonlawyers would answer, I believe, by citing the maxim that 'ignorance of the law is no excuse.'").

### 3. Legislative Processes and Institutional Relationships

*a. Presumption of Constitutionality of Statutes.* Courts accord statutes a presumption of constitutionality, at least in part because we presume that members of Congress have taken seriously their obligation to uphold the Constitution.<sup>124</sup> Yet experience suggests that members of Congress are as likely to propose constitutionally suspect legislation to prompt the Court to invalidate it—enabling the members to rally core supporters without creating the harms that the Constitution was designed to protect—as they are to propose it because of good-faith disagreement about what the Constitution requires.<sup>125</sup>

To be fair, there will be times when members of Congress introduce legislation that the Court likely, given precedent, will invalidate, but that the members

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124. See U.S. CONST. art. VI (“The Senators and Representatives before mentioned . . . shall be bound by Oath or Affirmation, to support this Constitution.”); *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) (“When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution.”); *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (“[T]he Court accords ‘great weight to the decisions of Congress’” because “[t]he Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States.”); *id.* (“The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act’s constitutionality.”); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring) (arguing that in reviewing legislation, “this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government”); *United States v. Butler*, 297 U.S. 1, 67 (1936) (“Every presumption is to be indulged in favor of faithful compliance by Congress with the mandates of the fundamental law.”). Of course, not all statutes are presumed constitutional, notwithstanding the oath; a statute that expressly imposes a burden because of one’s status as a racial minority, or criminalizes criticism of the government, would not enjoy a presumption of constitutionality. See, e.g., *Nixon v. Adm’r of Gen. Serv.*, 433 U.S. 425, 506 (Burger, C.J., dissenting).

125. Compare Flag Protection Act of 2005, S. 1911, 109th Cong. (1st Sess. 2005) (criminalizing, among other things, “intentionally threaten[ing] or intimidate[ing] any person or group of persons by burning, or causing to be burned, a flag of the United States”), with *United States v. Eichman*, 496 U.S. 310 (1990) (invalidating a federal statute that criminalized “knowingly mutilat[ing], defac[ing], physically defil[ing], burn[ing], maintain[ing] on the floor or ground, or trampil[ing] upon any flag of the United States”), and *Texas v. Johnson*, 491 U.S. 397 (1989) (invalidating a state statute that criminalized intentionally “defac[ing], damag[ing], or otherwise physically mistreat[ing] the flag] in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action”); compare Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531 (Supp. III 2003)) (criminalizing knowingly performing a partial-birth abortion and providing no exception for preserving the health of the mother), with *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) (invalidating a state law that banned partial-birth abortion procedure because, among other things, it lacked an exception for preserving the health of the mother); compare Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681, 2681-736 (1998) (codified at 47 U.S.C. § 231 (2000)) (criminalizing the knowing posting, for “commercial purposes,” of World Wide Web content that is “harmful to minors”), with *Reno v. ACLU*, 521 U.S. 844 (1997) (invalidating federal statute that criminalized the knowing transmission of obscene or indecent messages to any recipient under eighteen years of age and the knowing sending or displaying of patently offensive messages in a manner that is available to a person under eighteen years of age). For a less cynical view, see Russ Feingold, *Upholding an Oath to the Constitution: A Legislator’s Responsibilities*, 2006 WIS. L. REV. 1, 4 (arguing that the oath “has affected some of the most intense moments I have experienced since I have been in the Senate”).

believe in good faith to be consistent with a correct view of the Constitution. Indeed, sometimes the Court, upon revisiting a controversial constitutional question, will change course and overrule precedent.<sup>126</sup> And, of course, although the Court regularly asserts that it has the last word on questions of constitutional interpretation,<sup>127</sup> there continues to be a lively debate over the constitutional propriety of judicial review.<sup>128</sup> But at least sometimes it is difficult to reach any conclusion other than that members of Congress have consciously and intentionally supported legislation that they know is inconsistent with the Constitution.

In addition, it may well be that in practice, “deference” is an illusory and instrumental concept that judges invoke when they want to uphold legislation and give short shrift to when they want to invalidate legislation.<sup>129</sup> But to the extent that at least some judges and commentators take the notion seriously,<sup>130</sup> it is based at best on an overly simplistic assumption about how Congress acts, and at worst on a new legal fiction.<sup>131</sup>

*b. Statutory Interpretation and the Legislative Process.* Under the traditional approach to statutory interpretation, courts view their role as “implementing the original intent or purpose of the enacting Congress,” and “almost anything that casts light upon what Congress attempted to do when it enacted a statute is potentially relevant.”<sup>132</sup> Accordingly, courts applying the traditional approach often rely on legislative history—on rare occasions even permitting such history to trump the text’s plain meaning<sup>133</sup>—and often attempt to “reconstruct” the answer Congress would have given to a question not specifically addressed in

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126. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

127. See, e.g., *City of Boerne*, 521 U.S. at 535–36 (“When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.” (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

128. See, e.g., BICKEL, *supra* note 20; LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L. J.* 1943, 2023–45 (2003).

129. Cf., e.g., JEROME FRANK, *LAW AND THE MODERN MIND* 118 (1935).

130. See, e.g., Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 *IOWA L. REV.* 941, 947–66 (1999).

131. Randy Barnett has attacked the presumption on normative grounds, arguing that instead there should be a “presumption of liberty.” RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 259–68 (2004). Barnett’s argument is based not on a criticism of the Court’s factual premise, but rather on a view about the appropriate role of government in our constitutional system.

132. William N. Eskridge Jr., *The New Textualism*, 37 *UCLA L. REV.* 621, 626 (1990).

133. The classic example is *Holy Trinity Church v. United States*, 143 U.S. 457, 460 (1892).

the text of the statute.<sup>134</sup>

In the 1980s, self-described textualists began to attack the traditional approach to interpreting statutes on four principal grounds. First, they pressed the realist argument that the notion of collective legislative intent is a fiction, and that attempts to discern it inevitably will embody the views of the interpreter.<sup>135</sup> Second, they deployed the insights of public choice theory to attack the assumption that it is possible to reconstruct how legislators would have voted on matters that they never actually considered.<sup>136</sup> Third, they argued that even if legislative intent were a workable concept, legislative history does not supply “meaningful evidence of that intent.”<sup>137</sup> Fourth, they argued that because legislative history is not subject to the constitutional requirements of bicameralism and presentment, authoritative treatment of it in construing a statute is inconsistent with the structure of our constitutional democracy.<sup>138</sup>

Textualists, in other words, attacked several of the assumptions of the traditional approach to statutory interpretation as new legal fictions. But in their place, textualists have relied on a different set of problematic premises. First, although textualists reject legislative history in part on the ground that members of Congress often have not read it, they assume that members of Congress have read the text of the bills upon which they have voted.<sup>139</sup> Second, the “textualist’s attention both to the statutory text and the statutory structure requires that it

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134. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 186, 267–87 (1985) (discussing “imaginative reconstruction” of statutes).

135. See Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL’Y 61, 68 (1994); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 684–85 (1997); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517; Kenneth Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

136. See, e.g., Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983) (“The existence of agenda control makes it impossible for a court—even one that knows each legislator’s complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact.”); Manning, *supra* note 135, at 685–86 & n.53 (discussing social choice theory and Arrow’s theorem, which suggests that “if multiple legislators have multiple preferences, majority rule will not necessarily yield a transitive ordering of voting choices”); see also DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

137. Manning, *supra* note 135, at 686. Textualists argue that many legislators are not even aware of the legislative history when they vote on a bill, and that in any event “awareness of the legislative history does not equal assent to its contents.” *Id.* at 687; see *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 647 (2005) (Scalia, J., concurring) (chastising the majority for relying “on a Senate Committee Report to establish the meaning of the statute at issue” because it is “a legal fiction to say that this expresses the intent of the United States Congress”). Legislative history, moreover, can be deployed tactically by interest groups that effectively purchase it to affect courts’ subsequent construction of the statute. Manning, *supra* note 135, at 687–88; see also Eskridge Jr., *supra* note 132, at 643–44; Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1299–1310 (1990).

138. See Manning, *supra* note 135, at 690–706 (exploring legislative history under the nondelegation doctrine); Zeppos, *supra* note 137, at 1300–04.

139. See Zeppos, *supra* note 137, at 1311–12.

create the fiction of the rational drafting legislature.”<sup>140</sup> Third, textualists, who regularly consult dictionaries to determine statutory meaning, assume that members of Congress consult dictionaries when drafting and voting on statutory text.<sup>141</sup> Fourth, they assume that, notwithstanding the lessons of public choice theory that they effectively deployed against the traditional approach, the enacted text is both purposeful and the legitimate reflection of majoritarian preferences.<sup>142</sup> Fifth, textualists interpret text in light of prior judicial precedent and according to the notoriously manipulable canons of construction,<sup>143</sup> based on the assumption that Congress was familiar with them when it enacted the statutory text.<sup>144</sup>

As William Eskridge has argued, “[e]veryone knows that these assumptions have virtually no basis in reality.”<sup>145</sup> Indeed, even Justice Scalia, the most forceful and prominent proponent of textualism and its associated assumptions, has acknowledged that the assumptions are a “benign fiction.”<sup>146</sup> Accordingly, proponents of textualism have relied on several new legal fictions.<sup>147</sup>

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140. *Id.* at 1319; see also STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 99 (2005) (describing “fiction” of the “reasonable legislator”).

141. Zeppos, *supra* note 137, at 1320–21.

142. *Id.* at 1321–22.

143. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (arguing that for every canon counseling in favor of one interpretation, a counter-canon may be cited favoring a contrary interpretation); Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1419–20 (2005).

144. Eskridge Jr., *supra* note 132, at 679–81; Zeppos, *supra* note 137, at 1328–29.

145. Eskridge Jr., *supra* note 132, at 679–81; accord Zeppos, *supra* note 137, at 1319 (“[T]extualist theory itself rests on elaborate fictional constructs about Congress as a collective entity and the language it chooses.”). At a minimum, textualist assumptions generally are not supported by empirical findings. See Zeppos, *supra* note 137, at 1311 (noting that textualist claims about legislative history are made “without any empirical support,” and are based on anecdotal evidence that “supports a contrary view as well”). To be fair, perhaps in the general run of cases it is not unreasonable to assume that dictionary definitions are good proxies for legislators’ understandings about language. But the cases most likely to require judicial resolution are much more likely to involve ambiguous language with respect to questions not contemplated by the enacting legislators. Cf. Priest & Klein, *supra* note 34.

146. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment).

147. Of course, textualism is not yet the dominant judicial mode of interpreting statutes, and “most scholars and judges do not associate themselves with the textualist movement.” Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 29 (2006). But “textualism’s core observations about the pitfalls of purposivist interpretation influenced nonadherents and adherents alike. . . . As a result, few judges or scholars today espouse the strong purposivism that textualists set out to discredit two decades ago.” *Id.* at 29–30. In a very important sense, therefore, “we are all textualists” now. *Id.* at 43; William N. Eskridge Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1090 (2001) [hereinafter Eskridge Jr., *All About Words*]; Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057 (1998); see also William N. Eskridge Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1513 (1998) [hereinafter Eskridge Jr., *Unknown Ideal*] (“Scalia’s theory dominates debate about statutory interpretation, is gathering more defenders in academe, has one other fan on the Court (Justice Thomas) and influences the way all the other justices write their opinions and advocates argue their cases before the Supreme Court, is increasingly popular in the state courts and among many federal judges, and has a strong allure for Generation X law students. . . . [T]he new textualism has been

*c. Originalism and Collective Intent.* Whereas textualism purports to reject the fiction of collective intent, originalism wholeheartedly embraces it. Originalism is a theory of constitutional interpretation that assigns dispositive weight to the original understanding of the constitutional provision at issue, rather than to the different meaning that subsequent generations have ascribed to it.<sup>148</sup> Although there is some debate among originalists over *whose* understanding matters,<sup>149</sup> there is little doubt that originalists presume that there is—and that it is possible to discern—one fixed, meaningful, singular meta-original understanding of the Constitution,<sup>150</sup> which originalists seek to discern by reference to historical materials.<sup>151</sup> Originalists presume, moreover, that it is possible to find such an understanding even with respect to questions that the ratifying generation never considered or anticipated.<sup>152</sup>

As discussed above, however, legal realism cast substantial doubt on the assertion that it is possible to discern a collective intent, let alone to reconstruct such an intent for questions that the relevant decisionmaking body did not even consider. Indeed, in the statutory interpretation context, textualists regularly deride such an inquiry as a blatant fiction.<sup>153</sup> To the extent that one accepts this realist criticism, originalism is based on a new legal fiction.<sup>154</sup>

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agenda-setting and a public relations hit.”). Whether textualism’s assumptions are new legal fictions is thus more than simply a matter of academic interest.

