

POLICE DECEPTION IN INTERROGATION AS A PROBLEM OF PROCEDURAL LEGITIMACY

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Police lie. It's part of their job. They lie to suspects and others in hopes of obtaining evidence. These investigative lies cover a wide web of deception.

—Val Van Brocklin¹

Police always lie to me so why shouldn't I lie to you?

—*United States v. Gardner*²

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For a conference like the current one—and we are honored that the late and great Professor Loewy thought to include us—one usually categorizes the pressing demands for police reform as a topic for the Fourth Amendment panel, not the confessions panel. Police reform is usually focused on street policing: the need to restrain the police to prevent unjustified and discriminatory street-level enforcement, especially the use of force.³ Our thesis, however, is that there is an important connection between police interrogation in the station house and broad issues of police reform. The connection is legitimacy. Numerous scholars of procedural justice observe that the police damage their legitimacy, and that of law generally, by engaging in unjustified and discriminatory stops, frisks, and other uses of

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1. Val Van Brocklin, Training Cops to Lie- Pt. 1, Officer.com (Nov. 16, 2009) (“They lie to suspects and others in hopes of obtaining evidence. These investigative lies cover a wide web of deception”), <https://www.officer.com/home/article/10233095/training-cops-to-lie-pt-1>.

2. *United States v. Gardner*, 993 F. Supp. 2d 1294, 1298 (D. Or. 2014) (quoting what the defendant allegedly said to police).

3. See, e.g., Tom R. Tyler, *Legitimacy and Procedural Justice: A New Element of Police Leadership*, POLICE EXEC. RES. F. 18–19 (Mar. 2014), https://www.policeforum.org/assets/docs/Free_On_line_Documents/Leadership/legitimacy%20and%20procedural%20justice%20-%20a%20new%20element%20of%20police%20leadership.pdf.

force.⁴ Residents who perceive the police as failing to respect their rights and otherwise treat them fairly are less likely to cooperate with law enforcement and more likely to offend, so policing becomes counter-productive when it lacks this legitimacy.⁵ We shall argue that the same can be said about police deception in interrogation.

Professor Loewy asked: What is the most important issue in the field of confessions, and while there are several, we believe that an important and under-explored issue is how pervasive police deception in police-citizen encounters undermines police legitimacy. We focus on deception in the interrogation room where it is encouraged and state sanctioned. When the police are discovered to have lied in the interrogation room about the nature of the evidence, whether suspects are better off waiving their right to silence and counsel, or whether the police sympathize with suspects and their reasons for offending, the interrogator threatens the public's perception of police legitimacy. Almost all of the prior scholarship critical of police deception in interrogation makes the point that such deception offends fundamental principles of democratic governance or runs the risk of inducing false confessions. At least one scholar considers these arguments but rejects a utilitarian framing with regard to the costs of deception in favor of a normative one that focuses on the moral illegitimacy of lies.⁶ Without arguing against these points, we wish to identify the distinct problem of undermining public trust in the police.

We begin by introducing the procedural justice literature in Part I. In Part II, we explain the varieties and frequency of deception in police interrogation. Part III describes the resulting inconsistency: that police lying in interrogation with the goal of closing cases and improving public safety undermines police legitimacy, producing the unintended consequence of lowered compliance with law and lowered cooperation with police.

I. THE LITERATURE ON POLICING AND PROCEDURAL JUSTICE

In response to the civil unrest in Ferguson, Missouri, after the police shooting death of Michael Brown, President Obama appointed a Task Force on 21st Century Policing in December of 2014.⁷ When the Task Force issued

4. See, e.g., Loraine Mazerolle et al., *Legitimacy in Policing: A Systematic Review*, 9 CAMPBELL SYSTEMATIC REVIEWS, I, 10–11 (2013) (finding a positive correlation between procedurally just police practices and police legitimacy).

5. See Tyler, *supra* note 3, at 9–10.

6. See Julia Ann Simon-Kerr, *Public Trust and Police Deception*, 11 NE. U. L. REV. 625, 692 (2019) (“Putting aside utility, a moral assessment that understands all lies to be suspect makes the problem with deceptive interrogation even starker.”).

