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A Tempered "Yes" to the "Exculpatory No"

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What circumstances trigger a person's duty to tell the truth? Immanuel Kant claimed without qualification that all circumstances require truthtelling, even when speaking the truth injures the speaker.[1] John Henry Cardinal Newman made exceptions for lies that achieved some positive end.[2] Hugo Grotius permitted lies to adversaries.[3] The philosophy of twentieth-century common sense largely permits white lies.[4]

Perhaps surprisingly, some courts have found that Kant's absolute prohibition of falsehood more accurately characterizes a speaker's duty to tell the truth to the federal government under 18 U.S.C. § 1001 than these other, more relaxed standards.[5] According to this view, the prohibition on lying has no less force in informal circumstances, in which the speaker swears no oath and the government has no reciprocal duty.[6] The statute provides in relevant part:

> Whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
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> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
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> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
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> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
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> shall be fined under this title or imprisoned not more than 5 years, or both.[7]

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1. *See* IMMANUEL KANT, *On a Supposed Right to Tell Lies From Benevolent Motives, in* CRITIQUE OF PRACTICAL REASON AND OTHER WORKS ON THE THEORY OF ETHICS 361, 361-65 (Thomas Kingsmill Abbott trans., Longmans, Green & Co. 6th ed. 1923) (1873).

2. *See* JOHN HENRY CARDINAL NEWMAN, APOLOGIA PRO VITA SUA 308-11 (Martin J. Svaglic ed., Oxford Univ. Press 1967) (1865) (accepting that untruths told for just causes are arguably morally permissible).

3. *See* 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 618-19 (Francis W. Kelsey trans., Oxford Univ. Press 1925) (1646).

4. *See* SISSELA BOK, LYING 61 (1978) (discussing "post-Watergate" society's acceptance of white lies).

5. *See, e.g.*, United States v. Wiener, 96 F.3d 35, 37 (2d Cir. 1996).

6. *See, e.g., Wiener,* 96 F.3d at 40 (noting only two trivial exceptions to the statute's reach).

7. 18 U.S.C.A. § 1001 (West 1976 & Supp. 1997).

Prosecutors legitimately employ the provision to punish individuals who supply false information to the government on statutorily required reports.[8] Accordingly, the federal judiciary has widely applied section 1001 to punish individuals who gave false statements to the General Services Administration,[9] the Customs Service,[10] the FBI,[11] and state unemployment agencies.[12]

Courts have been reluctant, however, to apply the statute to certain kinds of false statements given in the context of criminal investigations.[13] This reluctance may stem from the fear that prosecutors might use the provision improperly: authorities unable to prove the elements of a substantive crime could induce a suspect to spout falsehoods in order to charge him with a section 1001 violation,[14] or they could encourage repetition of false responses in order to charge multiple statutory violations.[15] These kinds of concerns prompted one court to create the *exculpatory no exception* to section 1001.[16]

The exculpatory no exception shields from section 1001 liability an interrogee's denial of involvement in, or knowledge of, criminal activity.[17] As the name implies, protected responses must have two general characteristics: (i) they must be exculpatory; and (ii) they must be limited to words of denial containing no discursive misrepresentations.[18]

Courts deem a response exculpatory if it conveys false information in a situation in which a truthful reply would have incriminated

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8. 31 U.S.C. § 5316, for example, requires travelers who cross U.S. borders with more than $10,000 in cash to file a report. Section 1001 punishes falsifying reports of this kind. *See, e.g.*, United States v. Grotke, 702 F.2d 49, 53 (2d Cir. 1983).

9. *See, e.g.*, United States v. Raether, 940 F. Supp. 1485 (D.S.D. 1996).

10. *See, e.g.*, United States v. Wydermyer, 51 F.3d 319 (2d Cir. 1995).

11. *See, e.g.*, United States v. Rogers, 118 F.3d 466 (6th Cir. 1997).

12. *See, e.g.*, United States v. Herring, 916 F.2d 1543 (11th Cir. 1990) (holding that because state unemployment agencies receive federal funds, false statements made to state officials are, indirectly, false statements to the federal government).

13. *See* Timothy I. Nicholson, Note, *Just Say "No": An Analysis of the "Exculpatory No" Doctrine*, 39 WASH. U. J. URB. & CONTEMP. L. 225, 229-30 (1991) (listing doctrinal devices courts use to restrict the apparent breadth of § 1001).

14. *See* Giles A. Birch, Note, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U. CHI. L. REV. 1273, 1278 (1990). Indeed, there are many cases in which the court dismisses the government's substantive charge and convicts the defendant only of the § 1001 charge. *See, e.g.*, United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994).

15. *See* United States v. Russo, 699 F. Supp. 1344, 1347 (N.D. Ill. 1988).

16. *See* United States v. Stark, 131 F. Supp. 190 (D. Md. 1955).

17. *See, e.g.*, United States v. Equihua-Juarez, 851 F.2d 1222 (9th Cir. 1988) (holding that a suspect's refusal to provide to an immigration official evidence of a previous illegal entry into the United States constituted an exculpatory denial).

18. *See generally* Tim A. Thomas, Annotation, *What Statements Fall Within Exculpatory Denial Exception to Prohibition Under 18 U.S.C.S. § 1001, Against Knowingly and Wilfully Making False Statement Which is Material to Matter Within Jurisdiction of Department or Agency of United States*, 102 A.L.R. FED. 742 (1991).

the interrogee. A question incriminates the interrogee if the truthful answer "would in [itself] support a conviction under a federal criminal statute [or] . . . would furnish a link in the chain of evidence needed to prosecute the [interrogee]."[19] The following scenario represents a clear case of an answer that would itself support a conviction: an FBI agent asks a suspect who had received illegal income whether he had done so, and the suspect denies receiving the illegal income.[20] Similarly, truthfully admitting receipt of an original tax refund check would not directly incriminate a defendant, but would furnish a link in the chain of evidence necessary to convict her of fraudulently seeking a replacement check for the original that she claimed never to have received.[21] A false denial in these circumstances would therefore be exculpatory.[22] On the other hand, had an agent asked whether the sky were blue, and had the suspect denied it, the response would not have qualified for the exception because, presumably, a truthful answer would not have been incriminating,[23] and the denial, therefore, would not have been exculpatory.[24]

The second characteristic of protected responses is their limitation to words of denial. Although there is less unanimity on this issue than on the definition of exculpatory,[25] this Note initially adopts a broad definition reflective of the majority position.[26] A denial is a simple statement of negation with regard to involvement in, or knowledge of, criminal activity.[27] The statement must not include affirmative misrepresentations.[28] Words and phrases like

19. Hoffman v. United States, 341 U.S. 479, 486 (1951) (defining the term *incriminating question*) (citations omitted).

20. *Cf.* United States v. Paternostro, 311 F.2d 298 (5th Cir. 1962) (holding that such a statement would support a conviction), *overruled on other grounds by* United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994).

21. *See* United States v. Cogdell, 844 F.2d 179 (4th Cir. 1988).

22. *See Cogdell,* 844 F.2d at 185.

23. The danger of incrimination must be "real and appreciable" and not "imaginary and unsubstantial." Brown v. Walker, 161 U.S. 591, 599 (1896).

24. *Cf., e.g.,* United States v. Rose, 570 F.2d 1358 (9th Cir. 1978) (holding that the defendant's truthful answer to a customs agent's routine questions would not have incriminated him and that he therefore did not qualify for the exception).

25. *Compare* United States v. King, 613 F.2d 670, 674 (7th Cir. 1980) (restricting eligible responses to the word "no") *with* United States v. Bush, 503 F.2d 813, 819 (5th Cir. 1974) (characterizing a two-page affidavit replete with falsehoods as an exculpatory no), *overruled by Rodriguez-Rios,* 14 F.3d at 1040. No other court has been as generous as the *Bush* court in terms of defining "denial."

26. *See generally* Thomas, *supra* note 18, at 759-61 (listing cases holding that the exception does not apply to affirmative misrepresentations).

27. *See* United States v. Chevoor, 526 F.2d 178, 183 (1st Cir. 1975).

28. *Cf.* Thomas, *supra* note 18, at 759-61 (listing cases adopting such a limitation).

"No, I did not," "none," or "never" qualify as denials.[29] "[D]evis[ing] an elaborate exculpatory story designed to mislead investigators," on the other hand, is not a simple denial.[30] From these two characteristics, it is evident that the exception shields a "very limited" class of responses.[31]

Following the original articulation of the exculpatory no exception in 1955,[32] the First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have adopted it.[33] Yet despite the exception's forty-two-year pedigree, the Second and Fifth Circuits have in recent years either overturned or ignored their own precedent and have rejected the exception.[34] These two circuits each justify their about-face on the same two bases. First, they deny that the statute's plain wording, even when augmented by the legislative history, authorizes an exception for mere exculpatory denials[35] — the "Plain Language Objection." Second, they reject the idea that respect for the values underlying the Fifth Amendment requires affirming the exculpatory no exception — the "Values Objection."[36]

This Note contends that the Supreme Court, which has granted certiorari,[37] should recognize the continued validity of the exculpatory no exception. To reflect more closely the concerns that justify the exception, the Court should also reformulate the varied tests lower courts have employed to determine whether a defendant may invoke the exception.[38] Part I asserts that Congress had no intention of criminalizing mere exculpatory denials, and that the exception is thus completely consistent with the purposes of the false statement statute. Part II argues that punishing exculpatory denials may threaten the privilege against self-incrimination. This Part

29. More discursive responses that are statements of negation but do not contain affirmative misrepresentations present borderline cases. They may also qualify for the exception. *See infra* Part IV (setting out the contours of the test for the exception).

30. United States v. Mayo, No. 96-4867, 1997 WL 657009, at *1 (4th Cir. Oct. 22, 1997) (per curiam).

31. *See* United States v. King, 613 F.2d 670, 674 (7th Cir. 1980).

32. *See* United States v. Stark, 131 F. Supp. 190 (D. Md. 1955).

33. *See* United States v. Moser, 18 F.3d 469, 473-74 (7th Cir. 1994); United States v. Taylor, 907 F.2d 801, 805 (8th Cir. 1990); United States v. Cogdell, 844 F.2d 179, 183 (4th Cir. 1988); United States v. Medina de Perez, 799 F.2d 540, 544 (9th Cir. 1986); United States v. Tabor, 788 F.2d 714, 719 (11th Cir. 1986); United States v. Fitzgibbon, 619 F.2d 874, 880-81 (10th Cir. 1980); United States v. Chevoor, 526 F.2d 178, 184 (1st Cir. 1975).