148. See generally Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 681–82 (1991) (distinguishing the “unsophisticated version of originalism,” which looks at the original understanding, from the “sophisticated originalism,” which looks to the present); Smith, *Sources*, *supra* note 67, at 226–28. For a discussion of whether it is possible to be both a textualist for statutory interpretation and an originalist for constitutional interpretation, see Eskridge Jr., *Unknown Ideal*, *supra* note 147, at 1516–22; Zeppos, *supra* note 137, at 1316–19.

149. Compare RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987) (intent of drafters), with John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1339 (1998) (reasonable ratifier), with Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997) (reasonable person standard), and Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 677 (1991) (similar), with ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990) (average citizen as determined by evidence of ratifiers’ understanding).

150. See, e.g., Scalia, *supra* note 5, at 854 (arguing that the Constitution “has a fixed meaning ascertainable through the usual devices familiar to those learned in the law”).

151. See BORK, *supra* note 149, at 144; see also Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of “This Constitution,”* 72 IOWA L. REV. 1177, 1181 n.4 (1987); Scalia, *supra* note 149, at 38.

152. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (applying the “original meaning” of the Fourth Amendment to thermal imaging technology); *Printz v. United States*, 521 U.S. 898, 905–09 (1997) (relying on the absence of congressional statutes to establish original meaning); Scalia, *supra* note 149, at 45.

153. See *supra* notes 139–47 and accompanying text.

154. As with textualism, originalism is not the dominant methodology for construing the Constitution. But like textualism, originalism’s proponents have had a significant influence both on the scholarly debate over constitutional interpretive methodologies and on the way that the Court decides actual cases. In addition, originalism is dominant in at least some types of constitutional cases, including federalism cases. See Smith, *Sources*, *supra* note 67, at 234. To borrow a phrase, in at least some sense,

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I imagine that by now most readers will feel strongly that some of the examples discussed above plainly are new legal fictions, and that others plainly are not. I also expect that readers will disagree about *which* examples are convincing, and which are not. If nothing else, the different categories of examples raise distinct questions. New legal fictions involving false premises about Congress, for example, raise questions about (and perhaps can be explained by) the separation of powers; the judiciary's relationship to Congress obviously is different than its relationship to private actors (such as securities market participants) and quasi-public actors (such as jurors).

In addition, whereas the Justices of the United States Supreme Court deployed some of the new legal fictions discussed above, state court judges deployed some of the others. It is at least possible to argue that we ought to be more troubled when the Supreme Court relies on new legal fictions, because the Court's decisions tend, by virtue of the Court's institutional role, to carry substantive and methodological implications for judicial decisionmaking at all other levels. To the extent that new legal fictions are dangerous or at least problematic—a subject to which I turn below—such ripple effects are also likely to be undesirable.

There undoubtedly are other important differences among the examples discussed above, some of which I address below. At bottom, however, the examples share a central characteristic: all involve, to one degree or another, a false premise that serves at least ostensibly as a basis for a judicially fashioned legal rule. With this common feature in mind, we can consider first where exactly the new legal fiction fits on the judicial landscape, and then why judges so frequently rely on the device.

## II. SITUATING NEW LEGAL FICTIONS

New legal fictions are in some ways similar to other, familiar legal phenomena—in particular, common law legal fictions and legal subterfuges. But there are also some important differences. To understand why judges rely on new legal fictions—and whether such reliance is justified—it is useful to understand these other legal devices and when and why judges rely on them. In the sections that follow, I contrast new legal fictions with these other devices.

### A. DISTINGUISHING NEW LEGAL FICTIONS FROM CLASSIC LEGAL FICTIONS

The classic common law legal fiction has a rich history. It is somewhat difficult to define the classic legal fiction because “[n]one of the participants in the historical debate could agree” on what should count as a fiction.<sup>155</sup> Lon

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“we are all originalists now.” Cf. Molot, *supra* note 147, at 43 (“[W]e are all textualists in an important sense.”).

155. Harmon, *supra* note 30, at 2. Maine, for example, “employ[ed] the expression ‘Legal Fiction’ to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone



Fuller provided the most comprehensive treatment of the phenomenon, and he defined the classic legal fiction as “either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility.”<sup>156</sup> The common law was rife with fictions: in “actions arising under the ‘attractive nuisance doctrine’ the defendant is alleged to have invited children (of whose very existence he may have been ignorant) to visit his premises”;<sup>157</sup> a “plaintiff who had bailed his chattel under a bailment terminable at his will” was deemed to have possession of the chattel and thus could bring an action in trespass;<sup>158</sup> British courts deemed certain contracts for which the promises were exchanged at sea to have been made at the Royal Exchange in London in order to divest the admiralty courts of jurisdiction;<sup>159</sup> and so on.

The early commentators were divided on the virtue of the legal fiction. Bentham declared that the “fiction is a syphilis, which runs in every vein, and carries into every part of the system the principle of rottenness.”<sup>160</sup> In Bentham’s view, the legal fiction had “for its object the stealing legislative power, by and for hands, which could not, or durst not, openly claim it—and, but for the delusion thus produced, could not exercise it.”<sup>161</sup> Bentham argued, in other words, that legal fictions in practice effect a change in the law—by expanding a legal rule to apply to facts that previously were outside the operation of the rule—and thus amounted to impermissible judicial lawmaking. Blackstone, on the other hand, regarded legal fictions as largely harmless,<sup>162</sup> and sometimes “highly beneficial and useful,”<sup>163</sup> devices that should be preserved to ensure the continuity of the law and to avoid upheaval.<sup>164</sup>

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alteration, its letter remaining unchanged, its operation being modified.” HENRY S. MAINE, *ANCIENT LAW* 25 (New York, Henry Holt & Co. 1873). Pound, in contrast, suggested that interpretation, equity, and natural law were all forms of legal fiction. See ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 130–34 (1923).

156. LON L. FULLER, *LEGAL FICTIONS* 9 (1967).

157. *Id.* at 12, 66.

158. *Id.* at 18.

159. See WILLIAM BLACKSTONE, 3 *COMMENTARIES* \*107.

160. 5 JEREMY BENTHAM, *Elements of the Art of Packing as Applied to Special Juries, Particularly in Cases of Libel Law*, in *THE WORKS OF JEREMY BENTHAM* 91, 92 (John Bowring ed., London, Simpkin, Marshall, & Co. 1843) (emphasis omitted).

161. JEREMY BENTHAM, *A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT* 509 (J.H. Burns & H.L.A. Hart eds., 1977) (preface to the unpublished 1822 edition). Some later commentators, in contrast, viewed the fact that legal fictions were a form of judicial lawmaking as a reason to praise the devices. See Oliver R. Mitchell, *The Fictions of the Law: Have They Proved Useful or Detrimental to Its Growth?*, 7 *HARV. L. REV.* 249, 263, 265 (1893).

162. BLACKSTONE, *supra* note 159, at \*267.

163. *Id.* at \*43; see also POUND, *supra* note 155, at 131 (describing legal fictions as “creative devices of far-reaching effect which did not evolve spontaneously but were deliberately made by known men to meet definite demands in concrete cases”).

164. BLACKSTONE, *supra* note 159, at \*267–68 (arguing that the judicial creation of legal fictions “wisely avoided soliciting any great legislative revolution in the old established forms”). More recent commentators have likewise argued over the virtues of legal fictions. Samek argues that the problem with legal fictions is that they tend ultimately to go from being means of achieving an end to ends

Fuller's classic treatment was more nuanced. He recognized that the "fiction is generally the product of the law's struggles with *new* problems."<sup>165</sup> After all, when "established legal rules encompass neatly the social life they are intended to regulate, there is little occasion for fictions,"<sup>166</sup> which are "intended to escape the consequences of an existing, specific rule of law."<sup>167</sup> Fuller argued that courts so frequently introduced "new law in the guise of old"<sup>168</sup> because of the courts' conservative inclinations. The use of the fiction, rather than candor about the change in legal doctrine, "temper[ed] the boldness of the change,"<sup>169</sup> and perhaps also tempered the disruptive effect of the change on the legal profession.<sup>170</sup> Fuller argued that fictions were sometimes useful and not necessarily problematic.<sup>171</sup> A legal fiction becomes "dangerous," he argued, only if "believed"; conversely, a "fiction becomes wholly safe only when it is used with a complete consciousness of its falsity."<sup>172</sup> If a legal fiction is a false statement not intended to deceive, then its utility must wane—and its danger correspondingly wax—as recognition that it is in fact false diminishes.<sup>173</sup>

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themselves; too often, the focus is on which fictions are appropriate, and not on the substantive ends that the fictions are deployed to reach. See R.A. Samek, *Fictions and the Law*, 31 U. TORONTO L.J. 290, 291 (1981) (arguing that the "mischief of fictions . . . results from the *meta phenomenon*"—"the human propensity to displace 'primary' with 'secondary' concerns, that is concerns about ends with concerns about means"—and not from their pretence to be true).

165. FULLER, *supra* note 156, at 94; see also *id.* at 21–22 ("[F]ictions are, to a certain extent, simply the growing pains of the language of the law.").

166. *Id.* at viii.

167. *Id.* at 53; see also *id.* at 51 ("[T]he purpose of any fiction is to reconcile a specific legal result with some premise or postulate"; a "premiseless law would be a fictionless law—if it could be called law at all."); *id.* at 71 (arguing that the function of a fiction is "effecting an adjustment between new situations and an existing conceptual structure"); accord Mitchell, *supra* note 161, at 262 (defining "legal fiction" as "a device which attempts to conceal the fact that a judicial decision is not in harmony with the existing law. The only use and purpose, upon the last analysis, of any legal fiction is to nominally conceal this fact that the law has undergone a change at the hands of the judges").

168. FULLER, *supra* note 156, at 58.

169. *Id.* Fuller called this the "motive of policy." *Id.* at 57. For an application of this justification to the tax context, see generally John A. Miller, *Liars Should Have Good Memories: Legal Fictions and the Tax Code*, 64 U. COLO. L. REV. 1 (1993).

170. FULLER, *supra* note 156, at 59–63. Fuller called this the "motive of convenience." *Id.* at 59. Fuller also argued that the use of the fiction was sometimes more comforting to the judge's audience—he called this the motive of "emotional conservatism," see *id.* at 58—and was sometimes a product of the judge's "inability to state his result in nonfictitious terms"—what Fuller called the motive of "intellectual conservatism," *id.* at 63–64. Cf. JOHN C. GRAY, *THE NATURE AND SOURCES OF THE LAW* 35 (Gaunt, Inc. 1999) (1909) (analogizing legal fictions to "scaffolding,—useful, almost necessary, in construction—but, after the building is erected, serving only to obscure it"); Samek, *supra* note 164, at 315 ("The use of legal fictions is a conservative strategy for change. There is nothing wrong with such a strategy as long as it is employed as a means and not as an end."). Aviam Soifer offered a "post-realist critique" of Fuller's apparent claim that "categories of [judicial] motivation can be isolated." Soifer, *supra* note 31, at 879.

171. Soifer argues that "Fuller considered legal fictions a kind of necessary evil for systematic thinking about law." Soifer, *supra* note 31, at 875.

172. FULLER, *supra* note 156, at 9–10.

173. Cf. Harmon, *supra* note 30, at 63 (arguing that when a fiction is "irresponsibly borrowed"—that is, expanded to apply to a different legal rule—then the danger of the legal fiction grows dramatically).

At first blush, new legal fictions appear similar to common law legal fictions. Both pertain to facts: classic legal fictions merely asserted that something that clearly was not true or had not happened was or had, solely for purposes of adjudication of the claim;<sup>174</sup> new legal fictions involve ostensibly factual suppositions that serve as the basis for the formulation of legal rules. But there are important differences that arise from the distinction between law and fact, with which commentators have long struggled. The formalist classical view, summarized by James Bradley Thayer, was that the law did not change but merely was divined by judges. Accordingly, the category of “questions of law” embraced only the choice between competing possible rules, and everything else was classified as a question of fact.<sup>175</sup> As John Monahan and Laurens Walker have shown, it was against this background that the Court began to consider social science in formulating legal rules, and social science evidence thus was classified as fact.<sup>176</sup>

The Realists viewed the judicial role quite differently, conceiving of the law as being “in flux” and subject to revision by judges attempting to meet contemporary needs.<sup>177</sup> Kenneth Culp Davis famously challenged the classical definitions of law and fact—and their corresponding definition of the appropriate judicial role—by distinguishing between legislative facts and adjudicative facts.<sup>178</sup> Adjudicative facts are facts that are particular to the dispute before the court, and they are in the province of the trier of fact to decide. Legislative facts, on the other hand, are those facts that transcend the litigation before the court and are relevant to legal reasoning and the fashioning of legal rules. It was never entirely clear how a judge was supposed to go about finding legislative facts,<sup>179</sup> but widespread support for Davis’s distinction freed the Court to rely less abashedly on a broader range of evidence in formulating legal rules.<sup>180</sup>

Classic legal fictions generally pertained to adjudicative facts. A court deploying a classic legal fiction generally would deem some fact particular to the controversy—such as possession by the plaintiff in a case involving a bailment—to have occurred, even though in reality it had not.<sup>181</sup> In contrast, new

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174. For example, the common law of gifts, which required acceptance by the donee to effectuate a legally binding transfer of ownership, simply deemed there to have been acceptance even when the gift had been delivered out of his presence and without his knowledge. See FULLER, *supra* note 156, at 53.