7. David Jackson, *Obama Appoints Task Force on Police Practices*, USA TODAY (Dec. 18, 2014), <https://www.usatoday.com/story/news/nation/2014/12/18/obama-21st-century-policing-task-force-valeri-e-jarrett/20598339/>.

its Final Report⁸ six months later, one of its core principles was the importance of *procedural justice*,⁹ which was said to be essential to achieving the first pillar of effective policing: building trust and legitimacy.¹⁰ The basic claims of the literature are that (1) “citizens are more likely to comply and cooperate with police and obey the law when they view the police as legitimate,” and (2) “[t]he most common pathway that the police use to increase citizen perceptions of legitimacy is through the use of procedural justice,”¹¹ which, as explained below, involves the police treating civilians fairly and respectfully.¹² Procedural justice is therefore one means of earning police legitimacy.¹³ In sum, “[i]f legal authorities exercise their authority fairly, they build legitimacy and increase both willing deference to rules and the decisions of the police and courts, as well as the motivation to help with the task of maintaining social order in the community.”¹⁴

Consider each of these points in more detail. First, citizens are more likely to obey the law and cooperate with police when they view the police as legitimate.¹⁵ The general connection between public compliance with law and its perceived legitimacy is an old one.¹⁶ For our purposes, the first question is: What does it mean for people to perceive the police, specifically, as legitimate? Psychologist Tom Tyler explains:

Legitimacy is reflected in three judgments. The first is public trust and confidence in the police. Such confidence involves the belief that the police are honest, that they try to do their jobs well, and that they are trying to protect the community against crime and violence. Second, legitimacy reflects the willingness of residents to defer to the law and to police authority, i.e. their sense of obligation and responsibility to accept police authority. Finally, legitimacy involves the belief that police actions are morally justified and appropriate to the circumstances.¹⁷

8. See Final Report of the President’s Task Force on 21st Century Policing, U.S. DEPT. JUST. OFF. CMTY. ORIENTED POLICING SERVS. (May 2015), [hereinafter Final Report], https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

9. See generally JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975).

10. Final Report, *supra* note 8, at 9.

11. Mazerolle et al., *supra* note 4, at 8.

12. *Id.* at 11.

13. See *id.*

14. Tom R. Tyler et al., *Psychology of Procedural Justice and Cooperation*, in *ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE* 4011 (Gerben Bruinsma & David Weisburd eds., 2014).

15. *Id.* at 4015.

16. See generally MAX WEBER, *ECONOMY AND SOCIETY* (Guenther Roth & Claus Wittich eds., 2013); Herbert C. Kelman, *Patterns of Personal Involvement in the National System: A Social-Psychological Analysis of Political Legitimacy*, in *INTERNATIONAL POLITICS AND FOREIGN POLICY* 276 (James N. Rosenau ed., 1969); Richard M. Merelman, *Learning and Legitimacy*, 60 *AM. POL. SCI. REV.* 548 (1966).

17. Tyler, *supra* note 3, at 9.

To summarize, we might say that legitimacy captures the degree to which people *believe in* the police.¹⁸

The second question is: How do the police earn legitimacy? The term *procedural justice* captures what the police must do.¹⁹ The Task Force's Final Report summarized the four main elements:

Decades of research and practice support the premise that people are more likely to obey the law when they believe that those who are enforcing it have the legitimate authority to tell them what to do. But the public confers legitimacy only on those they believe are acting in procedurally just ways. Procedurally just behavior is based on four central principles:

1. Treating people with dignity and respect[;]
2. Giving individuals "voice" during encounters[;]
3. Being neutral and transparent in decision making[;] and
4. Conveying trustworthy motives[.]