34. *See* United States v. Wiener, 96 F.3d 35 (2d Cir. 1996), *cert. granted sub nom.* Brogan v. United States, 117 S. Ct. 2430 (1997) (ignoring ruling in favor of the exception in United States v. Thevis, 469 F. Supp. 490, 513 (D. Conn.), *affd.*, 614 F.2d 1293 (2d Cir. 1979)); United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994) (overruling Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962)).

35. *See Wiener,* 96 F.3d at 38; *Rodriguez-Rios,* 14 F.3d at 1044.

36. *See Wiener,* 96 F.3d at 39; *Rodriguez-Rios,* 14 F.3d at 1049-50.

37. *See* Brogan v. United States, 117 S. Ct. 2430 (1997).

38. For a circuit-by-circuit analysis, see Nicholson, *supra* note 13, at 232-49.

contends, however, that the Supreme Court can avoid an unnecessary constitutional determination of this issue by upholding the exception. Part III argues that the exculpatory no exception protects certain principles of fairness that also underlie the Constitution, and that, absent congressional intent to the contrary, respect for these principles requires recognition of the exception in interpreting section 1001. Part IV urges adoption of a streamlined version of the tests courts have used to determine the exception's applicability, a version that more clearly captures the fairness concerns articulated in Part III and the legislative intent noted in Part I.

I: The Purpose of the False Statement Statute

This Part argues that in enacting section 1001, Congress evinced no intention to criminalize simple false denials when an interrogee offers them to exculpate himself in the context of a criminal investigation. Section I.A contends that the exception is consistent with the limited statutory scope and purposes described in the legislative history.[39] It also refutes the Second and Fifth Circuits' claims that the statutory history prohibits courts' use of the exception. Section I.B counters the Second and Fifth Circuits' Plain Language objection.

A. *Congressional Intent and the False Statement Statute*

The exculpatory no exception is consistent with the two purposes of the false statement statute: to protect the government from certain deceptive practices by contractors, and to protect the government from relying on false information that interferes with its functions. As to the first purpose, nondiscursive exculpatory denials are simply not the types of practices against which the statute

39. This Note will treat the 1934 amendment as providing the relevant current statutory language. *Compare* Act of June 18, 1934, Pub. L. No. 73-394, 48 Stat. 996 ("[W]hoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States . . . [shall be punished].") *with supra* text accompanying note 7 (quoting 18 U.S.C.A. § 1001 (West 1976 & Supp. 1997)). *See also* Hubbard v. United States, 514 U.S. 695, 703-08 (1995) (selecting the 1934 amendment and its legislative history as the appropriate sources of congressional intent for § 1001); United States v. Rodgers, 466 U.S. 475, 480 (1984) (same). The 1948 amendment, Act of June 25, 1948, Pub. L. No. 80-772, 62 Stat. 683, consisted of "housekeeping changes in language which are of no particular significance." United States v. Bramblett, 348 U.S. 503, 508 (1955), *overruled on other grounds by Hubbard*, 514 U.S. at 715; *see also* Wiener, 96 F.3d at 39. In 1996, Congress reenacted § 1001 with some structural changes and an adjustment to the jurisdictional language to ensure coverage of individuals who lied before congressional committees. That change had no effect on the statute's applicability to statements made before executive branch investigators. *See* False Statements Accountability Act of 1996, Pub. L. No. 104-292, 110 Stat. 3459.

offers protection.[40] According to the Supreme Court, Congress enacted the current statutory language in 1934 "to protect the authorized functions of governmental departments and agencies from the perversion which might result *from the deceptive practices described.*"[41] The deceptive practices to which the Supreme Court referred were submission of false regulatory reports and false documents by contractors to the Public Works Administration.[42] Consistent with that interpretation, the legislative history indicates that

> [t]here is nothing [in the United States Criminal Code] which permits us to make an investigation and prosecute persons who are engaged in the "kick-back" practice. They make false returns, claiming that they paid certain amounts to their employees, when they have not done so. *This bill just amends the law so as to give the Federal Government authority to deal with that class of cases.*[43]

A simple denial of culpability in the face of incriminating questioning — at least in situations in which the speaker did not seek a government contract — would not even implicate "that class of cases," much less frustrate Congress's purpose in enacting the statute.

The exculpatory no exception is also reasonably consistent with the statute's second purpose: to prohibit perversion of, or interference with, the legitimate functions of government by, for example, inducing action or reliance.[44] Because exculpatory denials are responses to questioning, suspects issue them most often during an investigation. In a formulation reflected in the Code of Federal Regulations,[45] an investigator's function is "to determine whether sufficient evidence exists for a person to be charged with a crime."[46] Failure to admit wrongdoing is just a part of that evidence; it is not

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40. *See, e.g.*, United States v. Chevoor, 526 F.2d 178, 182-84 (1st Cir. 1975).

41. United States v. Gilliland, 312 U.S. 86, 93 (1941) (emphasis added).

42. *See* Donald D. Oliver, Note, *Prosecutions for False Statements to the Federal Bureau of Investigation — The Uncertain Law*, 29 SYRACUSE L. REV. 763, 766 n.12 (1978).

43. 78 CONG. REC. 11270 (1934) (emphasis added); *see also* United States v. Gilliland, 312 U.S. 86, 94-5 (1941) ("The report of the Judiciary Committee of the Senate stated that the amendment in question had been proposed by the Department of the Interior with the purpose 'of reaching a large number of cases involving the shipment of 'hot' oil where false papers are presented in connection therewith.'" (quoting S. REP. NO. 73-1202, at 1 (1934))).

44. *See* United States v. Stark, 131 F. Supp. 190, 205-6 (D. Md. 1955) (holding that false denials of paying bribes were not the types of statements that, inter alia, induced action by the FBI investigators, and that such actions were therefore outside the ambit of § 1001); *but see Rodriguez-Rios*, 14 F.3d at 1044 (rejecting requirement of inducing action or reliance and finding "no" to be a statement, though conceding that "that word [statement] may connote affirmative, aggressive, or overt declarations").

45. *See* 26 C.F.R. § 601.107 (1997) (describing the mission of the investigative wing of the IRS to include developing information regarding the extent of criminal violations and recommending matters for prosecution when appropriate).

46. Oliver, *supra* note 42, at 774 (citing United States v. Davey, 155 F. Supp. 175, 178 (S.D.N.Y. 1957)).

equivalent to a substantial perversion of the investigator's function.[47] It does not, for example, prevent the investigator from confirming his suspicions elsewhere. The investigator, after all, need not arrive at the truth of the issue investigated from the mouth of the suspect.[48]

Furthermore, because investigators usually expect a certain level of resistance from individuals to whom they pose incriminating questions,[49] the interference with investigation that exculpatory denials occasion probably is not significant.[50] Anticipating an untruthful answer, investigators almost certainly tend neither to act nor to rely on them.[51] Instead, as a matter of course, a competent agent would probably seek corroboration.[52] Even if an agent procured an admission rather than an exculpatory denial, after all, he would not rely on the admission alone but would seek corroborating evidence.[53]

The Second and Fifth Circuits employ two alternative but ultimately unpersuasive historical readings to support their rejection of the exculpatory no exception. They argue, first, that the history of amendments to the original version of the false statement statute indicates a congressional intent over time to broaden application of the statute.[54] The argument's proponents assert that each time

47. *Cf.* 28 C.F.R. § 0.85 (1997) (describing the relevant general function of the FBI as the collection of evidence in cases in which the United States is or may be a party). Because even the false denial may be evidence, if only for impeachment purposes, *see* FED. R. EVID. 801(d) (excluding party admissions from the definition of hearsay), "collecting" it from the suspect is not a perversion of the FBI's function.

48. The Department of Justice seems to accept this position in its adoption of a policy stating that prosecuting exculpatory denials is "not appropriate," 9 THE DEPARTMENT OF JUSTICE MANUAL § 9-42.160 (1997-1 Supp.), although it does not always adhere to this policy. *See, e.g.,* United States v. Wiener, 96 F.3d 35 (2d Cir. 1996).

49. *See, e.g.,* United States v. Cogdell, 844 F.2d 179, 184 (4th Cir. 1988) ("A false denial of guilt does not pervert the investigator's basic function . . . but is merely one of the ordinary obstacles confronted in a criminal investigation.").

50. *Cf.* Oliver, *supra* note 42, at 774 ("[A] denial of culpability to the FBI during a criminal investigation does no more to pervert the Bureau's function than a plea of 'not guilty' at trial does to pervert the jury's function.").

51. *See, e.g.,* United States v. Arnpriester, No. 92-10086, 1993 WL 329495, at *6 (9th Cir. Aug. 30, 1993) (holding that there was no perversion of function because false answers are expected, will not result in government reliance on their truth, and will not engender subsequent wild — and expensive — goose chases); *Cogdell,* 844 F.2d at 184 ("A trained agent cannot be overly surprised when a suspected criminal fails to admit guilt.").

52. *See, e.g.,* United States v. Medina de Perez, 799 F.2d 540, 546 (9th Cir. 1986) ("[A] competent government investigator will anticipate that the defendant will make exculpatory statements. . . . We presume that a thorough agent would continue vigorous investigation of all leads until he personally is satisfied that he has obtained the truth.").

53. *See* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 191-94 (3d ed. 1986) (asserting that "seldom, if ever" would an investigation end after securing a confession without searching for additional evidence).

54. *See, e.g.,* United States v. Wiener, 96 F.3d 35, 39 (2d Cir. 1996); United States v. Rodriguez-Rios, 14 F.3d 1040, 1048 (5th Cir. 1994).