175. See generally JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 183–262 (Boston, Little, Brown & Co. 1898).

176. Monahan & Walker, *supra* note 16, at 480–82 (discussing Brandeis’s brief in *Muller v. Oregon*, 208 U.S. 412 (1908)).

177. See, e.g., Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931).

178. See Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942).

179. See *infra* notes 204–05 and accompanying text.

180. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954) (citing social science studies to support conclusion that segregated public education harmed black children); Monahan & Walker, *supra* note 16, at 484 n.25.

181. See the examples *supra* at notes 157–59 and accompanying text.

legal fictions fall into Davis's general category of legislative facts. They are, at least ostensibly, factual, rather than legal, suppositions; but they are directly relevant to the fashioning of legal rules, and although courts sometimes assert them with empirical or evidentiary support, usually they do not.

In this respect, new legal fictions are related to Donald Faigman's concept of "normative constitutional fact-finding," which describes the "normative judgments underlying [the Court's] constitutionally based factual suppositions."<sup>182</sup> Faigman argues that notwithstanding the rise of empirical research, judges have continued to premise judicially created constitutional rules on unsubstantiated factual assertions because judges "continue[] to approach factual questions as a matter of normative legal judgment rather than as a separate inquiry aimed at information gathering."<sup>183</sup> But if by focusing on legislative rather than adjudicative facts<sup>184</sup> Faigman's account implicitly identifies a difference between classic legal fictions and new legal fictions, it also implicitly underscores a similarity between them that perhaps helps to explain both the demise of the former and the rise of the latter.

The insights of legal realism increased both our awareness of the normative component of the law and our interest in finding interpretive methodologies that constrain judicial discretion. Tolerance for classic legal fictions declined in part because their use so often smacked of judicial willfulness, and (as I will explore below) the use of new legal fictions has been on the rise in part because of a recognition, albeit one that judges often resist articulating openly, that normative choices are often necessary in the formulation of legal rules. Indeed, as I discuss below, the most trenchant criticism of classic legal fictions also arguably applies to new legal fictions. Like the classic legal fictions that Bentham so despised, new legal fictions are sometimes a device that judges deploy to mask the fact that they are arrogating to themselves the power to make normative choices, and thus to make law itself.

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182. Faigman, *supra* note 30, at 549–50.

183. *Id.* at 549. Faigman argues that empirical evidence will soon become a source, like text, history, and precedent, that constrains judicial discretion because the Court will be "forced to attend to, and [will be] made accountable for, the value judgments underlying its factual jurisprudence." *Id.* at 551; *see id.* at 608 (discussing *McClesky v. Kemp*, 481 U.S. 279 (1987)). Although Faigman's concept of normative constitutional factfinding generally embraces my concept of new legal fictions, I do not use Faigman's typology for two reasons. First, although many of the most important examples of new legal fictions that I discuss here are premises for constitutional rules, not all of them are, and the phenomenon raises important questions of judicial role regardless of whether it is deployed specifically in the formulation of constitutional rules. Second, Faigman's concept of normative constitutional factfinding does not account for those factual suppositions that are simply the result of judicial ignorance, and that the Court might discard if confronted with competing data—that is, it does not account for those suppositions that are in fact *not* normative judgments masquerading as factual premises—and it thus does not provide a mechanism for identifying a form of judicial lawmaking. Perhaps more important for the prescriptive part of this Article, Faigman does not consider the range of normative choices that courts make in relying on new legal fictions, and he does not address the question of when, if ever, those rationales outweigh the interest in judicial candor. I address those questions in Parts III and IV, *infra*.

184. *See id.* at 552–55 (discussing categories of facts in formulation of constitutional rules).

But there also are other important differences between classic legal fictions and new legal fictions. There rarely was any confusion about whether a classic legal fiction had been deployed—as it was not intended to deceive—or what it accomplished.<sup>185</sup> Generally speaking, the purpose (and virtue) of the legal fiction was to ease the impact (and lessen the appearance) of legal change; rather than changing a legal rule to embrace the factual circumstances before the court, the court simply deemed the rule satisfied.<sup>186</sup> For new legal fictions, in contrast, there generally is no recognition of the fact that the premise is false, although the assertions need not consciously be intended to deceive. Indeed, what characterizes most new legal fictions is that the learned reader of the law would *not* have explicit or implicit indication that the court is simply deeming to be true that about which we know otherwise. In addition, new legal fictions are not simply a device for softening (or, depending on one's perspective, obscuring) the effects of legal *change*—that is, departure from a regime already established—but rather are instrumental in *justifying* doctrine, whether received or newly established. Classic legal fictions might be substantially less common today than they once were,<sup>187</sup> but their distant cousin—the new legal fiction—is thriving.

#### B. DISTINGUISHING NEW LEGAL FICTIONS FROM LEGAL SUBTERFUGES

New legal fictions also are similar in some ways to, and different in others from, the “legal subterfuges” about which Guido Calabresi has written extensively. A legal subterfuge is a device that accomplishes a socially desirable end without making clear the calculus that produces that end. Calabresi argues that we often deploy subterfuges, which he characterizes as “useful—if dangerous—lie[s],”<sup>188</sup> to cope with “tragic choices”<sup>189</sup> or to “keep us from expanding too far those narrow exceptions to our constitutional aspirations which we simply cannot avoid making.”<sup>190</sup> Tragic choices are presented in those cases in which “beliefs and moralisms or like sorts clash,”<sup>191</sup> particularly when life or death is

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185. The reasonable observer, that is, understood that the statement “not actually accepted = accepted for current purposes” served other ends.

186. See FULLER, *supra* note 156, at 21–22 (“[F]ictions are, to a certain extent, simply the growing pains of the language of the law.”).

187. The positivization of law, and a revolution against common law formalism, has erased many of the most egregious fictions of the common law. Cf. David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 740 (1987) (“I cannot help thinking that there is now less need for these devices, and more awareness of their flimsiness, than in the past.”).

188. GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 60 (1985).

189. *Id.* at 88; see GUIDO CALABRESI AND PHILIP BOBBITT, TRAGIC CHOICES 26, 78, 195–96 (1978).

190. CALABRESI, *supra* note 188, at 61.

191. *Id.* at 87. “[T]he very fact that we cannot hold to them as absolutely, as sacredly, as we would like, makes us all the more vehement in rejecting any stated deviation from them. Such open rejections destroy the fragile balance between aspiration and practice that characterizes how humans cope with impossible, but fundamental, ideals.” *Id.* at 87–88. Calabresi argues that “to cope with such tragic conflicts, we often resort to subterfuges. We look for solutions which seek to cover the difficulty and

on the line.<sup>192</sup> To illustrate a tragic choice, Calabresi offers the example of our society's treatment of euthanasia: "[o]ur law says mercy killing is wrong and is no defense to murder charges," but "our jury system permits us to let mercy killers go free without ever forcing us to admit they were acquitted because what they did was euthanasia. . . . As a result, we can have it both ways by both forbidding euthanasia and freeing mercy killers," even though it is "a lie because we want, and get, what formally we deny we wanted."<sup>193</sup>

To illustrate the use of subterfuges as devices to limit the reach of our constitutional aspirations, Calabresi cites the "distinction between a cult and a religion" that courts implicitly draw for purposes of the Establishment Clause—that is, that there "may be some beliefs which are considered *so* outlandish that they do not count as religions at all," even though "no principled distinction can be made between cults and religions."<sup>194</sup> "By denying that some cults are religions at all," Calabresi argues, "we may be able to give full protection in the face of majoritarian pressures to any number of other religions which are *not* 'acceptable,' but which could not be termed non-religions under any reasonable definition of religion."<sup>195</sup>

New legal fictions and Calabresian legal subterfuges have two important features in common: first, as I discuss below, they are often motivated by our aspirations for the law;<sup>196</sup> and second, they raise difficult questions about the extent to which judges ought to be candid about the grounds for their choices.<sup>197</sup> But they are also different in a fundamental way. Legal subterfuges are not used to justify the creation of legal rules, but rather are deployed to mask the choices implicit in the application of existing legal rules. Legal subterfuges, like classic legal fictions, permit judges to say that the law requires one thing while they actually do something quite different. New legal fictions, in contrast, are simply premises, albeit false ones, for legal rules that the court can be expected to apply faithfully in that and subsequent cases. Unlike legal subterfuges, new legal fictions are almost always justificatory devices—that is, they are used to

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thereby permit us to assert that we are cleaving to both beliefs in conflict." *Id.* at 88; see CALABRESI & BOBBITT, *supra* note 189, at 17–28.

192. See CALABRESI & BOBBITT, *supra* note 189, at 24, 78–79.

193. CALABRESI, *supra* note 188, at 88–89.

194. *Id.* at 60–61.

195. *Id.* at 61.

196. See CALABRESI, *supra* note 188, at 61, 90–91; see also GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 172–81 (1982); *infra* note 228 and accompanying text.

197. See CALABRESI, *supra* note 196, at 174–80. It is possible to argue that legal subterfuges are similar to new legal fictions when they are deployed to limit the reach of our constitutional aspirations because in such cases the subterfuge often relies on a premise that, if not false, is misleading or expressed with deceptive simplicity. For example, if, as Calabresi argues, there is no principled way for purposes of the First Amendment to distinguish between a religion and a cult, then the assertion that they are different is misleading or deceptively simple. But because the "false" premise here relates to the judges' ability to draw distinctions that are not easily drawn, the premises in these cases are no different from countless legal rules that are unprincipled or not easily or readily administered. I have in mind a more specific type of false premise when I speak of new legal fictions.

ground and justify legal doctrine, even though the very explanation is itself demonstrably or at least arguably false.<sup>198</sup>

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New legal fictions thus differ in important respects from common law legal fictions and legal subterfuges. In addition, although sometimes judges rely on new legal fictions for the same reasons that they once relied on common law legal fictions and continue at times to rely on legal subterfuges, often judges rely on new legal fictions for entirely different reasons. In order to determine the desirability and utility of new legal fictions, it is necessary to explore why judges rely on them.

### III. WHY COURTS RELY ON NEW LEGAL FICTIONS

As should be clear from the diverse range of examples of new legal fictions discussed above, judges rely on new legal fictions for many different reasons. I discuss here the most common and important. Of course, sometimes when a court relies on a new legal fiction, several of these justifications are present simultaneously. Only once we identify the reasons why courts rely on new legal fictions can we turn to the final inquiry: whether the reasons for relying on new legal fictions ever outweigh the interest in judicial candor.

#### A. IGNORANCE

Sometimes judges rely on new legal fictions simply because they believe them to be true. In such instances, putting aside for a moment the countervailing interest in stare decisis,<sup>199</sup> judges are open to abandoning the false premise—and possibly the legal rule for which it was a premise—when sufficient proof is offered to demonstrate its falsity.<sup>200</sup> In these cases, the new legal fiction is not intended to mask a normative choice, but instead is based on a misunderstanding or misreading of empirical reality.

For example, as social scientists have pointed out concerns about reliability of identifications from suspect lineups and photo arrays, courts (and law enforcement) have developed new protocols to enhance accuracy.<sup>201</sup> And although most courts still are resistant to admitting expert testimony about the reliability of eyewitness evidence, instances of courts' allowing such evidence not only have gradually increased in recent years but also have sometimes involved acknowledgements of the empirically based concerns about eyewitness testi-

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198. There are also important similarities and differences between legal fictions and legal subterfuges. For a discussion of their relationship, see Kathryn Abrams, *A Constitutional Law for the Age of Anxiety*, 73 CAL. L. REV. 1643, 1654–55 (1985) (reviewing GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW (1985)).

199. See *infra* notes 251–61 and accompanying text.

200. Indeed, in some cases judges are explicit that their decisions are empirically contingent. See, e.g., *United States v. Leon*, 468 U.S. 897, 927–28 (1984) (Blackmun, J., concurring).

201. See Brown, *supra* note 59, at 1593; Overbeck, *supra* note 80, at 1904–06.

mony.<sup>202</sup> Similarly, much (though not all) of the behavioral economics and finance research that casts doubt on the efficient-capital-markets hypothesis was conducted—and incorporated into discussions by legal scholars—after the Court’s decision in *Basic*.<sup>203</sup> There may therefore be reason to expect change in the Court’s willingness to indulge the fraud-on-the-market theory.