Research demonstrates that these principles lead to relationships in which the community trusts that officers are honest, unbiased, benevolent, and lawful.²⁰

The Task Force tied procedural justice to its six pillars of reform, noting that "[a]t the first session, Building Trust and Legitimacy [the first pillar], the topic of procedural justice was discussed as a foundational necessity in building public trust."²¹ Based on this idea, recommendation 1.1 in the Final Report states: "Law enforcement culture should embrace a guardian mindset to build public trust and legitimacy."²² "Toward that end, police and sheriffs' departments should adopt *procedural justice* as the guiding principle for internal and external policies and practices to guide their interactions with the citizens they serve."²³ Procedural justice is embraced throughout the report.²⁴

18. *Id.* at 2.

19. *Id.*

20. Final Report, *supra* note 8, at 9–10; *see generally* TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375 (2006) (reviewing the procedural justice literature); Robert MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171 (2005); Mazerolle et al., *supra* note 4; Tyler et al., *supra* note 14.

21. Final Report, *supra* note 8, at 6.

22. *Id.*

23. *Id.* at 11 (emphasis added).

24. *Id.* at 1 ("[L]aw enforcement agencies should adopt procedural justice as the guiding principle for internal and external policies and practices to guide their interactions with rank and file officers and with the citizens they serve."); *id.* at 4 ("Internal procedural justice principles should be adopted for all internal policies and interactions."); *id.* at 12 ("Adopting procedural justice as the guiding principle for internal and external policies and practices can be the underpinning of a change in culture and should contribute to building trust and confidence in the community."); *id.* at 26 (discussing civilian oversight as

The third question is: What are the consequences of the police earning or failing to earn legitimacy via procedural justice? The empirical literature on procedural justice is not without dissent,²⁵ but it offers strong evidence for its basic claims, which is that the perception of police legitimacy makes people more likely to comply with the law²⁶ and more likely to cooperate with police.²⁷ As the Final Report notes, when the community trusts that officers are “honest, unbiased, benevolent, and lawful[,]” it “feels obligated to follow the law and the dictates of legal authorities and is more willing to cooperate with and engage those authorities because it believes that it shares a common set of interests and values with the police.”²⁸ By contrast, the absence of legitimacy makes people more likely to violate the law and refuse to cooperate with police.²⁹ Using procedural justice to produce legitimacy is, essentially, a crime-control measure.

II. THE UBIQUITY OF POLICE DECEPTION IN INTERROGATIONS

It would be an understatement to say that police officers in the United States have a legitimacy problem.³⁰ Their actions and motives are often

a means of implementing procedural justice); *id.* at 51 (“The goal is not only effective, efficient policing but also procedural justice and fairness.”).

25. One qualification is whether the findings apply in populations outside the United States. See Justice Tankebe, *Public Cooperation with Police in Ghana: Does Procedural Fairness Matter?*, 47 CRIMINOLOGY 1265, 1267 (2009); Kristina Murphy, *Public Satisfaction with Police: The Importance of Procedural Justice and Police Performance in Police-Citizen Encounters*, 42 AUSTL. & N.Z. J. CRIMINOLOGY 159, 161–162 (2009); Kristina Murphy & Adrian Cherney, *Fostering Cooperation with the Police: How do Ethnic Minorities in Australia Respond to Procedural Justice-Based Policing?* 44 AUSTL. & N.Z. J. CRIMINOLOGY 235, 248 (2011); Daniel S. Nagin & Cody W. Telep, *Procedural Justice and Legal Compliance*, 13 ANN. REV. L. & SOC. SCI. 5 (2017) (discussing other criticism); Michael D. Reising et al., *The Construct Validity and Refinement of Process-Based Policing Measures*, 34 CRIM. JUST. BEHAV. 1005, 1007–08 (2007); Justice Tankebe, *Policing, Procedural Fairness and Public Behaviour: A Review and Critique*, 11 INT’L JUST. POLICE SCI. MGMT. 8 (2009).

26. See Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 L. & SOC’Y REV. 163, 167 (1997); Tom R. Tyler et al., *Reintegrative Shaming, Procedural Justice, and Recidivism: The Engagement of Offenders’ Psychological Mechanisms in the Canberra RISE Drinking-and-Driving Experiment*, 41 LAW & SOC’Y REV. 553, 555 (2007); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC’Y REV. 513 (2003); Jonathan Jackson et al., *Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions*, 52 BRIT. J. CRIMINOLOGY 1051, 1052–53 (2012); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006).