Congress amended the statute, it sought to extend the statute's application to a broader class of statements.[55] According to these courts, the exception is inconsistent with this alleged intent toward progressively broader application.[56]

Even if one were to accept the tenuous proposition that courts can deduce a univocal congressional intent from examining amendments made periodically over the seventy years prior to enactment of the statute's current language, it lends no support to the Second and Fifth Circuits' argument. In fact, the Supreme Court's review of the statute's evolution actually supports the opposite conclusion: that no Congress intended to criminalize false denials.[57] Tracing the course of amendments through time is illustrative. The original false statement statute enacted in 1863, for example, reached only military officers and others who made false statements to the government "for the purpose of obtaining, or aiding in obtaining, the approval or payment of [a false] claim . . . ."[58] Although subsequent Congresses through 1918 codified and recodified the statute and changed the penalties, these successive amendments to the original statute did not broaden section 1001's basic character as the Second and Fifth Circuits claim. Rather, the statute's basic character throughout the period consistently required a purpose to bilk the government out of money or property.[59] Exculpatory denials generally do not have such a purpose,[60] so through 1918, at least, Congress apparently did not intend to criminalize them.[61] The subsequent substantive amendment in 1934 that enacted the present language, of course, did broaden the statute's reach,[62] but if the 1934 Congress had intended to change the statute's applicability to simple exculpatory denials, its legislative history ought to reflect

55. *See Wiener,* 96 F.3d at 39 (finding that "the long-term trend [of amendments to § 1001] is one of expansion"); *Rodriguez-Rios,* 14 F.3d at 1048.

56. *See Wiener,* 96 F.3d at 39; *Rodriguez-Rios,* 14 F.3d at 1048.

57. *See* Hubbard v. United States, 514 U.S. 695, 703-708 (1995) (reciting the history of the statutory progenitors of the current false statement statute).

58. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696.

59. *See Hubbard,* 514 U.S. at 705-06.

60. The purpose of an exculpatory no is, by definition, to exculpate. *See supra* notes 18-31 and accompanying text (defining the two characteristics of the exception).

61. *See* United States v. Stark, 131 F. Supp. 190, 201 (D. Md. 1955) (stating, after exhaustive review of the legislative history, that it was clear that defendant's false denials would not have been within the scope of the Act prior to 1934).

62. *See supra* notes 41-43 and accompanying text (describing how the 1934 amendment expanded the statute's reach).

that change.[63] In fact, it does not.[64] Subsequent amendments in 1948 and 1996 were largely technical and do not alter the analysis.[65] It is therefore reasonable to conclude that Congress intended no such change, and that the false statement statute, despite the broader application the 1934 amendment effected, remained inapplicable to simple denials of inculpatory activity.[66]

In its second alternative historical reading, the Fifth Circuit contends that the intent of Congresses more recent than the one that enacted the current language ought to help guide statutory interpretation.[67] The court argues that Congress's failure to codify the exculpatory no exception in subsequent years[68] reflects tacit congressional disapproval of the exception.[69] This argument may be dismissed on two grounds. First, as a preliminary matter, the Supreme Court has generally condemned the use of subsequent Congressional conduct to help guide statutory interpretation.[70]

Second, Congress's 1996 reenactment of section 1001 implicitly approved the exception. The 1996 Act restructured the statute's format but did not change the wording of the principal clauses. It also slightly altered the jurisdictional language to make clear that the statute applied to certain false statements given before the legislature and judiciary, as well as those made to the executive branch.[71] These changes merely reflected congressional concern

63. *See* United States v. Goldfine, 538 F.2d 815, 821-28 (9th Cir. 1976) (Ferguson, J., concurring and dissenting) (arguing that if Congress had intended for courts to give § 1001 a broad interpretation, the statute's enactment would have generated extensive debate because of the potential threat to Fifth Amendment values and ideas of fairness). For a discussion of this threat, see *infra* Parts II & III.

64. *See supra* note 43 and accompanying text (detailing how the legislative history shows that Congress intended the amendment to bring into the reach of the statute only a limited class of statements that did not include exculpatory denials).

65. *See supra* note 39.

66. For an extremely detailed reading of the statutory history that concludes that Congress wanted to protect the government from actual injuries, and not from all false statements in and of themselves, see *Goldfine,* 538 F.2d at 821-28 (Ferguson, J., concurring and dissenting).

67. *See* United States v. Rodriguez-Rios, 14 F.3d 1040, 1048 n.19 (5th Cir. 1994).

68. *See* Criminal Code Revision Act of 1980, H.R. 6915, 96th Cong. § 1742; Criminal Code Reform Act of 1977, S. 1437, 95th Cong § 1343; John Poggioli, *Judicial Reluctance to Enforce the Federal False Statement Statute in Investigatory Situations,* 51 FORDHAM L. REV. 515, 518 n.20 (1982) (citing Criminal Code Reform Act of 1981, S. 1630, 97th Cong. § 1343 (a)(1)(A), *reprinted in Reform of the Federal Criminal Laws: Hearings Before the Senate Comm. on the Judiciary on S. 1630,* 97th Cong. 544-45 (1981)).

69. *See, e.g., Rodriguez-Rios,* 14 F.3d at 1048 n.19.

70. *See* Firestone Tire & Rubber v. Bruch, 489 U.S. 101, 114 (1989) (citing Bowsher v. Merck & Co., 460 U.S. 824, 837 n.12 (1983)); United States v. Price, 361 U.S. 304, 313 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."); *see also* William N. Eskridge, Jr., *Interpreting Legislative Inaction,* 87 MICH. L. REV. 67 (1988).

71. *See* False Statements Accountability Act of 1996, Pub. L. No. 104-292, 110 Stat. 3459.

with the decision in *Hubbard v. United States,*[72] which held that the statute did not apply to false statements made in judicial proceedings.[73] Otherwise, Congress made no changes and stated in the legislative history that it meant to "ensure[ ] that the scope of section 1001 is limited [after the amendment], as it was prior to *Hubbard.*"[74] At the time of *Hubbard,* only the Fifth Circuit had rejected the exception;[75] seven circuits approved of it.[76] In this context, the legislative history and the fact of reenactment itself appear to approve the prior limit on section 1001's breadth that the exception then imposed.[77] Both this contemporary evidence and the evidence that the 1934 amendment provides indicate that the exculpatory no exception is a valid construction of section 1001.

B. *The Plain Language Objection*

Courts that reject the exception argue that it has no foundation in the statute's "plain language."[78] This Plain Language Objection is unpersuasive for two reasons. First, the statutory language is simply not as plain as these circuits claim. Second, courts — including the Second and Fifth Circuits — regularly permit judicial glosses on the same or similar statutes without explicit authorization in the language.[79] Thus, the fact that the exculpatory no exception is a gloss on the language is not sufficient reason to reject it.

The language of section 1001 is neither plain nor simple: at several points it exhibits ambiguities that courts must resolve — and lacunae that courts must fill — by going beyond the text.[80] The statute requires, for example, that the defendant have made the statement "knowingly and *willfully.*"[81] While the meaning of the

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72. 514 U.S. 695 (1995).

73. *See* H.R. REP. No. 104-680, at 2-6 (1996) (discussing the need to amend § 1001 in response to *Hubbard's* exclusion of judicial proceedings from the statute's scope).

74. *See* H.R. REP. No. 104-680 at 2.

75. *See* United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994).

76. *See supra* note 33.

77. In addition, Congress's past failures to codify the exception did not necessarily indicate any particular intent. The exception had not yet been challenged at the times of the proposed codifications the Fifth Circuit cited, and a change therefore may have seemed unnecessary. Furthermore, Congress had never amended section 1001 to *prevent* use of the exception, a failure that may as easily indicate tacit approval. *See* Erica S. Perl, United States v. Rodriguez-Rios: *The Fifth Circuit Says "Adios!" to the "Exculpatory No" Doctrine,* 69 TUL. L. REV. 621, 630 (1994).

78. *See, e.g.,* United States v. Wiener, 96 F.3d 35, 38 (2d Cir. 1996).

79. For example, every court construing the language of § 1001 has limited the statute's reach. No court has held that it applies to every possible statement that might arguably be construed as "false." *See* Oliver, *supra* note 42, at 763.

80. *See* United States v. Yermian, 468 U.S. 63, 76-77 (1984) (Rehnquist, J., dissenting) ("[T]he language . . . of § 1001 can provide 'no more than a guess as to what Congress intended.'" (quoting Ladner v. United States, 358 U.S. 169, 178 (1958))).

81. *See* 18 U.S.C.A. § 1001(a) (West 1976 & Supp. 1997) (emphasis added).

term "willfully" is not always clear,[82] the Supreme Court has interpreted it in other contexts to require that the defendant intended to violate a known law.[83] Lower courts have not gone so far in the context of section 1001, but some have held that "willfully" means "deliberately and with knowledge"[84] or, alternatively, with an evil motive.[85] Adopting these definitions would mean that a denial made out of surprise or a denial given with a good motive, such as to avoid incriminating oneself, would not be punishable under section 1001.[86] It is beyond the scope of this Note to argue that the Supreme Court ought to adopt a particular definition of "willfully" in the context of section 1001. The point is that the definition is not obvious and that some definitions — but not others — would put exculpatory denials outside the scope of the statute. This ambiguity refutes the Plain Language Objection.

Similarly, the meaning of the statutory term "statement,"[87] for example, is not "plain": it may encompass any oral or verbal utterance,[88] or it may refer to a more limited subset of utterances.[89] The Federal Rules of Evidence, for example, use the term in a limited way: a person must intend an utterance as an assertion for it to

82. *See* Spies v. United States, 317 U.S. 492, 497 (1943) ("[W]illful . . . is a word of many meanings, its construction often being influenced by its context.").

83. *See, e.g.*, Ratzlaf v. United States, 510 U.S. 135, 149 (1994) (holding that willfulness in the context of the antistructuring provisions of the cash transaction reporting requirements included knowledge of the duty not to structure such transactions); Cheek v. United States, 498 U.S. 192, 201 (1991) ("Willfulness . . . requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.").

84. *See e.g.*, United States v. Hildebrandt, 961 F.2d 116, 118 (8th Cir. 1992).

85. *See, e.g.*, United States v. Weiler, 385 F.2d 63, 67 (3d Cir. 1967).

86. *See* United States v. Fitzgibbon, 619 F.2d 874, 876 (10th Cir. 1980) (holding that a simple exculpatory denial does not give sufficient indication of being knowing and willful enough to meet the *mens rea* requirement of § 1001).

87. *See* 18 U.S.C.A. § 1001 (West 1976 & Supp. 1997).

88. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 1128 (1980) (defining the word as a "declaration or remark: assertion").