#### B. INSTITUTIONAL AND PROFESSIONAL CONSTRAINTS

Judges also rely on new legal fictions because of the law’s general imperviousness to social science and change. Because of the ambiguous status of legislative facts in the creation of legal rules, courts have no formal or established mechanism for consideration of empirical research.<sup>204</sup> And even on those relatively rare occasions when the lessons of social science penetrate the sphere of judicial decisionmaking, the mechanisms for correcting legal rules tainted by false premises are cumbersome and institutionally disfavored. At least with respect to existing legal rules whose premises have been called into doubt by subsequent empirical research, judges are reluctant to take the rather drastic step of overruling precedent, thus upsetting settled expectations and imposing costs on repeat players in the legal system, such as trial lawyers.

Judges in particular are unlikely to find fault with the trouble that the legal system has in responding to social science. Judges are lawyers, and lawyers are the product of a system of professional education that seeks, among other things, to sensitize its students to the specialized considerations of the legal system. Lawyers are socialized to view the legal system as a distinct system with a distinct set of norms, and they tend to guard that system from challenges to its norms.<sup>205</sup> Judges by definition have succeeded in that system, and we can perhaps expect them to guard it even more zealously than the average lawyer.

#### C. MASKING NORMATIVE CHOICES

Judges sometimes rely on new legal fictions to conceal that they are making normative choices in fashioning legal rules.<sup>206</sup> The Court’s test for determining

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202. See *United States v. Smithers*, 212 F.3d 306, 311–12 (6th Cir. 2000) (recognizing jurisprudential trend in admitting expert testimony regarding accuracy of identification); Overbeck, *supra* note 80, at 1910–11. To be sure, these developments might not represent a trend because many of the judges who presume that jurors can accurately assess eyewitness testimony rely on that premise for reasons other than mere ignorance. See *infra* Part III.E.

203. See *supra* notes 100–11 and accompanying text.

204. See Vince Blasi, *The Newsmen’s Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 235 (1971) (“Many, if not most, of the empirical premises that guide legal decision-making are initially formulated by a most unsystematic and impressionistic process. What is worse, these premises are seldom tested in operation. Indeed, probably the greatest single shortcoming of American law as a decision-making process is its failure to institute any sort of systemic auditing procedure.”); Monahan & Walker, *supra* note 16, at 485–88.

205. See Tanford, *supra* note 38, at 157, 159–66 (analyzing the Supreme Court’s failure to embrace psychology due to its adherence to settled trial procedures).

206. See, e.g., Faigman, *supra* note 30, at 549; Meares & Harcourt, *supra* note 48, at 735; Tanford, *supra* note 38, at 155–56.



when an interrogation by law enforcement is custodial appears to fall into this category. Although few objectively reasonable people would feel free to leave when the police stop them to ask questions, the doctrine as applied often finds that the person was not legally in custody. The most plausible explanation is that the “reasonable person” test that the Court applies is not a descriptive claim about individual views of police coercion, but rather a normative judgment about when the particular legal consequences at issue—the obligation of law enforcement to provide *Miranda* warnings—ought to attach. This normative choice presumably is based on a balancing of liberty and order interests.<sup>207</sup> But by couching the test as at least partially factually contingent, the Court effectively masks the normative nature of its task.<sup>208</sup>

Of course, many if not all of the examples of new legal fictions discussed above involve judges making normative choices. But most of the examples involve not only a normative choice in the fashioning of the legal rule, but also a normative choice to obscure that choice in the service of some *other* normative goal, such as to legitimate some aspect of the legal system or to operationalize a legal theory. With the Court’s test for custody, in contrast, the end to be served by the new legal fiction is simply obfuscation.

I attempt below to refine the categorization of most of the other examples further based on the apparent justification for the normative choices involved for each example. Indeed, the ultimate question—whether the justification for use of the new legal fiction outweighs the general interest in judicial candor—cannot be answered without a more nuanced consideration of the particular justifications for masking normative choices with ostensibly factually based suppositions. I thus turn now to the more specific justifications for the normative choices concealed by new legal fictions.

#### D. OPERATIONALIZING LEGAL THEORIES

New legal fictions often are devices for operationalizing other legal theories, many of which are themselves reflections of normative judicial choices. For example, many originalists concede that the inquiry for determining constitu-

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207. See Meares & Harcourt, *supra* note 48, at 737.

208. The same phenomenon often exists when courts apply objective reasonableness tests in other contexts. For example, the test for granting judgment as a matter of law—that no reasonable jury could rule in favor of the non-moving party—in its application has been something closer to a normative standard for how much evidence the party who bears the burden of persuasion must produce in order to change the status quo, with little obvious relationship to what reasonable people might actually conclude. See, e.g., *Galloway v. United States*, 319 U.S. 372 (1943) (affirming directed verdict because evidence introduced was unduly speculative); *Denman v. Spain*, 135 So. 2d 195, 197 (Miss. 1961) (affirming a grant of judgment notwithstanding the verdict in negligence case involving collision in which plaintiff offered evidence showing that defendant’s car was speeding but no evidence that defendant’s car crossed the median).

tional meaning often will be very difficult to conduct,<sup>209</sup> but they nevertheless defend the methodology on the ground that it is more likely to limit judges' ability to substitute their own views under the guise of constitutional interpretation.<sup>210</sup> For these originalists, the choice of interpretive methodology is driven principally by the desire to constrain judicial discretion in a constitutional democracy. The theory is difficult to translate into practice, but accepting the fiction of collective intent and determinate meaning is a small price to pay in the service of broader theoretical ambitions. Similarly, textualists—who, apparently unlike originalists, explicitly reject as a fiction the notion that one can readily ascribe intention to a multi-member body with respect to questions that the members did not consider—accept a different set of fictions in order to operationalize a related theory of judicial restraint.<sup>211</sup>

The Court's willingness to permit expert testimony predicting future dangerousness likewise might be justified on this ground. Although there are serious doubts about the reliability of such predictions, permitting them might help to operationalize a theory of judicial sanctions, at least when deployed outside of the civil context. Obviously, such predictions do nothing to actualize a backward-looking theory of "just deserts"—one of the most popular theories of punishment<sup>212</sup>—but they do help the courts to implement a forward-looking theory of crime control. Excluding testimony about future dangerousness might undermine effectuation of this latter theory of punishment, which courts enforce because of both its utilitarian and normative attractiveness.<sup>213</sup>

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209. See Scalia, *supra* note 149, at 45 ("There is plenty of room for disagreement as to what original meaning was, and even more as to how that original meaning applies to the situation before the court."); Scalia, *supra* note 5, at 863.

210. See Scalia, *supra* note 5, at 863 (arguing that originalism is more likely than other approaches to constitutional interpretation to avoid the "main danger in judicial interpretation"—that "the judges will mistake their own predilections for the law"); see also Scalia, *supra* note 149, at 41–47.

211. See Easterbrook, *supra* note 135, at 63; Eskridge Jr., *supra* note 132, at 648 (arguing that textualism is necessary to "prevent judicial usurpation of legislative power"); Zeppos, *supra* note 137, at 1322 (arguing that textualism ultimately does not follow from social choice theory, but rather from a "particular normative vision of both legitimacy and the appropriate constraint in judging"); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1087–88 (1992) (presenting the textualists' claim that their methodology "allows judges to follow the law and not their own view of justice"). Textualists subscribe to the "faithful agent" theory of the judicial role. See Easterbrook, *supra* note 135, at 63; Manning, *supra* note 29, at 9–22. This theory holds that judges are "a subordinate branch of government whose only role in statutory interpretation is to carry out Congress's instructions faithfully." Molot, *supra* note 147, at 6–7. In contrast, proponents of the "coequal partner" theory of the judicial role, which holds that judges share "equal responsibility for law elaboration," *id.* at 7, can avoid the new legal fictions upon which textualism is based because under that theory judges apply independent judgment in constructing statutory meaning. It is ultimately this choice between theories of judicial role that determines whether new legal fictions are necessary. See Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) ("Any theory of statutory interpretation is at base a theory about constitutional law.").

212. See John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, *Incapacitation and Just Deserts as Motives for Punishment*, 24 LAW & HUM. BEHAV. 659, 659–60 (2000).

213. Cf. Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1442–44 (2001) ("The justice problems resulting from the conflict

## E. FUNCTIONALISM AND ADMINISTRABILITY

Judges often rely on new legal fictions in order to advance functional goals and to craft rules that are judicially administrable. For example, although many judges at this point undoubtedly are well aware that empirical research has demonstrated that eyewitness identifications often are unreliable, they continue to rule in most cases that expert testimony to that effect is inadmissible at trial. Although judges usually do not articulate it, I suspect that the principal reason for their refusal to admit such testimony is they fear that if they permit it, in every trial involving eyewitness testimony—and there are many, particularly on the criminal docket—there will be a mini-trial on the reliability of one piece of evidence in the case. And because so many criminal cases turn on eyewitness testimony, judges likely are not willing to exclude the testimony as a way to avoid such mini-trials, notwithstanding concerns about its generic reliability. Even if eyewitness testimony is the most frequent basis for erroneous convictions, the percentage of cases tainted by such errors likely is relatively small, and judges likely view potentially undermining a broad range of criminal prosecutions as too bitter a pill to swallow.

Indeed, the few instances of candid judicial reflection on this question reveal that courts rely on the new legal fiction that jurors can accurately assess the reliability of eyewitness testimony for reasons of functionalism and administrability.<sup>214</sup> The same appears to be true for the new legal fiction that jurors can understand and follow limiting instructions. Justice Scalia, for example, has argued that the presumption is “a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.”<sup>215</sup> He perhaps thought it unnecessary to spell out the likely consequences of abandoning the new legal fiction, which

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between incapacitation and desert are significant not only because doing justice is an important value in its own right—the nonconsequentialist, retributivist view—but also because doing justice can have important crime-prevention effects—the consequentialist, utilitarian argument.”)

214. See *United States v. Brien*, 59 F.3d 274, 277 (1st Cir. 1995) (raising concerns that trials will be “prolonged by battles of experts”); *United States v. Fosher*, 590 F.2d 381, 384 (1st Cir. 1979) (similar). Judge Easterbrook more thoroughly (and sarcastically) sounded the same themes:

Because trials rest on so many contestable empirical propositions, including those about eyewitness recollection, it always would be possible to offer expert evidence along these and related lines.

Yet a trial *about the process of trials* not only would divert attention from the main question . . . and substantially lengthen the process but also would not do much to improve the accuracy of the outcome. Social science evidence is difficult to absorb; the idea of hypothesis formulation and testing is alien to most persons . . . Many lawyers think that the best (= most persuasive) experts are those who have taken acting lessons and have deep voices, rather than those who have done the best research. Perhaps that is too pessimistic a view; but then the effect of experts is *itself* a question open to empirical inquiry, which might be added to the agenda for trial.

*United States v. Hall*, 165 F.3d 1095, 1119–20 (7th Cir. 1999) (Easterbrook, J., concurring).

215. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

would be that “[e]vidence could not be received for limited purposes” and “a mistrial would have to be ordered each time the jurors heard something they should not have heard.”<sup>216</sup>

Likewise, the premise of the fraud-on-the-market theory—that individuals are rational economic actors and that markets as a result operate efficiently—is more easily administrable than the more nuanced view of human decisionmaking advanced by proponents of behavioral law and economics.<sup>217</sup> Indeed, the principal critique of behavioral law and economics is that it fails to provide an administrable account of human choice. Jennifer Arlen, for example, argues that not only does the account of the rational economic actor remain in many circumstances “a reasonable description of individual choice because many—though not all—cognitive biases are muted as people learn by experience, work within organizations, or obtain advice from experts,” but also that “even when people are not rational, behavioral analysis of law cannot necessarily provide an alternative framework for developing normative policy prescriptions because it does not yet have a coherent, robust, tractable model of human behavior which can serve as a basis for such recommendations.”<sup>218</sup> The argument about administrability can also be made to justify the Court’s apparent premise that reasonable people sometimes feel free to leave when subject to questioning by police, although I find the argument ultimately unpersuasive.<sup>219</sup>

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216. Ritter, *supra* note 71, at 204; see Tanford, *supra* note 38, at 162 (“Research demonstrating that jurors might be unable to follow instructions . . . has likewise been rejected because ordering new trials after every instance of improper use of evidence would overwhelm the system.”). These consequences of abandoning the new legal fiction do not necessarily imply that continued reliance on it therefore raises constitutional concerns. In the early years of the Republic, jurors often decided questions of law as well as fact, and thus generally were not instructed about the law. See Ritter, *supra* note 71, at 188–89. If our constitutional system can tolerate such a state of affairs, arguably it can permit the lesser step of asking jurors to rule after being provided with instructions about how to consider evidence. But even if such a practice does not violate the Constitution, it is not necessarily a desirable way to administer a system of justice. In any event, over time concerns increased over jurors’ ability to apply the law, which among other things led to the use of special verdicts and jury instructions. See LEONARD W. LEVY, *THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY 71* (1999); BRUCE H. MANN, *NEIGHBORS AND STRANGERS* 79 (1987); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 *HOFSTRA L. REV.* 377, 486–88 (1996).

