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## MEMORANDUM

TO: Clark Neily

FROM: Andrew Eichen

DATE: August 14, 2020

RE: Prevalence of lying to suspects during interrogations and police perjury.

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### QUESTION PRESENTED

Two different types of lies told by law enforcement seem to be prevalent in American policing: lies told to suspects during interrogation and lies told in court. How commonplace are these two types of lies in the United States, especially when compared to European countries, what explains their prevalence, and is there any connection between them?

### BRIEF ANSWER

In the United States, the use of deceptive interrogation techniques, such as lying to suspects in order to obtain a confession, has become a routine practice for law enforcement. Police utilize these tactics since they are authorized by a flexible constitutional jurisprudence that has sanctioned the practice of lying during interrogation and utilizes an ill-defined test to assess the voluntariness of a confession. In contrast to American law on the matter, British and German law explicitly prohibit the use of deceptive techniques during interrogations.

While lying to suspects during interrogation is permissible under American law, another form of law enforcement misrepresentation, police perjury or “testilying,” is illegal, yet remains prevalent in the United States. American police engage in various different forms of perjury, such as lying during exclusionary hearings and lying on police reports. The prevalence of police perjury is exhibited by investigative reporting, survey data, and quantitative analysis. Research on the issue points towards a problematic police culture as causing and sustaining the practice.

Academics studying these two forms of police lying have concluded that there is indeed a connection between the pervasiveness of both phenomena in the United States. Since officers believe both lying during interrogation and perjury promote public safety, police naturally transfer their justification for one to the other. This conclusion is reinforced by psychological literature which illustrates how officers trained to lie during interrogations, become confident in their skills and develop a schema which encourages them to naturally apply those skills in other contexts.

## DISCUSSION

### **I. THE USE OF DECEPTIVE INTERROGATION TACTICS IS COMMON IN THE UNITED STATES BECAUSE IT IS SANCTIONED BY THE LAW, UNLIKE IN OTHER COUNTRIES, SUCH AS ENGLAND AND GERMANY, WHERE THE PRACTICE IS OUTLAWED AND INCREDIBLY RARE.**

In the United States, the use of deception as a tool in interrogations in order to elicit a confession has become a routine practice for law enforcement. Today, virtually all interrogations in the United States, at least all successful interrogations, involve the use of police deception at least to some extent.<sup>1</sup> Since the Supreme Court has put few limits on the practice, the varieties of deceptive techniques police may use are limited chiefly by officers' ingenuity.<sup>2</sup> Deceptive techniques are taught to officers in interrogation manuals and sociological studies have confirmed that officers rely heavily on these practices, often to the exclusion of using other strategies.<sup>3</sup> Since the practice is entirely legal, law enforcement officers freely admit to lying to suspects during interrogation. However, since the vast majority of cases in the United States end in guilty pleas, only a fraction of cases of police lying ever come to light.<sup>4</sup> The use of deception is so widespread among American police, that Richard Leo, a leading expert on police interrogations, has described it as "the single most salient and defining feature of how interrogation is practiced [in the United States]."<sup>5</sup>

To induce a confession, police rely on various different types of lies and forms of trickery during interrogation. Typically, officers will attempt to persuade a suspect that confessing is in his self-interest, despite the fact that this is often an outright lie.<sup>6</sup> An interrogator might tell a suspect that confessing will not harm him, or that doing so will lessen his culpability and result in a lighter sentence.<sup>7</sup> Some interrogation manuals suggest lying about the appropriateness of a suspect's conduct in order to convince him that his behavior was less blameworthy than he may believe.<sup>8</sup> The widely followed *Reid Nine Steps of Interrogation* instructs officers to sympathize with suspects and tell them that anyone would have done similarly under the same circumstances.<sup>9</sup> Interrogators may lie about the circumstances of the interrogation in order to lull

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<sup>1</sup> Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 Mich. L. Rev. 1168, 1168 (2001).

<sup>2</sup> *Id.*

<sup>3</sup> Margaret L. Paris, *Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3, 61 (1995).

<sup>4</sup> Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 427 (1996).

<sup>5</sup> Richard A. Leo, *Structural Police Deception in American Police Interrogation: A Closer Look at Minimization and Maximization*, in INTERROGATION, CONFESSION, AND TRUTH: COMPARATIVE STUDIES IN CRIMINAL PROCEDURE 183, 201 (2020).

<sup>6</sup> Young, *supra* note 4, at 429.

<sup>7</sup> *Id.*

<sup>8</sup> FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 213, 232–33, 241–42, 244 (4th ed. 2001).

<sup>9</sup> *Id.*

suspects into letting their guards down.<sup>10</sup> For example, officers have been known to lie to suspect about their identities or the privacy of the setting.<sup>11</sup> Officers may also lie about the strength of the government's case, for example, suggesting the existence of a piece of evidence that establishes the suspect's guilt.<sup>12</sup> This final technique, known as an evidence ploy, is one of the most common and fundamental techniques of modern psychological interrogation.<sup>13</sup> It is known as a particularly effective means of eliciting confessions since it communicates to the suspect that he is caught and should give up: his guilt is beyond dispute, his fate is certain, and the case is not going to disappear no matter how much he resists the accusations against him.<sup>14</sup>

These techniques are incredibly common in police interrogation, to the point of being routine practices. In order to assess the extent to which these techniques were used, Richard A. Leo conducted a study in 1996, spending nine months observing a major urban police department.<sup>15</sup> In total, he examined 182 interrogations involving forty-five different officers. He found that deceptive interrogation practices were indeed incredibly common.<sup>16</sup> In 34% of interrogations officers offered suspects moral justifications for their actions in order to convince them their behavior was acceptable.<sup>17</sup> In 30% of cases, interrogators confronted the suspect with a false piece of evidence.<sup>18</sup> In 22% of cases the officer attempted to minimize the moral seriousness of the offense committed.<sup>19</sup> In almost all interrogations, 88% of those observed, the officer appealed to the suspect's self-interest in order to induce a confession.<sup>20</sup> While an appeal to self-interest might not appear to be a form of trickery, it is almost always premised on a lie. It is rarely if ever in a suspect's self-interest to confess, so police must feign allyship, and lie to them in order to prompt a confession.<sup>21</sup>