89. *Cf.* United States v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997) (finding, in the context of the federal statute prohibiting interstate communications containing a threat, that the term "threat" had implicit limitations that begged for a narrow construction, despite being modified by the term "any"). The legislative history of the 1934 amendment to the false statement statute provides evidence of a more restrictive definition of statement. President Franklin Roosevelt vetoed the first attempt by Congress to reach the "hot oil" cases, *see supra* note 43, because he thought the penalty was not severe enough. *See* 78 CONG. REC. 6778-79 (1934). The legislative history of that first attempt clearly indicates that the Senators assumed that the word "statement" referred to statements on required reports to New Deal agencies. *See, e.g.*, 78 CONG. REC. 3724 (1934) ("We just took the statute as it now is and tried to make it applicable to the *new* operations of the Government." (emphasis added)); 78 CONG. REC. 2858-59 (1934) (asserting that the broad language was intended to reach all the "buzzards": "grafters, place hunters, [lobbyists and favor seekers] who [we]re trying to extract money illegally" by submitting false certificates and fictitious bids while transacting business with various agencies of the Department of the Interior). The successful 1934 amendment to the false statement statute shows no indication that the Senators had any broader understanding of the term "statement." *See, e.g.*, 78 CONG. REC. 11,270-71 (1934).

qualify as a "statement."[90] Even in rejecting the exculpatory no exception, the Fifth Circuit concedes in *Rodriguez-Rios* that "that word [statement] may connote [only] affirmative, aggressive, or overt declarations."[91] Consistent with these definitions, some courts have regarded a simple denial of culpability as nonassertive and therefore not a statement for the purposes of the statute.[92]

The statutory term "false" is also not as plain as it might appear initially. Certain declarations, such as excited utterances, can be neither true nor false. A "no" may be an exclamation or "excited utterance,"[93] if the accusative questioning is sufficiently startling, unexpected, or intense.[94] If the investigator, for example, browbeat and provoked a suspect to such an extent that the suspect angrily snapped "no" to get the investigator off his back, such a denial may be neither true nor false.[95] In fact, it may not even be a "statement" because of its nonassertive nature. As this section indicates, Congress's intent for meanings of the terms "willfully," "false," and "statement" is simply not so plain as the Second and Fifth Circuits have claimed.[96]

Even if the plain language had unambiguously authorized application of the statute to any utterance arguably deserving of the label "false" in any setting whatsoever, it is simply untrue that courts do not go beyond the plain language in making their decisions.[97] In fact, broad statutory language may represent a delegation of power from Congress to the courts. Thus, broad language may not require broad application, but may instead represent a license to create federal common law.[98] The Sherman Act provides an example. Courts have construed the words "[e]very contract . . . in restraint of trade"[99] not to prohibit literally *any* contract — because all con-

90. *See* FED. R. EVID. 801(a) (defining statement in the hearsay context as an "assertion or . . . conduct . . . intended . . . as an assertion").

91. United States v. Rodriguez-Rios, 14 F.3d 1040, 1044 (5th Cir. 1994).

92. *See, e.g.,* United States v. Stark, 131 F. Supp. 190, 206 (D. Md. 1955).

93. *Cf.* FED. R. EVID. 803(2) (excited utterance as hearsay exception).

94. *See, e.g.,* United States v. Steele, 933 F.2d 1313, 1319 (6th Cir. 1991) (implicitly suggesting that "spontaneous, emotional disclaimers uttered by a suspect" might not be statements for the purposes of § 1001).

95. The denial may be a response to the manner of questioning, rather than to the content of the questions.

96. *See Steele,* 933 F.2d at 1323-34 (Brown, J., dissenting) ("[Even t]he majority opinion . . . recognizes that the meaning of section 1001, on its face, is not so plain.").

97. *See* United States v. Katz, 271 U.S. 354, 362 (1926) ("[G]eneral terms . . . may and should be limited where the literal application of the statute would lead to extreme or absurd results, and where the legislative purpose gathered from the whole Act would be satisfied by a more limited interpretation."); *cf.* United States v. Bedore, 455 F.2d 1109, 1110 (9th Cir. 1972) (describing the absurdity that would result from a very broad application of § 1001).

98. *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes,* 1994 SUP. CT. REV. 345, 367-70.

99. 15 U.S.C. § 1 (1994).

tracts restrain trade in some way — but only contracts that unreasonably restrain trade.[100] To construe such a broad statute otherwise would be to impute to Congress an intent it could not possibly have had: to ban the practice of making contracts.[101]

The same logic justifies restricting the scope of section 1001. The strictest reading of the plain language, after all, could yield an interpretation that encompassed just about any statement in any circumstance whatsoever.[102] Nevertheless, every court, including the Second and Fifth Circuits, has limited the broad reading in some fashion. Indeed, the circuits' limitations on section 1001 have no more support from the plain language or legislative history than the exculpatory no exception.[103] This inconsistency demonstrates that the Second and Fifth Circuits object not to narrowing the statutory scope that section 1001's plain language dictates, but to the *method* of the narrowing. If the Plain Language Objection were viable, it would also preclude the interpretations these circuits accept. The objection is therefore merely an interpretive makeweight.

In sum, this Part has demonstrated that the exculpatory no exception is a valid construction of the false statement statute because it is consistent with the statute's two purposes. Moreover, the Plain Language Objection is insufficient to cast doubt on the exception's validity.

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100. *See* Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).

101. *See* National Socy. of Profl. Engrs. v. United States, 435 U.S. 679, 687 (1978) ("One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says.").

102. *See Bedore,* 455 F.2d at 1110 ("If . . . section 1001 were read literally, virtually any false statement, sworn or unsworn, written or oral, made to a Government employee could be penalized as a felony.").

103. Notwithstanding their Plain Language Objection, these circuits implicitly accepted two extratextual judicial glosses on the statute's then-existing plain language that are indistinguishable on a principled basis from the exculpatory no exception. Strictly speaking, the phrase "knowingly and willfully," for example, modified only "falsifies, conceals or covers up by any trick, scheme, or device a material fact." 18 U.S.C. § 1001 (1994). The other two phrases — regarding false statements and false writings — were unmodified, suggesting that no culpability requirement applies to them. Nevertheless, the Fifth Circuit *did* require that *each* of the types of conduct be done "knowingly and willfully." *See* United States v. Rodriguez-Rios, 14 F.3d 1040, 1044 (5th Cir. 1994). The Second Circuit explicitly noted that this requirement was only one of the safeguards "embodied" in — rather than evident from a strict reading of the plain language of — the statute. *See* United States v. Wiener, 96 F.3d 35, 40 (2d Cir. 1996).

Similarly, application of the "materiality" requirement to all three types of conduct in the pre-1996 version of the statute is also a judicial construction, a "judge-made limitation," *see* United States v. Baker, 626 F.2d 512, 514 (5th Cir. 1980), like the exculpatory no exception, that goes beyond the plain or literal meaning. *See* United Sates v. Gaudin, 515 U.S. 506, 524 (1995) (Rehnquist, C.J., joined by O'Connor & Breyer, JJ., concurring) ("Whether 'materiality' is indeed an element of every offense under 18 U.S.C. § 1001 is not at all obvious from its text.").

II. Coercion, Constitutional Decisionmaking, and the Values Objection

The exculpatory no exception permits the Supreme Court to avoid deciding whether applying the federal false statement statute to mere exculpatory denials violates the privilege against self-incrimination.[104] When a statutory construction obviates the need for a constitutional decision, and that construction does not frustrate congressional intent,[105] the Court's precedent requires it to accept the construction and refuse to reach the constitutional question.[106] The relevance of the Self-Incrimination Clause[107] has been the subject of significant conflict among the courts.[108] In response to the Second and Fifth Circuits' Values Objection, which holds the Fifth Amendment inapplicable to the prosecution of exculpatory denials under the federal false statement statute,[109] this Part sketches the prima facie argument, elaborated at length elsewhere,[110] that the Fifth Amendment's Self-Incrimination Clause *does* implicitly prohibit punishing simple exculpatory denials.[111] Specifically, it argues that punishing exculpatory denials creates for the interrogee a coercive "cruel trilemma"[112] that is analogous to that faced by a courtroom witness absent the protections of the Self-Incrimination Clause.[113] The Part goes on to argue that the exculpatory no exception is a statutory construction that permits the Court to avoid having to resolve whether the Self-Incrimination

104. Courts commonly justify the exculpatory no exception by making reference to the Fifth Amendment's Self-Incrimination Clause. *See, e.g.*, United States v. Armstrong, 715 F. Supp. 242, 243 (S.D. Ind. 1989).

105. *See supra* Part I (arguing that the exception does not frustrate congressional intent).

106. *See* NLRB v. Fruit Packers, 377 U.S. 58, 62-63 (1964) (declining to apply a statute broadly in a case in which a ban "might" collide with First Amendment rights); *see also* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (citing supporting cases dating back to the tenure of Chief Justice John Marshall).

107. *See* U.S. Const. amend. V ("[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . . .")

108. *Compare Rodriguez-Rios,* 14 F.3d at 1049 (rejecting the relevance of the Self-Incrimination Clause) *with* United States v. Russo, 699 F. Supp. 1344, 1346-47 (N.D. Ill. 1988) (identifying encroachment on a defendant's rights against self-incrimination as a justification for the exception).

109. *See* United States v. Wiener, 96 F.3d 35, 40 (2d Cir. 1996); *Rodriguez-Rios,* 14 F.3d at 1049.

110. *See generally* Richard E. Timbie, Note, *Constitutionally Privileged False Statements,* 22 Stan. L. Rev. 783 (1970).

111. *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966) ("[T]he Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in *any* significant way . . . ." (emphasis added)).

112. *See* Murphy v. Waterfront Commn., 378 U.S. 52, 55 (1964).

113. *See Murphy,* 378 U.S. at 55.

Clause protects such denials. For this reason, the Court should adopt it.

The options open to a suspect of federal agents are quite comparable to those options the Court has ruled unacceptable for a courtroom witness under the Self-Incrimination Clause.[114] Without the Fifth Amendment's protections, the courtroom witness would face prosecution for perjury for a lie, contempt for silence, or conviction for an incriminating admission. This scenario creates a "cruel trilemma"[115] and is constitutionally prohibited.[116] Similarly, without the exculpatory no exception's protection, the suspect would have to choose from a false denial, a self-incriminating truth, or silence — each of which entails adverse consequences. He could confess his wrongdoing, which could result in conviction on the basis of the confession. He could deny the conduct, so that a court might subsequently convict him of a false statement. Or the interrogee could attempt to remain silent.[117] Aside from the fact that silence may not be a practical option because the interrogee may be unaware of his right to silence,[118] or because "communicative realities" prohibit silence and require *some* answer,[119] federal prosecutors may subsequently use silence as evidence to convict the interrogee.[120] In each of these cases, a defendant "will have been convicted by his own words [or silence] given to an investigating

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114. *See Murphy*, 378 U.S. at 55.