217. See *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988) (establishing a presumption based on the fraud-on-the-market theory because of “considerations of fairness, public policy, and probability, as well as judicial economy”).

218. See Jennifer Arlen, Comment, *The Future of Behavioral Economic Analysis of the Law*, 51 *VAND. L. REV.* 1765, 1768 (1998); see also *id.* at 1788 (claiming that “[b]ehavioral economic analysis is unlikely to replace conventional law and economics unless it can formulate a superior model of human behavior”); Posner, *supra* note 110, at 1552, 1560 (arguing that behavioral economics has not sufficiently developed an alternative theory). Jolls, Sunstein, and Thaler address this criticism by arguing that although there is virtue in simplicity, “conventional economics is not in this position, for its predictions are often wrong.” Jolls et al., *supra* note 105, at 1487–88. In addition, they argue that to the extent that conventional law and economics purports to provide such an administrable concept, it “does so at the expense of any real predictive power” because “the term ‘rationality’ is highly ambiguous and can be used to mean many things.” *Id.* at 1488.

219. It is true that, generally speaking, a “broad exclusionary” objective test is more administrable than a “narrow exclusionary” objective test or a subjective test. See Rutledge, *supra* note 114, at

## F. LEGITIMATING FUNCTIONS AND THE EXPRESSIVE FORCE OF THE LAW

Judges often rely on and preserve new legal fictions—even in the face of evidence that they are false—because they serve a legitimating function and because their abandonment might have de-legitimizing consequences. Judges, in other words, recognize that the law often serves an expressive function, and they cling to premises, either consciously or subconsciously, that will produce legal rules with positive expressive value.<sup>220</sup>

Although unarticulated, judicial reliance on the presumption that jurors can understand and follow limiting instructions likely reflects an effort to legitimate the jury system itself. After all, if juries cannot faithfully follow limiting instructions, then what hope can we have for the fairness of the judicial system? The new legal fiction might also serve to mediate between conflicting values that are both fundamental to our system of justice: that cases ought to be decided accurately based on evidence adduced at trial, and that juries are important checks on government overreaching. The presumption that jurors can follow limiting instructions attempts to deflect concern that promotion of the latter value will undermine the former—or, in Calabresian terms, deceive us into believing that promotion of the latter will not undermine the former.

Similarly, the premise upon which the doctrine that ignorance of the law is no excuse is based—that citizens can reasonably be expected to know their rights and obligations in an increasingly complex legal and regulatory environment—can be explained on this ground. The conventional policy justification for the rule is that it creates an incentive for citizens to learn their legal obligations.<sup>221</sup>

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1013–16 (defining and analyzing both tests); *see also* Thompson v. Keohane, 516 U.S. 99, 112 (1995); Stansbury v. California, 511 U.S. 318, 322–25 (1994); *cf.* Richard H. Fallon Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1303 (2006) (discussing the argument that *Miranda*'s prophylactic rule “derived [its] justification from [its] efficacy in framing intelligible inquiries, within the empirical competence of courts to answer, and from yielding predictable results the overall benefits of which exceeded the costs”). But this is the case only when the test actually reflects what real people actually would perceive under the circumstances. The Court's test, in contrast, does not appear meaningfully linked to descriptive reality. *See supra* notes 112–17 and accompanying text. Indeed, if anything, the Court's application of the test is unpredictable precisely because its application seems so divorced for the literal enunciation of the standard.

220. *See generally* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

221. *See, e.g.*, OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 48 (Boston, Little, Brown & Co. 57th prtg. 1990) (1881) (“It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit [ignorance as an] excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.”); 21 AM. JUR. 2D *Criminal Law* § 153 (2006); Dan-Cohen, *supra* note 123, at 645–48. For a different account of the rule, *see* Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127 (1997). Kahan argues that contrary to the Holmesian view—which is premised on “liberal positivism” (the view that law and morality are separate) and the “utility of legal knowledge” (the view that we want to create an incentive for people to learn their legal obligations)—the doctrine in fact is premised on “legal moralism,” which holds that the law is suffused with morality and cannot be applied without making moral judgments, and the “prudence of obfuscation,” which holds that the law must employ strategies to *discourage* citizens from learning the law in order to game it by taking advantage of its

Indeed, many commentators have justified the gap between the traditional articulation of the rule—that ignorance of the law is basically never an excuse—and the reality of the doctrine—that in some circumstances “bona fide ignorance of the law negate[s] the culpability that would otherwise have attached to an act”—by observing that any attempt to convey the nuance of the actual doctrine might undermine citizens’ incentive to learn their legal obligations.<sup>222</sup> Courts assert the robust, somewhat misleading version of the rule—and the premise on which it is based—because they fear that if they made clear that sometimes ignorance *is* an excuse, people likely would claim (or seek to attain) ignorance more often. The statement of the rule itself, therefore, has expressive value.<sup>223</sup>

The new legal fictions discussed above that address the relationship between the courts and Congress likewise serve a legitimating function. Consider the premise that members of Congress considered their oath to uphold the Constitution in enacting a statute. What would it say about Congress, the courts, and the separation of powers—and what would it mean for the future of the relationship between Congress and the courts—if a court suggested that it is no longer realistic to presume that members of Congress take their constitutional obligations seriously? Similarly, textualism, particularly when robustly described and defended, “is a potentially objective method and vocabulary for solidifying the Court’s reputation as a protector of the rule of law, and the objectivity and credibility it creates, or gives the illusion of creating, will protect the Court when it confronts rather than acquiesces in the current political equilibrium.”<sup>224</sup>

This explanation for judicial reliance on new legal fictions is similar to the argument, most closely associated with Charles Nesson, that the acceptability of judicial judgments sometimes depends more on perception than reality, and sometimes flows more from obfuscation than from transparency.<sup>225</sup> In the end, however, whether reliance on new legal fictions *actually* serves a legitimating

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loopholes. *Id.* at 127–29. He argues that together these premises explain why the law generally does not permit a defense of reasonable mistake of the law for many crimes that are *malum in se*, but does for many crimes that are *malum prohibitum*. *Id.* at 129–30. In other words, courts do not want people to know too much about the letter of the law; instead, they want people, when there is a close question of the legality of the conduct in question, to act in the manner that is most virtuous. Whether one accepts Holmes’s or Kahan’s account is irrelevant for present purposes; it is the conventional articulation of the rule, not its justification, that implies the new legal fiction.

222. Dan-Cohen, *supra* note 123, at 648. As discussed *infra* at note 281 and accompanying text, Dan-Cohen argues that courts intentionally state the rule as an absolute, even though in fact it is not absolute, as a “strategy of selective transmission” to accomplish “partial acoustic separation.” *Id.*

223. See Shapiro, *supra* note 187, at 745–47. Fuller refers to the fiction that “everyone is presumed to know the law” as an “apologetic” or “merciful” fiction, which “apologizes for the necessity in which the law finds itself of attributing to the acts of parties legal consequences that they could not even remotely have anticipated.” FULLER, *supra* note 156, at 84. “The administration of the law would be a much more pleasant task if the legal consequences attributed to the acts of parties were such as the parties might have foreseen. This fiction is a way of obscuring the unpleasant truth that this cannot be the case.” *Id.* at 84.

224. Eskridge Jr., *Unknown Ideal*, *supra* note 147, at 1556.

225. See *supra* notes 19, 57 and accompanying text; see also Gacy v. Welborn, 994 F.2d 305, 312–14 (7th Cir. 1993) (Easterbrook, J.).

function—whether through the expressive force of law or by promoting the acceptability of judicial judgments—is itself an empirical question,<sup>226</sup> albeit not an easy one to answer.<sup>227</sup>

Even if one could demonstrate conclusively that a given new legal fiction did not meaningfully promote public perception of the system's legitimacy or the acceptability of the judgments in particular cases deploying the new legal fiction, we might expect judges to continue to rely on it. If nothing else, judges' factual assumptions often reflect their aspirations for society and the law, even if those aspirations are unlikely to be realized. This is particularly true in cases involving rules with constitutional dimensions, as the Constitution is itself in part an aspirational document, "embodying ideals that are not yet and perhaps need not ever be fully realized but that remain constitutional ideals nonetheless."<sup>228</sup>

Not surprisingly, courts often deploy a single new legal fiction for several of these reasons. It is at best debatable, for example, whether jurors truly can consider evidence for some purposes while ignoring it for others. But we must have some way to reconcile values that often are in tension: there is a constitutional entitlement to a jury trial in many cases, but we also want to guarantee fair trials that are decided, to the best of human ability, on the basis of evidence adduced during the proceedings. The rules of evidence allow us to operationalize these theories of fair process when they come into conflict, they maintain a fiction that might make jury verdicts seem more acceptable, and they state something about our normative preference—indeed, aspiration—for the institution of the jury. With these reasons for judicial reliance on new legal fictions in mind, we can now turn to the question whether and when reliance on the device is justified.

#### IV. NEW LEGAL FICTIONS AND JUDICIAL CANDOR

The preceding discussion about the reasons why judges rely on new legal fictions suggests that some reasons are more compelling than others. But what is most telling about the discussion is that, with respect to most of the examples discussed here, the judges did not themselves acknowledge the use of new legal fictions, let alone directly offer those reasons for their use that appear most compelling. Instead, we have been left to identify the new legal fictions and then to construct justifications for the judges' reliance on them.

Judges are human, and they often address questions that have no obviously correct answer. We thus can expect—and accept—a fairly wide range of errors:

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226. See Shapiro, *supra* note 187, at 745; see also Meares, *supra* note 47, at 860 (arguing that "Nesson's argument about ideal institutional design is a thoroughgoing empirical claim" that "might be true, or . . . might not").

227. See, e.g., Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333, 350 (1988) (finding support for the jury system despite knowledge of the frequency of errors in verdicts).

228. Fallon Jr., *supra* note 219, at 1279.

false factual assumptions, poor interpretive choices, and so on. But new legal fictions are different because they suggest not only that judges have been mistaken, but also in many cases that the judges were aware that they were mistaken and relied on the new legal fiction nonetheless. It is natural to be wary in such cases because they appear to involve a lack of judicial candor. In this section, I argue that judicial candor presumptively is desirable, and then I consider when, if ever, the unarticulated reasons that explain a judge's reliance on a new legal fiction overcome the presumption in favor of candor.

#### A. DEFINING JUDICIAL CANDOR

In his defense of judicial candor, David Shapiro argues that there is no lack of candor when a judge says something he believes to be true, even if it is false: "The problem of candor . . . arises only when the individual judge writes or supports a statement he does not believe to be so."<sup>229</sup> According to Shapiro, therefore, candor should be defined subjectively, not objectively.<sup>230</sup> I agree with Shapiro's definition. To be sure, there may be good reason to criticize some statements that the judge actually does believe—for example, a judge's assertion that originalism constrains judicial discretion more than other methodologies for interpreting the Constitution<sup>231</sup>—but the desire for candor is not one of them. Indeed, any definition of candor other than the subjective one risks draining the concept of all meaning.<sup>232</sup> New legal fictions that are the product solely of judicial ignorance thus do not involve a lack of judicial candor. But pure examples of such a phenomenon are difficult to find.<sup>233</sup>

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229. Shapiro, *supra* note 187, at 736; accord Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 297 (1990) ("By candid, I mean never being consciously duplicitous."); see also Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 25 (1979) ("If justifications cannot be stated in the opinion, they should not be relied upon in entering the judgment.").

230. Scott Idelman, in contrast, notes that there may be good reason to apply an objective definition of candor, which "calibrates the meaning of candor to one or more external criteria of assessment such as truth, logical validity, or factual or empirical accuracy." Scott Idelman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1317 (1995). Under this definition, "a judge could be considered less than candid whenever she adheres to or propounds a position that is either factually incorrect or logically unsound." *Id.* at 1318.

231. See, e.g., Smith, *Sources*, *supra* note 67, at 225. Of course, a judge who makes such a statement even though he believes it is *not* true—perhaps because he believes that originalism is more likely to produce substantive results with which he agrees, but that he cannot openly make such a declaration—might properly be criticized for lacking judicial candor, as well.

232. This is the case for Idelman's suggested objective test for candor, which a judge would violate by advancing "a position that is either factually incorrect or logically unsound." Idelman, *supra* note 230, at 1318. These may be valid grounds on which to criticize a judge's statements, but it is far from apparent that such a critique has anything to do with candor. Indeed, we generally think of candor as a form of forthrightness, and we do not conclude that a person who has accurately stated his suppositions and beliefs has failed the test of forthrightness. In the end, an "objective" test for candor is really like strict liability for judicial decisionmaking. There is nothing wrong with insisting that judges get it right—something virtually all academic criticism of judicial decisionmaking does—but we do not need to refine our understanding of candor to encourage judges to get it right more often.