27. See Sunshine & Tyler, *supra* note 26; JONATHAN JACKSON ET AL., JUST AUTHORITY? TRUST IN THE POLICE IN ENGLAND AND WALES (2012); Tom R. Tyler et al., *Legitimacy and Deterrence Effects in Counter-Terrorism Policing: A Study of Muslim Americans*, 44 L. & SOC’Y REV. 365, 388–89 (2010); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why do People Help the Police Fight Crime in their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 264 (2008); Aziz Z. Huq et al., *Why Does the Public Cooperate with Law Enforcement? The Influence of the Purposes and Targets of Policing*, 17 PSYCH. PUB. POL. & L. 419 (2011); Kristina Murphy et al., *Encouraging Public Cooperation and Support for Police*, 18 POLICING & SOC’Y 138 (2008).

28. Final Report, *supra* note 8, at 10.

29. See *id.*

30. See Mazerolle et al., *supra* note 4, at 10–11.

questioned, and they are increasingly reviled.³¹ Calls to abolish the police, or defund them, have become commonplace around the country.³² Police officers are quitting and retiring in droves,³³ and police departments are having difficulty replacing them.³⁴

Many of the instances that have led to the reputational harm suffered by police officers are self-inflicted.³⁵ Media reports of officers behaving badly, indeed criminally, are pervasive.³⁶ The many allegations of excessive force, particularly the killings of unarmed African-American men like George Floyd in Minnesota,³⁷ have highlighted this problem. Add to this the highly publicized cases of police corruption,³⁸ the use of qualified immunity³⁹ to protect police misconduct, and the “blue code of silence”⁴⁰ among officers that prohibits them from divulging the wrongdoing of their fellow officers.⁴¹ There is a growing distrust of police officers, and this is not surprising because one common theme among the explanations for the diminished reputation and stature of police officers is that they lie and deceive the public constantly.⁴² What the public thinks of police officers matters not simply because it harms their reputation, but because it impacts the perceived

31. *Id.*

32. Tracey Meares & Gwen Prowse, *Policing as Public Good: Reflecting on the Term “To Protect and Serve” as Dialogues of Abolition*, 73 FLA. L. REV. 1, 4 (2021) (discussing prominent calls to abolish and defund the police in academic circles and in the media); see generally Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2021).; see also Barry Friedman, *Disaggregating the Police Function*, 169 U. PA. L. REV. 925, 932 (2021) (discussing demands by police activists to defund police departments).

33. *Cop Vacancies Overwhelm Short-Staffed Police Departments*, WASH. TIMES (May 4, 2021), <https://www.washingtontimes.com/news/2021/may/4/cops-vacancies-overwhelm-short-staffed-police-depa/>.

34. *Id.*

35. See generally Andrew Cohen, *Good Cops, Bad Cops, and the Self-Fulfilling Prophecy of the Police Protest Movement*, BRENNAN CTR. FOR JUST. (June 17, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/good-cops-bad-cops-and-self-fulfilling-prophecy-police-protest-movement>.

36. See Barry Friedman, *Disaggregating the Police Function*, 169 U. PA. L. REV. 925, 928 (2021).

37. Evan Hill et al., *How George Floyd was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>; see also *934 People Have Been Shot and Killed by Police in the Past Year*, WASH. POST (Sept. 9, 2021), <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> (tallying the police shootings from 2015 to 2020). Of course, the killings would not include a victim like Floyd who was not shot. *Id.* The database includes victims who were armed and unarmed and is not limited by race and ethnicity. *Id.*

38. See Sanja Kutnjak Ivkovic, *To Serve and Collect: Measuring Police Corruption*, 93 J. CRIM. L. & CRIMINOLOGY 593, 593 (2003).

39. See Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1776 (2016); Angie Weiss, Note, *Excessive Force: Justice Requires Refining State Qualified Immunity Standards for Negligent Police Officers*, 44 SEATTLE U. L. REV. 33, 34–35 (2020) (arguing for the elimination of qualified immunity).