115. *See Murphy*, 378 U.S. at 55.

116. *See Murphy*, 378 U.S. at 55.

117. *But see* Nedra D. Campbell & Anne Gallagher, *Eleventh Survey of White Collar Crime: False Statements*, 33 AM. CRIM. L. REV. 679, 683 n.25 (1996) (reporting cases in which courts characterize silence as misleading and punish it under § 1001).

118. Indeed, absent the oath, *Miranda* warnings, transcript and other formal trappings that indicate legal rights are at stake, the interrogee may not realize he has, and may invoke, a present legal right not to answer questions in an informal interview. *Cf.* United States v. Chevoor, 526 F.2d 178, 184 (1st Cir. 1976) (noting some of the circumstances that prompted the court to describe the defendant's response as an exculpatory no, including lack of oath or transcript and informal, oral nature of the questioning). Without formal cues, the interrogee seems unlikely to be thinking in the language of rights. *See* Oliver, *supra* note 42, at 775.

119. *See* United States v. Goldfine, 538 F.2d 815, 821 n.2 (9th Cir. 1976) (Ferguson, J., concurring and dissenting) (noting that "communicative realities" make "standing mute in the face of question[ing] . . . exceedingly unnatural . . . and . . . unwholesome"). If investigators in fact construe silence as guilt in this way, they effectively "wring an admission of guilt from the accused's very decision to stand aside from the process." Robert S. Gerstein, *The Demise of* Boyd: *Self-Incrimination and Private Papers in the Burger Court*, 27 UCLA L. REV. 343, 352 (1979). In a situation requiring some response, the denial may function as a proxy for silence, a "filler" phrase, or it may be a performative, a refusal to participate in the interrogation, rather than a substantive response to the incriminating question. *See* DAVID NYBERG, THE VARNISHED TRUTH: TRUTH TELLING AND DECEIVING IN ORDINARY LIFE 179 (1993) (noting that when it is not possible to tell an intruder to mind his own business, a lie may be an appropriate defense of privacy (quoting J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 182 (1977))).

120. *See* Jenkins v. Anderson, 447 U.S. 231, 240 (1980) (holding that evidence of a witness's silence before receiving the *Miranda* warnings may be used to impeach the witness).

officer of the United States government, who at the time suspected [the defendant] of unlawful activity."[121] Posing questions to which an affirmative truthful answer would incriminate the suspected interrogee is, therefore, coercive and arguably prohibited by the Fifth Amendment.[122]

In rejecting the exculpatory no exception, the Second and Fifth Circuits argued that the Fifth Amendment provides a right to silence rather than a right to lie,[123] and therefore does not protect false denials.[124] The argument has three flaws. First, the Supreme Court case that the circuit courts quote simply does not involve a challenge under the Self-Incrimination Clause and is therefore inapposite.[125] Second, the argument assumes that the interrogee in an informal interview perceives silence as an option that is open to him; in fact, many times it is not.[126] A suspect's refusal to answer on the grounds that it may incriminate him, for example, prompts the unmistakable inference that the suspect is guilty of a crime related to the question asked and is, therefore, as inculpatory as an admission.[127] In this situation, silence would be the functional equivalent of an admission because it had the same effect.[128] Furthermore, in contrast to a formal interview preceded by oaths, *Miranda* warnings, transcripts, and other trappings of formality that indicate a setting in which it is appropriate for the interrogee to invoke legal rights, the informal interview provides no such cues.[129]

The third flaw in the Second and Fifth Circuits' focus on the "right to silence" is that their analysis is incomplete — it does not exhaust the content of the Fifth Amendment.[130] It fails to speak to

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121. United States v. Bush, 503 F.2d 813, 818 (5th Cir. 1974).

122. *See* United States v. Steele, 933 F.2d 1313, 1321 n.7 (6th Cir. 1991) (stating in dicta that where an interrogee is the suspect of the investigation, such circumstances implicate Fifth Amendment values (citing United States v. Alzate-Restreppo, 890 F.2d 1061, 1069-70 (9th Cir. 1989) (Patel and Nelson, JJ., concurring in the judgment))).

123. *See* United States v. Wiener, 96 F.3d 35, 39 (2d Cir. 1996) (quoting Bryson v. United States, 396 U.S. 64, 72 (1969)); United States v. Rodriguez-Rios, 14 F.3d 1040, 1049-50 (5th Cir. 1994).

124. *See Wiener,* 96 F.3d at 39; *Rodriguez-Rios,* 14 F.3d at 1049-50.

125. *See Bryson,* 396 U.S. at 72 (rejecting challenge on due process grounds), *cited in Rodriguez-Rios,* 14 F.3d at 1049-50. The *Wiener* court viewed favorably the *Rodriguez-Rios* court's interpretation of *Bryson. See Wiener,* 96 F.3d at 39 (citing with approval *Rodriguez-Rios,* 14 F.3d 1049-50).

126. *See supra* notes 117-20 and accompanying text.

127. *See* Timbie, *supra* note 110, at 790.

128. *See* NYBERG, *supra* note 119, at 179-80 ("Saying nothing may well be no real option: to give no answer to a question may well be, by implication, to give one answer rather than another . . . ." (quoting J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 182 (1977))).

129. *See supra* note 118.

130. Indeed, the primary case cited by the Second and Fifth Circuits to support their focus on silence explicitly notes that coercion would alter the analysis. *See Bryson,* 396 U.S. at 69-70 (noting that a claim of duress, inter alia, would have altered analysis of the lie).

the line of Fifth Amendment cases that emphasize the word "compelled" rather than the "right to silence."[131] Under this line of cases, the Self-Incrimination Clause protects individuals from improper methods of interrogation.[132] From this perspective, it makes no difference whether "no" is a statement, or whether the response is a lie, or a truth, or silence.[133] The *response,* in effect, is not important. What matters is whether the *method* of interrogation amounted to governmental compulsion.[134] Mere exculpatory denials should not be punished under section 1001 because they prevent cruel trilemmas that compel self-incrimination.[135]

When a given application of a statue would "raise serious constitutional problems,"[136] courts should seek a construction that avoids the constitutional issue, unless Congress expressly intended to confront it.[137] In the case of the false statement statute, Congress showed no such express intent.[138] The Court therefore should ap-

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131. *See* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent,* 94 MICH. L. REV. 2625 (1996) (arguing the existence of two readings of the Fifth Amendment, based respectively on a privilege against self-incrimination and on a right not to be subjected to compulsion). Professor Alschuler provides a long list of historical materials suggesting that the framers of the Constitution intended only the latter. *See id.* at 2647-60.

132. *See id.* at 2626.

133. *See* R. Kent Greenawalt, *Silence as a Moral and Constitutional Right,* 23 WM. & MARY L. REV. 15, 32 (1981) ("That right [to silence] is not a right to be thought innocent or a right to escape harmful consequences, but is a right not to *help* bring about those consequences.").

134. *See* Colorado v. Connelly, 479 U.S. 157, 170 (1986), *cited in* Alschuler, *supra* note 131, at 2626. In the case currently pending before the Supreme Court, *Brogan v. United States,* the investigating agents — who already had independent evidence of the defendant's wrongdoing — sprung a surprise interrogation on him, pressured him to cooperate, which he apparently refused to do, and then directly inquired whether the defendant had committed the wrongful acts. Brogan merely responded "no." Unable to secure a conviction on one of the two substantive charges, the government also charged him under § 1001 for his simple denial. *See* United States v. Wiener, 96 F.3d 35, 36 (2d Cir. 1996); Brief for Petitioner at *2-3 & n.1, Brogan v. United States, No. 96-1579, 1997 WL 523874 (filed August 21, 1997); *cf.* Orozco v. Texas, 394 U.S. 324, 326-27 (1969) (characterizing a situation in which several police officers questioned a suspect in his bedroom in the early morning as creating a potential for compulsion equivalent to a police station interrogation).

135. *See* Timbie, *supra* note 110, at 783 (arguing that the Fifth Amendment protects exculpatory denials from prosecution under the false statement statute). While the Supreme Court has ruled that statements in general, given in a noncustodial interview, may be used against the speaker, *see* Beckwith v. United States, 425 U.S. 341, 347 (1976), the Court has not ruled on using mere exculpatory denials against the speaker, or for that matter, whether a mere exculpatory denial constitutes a "statement" within the meaning of the *Beckwith* decision.

136. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

137. *See* Public Citizen v. Department of Justice, 491 U.S. 440, 466 (1989) (refusing to "conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils"); *Edward J. DeBartolo Corp.,* 485 U.S. at 575; Crowell v. Benson, 285 U.S. 22, 62 & n.30 (1932).

138. *Cf.* United States v. Yermian, 468 U.S. 63, 76-77, 82-83 (1984) (Rehnquist, J., dissenting) ("[T]he language and legislative history of § 1001 can provide 'no more than a guess

prove the exculpatory no exception to neutralize the potential constitutional threat this Part has illustrated.

III. Protecting Interests in Fairness and the Values Objection

Beginning from the assumption that courts ought to[139] — and often do[140] — construe the law against a moral background of fairness and equity, this Part contends that the Supreme Court, in keeping with its decisions regarding its supervisory power over criminal law enforcement,[141] should retain the exculpatory no exception because it protects fairness. It should do so not on constitutional grounds, but because "courts' whole approach to nonconstitutional review is properly informed by conceptions of legitimate public purpose that underlie substantive constitutional scrutiny."[142] Absent congressional intent to the contrary,[143] the Court may assume that Congress legislated against the background of such "conceptions of legitimate public purpose" as ensuring fairness.[144] Informed by this assumption, the Court ought to adopt the exception as consistent with the values underlying the Constitution and with the purposes of the false statement statute.[145] This argu-

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as to what Congress intended.' . . . [T]he legislative history simply 'fails to evidence congressional awareness of the statute's claimed scope.'" (citations omitted)).

139. *See, e.g.*, Ronald Dworkin, A Matter of Principle 16-17 (1985) (describing a model of adjudication in which judges decide hard cases against a background of moral values, provided, however, that these background principles do not conflict with other principles that must be presupposed to justify the law, or scheme of laws, they are enforcing).