233. A related question of definition is whether candor necessarily entails introspection. Scott Altman argues that judges should be candid but not introspective—that is, that judges should state what



## B. THE VIRTUES OF JUDICIAL CANDOR

As David Shapiro observes, candor plays the same salutary role in the context of judicial decisionmaking as it does in all other areas of human relations: its value “rests in part on the importance of treating others with respect” and the “need for trust in the carrying on of human affairs.”<sup>234</sup> But judicial candor might be desirable for reasons other than this deontological defense. There are also consequentialist arguments in favor of candor that draw “special strength from the nature of the judicial process.”<sup>235</sup> As Shapiro and Lon Fuller before him have argued, “reasoned response to reasoned argument is an essential aspect” of judicial decisionmaking, and a “requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary’s exercise of power.”<sup>236</sup> As John Rawls argued, this view is attractive as a matter of general political philosophy;<sup>237</sup> but it also carries special force in this context because of the particular role of the judge in a constitutional democracy and the

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they believe their reasons to be when they reach decisions, but should not introspect to determine whether in fact the reasons that they believe are correct have in fact motivated them because introspection might perversely undermine the desirable constraint on the judge’s ability to act politically that a requirement of candor imposes. See Altman, *supra* note 229, at 299, 303–27, 351. Altman argues that if judges introspect about the real reasons for their decisions, then they are likely to realize that they are deciding cases politically more often than they believed; this realization, in turn, is likely to make them more cynical about judging, which will lead them to act politically even more often. See *id.* at 304–27, 351. Richard Posner, in contrast, has argued that judges should stop deluding themselves into believing that they do not act politically, and he has urged judges to be more introspective and candid about the extent to which law and precedent do not truly bind the judge. See Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 865, 872–73 (1988). It is not clear which approach is preferable; the question whether judges should introspect is largely empirical but virtually impossible to test. At bottom, the answer turns on how realist one is about the process of judging, and one’s intuition about the good faith of judges in trying to fulfill the idealized version of their role. At a minimum, however, we can ask whether judges who, even without introspection, recognize that they are asserting a new legal fiction ought instead to be candid about the actual path of their reasoning.

234. Shapiro, *supra* note 187, at 736–37. As he explains, “lack of candor often carries with it the implication that the listener is less capable of dealing with the truth, and thus less worthy of respect, than the speaker.” In addition, “[i]n a society that placed no special value on truthfulness, all cooperative undertakings would be difficult or impossible.” *Id.*

235. *Id.* at 737.

236. *Id.* (discussing Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365–72 (1978)); see also BREYER, *supra* note 140, at 127; Leflar, *supra* note 35, at 740–41 (arguing that decisions that “seek to break new ground, or ask reasonably that old ground be broken anew” must include “the reasons of ‘practical politics’ that induced conviction, or else the opinions will be incomplete and false”).

237. See JOHN RAWLS, A THEORY OF JUSTICE 115 & n.8 (rev. ed. 1999) (arguing that principles of justice must be defensible publicly, and that their basis and content must not be kept secret). There is also an elaborate literature on the ethics of falsehood, and in particular on the ethics of lies for the public good. See generally Sissela Bok, *Lies for the Public Good*, in WHAT’S FAIR: ETHICS FOR NEGOTIATORS 371–82 (Carrie Menkel-Meadow & Michael Wheeler eds., 2004). New legal fictions might seem analogous to “white lies,” which are generally less pernicious than lies without a noble motive. But “[d]eceiving the people for the sake of the people is a self-contradictory notion in a democracy,” and “[a]s with all white lies, . . . the problem is that they spread so easily, and that lines are very hard to draw.” *Id.* at 376, 378.

phenomenon that Alexander Bickel described as the counter-majoritarian difficulty.<sup>238</sup>

Specifically, because a requirement of candor makes transparent a judge's reasons, it also makes transparent his choices. Sometimes those choices will be factually contingent, and sometimes they will be purely normative. When the choices are factually contingent, the public—lay people, political officials in other branches, and scholars—can measure the descriptive validity of the factual claims. And, more important, when the choices are normative, candor enables the public to assess both the appropriateness in general of judges' making such choices and the desirability of the particular normative choice at issue in the case.

For this reason, arguments about judicial candor often move quickly to arguments about the appropriate role of the judge.<sup>239</sup> Are judges political actors? May judges make law, or must they only apply it? But it is (thankfully) not necessary to resolve those thorny questions here because a presumption of judicial candor is desirable in the context of new legal fictions regardless of one's view about the appropriate role of the judge. For those who believe that judges presumptively should not make normative judgments—and that it is possible to limit judges to such a role<sup>240</sup>—a near-absolute rule of judicial candor should be appealing because a requirement of candor prevents judges from disguising normative judgments as purportedly factual assertions, and thus lays bare the judges' normative choices. A requirement of candor, in other words, will help to detect, criticize, and thus deter impermissible judicial choices. For those who accept that the judicial role sometimes will entail the making of normative judgments,<sup>241</sup> a rule favoring judicial candor likewise should be attractive. Indeed, the mere acknowledgment that judges make such judgments does not imply that they should not be constrained *in some way* in such endeavors, even for the most realistic of legal realists.<sup>242</sup> Forcing judges to reveal when they are making normative choices increases the likelihood of

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238. BICKEL, *supra* note 20, at 16–17.

239. For a brief but provocative example, see Shapiro, *supra* note 187, at 155–56 (arguing that judges face a “fundamental paradox” because they are not supposed to “make law,” but must also “make rules for decision of future cases” and, therefore, make law). See also Monaghan, *supra* note 229, at 19–20; cf. Soifer, *supra* note 31, at 885, 909 (asserting that “[o]ur great judges are those who most effectively use the fabric of fiction to camouflage their creativity” and that “[p]erhaps we judge judges by their skill at covering their tracks”).

240. See, e.g., Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism*, 103 MICH. L. REV. 1081, 1091–97 (2005) (reviewing RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004)) (“What I do take issue with . . . is the presumption that unelected federal judges should sit as a Council of Revision over the necessity and propriety of all state and federal laws.”); Manning, *supra* note 29, at 56–105.

241. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 66–68, 326–27 (1978); Meares, *supra* note 47, at 869–71; Posner, *supra* note 233, at 859, 865, 872–73; cf. Idelman, *supra* note 230, at 1412–13 (“[T]he dichotomy between law and politics persists as a source of institutional orientation and symbolic or rhetorical value . . . rather than as a genuine description of reality.”).

242. See, e.g., Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 521 (1986) (describing a judge with a “vocation of social transformation”);

workable constraints because scholars and other actors in the political and legal system can more readily challenge normative judgments that they think are unwise or undesirable.<sup>243</sup>

Judges, of course, play other roles as well, and the desirability of candor might vary depending upon the demands imposed by these varying roles. Judges find facts; they apply previously determined rules to particular factual circumstances; they make equitable judgments about the need for a judicially imposed remedy and they dispense justice accordingly; they educate participants in the legal system, such as jurors and litigants, about their legal responsibilities; and to many participants in that system, they embody the state. Each of these roles triggers professional and ethical obligations for the judge, and at least at times candor will be in tension with some of these obligations. My principal concern here, however, is with the judge's role as lawmaker, and in this context judicial candor is almost always desirable. Accordingly, I start from the assumption that there is a presumption in favor of judicial candor, and thus against the use of new legal fictions.<sup>244</sup>

To be sure, it might be unrealistic, unnecessary, and at times undesirable to insist even on a presumption of judicial candor. On at least some accounts of judicial decisionmaking, judges lie regularly. A judge might insist that a particular decision is controlled by precedent when in fact the prior case was at best of marginal relevance to the issue presented; conversely, a judge might distinguish a precedent that, properly characterized, is controlling.<sup>245</sup> A judge might rest a

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see also Faigman, *supra* note 30, at 602 (“[D]iscretion is a necessary part of every judge’s job description. The value of a restraining principle lies in its cabining that discretion, not eliminating it.”).

243. See Faigman, *supra* note 30, at 612–13; see also Kahan, *supra* note 221, at 154 (“When contentious moral judgments are camouflaged in seemingly nonjudgmental rhetoric, decisionmakers are freed from the constraints of public accountability, and citizens are denied the opportunity to examine, criticize, and reform the judgments that their law reflects.”); Meares, *supra* note 47, at 869 (“Reference to relevant social science and empirical data creates transparency because these references ground factual assertions. As a result, interpretive choices are more clearly reflected.”); Meares & Harcourt, *supra* note 48, at 793 (“By addressing social science data, the Court would articulate more explicitly the values of interest . . . . This, in turn, would make more transparent the interpretive choices that underlie the balancing of liberty and order interests.”); Shapiro, *supra* note 187, at 737–38, 750 (“[C]andor is to the judicial process what notice is to fair procedure. . . [T]he fidelity of judges to law can be fairly measured only if they believe what they say in their opinions and orders . . . .”).

244. I am mindful that arguments about the desirability of candor might vary depending on who we perceive to be the appropriate audience for a court’s reliance on a new legal fiction. When a judge relies on a new legal fiction in fashioning a non-constitutional rule, for example, the ability of the legislature to respond by changing the rule might be impaired by the judge’s lack of candor in crafting the rule. When a judge relies on a new legal fiction in fashioning a constitutional rule, in contrast, the rule generally will be impervious to legislative alteration. Candor in those cases is important primarily so that other audiences—such as lower court judges, scholars, and the public generally—can assess the judge’s choices. Although these questions about audience obviously affect which arguments about candor are most persuasive, I proceed on the assumption that candor is desirable regardless of the audience.

245. Cf. *Rasul v. Bush*, 542 U.S. 466, 478–79 (2004) (Stevens, J.) (arguing that *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973), *sub silentio* overruled *Ahrens v. Clark*, 355 U.S. 188 (1948)).

decision on a ground that seems unlikely to have been the ground that actually motivated the decision.<sup>246</sup> If this is so, one might wonder, then why insist on a requirement of judicial candor with respect to new legal fictions when we do not robustly do so in so with respect to some many other judicial devices?

One answer, of course, is that we ought to insist on candor in those contexts, as well. But this is not an entirely satisfactory response. It might not only be unrealistic to insist on a universal rule of judicial candor but also might be unnecessary. In most contexts, we insist only on a *plausible* public justification for judicial action—even if not the “actual” justification—because the justification offered can then serve as a basis for discussion and, if necessary, criticism.<sup>247</sup> But matters are somewhat different in the specific context of new legal fictions. Because new legal fictions involve premises that are false—demonstrably, in most cases—they cannot be said to offer plausible public justifications for judicial action. And because they purport to turn on mere matters of fact, they obscure the very fact that a normative judgment is required. Accordingly, there is good reason to insist on a presumption of judicial candor when new legal fictions are at issue.

### C. OVERCOMING THE PRESUMPTION IN FAVOR OF CANDOR

The question remains whether a new legal fiction can ever be justified by goals so important and weighty that they overcome the presumption in favor of judicial candor. One need not go as far as Scott Idelman, who argues that to the extent that candor is desirable, it is *purely* for instrumental reasons, in order to conclude that in unusual cases the value of judicial candor might be outweighed by other values.<sup>248</sup>

In the end, however, deciding whether some other value or goal trumps the value of judicial candor itself involves a normative judgment. Deciding, for example, whether the expressive value purportedly advanced by repeated insistence that members of Congress take seriously their oath to be faithful to the Constitution outweighs the interest in frank judicial acknowledgment that sometimes members of Congress do not do so requires us, to borrow a phrase from Justice Scalia, to decide “whether a particular line is longer than a particular rock is heavy.”<sup>249</sup> To be sure, that normative judgment might be informed by empirical assessment of the countervailing interests. But the value of those interests obviously is not easy to measure. And even if it were possible to

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246. Cf. *Bush v. Gore*, 531 U.S. 98, 111 (2000); David Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. CHI. L. REV. 737 (2001).

247. This is true for both deontological reasons, see RAWLS, *supra* note 237; Micah Schwartzman, *The Principle of Judicial Sincerity*, available at [http://www.law.ucla.edu/docs/judicial\\_sincerity.pdf](http://www.law.ucla.edu/docs/judicial_sincerity.pdf) (last visited Jan. 26, 2007), and consequentialist reasons, see Fuller, *supra* note 236, at 365–72.

248. See Idelman, *supra* note 230, at 1328. Idelman proposes a “prudential theory of candor” that weighs, in every given case, the value of candor against other goals. See *id.* at 1313, 1401.

249. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment).

measure the actual expressive value—by, for example, conducting surveys to see what effect, if any, the presumption in favor of constitutionality or its premise has on public faith in Congress—a normative judgment would still be required to weigh that value against the value in judicial candor.<sup>250</sup> As such, it is not possible mechanically or categorically to define prospectively when a court's reliance on a new legal fiction is justified.

It is possible, however, to identify certain contexts for the use of new legal fictions that arguably make their use more or less justified. I sketch those out below. I also discuss the justifications for the examples of new legal fictions offered above and consider whether, in the main, they might be sufficiently weighty to overcome the presumption in favor of judicial candor.