Lying during interrogations is such a prevalent practice in American policing because the law tolerates it. The use of deception can be conceived of as an adaptive strategy by American police, developed over the years in response to a jurisprudence that placed strict limits on the use of physical and psychological coercion, but held only vague and discretionary constitutional restrictions constrained the use of deception.<sup>22</sup> The Supreme Court's constitutional jurisprudence

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<sup>10</sup> Irina Khasin, *Honesty is the Best Policy: A Case for the Limitation of Deceptive Police Interrogation Practices in the United States*, 42 VAND. J. TRANSNAT'L L. 1029, 1040 (2009).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1041.

<sup>13</sup> RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 139 (2008).

<sup>14</sup> *Id.*

<sup>15</sup> Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 266 (1995-1996).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 278.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Leo, *supra* note 5, at 185-86.

<sup>22</sup> *See Id.* at 188 (stating that "deception is an adaptive strategy that American police have developed over the years to move away from the "third degree" (the use of physical and psychological coercion and distress to obtain

on police behavior during interrogation, can be traced back to *Hopt v. Utah*.<sup>23</sup> The Supreme Court first recognized in *Hopt* that physically abusive interrogation tactics might deprive the defendant of “that freedom of will or self-control essential to make his confession voluntary within the meaning of the law” and therefore that these confessions should be “subjected to careful scrutiny.” Subsequently in *Sparf v. United States*, the Supreme Court extended its ruling in *Hopt*, holding that the standard for admissibility was whether “confessions were entirely free and voluntary, uninfluenced by any hope of reward or fear of punishment.”<sup>24</sup> This standard was solidified in *Brown v. Mississippi*, where the Supreme Court firmly rejected the use of any sort of violence and torture in interrogations, holding these techniques were “revolting to the sense of justice” and that Due Process required interrogation procedures that yielded voluntary and reliable statements.<sup>25</sup> In *Chambers v. Florida*, the Supreme Court finally moved beyond violence, extending its bar on physical coercion to “other ingenious forms of entrapment” that could constitute compulsion.<sup>26</sup> Following *Brown* and *Chambers*, courts began to utilize a “totality of the circumstances” analysis to determine if the interrogation induced a voluntary confession, analyzing factors such as the conduct of the officer and the characteristics of the defendant.<sup>27</sup>

By the mid-1900s, the Supreme Court began to shift from a focus on the voluntariness of a confession, to a view that condemned police practices likely to induce an involuntary confession.<sup>28</sup> This shift began in *Ashcraft v. Tennessee*, where the Supreme Court found that a confession induced after thirty-six hours of interrogation was inadmissible because the practice was so “inherently coercive” as to render the confession compelled.<sup>29</sup> The Supreme Court first addressed the issue of deceptive interrogation practices in *Spano v. New York*.<sup>30</sup> In *Spano*, the police asked a friend of the defendant to lie to him during the interrogation and tell the defendant that he would be fired (and unable to support his pregnant wife) if the defendant did not confess.<sup>31</sup> The Court used a totality of the circumstances test to evaluate the admissibility of the confession, emphasizing the abhorrent nature of the police’s tactics, the pressure exerted by the officers, and the defendant’s fatigue, ultimately holding that the confession was involuntary.<sup>32</sup>

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confessions) and achieve maximum strategic advantage over the suspect while remaining within the mostly vague and highly discretionary constitutional guidelines that constrain them.)

<sup>23</sup> *Hopt v. Utah*, 110 U.S. 574, 585 (1884).

<sup>24</sup> *Sparf v. United States*, 156 U.S. 51, 55 (1895).

<sup>25</sup> *Brown v. Mississippi*, 297 U.S. 278, 286 (1936).

<sup>26</sup> *Chambers v. Florida*, 309 U.S. 227, 237 (1940).

<sup>27</sup> *Khasin*, *supra* note 10, at 1044.

<sup>28</sup> *Id.* at 1045.

<sup>29</sup> *Ashcraft v. Tennessee*, 322 U.S. 143, 153–54 (1944).

<sup>30</sup> *Spano v. New York*, 360 U.S. 315, 320–21 (1959).

<sup>31</sup> *Id.* at 318-19.

<sup>32</sup> *Id.* at 323.

It wasn't until the landmark case *Miranda v. Arizona*, that the Supreme Court implicitly endorsed the use of deceptive interrogation practices.<sup>33</sup> In *Miranda*, the Court held that a suspect must be informed of his right to have an attorney, in part *because* of the deceptive practices used by the police to induce confessions (practices the court listed).<sup>34</sup> Essentially, the Court in *Miranda* acknowledged and indeed assumed that all interrogations would be inherently coercive, and therefore, that the warning was necessary to dissipate this inherent coercion.<sup>35</sup> Finally, in *Frazier v. Cupp*, the Supreme Court explicitly endorsed lying during interrogations in order to obtain a confession.<sup>36</sup> In *Frazier*, a defendant had been indicted jointly with another defendant. The police had falsely told one defendant that the other defendant had confessed, and that he should confess as well because he couldn't be in more trouble than he was in already.<sup>37</sup> The court held that the defendant's confession was not coerced, and although the lies were relevant, they did not make an otherwise voluntary confession inadmissible.<sup>38</sup> Following *Frazier*, the courts have routinely upheld the legitimacy of using other lies and forms of deception in interrogations.<sup>39</sup>

Today, when lies and deception are used to elicit a confession, courts typically use an ill-defined totality of the circumstances test to assess whether the confession was voluntary.<sup>40</sup> The test is so flexible, however, that courts can permit or not permit deceptive interrogation techniques without proving a clear reason.<sup>41</sup> Some courts have proceeded by simply citing *Frazier* for the proposition that "false statements by the police are insufficient to invalidate an otherwise voluntary confession," thereby drawing a bright line that permits police lying.<sup>42</sup> Other courts utilize a balancing test, weighing the coercive nature of the practice with other circumstances surrounding the interrogation.<sup>43</sup> This test is further complicated by the fact that admissibility is a dichotomous decision (a confession is either voluntary or involuntary) while deceptive practices exist across a spectrum of coerciveness.<sup>44</sup> Thus, without any theoretical

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<sup>33</sup> *Miranda v. Arizona*, 384 U.S. 436, 448-49 (1966).