140. *See, e.g.*, Anderson v. Abbott, 321 U.S. 349, 366-67 (1944) (permitting disregard of the legal form of the corporation to avoid an inequitable result); United States Fidelity and Guar. Co. v. Federal Reserve Bank, 620 F. Supp. 361, 369, 373 (S.D.N.Y. 1985) (reaching a result "not expressly sanctioned" by the Uniform Commercial Code in order to avoid an "unjust" and "inequitable" outcome), *affd.*, 786 F.2d 77 (2d Cir. 1986); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 85 (N.J. 1960) (abandoning the old warranty-based products liability regime in favor of a form of enterprise liability in part because "[a]n instinctively felt sense of justice crie[d] out" against the result otherwise obtaining).

141. *See* McNabb v. United States, 318 U.S. 332, 340 (1943) (avoiding a decision on constitutional grounds and pointing out that while review of state criminal law is limited to enforcement of the Fourteenth Amendment, the standards of federal criminal justice "are not satisfied merely by observance of [the] minimal historic safeguards" of due process); *see also* Mallory v. United States, 354 U.S. 449, 455-56 (1957) (holding federal criminal law officers to a standard more stringent than due process required).

142. Glen O. Robinson, American Bureaucracy 153 (1991); *see also* William N. Eskridge, Jr., *Public Values in Statutory Interpretation,* 137 U. Pa. L. Rev. 1007, 1018 (1989).

143. *See* Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

144. *See* Robinson, *supra* note 142, at 153; *cf.* Eskridge, *supra* note 142, at 1020 ("The Court should assume that Congress is sensitive to constitutional concerns . . . .").

145. For a discussion of the fairness interests protected by the Fifth Amendment, see, for example, Miranda v. Arizona, 384 U.S. 436, 460 (1966); Gerstein, *supra* note 119, at 345-52 (discussing moral autonomy and other justifications for the privilege). Similarly, courts have often hinted that fairness prompts the impulse to recognize the exculpatory no exception. *See, e.g.*, United States v. Levin, 133 F. Supp. 88, 90 (D. Colo. 1953).

ment, then, is an alternative response to the Second and Fifth Circuits' Values Objection.

Borrowing the phraseology of John Rawls,[146] this Part articulates four such concepts of fairness. Sections III.A through III.D define fairness as, respectively, procedural proportionality,[147] human dignity,[148] fair play,[149] and notice.[150] Each section then identifies the legal analogue suggesting that a particular defined value underlies the terms of the Constitution. Without addressing the merits of the fairness claims, which are treated at length in the cited sources, these sections instead sketch how the exculpatory no exception vindicates these fairness interests. It also asserts that the parallels between the fairness interests protected by the Constitution and those protected by the exception ought to militate in favor of sustaining the exception.

A. *Fairness as Procedural Proportionality*

In the section 1001 context, the principle of procedural proportionality[151] requires courts to balance the public's interest in the orderly functioning of government against the individual's interest in freedom from government interference.[152] A constitutional analogue lies in the Court's search and seizure decisions requiring some parity between the government's needs and the extent of its invasion.[153] Similarly, if the government is unlikely to rely on the answer to an incriminating question, its need for a truthful reply may diminish relative to the interrogee's right to be let alone.[154] The

146. *Cf.* JOHN RAWLS, A THEORY OF JUSTICE 11-17 (1971) (describing the propriety of the label "justice as fairness").

147. *See* discussion *infra* section III.A.

148. *See generally* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 38-46 (1993).

149. *See generally* William J. Schwartz, Note, *Fairness in Criminal Investigations Under the Federal False Statement Statute*, 77 COLUM. L. REV. 316, 325 (1977) (noting that the exculpatory no exception guards against, inter alia, prosecutorial overreaching).

150. *See generally* Oliver, *supra* note 42, at 775-777 (referring to notice as procedural safeguards).

151. *See* Greenawalt, *supra* note 133, at 41 (arguing that, with the exception of very serious crimes like murder, police should generally leave potential suspects alone unless the police have a substantial basis for suspicion). Implicitly, Greenawalt is contending that the harm done must justify the invasion of the right to be left alone.

152. *See, e.g.*, United States v. Cogdell, 844 F.2d 179, 183 (4th Cir. 1988).

153. *Cf.* Camara v. Municipal Court, 387 U.S. 523, 534-39 (1967) (holding that the quantum of probable cause required for issuance of an inspection warrant must be determined in part by the reasonableness of the search: reasonableness requires "balancing the need to search against the invasion which the search entails").

154. In theory, for example, the public is less apt to feel resentment in situations in which there is no harm. *See* Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237, 267 (1994). Where the public feels no resentment, there is arguably less of a likelihood that the public will want to authorize such government intrusions. *See id.* at 268.

Department of Justice appears to concede this view.[155] In such a case, therefore, permitting a minimally harmful[156] exculpatory denial that frees an interrogee from his coercive predicament seems to strike an appropriate balance.[157] The exception helps ensure that the government's investigation is procedurally proportional by creating a zone of noninterference where governmental interests are minimal, much as the privilege against self-incrimination secures a preserve against government intrusion.

B. *Fairness As Human Dignity*

Application of the false statement statute to simple exculpatory denials can violate the principle of fairness as human dignity by making an individual the instrument of his own destruction.[158] A violation of this principle is a particularized form of governmental interference for which the Supreme Court has previously shown concern through its solicitude, in the context of the Fifth Amendment, for "the inviolability of the human personality."[159] Issuing an exculpatory denial can be an assertion of human dignity, an "affirmation of self in the face of the state"[160] similar to the ethical basis for the requirements of various provisions of the Bill of Rights,[161] because it serves the function of self-preservation. Morally, there is intrinsic value in giving the accused the capacity to defend himself with an exculpatory denial rather than having the government look after his liberty.[162]

This fairness interest also accords with common intuition. Commentators argue, for example, that self-preservation is — at best — a laudable instinct[163] and, even at worst, an understandable one. The squeamishness about punishing the instinct, for example, may

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155. *Cf.* 9 THE DEPARTMENT OF JUSTICE MANUAL, *supra* note 48, § 9-42.160 (stating policy "that it is not appropriate to charge a Section 1001 violation where a suspect, during an investigation, merely denies his guilt"). Such a policy implies that obtaining the truth from the suspect in these limited circumstances is not so valuable to the government that it outweighs other concerns.

156. See *supra* notes 44-53 and accompanying text for a discussion of why a mere "no" causes little or no harm.

157. *See Cogdell*, 844 F.2d at 184-85.

158. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 194 (1988) ("[M]aking me the active instrument of my own destruction signals the entire subordination of the self to the state.").

159. Miranda v. Arizona, 384 U.S. 436, 460 (1966).

160. LUBAN, *supra* note 158, at 195.

161. *See id.; see also* Greenawalt, *supra* note 133, at 49-50 (outlining the argument for the symbolic significance of the right to silence).

162. *See* Gerstein, *supra* note 119, at 351 ("[T]he self-respect of an autonomous person rests in part on his capacity to protect his own interests through the assertion of his rights.").

163. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 208 (1995) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *186 for the proposition that self-preservation is a "great universal principle."); Greenawalt, *supra* note 133, at 29.

be a "There-but-for-the-grace-of-God-go-I" empathy.[164] Each of us is unsure that he would act differently if faced with the situation, and fairness thus requires that society not hold particular individuals to norms more strict than its individual members believe they can meet.[165]

C. *Fairness as Fair Play*

By providing the suspect with the safe harbor of an exculpatory denial, the exception helps to level the playing field between a relatively weak criminal suspect and a powerful government together engaged in an adversarial contest.[166] The Court's decisions in *Miranda v. Arizona*[167] and other cases[168] reflect one constitutional analogue of this type of fairness. Instead of permitting the already strong state to exploit the suspect by compelling him to incriminate himself, the Self-Incrimination Clause forces the state to "maintain a 'fair state-individual balance'"[169] and to "'shoulder the entire load'"[170] of proving that individual guilty.[171] A second analogue is the Supreme Court's due process vagueness doctrine that aims in part at "eliminating laws that invite [government] manipulation."[172] Similarly, the exculpatory no exception discourages the government not only from enlisting the suspect in his own destruction, but also from engaging in misconduct involving the very real danger of

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164. *Cf.* J.R. LUCAS, ON JUSTICE 212 (1980) ("Human beings . . . are not so separate as liberal theorists have commonly supposed. They share, to some limited extent, a common rationality and some common values.").

165. *See* William J. Stuntz, *Self Incrimination and Excuse,* 88 COLUM. L. REV. 1227, 1242-61 (1988); *cf.* MODEL PENAL CODE, § 2.09 cmt. at 374-75 (1985) (construing duress as encompassing those unfair choices where "judges are not prepared to affirm that they . . . could comply with [the law] if their turn to face the problem should arise").

166. *See generally* GRANO, *supra* note 148, at 28-32 (describing the similar "fox-hunter's argument" that even a guilty defendant deserves a sporting chance to prevent his trial from becoming a meaningless exercise and to encourage the government to conduct a thorough investigation).

167. 384 U.S. 436 (1966).

168. *See, e.g.,* Miller v. Fenton, 474 U.S. 104, 110 (1984) ("[T]actics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness.").

169. *Miranda,* 384 U.S. at 460 (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2251(12) (McNaughton rev. 1961)).

170. Murphy v. Waterfront Commn. 378 U.S. 52, 55 (1964) (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2251(12) (McNaughton rev. 1961)).

171. Silence, of course, could have the same effect, but often the suspect does not perceive silence as an option, *see supra* note 118, or silence does not adequately protect the interrogee's interests. *See* Greenawalt, *supra* note 133, at 30.

172. *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes,* 71 VA. L. REV. 189, 197 & n.21 (1985) (citing Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)).

abuse of section 1001.[173] Such abuse might take the form, for example, of the government's asking questions to which it already knows the answer in order to invite repetition of what it knows to be false statements for the purpose of multiplying the counts.[174] Even absent the abuse, the exculpatory denial may help to ensure fair play between investigator and suspect: it offers a suspect a limited exception from his duty of truthtelling in a situation in which the government agent has no equivalent duty.[175]

D. *Fairness as Notice*

The exculpatory no exception protects individuals who had no notice[176] that a false denial of guilt is legally wrong.[177] The Supreme Court has held that due process requires notice to potential wrongdoers when ordinary conduct constitutes criminal behavior.[178] Without such protection, the government could punish a

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173. *Cf.* Robert B. Fiske, Jr., *White Collar Crime: A Survey of Law*, 18 AM. CRIM. L. REV. 169, 280 (1980) ("Because section 1001 . . . combines lenient standards of proof with relatively high penalties, it has the potential for abuse.").