### 1. Legal Continuity

In rare cases the need for legal continuity might justify dispensing with candor. This was the traditional justification for classic legal fictions.<sup>251</sup> For our purposes, the argument boils down to a claim that stare decisis might at times justify reliance on a new legal fiction.<sup>252</sup> For instance, in assuming that psychologists and psychiatrists could accurately predict an individual's future dangerousness, the Court in *Barefoot* expressed concern about the effect that a contrary view would have on other cases that relied on the same premise.<sup>253</sup> But the Court's argument in *Barefoot* demonstrates the weakness of this form of justification: it usually smacks of circularity and is unlikely to be compelling in the long run. The Court argued that because it had previously held, in *Jurek v. Texas*, that predictions of future dangerousness are a constitutionally permissible criteria for imposing the death penalty,<sup>254</sup> *a fortiori* it must be constitutional to permit psychiatrists, "out of the entire universe of persons who might have an opinion on the issue," to make such predictions.<sup>255</sup> But the *Jurek* case itself—which involved lay, not expert, testimony about future dangerousness—was premised at least in part on the assumption that such predictions are reliable

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250. Cf. Meares, *supra* note 47, at 860 (discussing Nesson's argument about the acceptability of jury verdicts).

251. See FULLER, *supra* note 156, at 52, 57–63; *supra* Part II.A.

252. See, e.g., Faigman, *supra* note 30, at 580 ("Following the facts wherever they lead might require modifying or overruling precedent and might create uncertainty over the state of the law pending scientific research. The Court's tendency toward revisionist interpretations is especially marked where the data contradict the Court's prior judgments.").

253. See *Barefoot v. Estelle*, 463 U.S. 880, 896–98 (1983) (stating that defendant's argument was "somewhat like asking us to disinvent the wheel" (citing *Jurek v. Texas*, 428 U.S. 262 (1976) (the likelihood of a defendant committing further crimes is a constitutionally acceptable criterion for imposing the death penalty))), *superseded by statute on other grounds*, 28 U.S.C. §2253 (2000), as recognized in *Slack v. McDaniel*, 529 U.S. 473 (2000); *Addington v. Texas*, 441 U.S. 418, 429 (1979) (holding that expert testimony by psychiatrists and psychologists about future dangerousness is important to determining whether a person subject to civil commitment proceedings may be committed).

254. *Jurek*, 428 U.S. at 262.

255. *Barefoot*, 463 U.S. at 896–97 (citing *Jurek*, 428 U.S. at 274–76).

and can accurately be assessed by jurors. The Court, in other words, justified reliance in *Barefoot* on the new legal fiction on the ground that the constitutional rule that the Court had created in *Jurek* relied on the same new legal fiction. To be sure, discarding the premise in *Barefoot* would have left *Jurek* vulnerable to attack; but perhaps such should be the fate of judicially created constitutional rules that rely on false factual assumptions.

This argument suggests the inherent malleability of stare decisis, which makes it a difficult ground on which to justify reliance on a new legal fiction. As the Court has stated, “[t]he obligation to follow precedent begins with necessity,”<sup>256</sup> but it is not an “inexorable command.”<sup>257</sup> In examining a prior holding—including in those cases where the prior holding is vulnerable because it was premised on a false factual supposition<sup>258</sup>—the Court’s “judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.”<sup>259</sup> Whether to overrule a case, in other words, involves a complex normative judgment, and the Court’s actual practice suggests that, as often as not, it deploys arguments for or against stare decisis based more on the Justices’ views about the desirability of the old or new rules than on their assessment of the persuasiveness of rule-of-law concerns.<sup>260</sup>

The argument for stare decisis is strongest in those cases in which the new legal fiction has branched out, serving as the basis for a wide range of legal rules. In such cases, abandoning the new legal fiction risks creating avulsive legal change. On the other hand, we might be particularly troubled to learn that a wide range of legal rules, rather than simply one isolated rule, are tainted by reliance on a false factual supposition, and this ultimately may serve as an argument in favor of abandoning the premise. Indeed, because the definition of new legal fiction excludes those factual premises that are embedded in legal rules that judges did not themselves create, the question is whether false premises are sufficient to justify *judge-made* legal rules—which, perhaps, are presumptively more problematic anyway, given the conventional institutional limits on the judicial function. Stare decisis therefore is unlikely to be a persuasive justification for preserving new legal fictions in the general run of

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256. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 854 (1992).

257. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–11 (1932) (Brandeis, J., dissenting).

258. See *Casey*, 505 U.S. at 863–64 (arguing that the Court overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Lochner v. New York*, 198 U.S. 45 (1905), because the “facts, or [the Court’s] understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions”).

259. *Casey*, 505 U.S. at 854.

260. See Monaghan, *supra* note 229, at 3 (“[T]he received tradition among most Justices and commentators denies that members of the Court are or should be meaningfully constrained by stare decisis. . . . [U]sually . . . stare decisis has no weight when the constitutional law on a particular subject seems, to a majority of the Court, to be in need of correction.”); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 84, 235–51 (3d ed. 2000).

cases.

But if nothing else, stare decisis should probably never justify a court's *lack of candor* about the actual reason for preserving the new legal fiction. There is no obviously compelling reason why a judge concerned about the ripple effects of abandoning a new legal fiction cannot say so, invoking stare decisis as a reason for the decision.<sup>261</sup> At least then we can have a reasoned discussion about whether rule-of-law and continuity values justify perpetuation of the new legal fiction. Unlike the other justifications discussed below for a lack of candor, stare decisis at best is simply a reason to preserve a mistaken premise, not a reason to obscure the basis for the decision to preserve it.

## 2. Tragic Choices

As discussed above, Guido Calabresi has argued that courts sometimes rely on legal subterfuges to reconcile competing—and often irreconcilable—goals. In order for the subterfuge successfully to play this role, the court must dispense with candor.<sup>262</sup> Judges sometimes rely on new legal fictions for similar reasons. I have suggested, for example, that courts might continue to assert the new legal fiction that jurors can understand and faithfully follow limiting instructions in part as a way to obscure a conflict between our desire that cases be decided accurately based on evidence adduced at trial and our belief that juries are, or can be, important checks on government overreaching.<sup>263</sup>

It is not clear, however, that important values are preserved simply by ignoring the extent to which they cannot fully be effectuated. One might expect, for example, that over time sustained attention to the fact that jurors have extensive difficulties understanding and following limiting instructions will erode the effectiveness of the new legal fiction in mediating between competing goals; if anything, one might expect increased cynicism about the fairness of the jury system if commentators continue to raise significant doubts about its effectiveness and accuracy. Indeed, Calabresi himself has suggested that legal subterfuges cannot be long-term fixes,<sup>264</sup> and he is accordingly deeply skeptical about the frequency with which an argument about tragic choices ought to succeed in overcoming the presumption in favor of judicial candor.<sup>265</sup>

As with many of the examples justified by such claims, it is ultimately an empirical question whether use of a new legal fiction in fact delivers what the judge who deploys it hopes it will, but we at least have good reason to be

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261. The Court in *Barefoot* did assert such a rationale for preserving the new legal fiction, and as such is not an example of lack of judicial candor. See *supra* note 19 and accompanying text.

262. See CALABRESI, *supra* note 188, at 90–91; CALABRESI, *supra* note 196, at 172–73 (“Dishonesty, whether chosen or through a failure to look far enough into dark corners, is preferred because total candor is given less weight than the other values involved in the conflict, one of which be undermined by honesty.”).

263. See *supra* notes 221–23 and accompanying text.

264. See CALABRESI & BOBBITT, *supra* note 189, at 17–28, 49.

265. See CALABRESI, *supra* note 196, at 172–81.

skeptical. And even if we could adequately measure what is gained, we would still have to make a normative choice between the value gained by the use of the new legal fiction and the competing value of candor. I take up this question in more detail below.

### 3. Other Rationales

If the urge to preserve continuity in legal rules and to obscure tragic choices are not obviously compelling reasons, at least categorically, for judges to dispense with candor about the reasons for relying on new legal fictions, then what about the reasons discussed in the previous section? In virtually all of the examples I presented of new legal fictions, the judges (although generally failing to articulate the reason) likely relied on them in order to operationalize another legal theory, to serve the interests in functionalism and administrability, or to promote the legitimacy of the politico-legal system. Are these sufficient justifications for dispensing with judicial candor?

At the outset, it is worth observing that any time a judge relies on a new legal fiction in order to serve one of these goals, the judge makes a normative choice to advance the interest served by that goal. For example, the Court has (perhaps understatedly) acknowledged that it lacks “absolute certitude” that the premise that jurors can understand and follow limiting instructions is true;<sup>266</sup> it has nevertheless justified the premise as necessary to avoid unduly constraining the government’s ability to bring successful criminal prosecutions.<sup>267</sup> The Court, in other words, has made a normative choice—albeit a candid and transparent one—that the state’s interest in obtaining convictions might outweigh the defendant’s interest in a more unimpeachably accurate jury verdict.

In most cases involving new legal fictions, however, the Court does not acknowledge that it is relying on a faulty factual premise. By presuming that members of Congress take seriously their oaths to uphold the Constitution, for example, the Court does not explain that the premise, though at best debatable as a matter of descriptive reality, is deployed principally to legitimate our constitutional democracy and the Court’s role in that fragile arrangement.<sup>268</sup> In such cases, the Court makes an additional normative choice—not only to advance the (unstated) goal but also to privilege it over the interest in candor. In most cases involving new legal fictions, therefore, reliance on the new legal fiction is justified only if the normative choice is of obvious importance *and* it could not be made transparently.

The legal premise on which the Court relies in cases determining whether a person was in “custody” for purposes of *Miranda*—that a reasonable person might ever feel free to leave when being questioned by the police—does not fare well against this standard. As argued above, it is difficult to understand the

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266. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987); see also *supra* text accompanying note 215.

267. *Id.*

268. See *supra* notes 124–31 and accompanying text.



Court's application of the test for custody as anything other than a normative choice to privilege order interests over liberty interests in the balancing central to the Court's criminal procedure doctrine. It is debatable whether the balance effectively struck by the Court's application of the custody test is defensible,<sup>269</sup> but there is no apparent reason why the Court could not strike that balance transparently instead of masking its normative judgment with an ostensibly descriptive claim about individual views of police coercion. One need not be categorically troubled by judges making such normative choices to be troubled by their masking them with purportedly non-normative determinations.<sup>270</sup>

The critique based on candor thus is most trenchant in those cases in which the judge deploys the new legal fiction simply to obscure the core normative choice that the judge must make in fashioning the legal rule, but in which there is no other interest served by dispensing with candor. But most of the examples of new legal fictions discussed above involve judicial choice to dispense with candor not solely to obscure that the court is making a normative choice, but also to advance some other presumptively laudable interest that the judge believes would not be promoted—or would be undermined—by candor. For example, when textualists assume that members of Congress consult dictionaries when they vote on statutory text—let alone read the statutory text itself—they generally do so to operationalize a theory of judicial constraint; when originalists assume that it is possible to discern collective intent on a matter not actually considered over two hundred years ago, they do the same. This desire to address—and soften the impact of—the counter-majoritarian difficulty is, I think, a laudable goal. But whether this is a sufficient justification for dispensing with judicial candor turns, at a minimum, on whether textualism and originalism actually do effectively constrain judicial discretion any more than other interpretive methodologies that do not rely on new legal fictions—a matter about which I have serious doubts.<sup>271</sup> And even if they are superior at limiting judicial willfulness, one would expect that they would effectively serve a

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269. Compare Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998) (arguing that empirical data suggests that the *Miranda* decision is the cause of a decline in national crime clearance rates), with Stephen J. Schulhofer, *Miranda, Dickerson, and the Puzzling Persistence of Fifth Amendment Exceptionalism*, 99 MICH. L. REV. 941 (2001) (justifying *Miranda*'s exceptional treatment of police interrogations by distinguishing those situations from other applications of the Fifth Amendment).

270. Cf. Meares & Harcourt, *supra* note 48, at 743–44 (supporting the use of balancing-of-interests where the Court is explicit and articulates the interpretive choice).