<sup>34</sup> *Id.*

<sup>35</sup> See *Id.* at 467 ("We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.").

<sup>36</sup> *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) ("The fact that the police misrepresented the statements that Rawls had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible.").

<sup>37</sup> *Id.* at 737-38.

<sup>38</sup> *Id.* at 738-39.

<sup>39</sup> See *Holland v. McGinnis*, 963 F.2d 1044, 1051 (7th Cir. 1992) (admitting a confession obtained after police officers exaggerated the strength of the case against the defendant during an interrogation); *Lucero v. Kerby*, 133 F.3d 1299, 1311 (10th Cir. 1998) (holding that without additional evidence, a detective's false statement about fingerprint evidence would not render an otherwise voluntary confession inadmissible).

<sup>40</sup> Young, *supra* note 4, at 451; See also Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 863 (1979) ("The Court's general unwillingness to articulate the policies underlying volitional terminology explains the ambiguity of voluntariness doctrine . . .").

<sup>41</sup> *Id.* at 452.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

guidance as to where the line should be drawn, different courts draw it at different places.<sup>45</sup> Generally speaking though, both federal and state courts have interpreted Supreme Court precedent as holding that almost no form of deception deems a confession involuntary.<sup>46</sup>

Unlike in the United States, the use of deception during interrogations in the U.K. is rare.<sup>47</sup> In England, the use of deceptive interrogation techniques is governed by the Police and Criminal Evidence Act of 1984 (PACE).<sup>48</sup> Under PACE, courts consider whether a given confession made by a particular suspect is likely to be unreliable.<sup>49</sup> This assessment largely focuses on the extent to which police conduct complied with the uniform PACE guidelines, however courts may also take the suspect's circumstances into account (such as age, mental state, experience with interrogations, etc.).<sup>50</sup> As a result of this analysis, English courts have declared that misrepresentation of evidence and other forms of deceit are impermissible.<sup>51</sup> English courts routinely exclude confessions obtained by police deceit or trickery.<sup>52</sup> Defendants may challenge confessions obtained through the use of tricks as "unfair" under PACE.<sup>53</sup> If the defendant can sufficiently demonstrate that the police made deliberately deceitful representations, courts will typically exclude the confession from evidence.<sup>54</sup> Thus, unlike American law which has practically sanctioned the practice, English law has ensured that deceptive interrogation techniques are rarely used against suspects.

Like the U.K., Germany also has strict rules barring the use of deceptive interrogation techniques. Unlike in the United States, where litigators are relied on to limit the use of coercive interrogation techniques using exclusionary rules at trial, in Germany, these norms are enforced by imposing rules directly on investigators that govern what police may and may not say to suspects during interrogation.<sup>55</sup> When compared to American police, German officers are

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<sup>45</sup> *Id.*

<sup>46</sup> Cf. Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 781 (1997) ("The message to the police is that, as far as the law is concerned, they have virtual carte blanche to engage in deceptive undercover work.").

<sup>47</sup> John Baldwin, *Police Interview Techniques: Establishing Truth or Proof?*, 33 BRIT. J. CRIMINOLOGY 325, 331 N.27 (1993).

<sup>48</sup> Khasin, *supra* note 10, at 1030.

<sup>49</sup> JOHN SPRACK, *EMMINS ON CRIMINAL PROCEDURE* 4-5, 9, 29 (9th ed. 2002).

<sup>50</sup> *Id.*

<sup>51</sup> Christopher Slobogin, *An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation*, 22 MICH. J. INT'L L. 423, (2001).

<sup>52</sup> *R v. Houghton*, (1978) 68 Crim. App. 197, 206 (Eng.) ("Evidence would operate unfairly against an accused if it had been obtained in an oppressive manner by force or against the wishes of an accused person or by a trick or by conduct of which the Crown ought not to take advantage.") (citations omitted); PETER MIRFIELD, *SILENCE, CONFESSIONS AND IMPROPERLY OBTAINED EVIDENCE* 12 (1997) (recognizing the "emerging consensus in official circles" that the kind of tactics "advocated by Inbau, Reid, and Buckley, as well as being arguably unethical, is also inimical to the gathering of reliable confession evidence").

<sup>53</sup> Mirfield, *supra* note 52, at 205-09.