174. *See* United States v. Russo, 699 F. Supp. 1344, 1347 (N.D. Ill. 1988).

175. The Supreme Court has endorsed many deceptive police practices in the course of investigation. *See, e.g.*, Lopez v. United States, 373 U.S. 427 (1963) (approving agent's use of false story to gain access to and record a criminal bribery conspiracy).

176. This account of notice presupposes a challenge to the liberal positivist position that mistake of law is not a permissible defense because it provides incentives for people to consult and know the intricacies of the criminal code. *See* People v. Marrero, 507 N.E.2d 1068, 1069 (N.Y. 1987). Under this challenged conception, *any* rule is fair with regard to notice, provided the rule is published. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 39-40 (Mark DeWolfe Howe ed., Back Bay Books 1963) (1881). Commentators have widely criticized the liberal positivist position, which, according to one commentator, "cannot withstand modern analysis." DRESSLER, *supra* note 163, at 148 & 147 n.1 (citing commentators criticizing the positivist view). For an extended critique of this liberal positivist position and a general description of the legal moralist concept of notice that this Note employs, see Dan M. Kahan, *Ignorance of Law* Is *an Excuse — but Only for the Virtuous*, 96 MICH. L. REV. 127, 145-49 (1997) (analyzing, inter alia, the Supreme Court's implicit reasoning in Cheek v. United States, 498 U.S. 192, 199-200 (1991)).

177. For example, many government forms and declarations — including tax returns — include warnings above the signature line that falsehoods are punishable as perjury. A reasonable but uninformed citizen may infer that absent such a warning, falsehoods are not punishable — in other words, that it is the breaking of an oath, and not the failure to tell the truth, that warrants punishment. *Cf.* United States v. Chevoor, 526 F.2d 178, 183-84 (1st Cir. 1975) (noting the informality of the questioning, including the lack of an oath, as a factor that induced the court to declare the denials in question to be "clear" exculpatory no's).

178. *See* Wright v. Georgia, 373 U.S. 284, 293 (1963); Lambert v. California, 355 U.S. 225 (1957); *see also* Liparota v. United States, 471 U.S. 419, 426, 427 (1985) (absent congressional intent to do otherwise, construing a criminal statute as including a "knowledge-of illegality requirement" where the statute punished ordinary behavior that a defendant would not normally consider to be unlawful). The "willful" element of § 1001 also arguably requires "the specific intent to do something the law forbids." 9 THE DEPARTMENT OF JUSTICE MANUAL § 9-42.142(B) (1989-2 Supp.).

person who lacked opportunity to conform his conduct to the requirements of the law.[179]

Notice is particularly important when the ordinary conduct prohibited falls on the moral boundary line between what is socially desirable or tolerated[180] and what is socially undesirable.[181] Self-protective denials in the face of government interrogation are instances of such morally ambiguous acts.[182] The ambiguity of these denials stems from the clash of two moral imperatives: first, not to lie; and second, to protect oneself from an adversary. While the first imperative is strong in the Western tradition,[183] it is not absolute.[184] Indeed, this imperative is qualified by the common moral intuition that one has no duty to tell the truth to an adversary,[185] because neither side expects truth from the other.[186] In an interrogation, the government has opened an adversarial relationship[187] and has consequently relaxed the moral imperative not to lie.[188]

In such cases of moral ambiguity, fair notice requires actual knowledge that the conduct is wrong,[189] and the Court will there-

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179. *See* FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72 (University of Chicago Press 1956) (1944) ("[G]overnment [under Rule of Law] . . . is bound by rules fixed and announced beforehand — rules which make it possible to foresee with fair certainty how the authority will use its coercive powers . . . and to plan one's individual affairs on the basis of this knowledge.").

180. *Cf. Liparota*, 471 U.S. at 426 (construing a criminal statute that punished unauthorized transfer of food stamps to have a "knowledge-of-illegality requirement" to avoid punishing "apparently innocent conduct"). For a similar distinction, see also Kahan, *supra* note 176, at 148 (noting the difference between withholding punishment for conduct and approval of that conduct).

181. *See* Kahan, *supra* note 176, at 150-51. Professor Kahan notes that in such mere *malum prohibitum* crimes, particularly those involving ordinary conduct, *see supra* notes 164-65 (describing society's discomfort in holding others to a standard, under criminal law, that is higher than the average person could expect to meet), a defense of mistake of law may be available; he contrasts this to *malum in se* crimes, in which no mistake-of-law defense is available because behavior at the margins of legality indicates the bad character society wants to punish.

182. *See supra* text accompanying notes 1-4 (detailing ambiguity of the scope of one's duty to tell the truth).

183. *See, e.g., Exodus* 21:16 ("Thou shalt not bear false witness against thy neighbour.").

184. *See* Jennifer C. Bier & David Hibey, *False Statements*, 34 AM. CRIM. L. REV. 567, 572 (1997) ("Courts disagree on whether § 1001 itself imposes a general duty to be honest and forthcoming.").

185. *See* Greenawalt, *supra* note 133, at 37.

186. *See* BOK, *supra* note 4, at 135 ("[L]ies to enemies are traditionally accompanied by a special sense of self-evident justification[; they] appeal . . . to a sense of *fairness* through retribution.").

187. *See* Miranda v. Arizona, 384 U.S. 436, 468-69 (1966) (noting that interrogation constitutes a phase of the adversary system and that the interrogator does not act in the interrogee's interest); Greenawalt, *supra* note 133, at 37-38.

188. *See* Greenawalt, *supra* note 133, at 36-37 (citing BOK, *supra* note 4, at 134-45).

189. *See* United States v. Grotke, 702 F.2d 49, 52 (2d Cir. 1983) (requiring affirmative steps by the government to make suspect aware of duty of truthfulness to the government under § 1001 before allowing prosecutions of mere false denials); United States v. Fitzgibbon, 619 F.2d 874, 876 (10th Cir. 1980).

fore excuse legal mistakes.[190] The exculpatory no exception puts this toleration for mistakes of law stemming from moral ambiguity into doctrinal form, by excluding mere denials from punishment.[191]

In sum, construing section 1001 to include the exculpatory no exception reflects the reasonable assumption that Congress legislated with an eye to fairness. Absent indication of congressional intent inconsistent with this assumption, the Supreme Court should adopt the exception.

IV. Contours of the Test to Determine Whether a Suspect May Invoke the Exculpatory No Exception

This Part examines the circumstances necessary for a defendant to invoke the exculpatory no exception. While courts have used a variety of complex tests,[192] this Part proposes a simple three-factor test that more accurately comports with the purposes of the statute and the philosophical justifications of the exception than the multiple factors used by courts in the past. The three factors are as follows: (i) the false statement must be a mere denial; (ii) the false statement must not have perverted the basic functions of the agency; and (iii) the suspect must reasonably have believed that a truthful answer would have been incriminating. Section IV.A defends the three factors in light of congressional purpose and philosophical justifications. Section IV.B rejects, on the same grounds, other factors used by various courts.

A. *Conditions Required to Invoke the Exception*

A defendant should be able to invoke the exception only in situations in which he responds to an agent's incriminating question with a simple denial that containing neither aggressive elaboration nor discursive falsehood.[193] This requirement most closely reflects the conception of "No" as an exclamatory or performative utterance that is neither true nor false, and, hence, not within the plain

190. *See* Cheek v. United States, 498 U.S. 192, 199-200 (1991) (requiring intent both as to elements of crime and existence of duty for tax case, because the proliferation of rules may leave the taxpayer ignorant of her noncompliance); Liparota v. United States, 471 U.S. 419, 426 (1985) (permitting mistake of law defense for violation of statute criminalizing "apparently innocent conduct"); *see also* United States v. Fitzgibbon, 619 F.2d 874, 880 (10th Cir. 1980) (stating that a mere denial does not give sufficient indication of being knowing and willful enough to meet the *mens rea* requirement of § 1001).

191. *Cf.* Eskridge, *supra* note 142, at 1029-30 (discussing McNally v. United States, 483 U.S. 350 (1987), which construed a broad federal mail fraud statute narrowly on rule of lenity grounds for fear the statute would be applied to conduct that was merely unethical).

192. See Nicholson, *supra* note 13, for a circuit-by-circuit analysis.

193. *See* United States v. King, 613 F.2d 670, 674 (7th Cir. 1980).

language of the false statement statute.[194] In addition, a simple denial requirement would be the easiest standard to apply administratively,[195] because it does not require distinguishing the degree of discursiveness necessary to induce governmental reliance.

One might argue, of course, that any exculpatory effort, whether discursive or nondiscursive, could reflect a self-preserving quest for fairness as human dignity. This argument may appear to have particular force in situations in which, for example, a government agent refuses to accept or credit a simple denial and browbeats the interrogee into providing more detail. In fact, however, it also seems reasonable to expect that such browbeating would trigger the suspect to ask for the protection of counsel or for permission to leave the interview.[196] Even if it did not, a discursive exculpatory statement is likely to induce action or reliance on the part of government investigators. Such reliance — unlikely in the case of a mere denial[197] — would arguably significantly pervert the investigator's function.[198] Because Congress's intent in enacting the false statement statute was to prevent interference with legitimate government functions,[199] such a statement would more clearly cause the harm Congress intended to prevent. Thus, in a procedural proportionality analysis, the difference between a simple denial and a discursive statement may mark the point at which the government interest outweighs the suspect's interest in human dignity.[200]

Furthermore, a simple denial seems better evidence that self-preservation motivated the suspect.[201] More elaborate statements, on the other hand, suggest premeditated, nefarious and "willful" motives such as interference with agency function[202] or the deflec-

194. *See supra* note 119 and accompanying text.

195. *See* Nicholson, *supra* note 13, at 252-53 (recommending adoption of definition of simple denial: "negative responses without *any* affirmative, aggressive or overt misstatement" (quoting United States v. Paternostro, 311 F.2d 298 (5th Cir. 1962) (internal quotation marks omitted))).

196. *See* United States v. Thevis, 469 F. Supp. 490, 497-99 (D. Conn. 1979) (reporting that after fifty minutes of FBI questioning about various false statements, suspect finally called for an attorney).