40. See Jennifer E. Koepke, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 WASHBURN L.J. 211, 211–14 (2000).

41. *Id.*

42. See Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 467 (1996).

legitimacy of their actions and the legitimacy of the laws they are expected to enforce.⁴³

Police deception is pervasive. While the brutal killing of George Floyd was shocking for the world to witness, also shocking was the immediate explanation given by the Minneapolis Police Department that Floyd had resisted arrest and had died as a result of medical complications without any mention of the police officer's role in his death.⁴⁴ Only after then seventeen-year-old Darnella Frazer's video went viral did we learn that the initial police statements were grossly misleading.⁴⁵ Body cameras, surveillance cameras, and cellphone cameras have exposed many police officer lies.⁴⁶ Officers lie so frequently to justify their actions that the term "testilying" has been coined by officers themselves to describe the giving of knowingly false official or sworn statements on the witness stand or in affidavits.⁴⁷

As objectionable as these lies are, they are not the type of lies that are the subject of this Article. Such lies certainly undermine the public's trust in law enforcement and call into question the legitimacy of the law, but they are formally condemned and may be dismissed by some as the horrific acts of rogue or bad cops or as the result of a culture of police misconduct.⁴⁸ However, in addition to misconduct, there are many lawful and authorized deceptive practices that also play a significant role in undermining the law's legitimacy.⁴⁹ Police lie lawfully by pretending to be who they are not in undercover operations, and most importantly, for our purposes, they lie to witnesses and suspects with the goal of obtaining evidence.⁵⁰ There is no shortage of authorized lying by police officers in the United States.⁵¹ Because

43. See Simon-Kerr, *supra* note 6, at 663–66.

44. See Phillip Bump, *How the First Statement from Minneapolis Police Made George Floyd's Murder Seem Like George Floyd's Fault*, WASH. POST (Apr. 20, 2021), <https://www.washingtonpost.com/politics/2021/04/20/how-first-statement-minneapolis-police-made-george-floyds-murder-seem-like-george-floyds-fault/>.

45. Eric Levenson, *How Minneapolis Police First Described the Murder of George Floyd and What We Know Now*, CNN (Apr. 21, 2021, 3:35 PM), <https://www.cnn.com/2021/04/21/us/minneapolis-police-george-floyd-death/index.html> [perma.cc/47GU-XKLB]. Another example is the police shooting death of Laquan McDonald, where the initial reports suggested that McDonald "lunged at police," a statement that police video later proved false. See Mark Berman, *Why Did Authorities Say Laquan McDonald Lunged at Chicago Police Officers?* WASH. POST (Nov. 25, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/11/25/why-did-authorities-say-laquan-mcdonald-lunged-at-chicago-police-officers/>.

46. Renee Graham, *Excessive Force, Police Lies and Videotape*, BOS. GLOBE (May 25, 2021), <https://www.bostonglobe.com/2021/05/25/opinion/excessive-force-police-lies-videotape/>.

47. Larry Cunningham, *Taking on Testilying: The Prosecutors Response to In-Court Police Deception*, in 18 CRIM. JUST. ETHICS 26, 26 (1999) ("The term 'testilying' was coined by police officers in New York City. It usually refers to perjury committed by police officers. However, it has also been used to describe other forms of in-court deception.") (footnotes omitted).

48. See *id.* at 36–37.

49. See Saul M. Kassir et al., *Police-Induced Confession: Risk factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 16–19 (2010).

50. See *id.* at 16–17.

51. In most European countries police officers are not permitted to lie during interrogations. See *id.* at 17.

this conference panel was asked to explore confessions, we focus here on the lies police tell in the interrogation room.