<sup>54</sup> *Id.* at 206

<sup>55</sup> See Jacqueline Ross, *Do Rules of Evidence Apply (Only) in the Courtroom? Deceptive Interrogation in the United States and Germany*, 28 OXFORD J. LEGAL STUD. 443, 447 (2008) (explaining that in Germany, rules "that filter the

expected to take on a more neutral role during pre-trial investigation, and thus deceptive practices conflict with their duty to uncover exculpatory and incriminating evidence in an unbiased fashion.<sup>56</sup> As a result, employing a banned interrogation technique, may give rise to disciplinary action against the interrogating officer as well as a claim for damages on the part of the suspect.<sup>57</sup>

German interrogation rules bar a number of deceptive practices which are routinely used in the United States. Affirmative misrepresentation is prohibited and any misimpressions about the law must be corrected.<sup>58</sup> All forms of “deception” are entirely banned during interrogations, a term the law defines very broadly.<sup>59</sup> Deception includes not only outright lies, such as lying about the existence of evidence, but also non-verbal conduct that may induce misleading impressions.<sup>60</sup> For example, in a murder case in which the gun was never recovered, police may not place a gun on the table in front of a suspect without further comment, thereby giving the impression that the police poses the murder weapon.<sup>61</sup> The ban on deception even extends to true statements that may lead to false impressions, such as assertions that police are investigating a disappearance, when the body had in fact been found.<sup>62</sup> Police may not even take fingerprints from a suspect, and before telling him if they match, inform him that he has an opportunity to confess, since this prompt implies that the match was positive.<sup>63</sup> These rules are enforced at the trial level as well, through the use of non-discretionary exclusionary rules that require judges to disregard all statements obtained through prohibited interrogation techniques such as deception.<sup>64</sup> In this way, German law ensures the use of deception during interrogations is almost nonexistent.

## **II. INVESTIGATIVE REPORTING, SURVEY DATA, AND QUANTITATIVE ANALYSIS SHOW THAT POLICE PERJURY IS COMMONPLACE IN THE UNITED STATES, AN ISSUE ROOTED IN A PROBLEMATIC POLICE CULTURE.**

Lies told to suspects during interrogations are untruths that courts have deemed acceptable in the pursuit of justice. However, there exists another category of police lies that is deemed unacceptable, indeed illegal, yet, which is arguably just as prevalent in American

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way in which evidence is gathered rather than the way in which it is ultimately presented shift responsibility for applying evidentiary rules from litigators to investigators”).

<sup>56</sup> *Id.* at 455.

<sup>57</sup> *Id.* at 447.

<sup>58</sup> Thomas Weigend, Germany Rules of Criminal Procedure, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 202-03 (2007).

<sup>59</sup> Ross, *supra* note 55, at 456.

<sup>60</sup> *Id.* at 456-57.

<sup>61</sup> *Id.* at 457.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 447.

policing as the use of deceptive integration techniques: perjury. Police perjury has become so commonplace in modern American society that in some jurisdictions police have come up with a name for it themselves: "testilying."<sup>65</sup> As law professor Donald Dripps notes, "criminal procedure scholars agree that police perjury is not exotic. Police perjury has been called 'pervasive,' 'an integral feature of urban police work,' and the 'demon in the criminal process.'"<sup>66</sup> While the exact extent of the practice is debated, there is "a widespread belief that testilying is a frequent occurrence."<sup>67</sup>

Officer perjury takes a number of different forms. The most comprehensive account of the issue comes from the Mollen Commission report. Published in 1994, the report is the result of a two-year investigation appointed to examine police misconduct in New York. The report found that police "falsification" which includes "testimonial perjury....documentary perjury....and falsification of police records" is one of the most common forms of police corruption facing the criminal justice system.<sup>68</sup> The report describes officers "testilying" during the warrant application process, which the Constitution requires take place under oath.<sup>69</sup> The same practice has been reported in other jurisdictions as well.<sup>70</sup> The Mollen Commission report also provided accounts of police perjury in connection with the fabrication of police reports. While not testimony per se, lying on reports can arguably have the same consequences as perjury on the stand, as police reports "may be dispositive in a case resolved through plea bargaining, and can be compared to testimony in cases that aren't."<sup>71</sup> For instance, the Mollen Commission described how police "falsify arrest papers to make it appear as if an arrest that actually occurred inside a building [in violation of departmental regulations] took place on the street."<sup>72</sup> Similarly, Professor Stanley Fisher has chronicled extensive use of the "double filing" system, in which official reports provided to litigators are sanitized of exculpatory facts or possible impeachment evidence.<sup>73</sup>

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<sup>65</sup> COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, CITY OF NEW YORK, COMMISSION REPORT 36 (1994) (Milton Mollen, Chair) [hereinafter MOLLEN REPORT] ("Several officers also told us that the practice of police falsification in connection with such arrests is so common in certain precincts that it has spawned its own word: 'testilying.'").

<sup>66</sup> Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693, 693 (1995-1996).

<sup>67</sup> Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041 (1996).

<sup>68</sup> MOLLEN REPORT, *supra* note 65, at 36.

<sup>69</sup> Slobogin, *supra* note 67, at 1043.

<sup>70</sup> JONATHAN RUBINSTEIN, CITY POLICE 386-88 (1973) (describing the preparation of false search warrants as routine, with supervisors often selecting the officers most skilled in perjury as the ones to seek the warrant).

<sup>71</sup> Slobogin, *supra* note 67, at 1044.

<sup>72</sup> MOLLEN REPORT, *supra* note 65, at 38.

<sup>73</sup> Stanley Z. Fisher, *"Just the Facts, Ma'am" Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 N. ENG. L. REV. 1, 36-38 (1993).



The most common form of testilying described by the Mollen Commission is lying at suppression hearings, and in particular, post hoc fabrication of probable cause.<sup>74</sup> The commission's report recounts a number of examples of this phenomenon:

For example, when officers unlawfully stop and search a vehicle because they believe it contains drugs or guns, officers will falsely claim in police reports and under oath that the car ran a red light (or committed some other traffic violation) and that they subsequently saw contraband in the car in plain view. To conceal an unlawful search of an individual who officers believe is carrying drugs or a gun, they will falsely assert that they saw a bulge in the person's pocket or saw drugs and money changing hands. To justify unlawfully entering an apartment where officers believe narcotics or cash can be found, they pretend to have information from an unidentified civilian informant or claim they saw the drugs in plain view after responding to the premises on a radio run. To arrest people they suspect are guilty of dealing drugs, they falsely assert that the defendants had drugs in their possession when, in fact, the drugs were found elsewhere where the officers had no lawful right to be.<sup>75</sup>