197. *See supra* notes 49-53 and accompanying text.

198. *See* United States v. Steele, 933 F.2d 1313, 1321 (6th Cir. 1991) (suggesting that the government is not likely to rely on a mere denial of guilt, but very likely would rely on entire documents submitted to it).

199. *See supra* section I.A:

200. *Cf.* United States v. Cogdell, 844 F.2d 179, 183 (4th Cir. 1988) (holding that the exception helped the court "balance the need for protecting the basic functions of government agencies with the concern that a criminal suspect not be forced to incriminate himself").

201. *Cf.* United States v. Fitzgibbon, 619 F.2d 874, 876 (10th Cir. 1980) (holding that a mere "no" does not demonstrate the requisite intent to violate § 1001).

202. *See, e.g.*, United States v. North, 708 F. Supp. 375, 384 (D.D.C. 1988) (denying exculpatory no exception where denials consisted of extensive affirmative falsehoods designed not only to avoid self-incrimination, but also to impair the functioning of the congressional committees to which they were made).

tion of blame to an innocent person.[203] Such motives are *mala in se,* and the suspect's ignorance of his statutory duty to tell the truth would not mitigate his guilt.[204] Thus, lack of notice, too, would be less likely to be unfair when punishing a discursive lie, as opposed to a simple denial.

The second requirement for invoking the exception permits false denials only when they do not actually pervert a basic function of a government agency.[205] Because perversion of function clearly falls within the scope of Congress's intent for the statute,[206] fairness concerns are less relevant. Courts may not frustrate Congress's clear intent by invoking background principles of fairness;[207] rather, fairness concerns are relevant to statutory constructions that do not frustrate congressional intent.

To satisfy the third requirement for invoking the exception, the suspect must demonstrate that he reasonably believed he would have incriminated himself had he given a truthful answer to the agent's question. The standard should be "reasonable belief" rather than "actual danger" because fair play requires that the courts minimize the potential for government abuse.[208] A suspect who reasonably believes himself to be in danger of incriminating himself is as likely to be ripe for government overreaching as one is aware of an actual danger of self-incrimination. Giving the suspect a tool — the false denial — reduces the level of compulsion present in noncustodial interrogations so that the suspect is less vulnerable in either case. Similarly, without a legal false denial, a suspect compromises his human dignity not only when a truthful answer would have incriminated him, but also when he believes that the answer would have had this effect.[209] In either case, it is the belief that he

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203. *See* United States v. Rodgers, 466 U.S. 475, 481-82 (1984) (asserting that the valid legislative interest served by § 1001 is to protect individuals crime from the "grave consequences" resulting from discursive affirmative falsehoods made by others to government investigators).

204. *See* Kahan, *supra* note 176, at 137-44.

205. *See* United States v. Equihua-Juarez, 851 F.2d 1222, 1225 (9th Cir. 1988) (distinguishing between intrinsic ability to pervert the functions of government and actual ability to do so, and requiring the latter).

206. *See, e.g.,* United States v. Medina de Perez, 799 F.2d 540, 546 (9th Cir. 1986) (stating that the circuit had adopted this criterion "cognizant of section 1001's legislative history and Congress's concern over statements that pervert or corrupt agency operations").

207. *See* DWORKIN, *supra* note 139, at 16-17.

208. *See supra* notes 173-74 and accompanying text.

209. *See* United States v. Payne, 750 F.2d 844, 863 (11th Cir. 1985) ("[T]he 'exculpatory no' doctrine requires the reversal of a false statement conviction . . . if the defendant can establish that he or she *reasonably believed* that truthful affirmative answers would have been incriminating." (emphasis added)); *but see* United States v. Grotke, 702 F.2d 49, 53-54 (2d Cir. 1983) (rejecting reasonable belief standard and requiring actual incrimination).

is participating in his own destruction that constitutes the spectacle of unfairness and cruelty.[210]

B. *Conditions Not Required to Invoke the Exception*

In addition to the factors mentioned in section IV.A, courts have considered additional factors. This section argues that three of these factors should not be part of the test for invoking the exception because they do not lend themselves to administrative simplicity, let alone comport with congressional intent or the exception's philosophical underpinnings. These three requirements are: (i) that the statement be unrelated to a claim or privilege;[211] (ii) that the defendant have been a suspect in the investigation during which he delivers the false exculpatory denial;[212] and (iii) that the interrogee have issued the false denial in the course of an investigation, rather than during a routine administrative matter.[213]

The first requirement simply bears no sufficient relation to Congress's intent to prohibit statements that pervert the functioning of the government. Under this requirement a defendant who issued an exculpatory denial while seeking, for example, a government appointment, entry into the United States, or a government contract, would not be eligible for the exception.[214] While a "claim" or "privilege" does suggest that important government functions are at stake, the requirement is both under- and overinclusive. A suspect may be making a claim yet may not pervert agency functions; on the other hand, the suspect may not be making a claim but still interfere with the functioning of government.[215]

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210. *Cf.* Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (holding that in defining whether questioning is interrogation, courts should "focus[ ] primarily upon the perceptions of the suspect, rather than the intent of the police").

211. *See, e.g., Medina de Perez,* 799 F.2d at 544.

212. *See* United States v. Alzate-Restreppo, 890 F.2d 1061, 1067 (9th Cir. 1989) (requiring, apparently, that the defendant have been suspected of a crime or undergoing custodial interrogation to take advantage of exception).

213. *See, e.g., Medina de Perez,* 799 F.2d at 544-45.

214. *See, e.g.,* United States v. Barr, 963 F.2d 641, 647 (3d Cir. 1992) (prosecuting false denial where a defendant sought a job with the federal government); United States v. Rose, 570 F.2d 1358, 1364 (9th Cir. 1978) (prosecuting false denial where a defendant sought claim of entry to the United States); United States v. Raether, 940 F. Supp. 1485 (D.S.D. 1996) (prosecuting false statement given by a company official seeking to acquire cheaply excess federal property).

215. Furthermore, this requirement has proven difficult to administer; courts have interpreted identical factual scenarios in opposite ways. *Compare, e.g.,* United States v. Olsowy, 836 F.2d 439, 441 (9th Cir. 1987) (defendant's fraudulent attempt to obtain a replacement U.S. Treasury check for one he had already received and cashed characterized as a claim against the government) *with* United States v. Cogdell, 844 F.2d 179, 184 (4th Cir. 1988) (defendant's fraudulent attempt to obtain replacement U.S. Treasury check for one she had already received and cashed *not* characterized as claim against the government).

Enforcing the second requirement would inadequately protect fairness. It may exclude from protection nonsuspects to whom incriminating questions are posed.[216] There is no reason to think that nonsuspects would be invulnerable to the same kinds of unfairness; after all, the government can put even a nonsuspect into a position where he can incriminate himself.[217] In fact, one circuit restricts the exception to those who are unaware of being a suspect, reasoning that a nonsuspect is more vulnerable because his silence might alert the investigator to his guilt.[218] Accordingly, to protect fairness adequately, both suspects and nonsuspects ought to be able to invoke the exception.

The third requirement, that the suspect have issued the false denial in the course of an investigation — as opposed to during a routine administrative matter — is duplicative: a belief in the potential for self-incrimination usually only arises in the course of an investigation.[219] It has been argued that this distinction separates the potentially unfair investigatory situation entailing possible criminal sanctions,[220] from the presumably fair administrative situation, that has no such consequences.[221] In practice, however, courts have not uniformly applied the distinction,[222] and the Eleventh Circuit has deemed it unworkable.[223] Thus, the inquiry as to whether a truthful response would have been incriminating, a test that does not entail these complications, better captures the intent of the distinction.

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216. *See* United States v. Tabor, 788 F.2d 714, 716 (11th Cir. 1986) (involving criminal investigation of third party during which investigators posed incriminating questions to interrogee, even though they already knew the answers).

217. On the other hand, nonsuspects might be more likely to induce governmental reliance on the truthfulness of the statement because the agent would have no reason to doubt its authenticity. *See* Schwartz, *supra* note 149, at 328. A greater likelihood of reliance may create the interference with government functions Congress intended the statute to prevent. On balance, however, whether an interrogee is classified as a suspect or nonsuspect, agents ought to expect that people will avoid opportunities to incriminate themselves. For this reason, investigators ought to treat a denial of involvement in criminal activity like any self-serving statement: potentially true, but biased and requiring confirmation. *See supra* note 49-53 and accompanying text.

218. *See* United States v. King, 613 F.2d 670, 674 (7th Cir. 1980).

219. *Cf.* United States v. Steele, 933 F.2d 1313, 1320 (6th Cir. 1991) (noting that the two requirements are based on the same Fifth Amendment rationale).

220. *See* Gerstein, *supra* note 119, at 354 ("While the moral autonomy of the individual is compromised whenever the state compels an admission of wrongdoing, the wrong is clearest and gravest when the state compels the admission as part of the process by which it seeks to establish a defendant's guilt in a legally definitive manner.").

221. *See* United States v. Bush, 503 F.2d 813, 815 (5th Cir. 1974), *overruled by* United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994).

222. *See* Nicholson, *supra* note 13, at 254-55.

223. *See* United States v. Payne, 750 F.2d 844, 863 n.21 (11th Cir. 1985).

Conclusion

The Second and Fifth Circuits adduced two main reasons for rejecting the exculpatory no exception to the federal false statement statute approximately forty years after the exception was first adopted. First, the courts argued that the plain language of the statute provided no explicit authorization for the exception. As this Note has demonstrated, the plain language is rife with ambiguity, the courts recognize other judicial glosses that have no explicit authorization, and the legislative history shows no congressional intent to criminalize mere exculpatory denials. These facts refute the courts' Plain Language Objection.

Second, the courts ruled that the Fifth Amendment constituted no bar to applying section 1001 to mere exculpatory denials. After sketching the possible constitutional violation this application presents, this Note has argued that adopting the exculpatory no construction permits the Court to avoid unnecessarily resolving this constitutional question. The exculpatory no exception also protects background concepts of fairness inherent in the Constitution and especially the Fifth Amendment. These two factors refute the values objection.

The refutation of these two objections, combined with the fact that the exception is consistent with the statutory purpose of section 1001 counsels for Supreme Court adoption of the exception. This adoption should include the test that this Note has suggested for whether a defendant may invoke the exception. Thus, only a simple denial that causes no perversion of government functions in response to an incriminating question ought to be deemed an exculpatory no.