The thrust of this Article is not that officers are “natural [born] liar[s,]” but rather that they are trained and encouraged to lie.⁵² In order to understand why certain lies are told, it is helpful to know exactly what police are trying to accomplish in telling them.⁵³ Social psychologists Richard Ofshe and Richard Leo argue that modern interrogations occur in two phases.⁵⁴ The interrogator’s goal in the first phase is to render the suspect hopeless about the evidence against them and the likelihood of conviction; the goal in the second phase is to elicit a conviction by persuading the suspect that the cost of denial is less than the cost of confession.⁵⁵ Many of the lies that officers tell during interrogation serve the purpose of accomplishing one of these goals.⁵⁶

Criminologist Saul Kassin first described such strategies as maximization (the exaggeration of the strength of the case against the suspect) and minimization (the downplaying of the severity of the offense and the cost—psychological or moral—of confessing to it).⁵⁷ The leading interrogation training system, known widely as the “Reid Technique,”⁵⁸ teaches deception strategies for maximization and minimization.⁵⁹ The prominence of its authors in the world of law enforcement cannot be overstated.⁶⁰ The Reid Technique of interrogations is the most commonly used worldwide,⁶¹ and “[v]irtually every police department, sheriff[']s office, and other law enforcement agency in the United States[—]federal, state, and local” employ it.⁶² The Reid Technique explicitly teaches maximization and minimization, which explains how ubiquitous these practices are, yet the training manuals show no effort to prioritize forms of interrogation that help promote police legitimacy.⁶³

52. Lance Eldridge, *Do Police Officers Lie?*, POLICE 1 (Mar. 29, 2013), <https://www.police1.com/patrol-issues/articles/do-police-officers-lie-y1VPn4cUranI7sri/>; see Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DEN. U. L. REV. 979, 985 (1997).

53. See Ofshe & Leo, *supra* note 52, at 985.

54. *Id.* at 989–90.

55. See *id.* at 990.

56. See *id.* at 986.

57. See Saul Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 L. & HUM. BEHAV. 233, 234–35 (1991).

58. FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSION 185–329 (4th ed. 2001).

59. See Kassin & McNall, *supra* note 57, at 233–49.

60. See *id.*

61. Dylan French, *The Cutting Edge of Confession Evidence: Redefining Coercion and Reforming Police Interrogation Techniques in the American Criminal Justice System*, 97 TEX. L. REV. 1031, 1037 (2019).

62. See Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCH. 215, 215 (2005).

63. See generally *id.*

Reid-trained interrogators are taught to prioritize the immediacy of getting a confession above long-term concerns.⁶⁴ The Reid interrogation manual recommends that interrogators begin by expressing total certainty in the suspect's guilt.⁶⁵ But when the existing evidence does not warrant that level of certainty—as will usually be the case—the only way to credibly project such unqualified confidence in the suspect's guilt is to exaggerate or fabricate the evidence against the suspect. Indeed, if the evidence of guilt is so overwhelming, why is the investigator motivated to secure a confession using these tactics? Another standard recommendation of the Reid interrogation manual is to offer a false account of the investigator's motive for the interrogation—generally to determine not whether the suspect committed the crime, but *why*.⁶⁶

Moreover, interrogators seek to persuade suspects, contrary to fact, that it is in their interest not to exercise their rights to silence and counsel.⁶⁷ Suspects almost never have anything to gain by speaking to the police at all, let alone outside the presence of counsel. In some other forms of deception, the interrogator seeks to build rapport with suspects by claiming to sympathize with them, believing they are good people, and professing that other good people in the same position would have committed the same crime.⁶⁸ All of these deceptions are viewed as part of the job and are standard operating procedure.⁶⁹ Yet the fact that the deception may work in the moment does not mean that it remains a secret.⁷⁰ At the conclusion of the

64. INBAU ET AL., *supra* note 58, at 249.

65. See, e.g., FRED E. INBAU ET AL., *ESSENTIALS OF THE REID TECHNIQUE: CRIMINAL INTERROGATION AND CONFESSIONS* 127 (2d ed., 2005). “If the suspect perceives that the investigator is not certain of his guilt, he is unlikely to confess. Consequently, we recommend that the investigator start the interrogation with a direct statement indicating absolute certainty of the suspect's guilt.” *Id.* at 107.