Professor Richard Uviller, a former prosecutor who spent eight months observing the NYPD, gives similar accounts of police misconduct. Uviller recounted that "most police officers" view police perjury as "natural and inevitable."<sup>76</sup> He expressed just how common it was for officers to make slight alterations to the facts to satisfy constitutional constraints, or fortify the probable cause upon which a search was based.<sup>77</sup> For example, Uviller describes how easy it is for officers "to go into the flat, grab the suspect, and later say you busted him as he was leaving his mother's apartment to get a six-pack at the corner bodega."<sup>78</sup> In other cases police would "[a]dd a small but deft stroke to the facts-say, a visible bulge at the waistband of a person carrying a pistol. Just enough to put some flesh on the hunch that actually induced the officer to give the man a toss."<sup>79</sup> Uviller described a popular tactic used by officers in which they "might advance slightly the moment at which the Miranda warnings were recited to satisfy the courts' insistence that they precede the very first question in a course of interrogation."<sup>80</sup> Together, the Mollen Commission report and Professor Uviller's account complement each other, providing a comprehensive account of the various circumstances in which American police officers lie in order to pursue convictions.

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<sup>74</sup> See also Jennifer Hunt & Peter K. Manning, *The Social Context of Police Lying*, 14 SYMBOLIC INTERACTION 51, 56 (1991) (stating that the most common form of lying by police involves "the construction of probable cause for arrest, or search or seizure in situations where the legally required basis ...is weak or absent").

<sup>75</sup> MOLLEN REPORT, *supra* note 65, at 38.

<sup>76</sup> H. RICHARD UVILLER, TEMPERED ZEAL 116 (1988).

<sup>77</sup> *Id.* at 115-16.

<sup>78</sup> *Id.* at 115.

<sup>79</sup> *Id.* at 116.

<sup>80</sup> *Id.*

In recent years, the issue of police perjury has reached national prominence, sparking investigations by various newspapers around the country into the ongoing issue, and further legitimizing the prevalence of this misconduct. In 2015, WYNC reviewed more than a thousand New York civil and criminal court records and discovered “more than 120 officers with at least one documented credibility issue over the past 10 years.”<sup>81</sup> The investigation found that few of the officers faced anything beyond the most mild of penalties for their misconduct and “at least 54 went on to make more than 2,700 arrests after the date their word was challenged.”<sup>82</sup> In 2016, the Chicago Tribune found “more than a dozen examples over the past few years in which police officers, according to judges, gave false or questionable testimony - but experienced few, if any, repercussions.”<sup>83</sup> The Tribune reported that in the prior four years, not a single disciplinary charge had been brought for false testimony in court.<sup>84</sup> In 2018 alone, three different newspapers published investigations into the phenomenon of police perjury. Buzzfeed News reviewed internal NYPD files, and found that between 2011-2015, nearly 320 NYPD employees “committed offenses serious enough to merit firing were allowed to keep their jobs.”<sup>85</sup> Of those, almost fifty were found to have “lied on official reports, under oath, or during an internal affairs investigation.”<sup>86</sup> A New York Times investigation found that there were more than twenty-five cases between 2015 and 2018 in which “judges or prosecutors determined that a key aspect of a New York City police officer’s testimony was probably untrue.”<sup>87</sup> Finally, the Philadelphia Inquirer published a document made by Philadelphia DA Larry Krasner, listing sixty-six local police officers whose track record of lying was so well-established that they were considered unreliable witnesses by the DA’s office.<sup>88</sup>

While the multitude of newspapers investigating the subject contributes to the notion that police perjury is prevalent among law enforcement, academics have generally struggled to quantify the issue and assess just how commonplace the practice is. To date, two studies have made an attempt, each in their own way, to put numbers to the phenomenon. Some of the most stunning evidence of testilying, and moreover prosecutorial and judicial nonchalance toward it, comes from Myron Orfield's study of the Chicago system. Orfield's findings are notable because they represent the views of prosecutors, judges, and defense attorneys, those closest to the

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<sup>81</sup> Robert Lewis & Noah Veltman, *The Hard Truth About Cops Who Lie*, WNYC (Oct. 15, 2015), <https://www.wnyc.org/story/hard-truth-about-cops-who-lie/>.

<sup>82</sup> *Id.*

<sup>83</sup> Steve Mills & Todd Lighty, *Cops rarely punished when judges find testimony false, questionable*, Chi. Trib. (May 6, 2016), <https://www.chicagotribune.com/news/breaking/ct-chicago-police-testimony-met-20160506-story.html>.

<sup>84</sup> *Id.*

<sup>85</sup> Kendall Taggart & Mike Hayes, *Secret NYPD Files: Officers Who Lie And Brutally Beat People Can Keep Their Jobs*, BUZZFEED NEWS (Mar. 5, 2018), <https://www.buzzfeednews.com/article/kendalltaggart/secret-nypd-files-hundreds-of-officers-committed-serious#.kkYzy8VKzo>.

<sup>86</sup> *Id.*

<sup>87</sup> Joseph Goldstein, *‘Testilying’ by Police: A Stubborn Problem*, NY TIMES (Mar. 18, 2018), <https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html?smid=fb-share>.