271. See Smith, *Originalist's Dilemma*, *supra* note 67, at 677; Smith, *Sources*, *supra* note 67, at 279; see also Eskridge Jr., *Unknown Ideal*, *supra* note 147, at 1522 (“The context of constitutional debating history is slanted in a conservative direction much more so than the debating history of federal statutes, most of which were enacted by Democratic Congresses and therefore slanted too, but in a more regulatory-state direction. In short, a generously purpose-oriented historicist interpretation of the Constitution and an ungenerous approach to statutes are most obviously (but perhaps superficially) reconciled as a politically conservative move by courts.”); *id.* at 1531 (“[A]ny judge who is determined to be willful is unaffected by methodology.”); Zeppos, *supra* note 137, at 1331.

legitimizing function for the courts if judges advanced this normative rationale transparently.<sup>272</sup>

Similarly, it is far from clear that in most cases there would be any significant harm caused by a judge's explicitly stating that he chooses to rely on a new legal fiction for reasons of functionalism or administrability. As argued above, rare moments of candor suggest that courts rely on the premise that jurors can accurately assess the reliability of eyewitness testimony because they are concerned that frank acknowledgment of jurors' practical limitations will lead to trials prolonged by "battles of experts."<sup>273</sup> It is possible, of course, that judicial recognition of social science research demonstrating the limited capacity of jurors to assess eyewitness testimony, accompanied by continued judicial refusal in the general run of cases to permit expert testimony about juror capacity, will lead to concerns about the fairness of the convictions that turn on eyewitness evidence. But such concerns likely could be addressed without requiring expert testimony in *all* cases involving eyewitness evidence.<sup>274</sup> It is only a matter of time, moreover, before the findings of social scientists begin to seep into the public consciousness; when they do, we might expect public confidence in jury verdicts in cases involving eyewitness testimony to wane. If judges believe that the interest in producing accurate verdicts must be weighed against the interests in judicial economy and in facilitating that state's ability to obtain convictions, they should say so directly. Only then can we assess the wisdom of the normative choice. In any event, there is no indication that the sporadic moments of judicial candor about this rationale for using new legal fictions has worked any great harm.<sup>275</sup>

The argument for dispensing with judicial candor is strongest when the court uses the new legal fiction to serve a legitimizing function, but even in such cases we must be skeptical about the need for obfuscation. Most of the academic debate about limiting instructions, for example, has been over whether jurors—human actors subject to human limitations—can competently and faithfully follow them.<sup>276</sup> This is not surprising, because when courts are pressed on the problems with the device, they generally respond by reaffirming their confidence in jurors' abilities—that is, by relying on the new legal fiction. But as argued above, there is good reason to conclude that judges continue to rely on the new legal fiction not because they actually believe that jurors can

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272. A more difficult question, however, is whether judges should candidly acknowledge the assumptions and conclusions of public choice theory, on which textualism is in part based. See, e.g., Geoffrey Brennan & James M. Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie*, 74 VA. L. REV. 179, 185–86 (1988) ("As scientists, we consider it our purpose to destroy myths. But we should recognize that the 'myths of democracy' may be essential to . . . stable political order . . .").

273. *United States v. Brien*, 59 F.3d 274, 277 (1st Cir. 1995).

274. See *Brown*, *supra* note 59, at 1617–18; *Higgins & Skinner*, *supra* note 80, at 476–81; *Leippe*, *supra* note 78, at 948.

275. For examples of judicial candor, see *Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *United States v. Hall*, 165 F.3d 1095, 1119–20 (1999) (Easterbrook, J., concurring).

276. See *supra* notes 72–73 and accompanying text.

transcend the human limitations documented in the social science literature, but rather because they fear the consequences of abandoning the new legal fiction—specifically, that they will be forced to abandon the use of limiting instructions altogether, to work significant, and perhaps severely constraining, changes in accepted rules of evidence, and potentially to declare mistrials in every case in which inadmissible evidence is heard by the jury. Judges are simply not willing to put their imprimatur on a course that would lead to such avulsive change. More important, judges presumably worry about the legitimacy of the jury system itself. If jurors cannot faithfully follow limiting instructions, then what would that say about the fairness of our system of adjudication as it has existed for scores of years? And if we seek to preserve the jury trial right but, because of practical considerations, do not change trial practice and the rules of evidence to respond to the problems of juror competency, then what would that say about the fairness and accuracy of the outcomes of jury trials going forward?

The reasons to dispense with candor for these examples, thus, are serious and of considerable force.<sup>277</sup> But it is not obvious that they are ultimately persuasive. First, as noted above, whether continued reliance on the new legal fiction and judicial obfuscation about the rationale are justified must turn in part on the answer to the empirical question whether dispensing with candor in fact legitimates the jury system in the minds of the relevant audience. We do not yet have a good answer to that question, but there is reason to suspect that even if the new legal fiction has played a legitimating function for many years, recent attention by social scientists to juror limitations is likely, as it seeps in to the public consciousness, to be *de*-legitimizing. Second, candid acknowledgment by judges that jurors in fact might have great difficulties with limiting instructions will refocus the debate on the more difficult and important normative question: would we prefer a system of adjudication that does the least harm to the state's interests in prosecutions by permitting the introduction of relevant but potentially prejudicial or inadmissible evidence, even though jurors' deliberations likely will be affected by such evidence? Or would we prefer a system that treats accuracy as the paramount goal by minimizing the risk of juror prejudice and error, but that is considerably more costly—both because of mistrials and because of an increased acquittal rate—to administer? As with all normative questions, there is no obvious or easy answer. But judicial candor at least prompts us to work towards an answer to the right question, rather than continuing to debate the accuracy of the new legal fiction.<sup>278</sup>

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277. See Idelman, *supra* note 230, at 1403 (arguing that if “candor might cause damage to the legitimacy either of [the] court or of the judiciary in general, then indeed there is a conflict between the mandate of the pro-candor rationales and the concerns raised by these various practical and normative constraints”).

278. There have been a few notable examples of judicial candor on this issue, and they have been refreshing. See, e.g., *Richardson*, 481 U.S. at 211; *Gacy v. Welborn*, 994 F.2d 305, 313 (7th Cir. 1993) (Easterbrook, J.); *accord* *Thomas v. Peters*, 48 F.3d 1000, 1009 (7th Cir. 1995) (Easterbrook, J., concurring).

A stronger argument can be made to justify judicial obfuscation about the doctrine that ignorance of the law is no excuse. Judges regularly assert the robust, somewhat misleading version of the rule—and the implicit premise on which it is based—because they fear that if they made clear that sometimes ignorance *is* an excuse, people likely would claim (or seek to attain) ignorance more often. The statement of the rule itself, therefore, has expressive value.<sup>279</sup> Whereas judicial candor with respect to limiting instructions would facilitate public discussion about the appropriate normative choice, judicial candor about the actual rule of ignorance as an excuse risks changing the normative calculus altogether.

Meir Dan-Cohen encourages us to think of the doctrine that ignorance is no excuse as a legal rule that simultaneously plays two roles: it serves as a conduct rule, which is addressed to the general public and provides guidelines for conduct, and as a decision rule, which is addressed to judges to provide guidelines for their decisions.<sup>280</sup> In a hypothetical universe in which the public and officials occupied “different, acoustically sealed” chambers—what Dan-Cohen calls “acoustic separation”—conduct rules and decision rules might diverge, depending on the policies that the lawmakers deemed desirable in each context.<sup>281</sup> In a world of perfect acoustic separation, lawmakers could encourage citizens to learn their legal obligations by creating a conduct rule—heard only by the public—that ignorance of the law is never an excuse. At the same time, lawmakers could craft a decision rule—heard only by officials—that instructs judges that in some circumstances “bona fide ignorance of the law negate[s] the culpability that would otherwise have attached to an act.”<sup>282</sup>

In the real world, of course, there is no perfect acoustic separation. But Dan-Cohen argues that judges intentionally state the rule that ignorance is no excuse as an absolute, even though they are well aware that it is not, as a “strategy of selective transmission” to accomplish “partial acoustic separation.”<sup>283</sup> In practice, the clarity and simplicity of the rule formally announced—that ignorance of the law is no excuse—functions as a conduct rule, and the arcane exceptions that courts more subtly recognize function as a decision rule. The result is that the legally untutored public maintains its incentive to learn the law and judges administer justice based on the particular circumstances of the case.<sup>284</sup>

Of course, even assuming that such a use of “selective transmission permits the law to maintain higher degrees of both deterrence and leniency than could

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279. See *supra* notes 221–23 and accompanying text.

280. See Dan-Cohen, *supra* note 123, at 627, 630.

281. *Id.* at 630.

282. *Id.* at 648.

283. *Id.*

284. See *id.* at 651 (“To be coextensive with our morality, the laws that define offenses must often be broadly drawn and open ended; to serve as decision rules that adequately constrain judges, the laws must be narrow and precise.”).

otherwise coexist,”<sup>285</sup> ultimately the lawmaker—here the common law judges who created and continue to rely on the legal rule—must “evaluat[e] competing substantive moral considerations” to decide whether the practice outweighs the general interest in candor.<sup>286</sup> Once again, this is a normative question with no obvious answer. But we might not be able even to ask the underlying normative question—whether we want to risk creating an incentive for citizens not to learn their legal obligations—if judges were candid about the basis for the rule. There is a much stronger argument for dispensing with candor under such circumstances. We still must inquire, however, whether it is appropriate to assume that many, or even some, of the people regulated by the law would in fact act differently if judges were candid about the rule.<sup>287</sup>

Finally, our views about the appropriateness of dispensing with judicial candor in order to serve a legitimating function obviously depend on what exactly is being legitimated. The presumption of constitutionality of statutes, for example, seeks to legitimate not only Congress’s authority as a lawmaker, but also the courts’ presumptively subordinate relationship to Congress in matters of lawmaking. These are obviously foundational principles; if indeed we are confident that reliance on the new legal fiction that members of Congress take their oaths to uphold the Constitution seriously legitimates these principles, then the new legal fiction does little harm and perhaps some bit of good. The same is true of textualism to the extent that its robust deployment serves rule-of-law values, although there is reason to be skeptical about the extent that it actually does so.<sup>288</sup>

I recognize that it may be naïve to expect judges always to be candid about their normative goals. I imagine that in most cases judges honestly believe that they are able to ignore their normative preferences when creating legal rules. And in those cases in which they are aware that they are making normative choices in fashioning legal rules, they likely will not be eager to disclose that they are doing so. But by carefully considering different aspects of the structure of legal argument—for present purposes, new legal fictions—we are more likely to identify situations in which judges are not being candid about their normative choices. And the ability to do so might make candor more likely in the future.

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285. *Id.* at 665. Shapiro observes that the question whether dispensing with candor is justified by “fear that truthfulness would adversely affect the person addressed or would cause an undesired kind of behavior” is an empirical one: “would a fuller, more accurate statement of the rule or principle give rise to abuse and perhaps undermine the very rule or principle we are trying to explain?” Shapiro, *supra* note 187, at 744–45. He concludes that “[e]ven in the most compelling case—where the undisclosed rule is more lenient than the disclosed one and where disclosure might threaten the integrity of the rule—I think people might well ask for and appreciate the respect that full disclosure would accord them.” *Id.* at 747.

286. Dan-Cohen, *supra* note 123, at 667 (“The desirability of candor is, on some occasions, no less an issue for the law than it is for the politician.”).

287. See Kahan, *supra* note 221, at 129; Shapiro, *supra* note 187, at 746.

288. See Eskridge Jr., *Unknown Ideal*, *supra* note 147, at 1556.

## CONCLUSION

Seventy-five years ago, with legal realism on the rise and the Brandeis Brief a hot topic of discussion,<sup>289</sup> Lon Fuller observed:

[I]t is not always easy to distinguish between the process of discovering the facts of social life (descriptive science), and the process of establishing rules for the government of society (normative science). Much of what appears to be strictly juristic and normative is in fact an expression, not of a rule for the conduct of human beings, but of an opinion concerning the structure of society. Before one can intelligently determine what *should* be, one must determine what *is*, and in practice the two processes are often inseparably fused.<sup>290</sup>

Fuller's observation remains trenchant today. In his day, of course, the common law legal fiction was the device that judges deployed to mix descriptive and normative judgments. As the common law approach has waned, so has judicial reliance on classic legal fictions. But the judicial urge, or perhaps necessity, to make normative judgments in the creation of legal rules has persisted, as has the judicial desire to obscure the appearance of judicial lawmaking. Today, judges rely less on classic legal fictions than on new legal fictions. But the effect is largely the same.

My point here is not that judges should never be in the business of lawmaking. On the contrary, to properly perform their adjudicative function, judges often must craft legal rules, whether to fill in statutory gaps, interpret ambiguous and general constitutional provisions, or act in a common law fashion. But there is a difference between accepting that judges sometimes must make law, on the one hand, and tolerating unconstrained choice for judges in exercising that power, on the other. Since at least the time of the legal realists, the dirty little secret has been out: judges often make normative choices. Our task is to insist that when they do so, they do so openly, so that we can check, when appropriate, the exercise of their discretion.

We thus must be sensitive to judicial reliance on new legal fictions because new legal fictions more often than not are devices to obscure judges' normative choices. To be sure, there will be times when, on balance, such obfuscation seems preferable to candor. But those times, I think, will be rare. By identifying new legal fictions when we see them, and by focusing discussion on the normative choices obscured by reliance on the device, we can help to limit judicial obfuscation to those rare times when it seems appropriate.

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289. See Monahan & Walker, *supra* note 16, at 480–81.

290. FULLER, *supra* note 156, at 131.