66. *Id.* at 108 (“[The transition] statement offers a reason for the interrogation other than eliciting a confession. (Because the interrogation begins by the investigator telling the suspect that there is no doubt about his involvement in the crime, the investigator must develop a reason for the interrogation other than eliciting a confession.)”); *id.* at 196 (“After all, if there is no doubt as to the suspect's involvement in the crime, the investigator should not require any further statements from the suspect to prove his case. Therefore . . . [the] transition statement . . . must establish a *pretense* for the interrogation other than to elicit a confession.”) (emphasis added). The interrogation manual offers these examples of transition statements: “[B]ecause of [the suspect's] redeeming qualities[, the investigator] feels obligated to offer the suspect an opportunity to explain his side of the story[]”; “[Explain that the only unanswered question is why the suspect committed the crime[]]”; “[Explain that you need to find out what kind of person the suspect is[]]”; “[Explain that you [really] need to establish the extent or frequency of the suspect's involvement.]” *Id.* at 197–98.

67. See Susan R. Klein, *Lies, Omissions and Concealment: The Golden Rule in Law Enforcement and the Federal Criminal Code*, 39 TEX. TECH L. REV. 1321, 1321–22 (2007) (suggesting that the Supreme Court, Congress, and the state and federal prosecutors do not want citizens to know their rights because exercising them would result in fewer solved crimes).

68. See INBAU ET AL., *supra* note 58, at 141–57.

69. See OFFICER.COM, *supra* note 1 (“Police lie. It's part of their job. They lie to suspects and others in hopes of obtaining evidence. These investigative lies cover a wide web of deception . . .”).

70. See generally Geoffrey P. Albert & Jeffrey J. Noble, *Lies, True Lies, and Conscious Deception: Police Officers and the Truth*, POLICE Q. (Nov. 17, 2008), https://www.prisonlegalnews.org/media/publications/aplert_expert_reports_police_excessive_force_2008.pdf.

interrogation, and perhaps in some instances at the conclusion of the case, these interrogation strategies are revealed to the suspect/defendant and others as deceptive.⁷¹ The police officer's lies come to be known as lies, not only to the suspect, but to anyone who listens to the suspect complain about police deception. According to the procedural justice literature, rude and discriminatory police encounters on the street influence the attitudes, not only of those involved in the encounter, but their close family and friends. The obvious reason is that people share their experiences with the police. There is every reason to believe the same is true of police deception in interrogation: an interrogation suspect shares with family and friend the lies that police deployed in their efforts to secure a confession.⁷²

The Supreme Court of the United States has repeatedly affirmed cases involving police deception, confirming that “stealth and strategy are necessary weapons in the arsenal of the police officer.”⁷³ Accordingly, the Court has established very few limits to police use of deceitful or stealth tactics generally.⁷⁴ As one prosecutor explained, “the variety of deceptive techniques is limited chiefly by the ingenuity of the interrogator” because the Supreme Court itself has placed few limits on deception.⁷⁵ The Court has interpreted the constitutional Due Process Clause as prohibiting law enforcement from using interrogation strategies that would lead suspects to make involuntary or coerced statements.⁷⁶ Judges apply the “totality of the circumstances” test to determine whether “the interrogation was . . . unreasonable or shocking, or if the accused clearly did not have an opportunity to make a rational or intelligent choice.”⁷⁷ Few cases rise to this level.⁷⁸

Moreover, the totality of the circumstances test has been repeatedly criticized for its malleability in assessing interrogation practices.⁷⁹ Describing it as vacuous, one scholar notes that “the totality of the circumstances approach allows a court to reach any conclusion it wishes by accentuating the evidence that points in the direction the court wishes to go and understating the evidence that points in the other direction.”⁸⁰ The author

71. *See generally id.*

72. *See generally id.*

73. *Sherman v. United States*, 356 U.S. 396, 372 (1932).

74. *See Missouri v. Seibert*, 542 U.S. 600, 617 (2004).

75. Lavrie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168, 1168 (2001).

76. *See id.* at 1172–73.

77. *New York v. Quarles*, 467 U.S. 649, 661 (1984) (O'Connor, J., concurring and dissenting).