<sup>88</sup> *The full list of Philadelphia’s 66 problem cops*, PHILA. INQUIRER. (Mar. 16, 2018), <https://www.inquirer.com/crime/inq/full-list-phila-delphias-66-problem-cops-20180316.html>.

problem and best equipped to assess its pervasiveness. The judges and prosecutors surveyed estimated that judges disbelieve police testimony 18% and 19% of the time respectively, while public defenders put the figure at 21%.<sup>89</sup> While Orfield notes that the “figures alone suggest a shocking level of police perjury” he adds that the situation is likely much worse considering that “the majority of judges and public defenders, and almost half of the state's attorneys, believe that police lie more often than they are disbelieved.”<sup>90</sup> When respondents from all three groups were asked to estimate the frequency with which police officers lie in court to avoid suppression, “92% responded that the police lie at least “some of the time” and 22% reported that police lie more than half of the time they testify in relation to Fourth Amendment issues.”<sup>91</sup> Public defenders on average thought that law enforcement officers lied 53% of the time in relation with Fourth Amendment issues.<sup>92</sup> Only 8% of all surveyed believed that officers almost never lie. In a separate study by Orfield, this time surveying police officers themselves, 76% acknowledged that police witnesses tailor testimony or “shade the facts” to establish probable cause, when in fact probable cause may not have existed.<sup>93</sup>

Some of the most striking quantitative evidence for the prevalence of police perjury, comes from a study conducted by Columbia law students in the wake of *Mapp v. Ohio*. In *Mapp*, the Supreme Court held that the states were bound by the exclusionary rule in search and seizure cases.<sup>94</sup> Thus, following *Mapp*, evidence obtained illegally in contravention of the Fourth Amendment, would no longer be admissible in court. Prior to the Court’s ruling in *Mapp*, New York was the only large state that had not previously adopted the exclusionary rule, making it an ideal target for a comparative study analyzing the effects of the new rule.<sup>95</sup> The students reviewed misdemeanor narcotics cases, analyzing the evidentiary grounds for arrest before and after *Mapp*.<sup>96</sup> They found that in cases after *Mapp* in which evidence might have been subject to exclusion based on a lack of probable cause, there was a precipitous decline in police testimony that “contraband was found on the defendant's body or hidden in the premises.”<sup>97</sup> Instead, they found a “suspicious rise in cases in which... officers alleged that the defendant dropped the contraband to the ground” (known as “dropsy testimony”) or freely exposed the contraband.<sup>98</sup> For example, in the narcotics bureau, cases where evidence was hidden on a person dropped from 35% of arrests in the months before *Mapp* to just 3% in the months after, while cases where

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<sup>89</sup> Myron W. Jr. Orfield, *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 107 (1992).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Myron W. Jr. Orfield, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1050 (1987).

<sup>94</sup> *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

<sup>95</sup> *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J. L. & SOC. PROBS. 87, 87 (1968).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 95.

<sup>98</sup> *Id.*

evidence was dropped or thrown to the ground increased from 17% to 43% of arrests.<sup>99</sup> Over this period, there was no evidence that a substantial reform of police practices had occurred.<sup>100</sup> The authors concluded that “police have been fabricating grounds of arrest in narcotics cases in order to circumvent the requirements of *Mapp*.”<sup>101</sup> In the words of Irving Younger, who served as a prosecutor, judge, and law professor, after *Mapp* “police made the great discovery that if the defendant drops the narcotics on the ground, after which the police man arrests him, the search is reasonable and the evidence is admissible.”<sup>102</sup> Essentially, before *Mapp* officers would honestly describe how evidence was obtained, even when unconstitutional searches were conducted, since evidence seized illegally was admissible in court. However, with the implementation of the exclusionary rule, officers began to lie about how evidence was obtained, testifying that contraband was dropped, since telling the truth would now mean the suppression of the relevant evidence, potentially leading to a not-guilty verdict. A separate study conducted the exact same year concluded similarly, showing that police testified to the abandonment of narcotics more than twice as often after *Mapp*.<sup>103</sup> Due to the unique change in law in New York after the Court’s holding in *Mapp*, these studies present some of the most concrete quantitative evidence for the prevalence of police perjury.

The prevalence of police perjury in the United States, is likely the result of a self-reinforcing police culture that teaches officers that lying is a part of the job, and guilty verdicts must be achieved at any cost. As J. McNamara, a thirty-five year veteran of the NYPD, points out, officers who routinely commit perjury “are not the corrupt officers who take bribes or commit crimes ... they are law abiding and dedicated.”<sup>104</sup> Rather, police perjury is simply an outgrowth of a general police culture which distrusts the public and promotes a strong loyalty to fellow officers.<sup>105</sup> As Jennifer Hunt and Peter Manning note in their study on police lying, “there is an accepted view that it is impossible to ‘police by the book;’ that any good officer, in the course of a given day, will violate at least one of the myriad rules and regulations governing police conduct.”<sup>106</sup> During training officers learn that lying is part of the job, and just a part of “good police work.”<sup>107</sup> Once on the job, rookies learn the utility of lying when they see veteran detectives changing reports to avoid paperwork or maintain clearance rates.<sup>108</sup> This learned behavior is then naturally extended to testifying. Police culture reinforces the notion that “perjury

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<sup>99</sup> *Id.* at 94.

<sup>100</sup> *Id.* at 95-96.

<sup>101</sup> *Id.* at 95.

<sup>102</sup> Irving Younger, *The Perjury Routine*, NATION, May 8, 1967, at 597.

<sup>103</sup> Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62*, 4 CRIM. L. BULL. 549, 555-60, 570 (1968).

<sup>104</sup> Joseph D. McNamara, *LAW ENFORCEMENT: Has the Drug War Created an Officer Liars' Club?*, L.A. TIMES (Feb. 11, 1996), <https://www.latimes.com/archives/la-xpm-1996-02-11-op-34758-story.html>.

<sup>105</sup> Geoffrey P. Alpert & Jeffrey J. Noble, *Lies, True Lies, and Conscious Deception: Police Officers and the Truth*, 12 POLICE Q. 237, 239-40 (2009).

<sup>106</sup> Hunt & Manning, *supra* note 74, at 52.

<sup>107</sup> *Id.* at 54.

<sup>108</sup> *Id.*

is not an evil act, just a morally questionable one.”<sup>109</sup> After all, if these lies are acceptable to an officer’s peers and “happen all the time,” how could they be wrong?<sup>110</sup> Thus the prevalence of the behavior creates the impression among officers that these lies are acceptable. This mentality is further amplified by a culture which teaches officers to believe the ends justify the means in pursuit of justice.<sup>111</sup> Officers may justify perjury by asserting that the suspect is guilty, and the crime is far more serious than the lie used to convict him.<sup>112</sup> Others regard testifying as the natural and legitimate response to unrealistically strict constitutional restrictions that result in the release of guilty criminals and make policing impossible.<sup>113</sup> Yet these rationales are rarely challenged, and police perjury continues largely unabated since it is rarely if ever condemned by officers, police organizations, courts, judges, prosecutors or defense attorneys.<sup>114</sup> Rather, “police perjury appears to be acknowledged, tolerated, accepted and even expected.”<sup>115</sup> In the words of Alan Dershowitz, testifying “has been an open secret among prosecutors, defense lawyers and judges yet many tolerate it because they think most victims of perjury are guilty of the crimes for which they are charged.”<sup>116</sup> Ultimately, police perjury continues because police culture reinforces the utility and acceptability of lying, while other parties turn a blind eye, leaving officers with no incentive to limit the practice.

### **III. ACADEMICS HAVE PROPOSED A CONNECTION BETWEEN THE LEGALITY OF LYING IN INTERROGATIONS AND THE PREVALENCE OF POLICE PERJURY IN THE UNITED STATES.**

A number of academics have hypothesized that there is a connection between the legality of deception during interrogations in the United States and the prevalence of police perjury. While the connection is difficult to convincingly prove, there are a number of reasons to believe that there is indeed a connection between the two phenomena. The academic commentary collected below highlights this connection and explains the difficulty in allowing the former, while shunning the latter.

Jerome Skolnick in his article *Deception by Police* argues that “courtroom lying is justified within the police culture by the same sort of necessity rationale that courts have permitted police to employ at the investigative stage: The end justifies the means. Within an

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<sup>109</sup> Michael O. Foley, *Police Perjury: A Factorial Survey* 7 (Apr. 14, 2000) (unpublished graduate dissertation) (on file with the National Criminal Justice Reference Service).

<sup>110</sup> See Hunt & Manning, *supra* note 74, at 57 (police officer who committed perjury justified his actions by stating that “such lies are acceptable to his peers - they ‘happen all the time’”).

<sup>111</sup> See Foley, *supra* note 109, at 7 (stating “[t]he police believe and are told that the ends justify the means”).

<sup>112</sup> Hunt & Manning, *supra* note 74, at 57.

<sup>113</sup> See UVILLER, *supra* note 76, at 38 (arguing that “police officers regard such alterations of events as the natural and inevitable outgrowth of artificial and unrealistic post facto judgments that release criminals.”).

<sup>114</sup> See Foley, *supra* note 109, at 7 (stating “[t]he police believe and are told that the ends justify the means”).

<sup>115</sup> *Id.* at 9.

<sup>116</sup> Alan M. Dershowitz, *Controlling the Cops; Accomplices To Perjury*, NY TIMES (May 2, 1994), <https://www.latimes.com/archives/la-xpm-1996-02-11-op-34758-story.html>.

adversary system of criminal justice ... the policeman will thus lie to get at the truth.”<sup>117</sup> As Skolnick describes:

The law permits the policeman to lie at the investigative stage, when he is not entirely convinced that the suspect is a criminal, but forbids lying about procedures at the testimonial stage, when the policeman is certain of the guilt of the accused. Thus, the policeman characteristically measures the short-term disutility of the act of suppressing evidence, not the long-term utility of due process of law for protecting and enhancing the dignity of the citizen who is being investigated by the state.<sup>118</sup>

Judicial acceptance of deception in the investigation process enhances moral acceptance of deception by detectives in the interrogatory and testimonial stages of criminal investigation, and thus increases the probability of its occurrence. This hypothesis does not suggest that every detective who deceives also perjured himself. It does suggest that deception in one context increases the probability of deception in the other.<sup>119</sup>

This latitude to deceive, I have argued, carries over into the interrogation and testimonial stages as a subculturally supported norm. I have suggested that there is an underlying reason for this. When detectives deceive suspects in the course of criminal investigations or interrogations, they typically are not seeking to promote their own self-interest (as a detective would if he had lied about accepting bribes). On the contrary, the sort of deception employed to trap a narcotics dealer or dealer in stolen goods, or to elicit a confession from a murderer or rapist, is used for the public interest. The detective-and here I am speaking of the professional detective who explicitly condemns the use of physical violence but accepts employing psychological intimidation during interrogation is also interested in eliciting truth. This result, I have suggested, is a paradox. The end of truth justifies for the modern detective the means of lying. Deception usually occurs in the interest of obtaining truth.<sup>120</sup>

Skolnick therefore notes that there are difficulties in creating “moral justification for distinguishing between governmental deception at the investigative stage and at the interrogation stage.”<sup>121</sup> He concludes that, “[b]ecause of this appearance of [legal] inconsistency, police are not likely to take the stated rules of the game seriously and are encouraged to operate by their

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<sup>117</sup> Jerome H. Skolnick, *Deception by Police*, 1 CRIM. JUST. ETHICS 40, 42 (1982).

<sup>118</sup> *Id.* at 43.

<sup>119</sup> *Id.* at 45.

<sup>120</sup> *Id.* at 51.

<sup>121</sup> *Id.* at 52.

own codes, including those which affirm the necessity for lying wherever it seems justified.”<sup>122</sup> As he states in a different article: “There is, it seems to me, always a problem with constraining the limits of an ‘ends justify the means’ rationale. If detectives routinely lie during investigations and interrogations, why should they not lie in the courtroom in the interests of convicting a criminal against whom they have slight evidence?”<sup>123</sup>

Deborah Young in her article *Unnecessary Evil: Police Lying in Interrogations* makes a similar point to Skolnick, arguing that “justifications for police lying extend beyond the context of interrogations.”<sup>124</sup> Young makes the claim that the “most egregious evidentiary harm of police lying in interrogations is the expansion of lying beyond the interrogation.”<sup>125</sup> As she argues:

The justification of lying for the public good ... may readily transfer to other lies. The officer wants to convict the criminal, punish him, and protect other potential victims throughout the officer's involvement in the case, not just during interrogation. For example, an officer may extend this justification to lying on a warrant affidavit for a search. The reviewing judge thus would base a key rights-protecting decision, the determination of probable cause to search, on false or incomplete evidence. The officer's motives may also trigger lies to third parties, such as to encourage consent for a search or to encourage false testimony by others. The officer may then argue that such lies also are justified by the public good.<sup>126</sup>

In an even more egregious application of this justification, an officer may lie at trial, committing perjury to obtain the conviction of someone he believes is guilty. The officer knows he is not supposed to lie at trial, not even for the public good. But when the officer testifies at trial, he has the same motives that he had pretrial: he wants conviction and punishment for the criminal and protection for the innocent. The inherent problem with lying for the public good is that people who believe their entire work is for the public good, as police officers do and should, may use this rationale to justify any and all lies that they tell, and even to justify other acts, such as physical coercion.<sup>127</sup>

Similarly, the justification of lying to enemies may extend beyond the interrogation room. Law enforcement officers may view prosecutors, judges, and even jurors as enemies, or at least as obstacles. With this perspective, as with the justification of lying for the public good, the theoretical justification for lying extends as far as the

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<sup>122</sup> *Id.* at 53.

<sup>123</sup> Jerome H. Skolnick, *The Risks of Covert Facilitation*, 43 J. SOC. ISSUES 79, 83-84 (1987).

<sup>124</sup> Young, *supra* note 4, at 463.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 463-464.

category of enemies. If an officer views a "liberal" judge as an enemy because the judge strictly enforces constitutional standards for searches, the officer may feel justified in lying about details of the probable cause to ensure the admissibility of the evidence.<sup>128</sup>

But there are other compelling reasons why police lying expands. Lying is a skill that people acquire and improve with practice.' Lying in the course of an hour's interrogation requires the liar to "keep straight" the details of the lie. If an officer falsifies fingerprint evidence or invents a witness who saw the defendant leave the scene of the crime, the officer must remember the lie in inquiring about other facts. Of course, the interrogator can respond to questions about details, such as "Who says he saw me?" with the response, "I can't tell you that." But the skill required to keep lies straight in interrogations transfers easily to other circumstances, such as setting forth the facts for a warrant affidavit.<sup>129</sup>

In their article *Lies, True Lies, and Conscious Deception: Police Officers and the Truth*, Professors Geoffrey Alpert and Jeffrey Noble echo similar sentiments to Skolnick and Young in regard to how lying can become a learned behavior that, once applied in one context, becomes natural to apply in others. However, they also build on this argument, introducing literature from the field of psychology that legitimizes this phenomenon and reveals its psychological basis. As Alpert and Noble argue:

Specifically, cognitive theorists recognize that learning includes acquiring or reorganizing information or observations. ... In other words, experiences, scripts, or cognitive schema develop as shorthand for entering events into categories of memory. ... For example, it is likely that familiar behaviors or responses will be triggered when one is involved in a situation that has been successful in the past when a given response has been successful. A learned pattern of behavior is an expected response to a stressful or ambiguous situation. Once a person has identified a specific response that has been successful or "victorious," future behavioral patterns will be predicted on the previously developed schema. In other words, unless police officers who have told lies in the past with no negative consequences can "learn" to be truthful, and acquire and accumulate anti deceptive attitudes and beliefs, it is likely that the deception and lies will continue and possibly grow in frequency and seriousness.<sup>130</sup>

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<sup>128</sup> *Id.* at 464.

<sup>129</sup> *Id.* at 465-466.

<sup>130</sup> Alpert & Noble, *supra* note 105, at 248.



The accessibility of information, its history, or the ease with which it can be recalled is a strong predictor of how people act toward others. The body of literature on social cognition suggests that responses to situations are learned behaviors that develop after repetitive activities. This learned behavior can act as organizational scripts for social memory and thus guide actions in future encounters. For example, if police officers use deceptive practices and “lie” repetitively with nonnegative results, they will likely develop cognitive scripts that link deception and success. If officers are taught to be deceptive in one aspect of their work, it makes sense that when possible, the success will be transferred to other aspects of work. Over a period of time, it is likely that the police will process new situations through the filter of existing schemas and successes that become easier to recall because of the large number of times the use of deception and lying is successful and easy to do. On a more practical level, many recruits who enter police work wanting to be honest learn to lie in the academy, observe their training officers make changes in reports, reduce the seriousness of crime statistics in certain areas, and augment the information of warrants. Finally, many of these same young officers begin to mirror the experiences of their mentors. In other words, they learn to lie, are not sanctioned for it, and come to believe it makes their work easier and less complicated. After a while, it becomes a learned behavior and one of the common tools of the job.<sup>131</sup>

## **CONCLUSION**

The use of deceptive techniques during interrogation and police perjury are two distinct yet related practices among American police that involve lying in their official duty. The former, while relatively unique to the United States, is permissible, sanctioned by the Supreme Court, and drilled into officers during training. The latter is illegal and supposedly condemned by our courts, yet in reality, remains a ubiquitous practice among American police; motivated by a police culture that encourages lying, and tolerated by officials at all levels of the criminal justice system. While difficult to prove, these two phenomena appear intrinsically linked, the acceptance of the former promoting the prevalence of the latter, together giving rise to a model of policing that prioritizes convictions over truth.

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<sup>131</sup> *Id.* at 248-249.