78. *See generally Haynes v. Washington*, 373 U.S. 503 (1963); *Payne v. Arkansas*, 356 U.S. 560 (1958); *Chambers v. Florida*, 309 U.S. 227 (1940).

79. *See George C. Thomas III, Regulating Police Deception During Interrogation*, 39 TEX. TECH L. REV. 1293, 1304 (2007).

80. *Id.* at 1303–04 (citing Jana Nestlerode, *Re-Righting the Right to Privacy: The Supreme Court and the Constitutional Right to Privacy in Criminal Law*, 41 CLEV. ST. L. REV. 59, 93 (1993)).

describes a case involving an African-American suspect accused of killing a white woman in which the suspect was repeatedly questioned by police and told he was facing the death penalty.⁸¹ During one interrogation, the police produced a bloody knife with a fingerprint that they falsely told the suspect matched his print and the prints found at the crime scene.⁸² The suspect confessed and the North Carolina Supreme Court deemed the confession voluntary and admissible.⁸³

In *Illinois v. Perkins*, for example, an undercover officer who was posing as another inmate was placed in a cell with a murder suspect in order to gain his trust and secure a confession.⁸⁴ Evidence of the confession was later deemed admissible by the Supreme Court, which stated that *Miranda* is not violated simply because an officer uses lies to mislead a suspect so long as those lies “do not rise to the level of compulsion or coercion.”⁸⁵ A police officer can lie to a suspect by claiming that an associate confessed to the crime and implicated the suspect, even when that is not the case.⁸⁶ The fake confession of a compatriot is a fairly common, yet old ploy.⁸⁷ Deceptive omissions do not render inculpatory statements involuntary.⁸⁸ Officers can omit valuable information in order to obtain a confession.⁸⁹ For instance, law enforcement agents were not required to tell a suspect that his lawyer had called and instructed police not to talk to the suspect without her present.⁹⁰

When police officers lie, omit, or misrepresent critical facts during interrogation, courts have been very reluctant to denounce such strategies for being unconstitutional absent evidence of coercion or torture.⁹¹ Police deception is deemed unconstitutional when it elicits statements that are said to be coerced or involuntary.⁹² As discussed above, many view the voluntariness test as woefully insufficient, particularly against the risk of false confessions.⁹³ Scholars and practitioners have called for various reforms, including an outright ban on deceitful interrogation practices,⁹⁴ an

81. *Id.* at 1304.

82. *State v. Jackson*, 304 S.E.2d 134, 139 (N.C. 1983).

83. *Id.* at 154.

84. *Illinois v. Perkins*, 496 U.S. 292, 292 (1990).

85. *Id.* at 297.

86. *Frazer v. Cupp*, 394 U.S. 731, 737–39 (1969).

87. *See Lisenba v. California*, 314 U.S. 219, 226 (1941).

88. *See Jackson*, 304 S.E.2d at 152–53.

89. *Moran v. Burbine*, 475 U.S. 412, 425–27 (1986).

90. *Id.*

91. *Id.* at 425.

92. *Id.* at 421.

93. Thomas, *supra* note 79, at 1298–1304.

94. Amelia C. Hritz, *Voluntariness with a Vengeance: The Coerciveness of Police Lies in Interrogations*, 102 CORNELL L. REV. 487, 511 (2017) (proposing a ban on police lying in interrogation unless warranted by imminent necessity); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 477 (1996) (proposing elimination of lying in police interrogations); Margaret L. Paris, *Faults, Fallacies, and the Future of our Criminal Justice System: Trust,*

exclusionary rule for confessions obtained by deceit,⁹⁵ or evidentiary rules that exclude confessions based on reliability or credibility.⁹⁶ Others contend that the current legal landscape, and its focus on voluntariness, may not be perfect but strikes a reasonable balance between fairness and public safety that may, at most, require modest reforms.⁹⁷ They argue that limiting police deception will allow too many guilty suspects to go free.⁹⁸

The key point is to acknowledge the potential tradeoff⁹⁹ between arguably reducing the number of true confessions and other societal costs such as sacrificing procedural legitimacy, as we argue here, or inducing false confessions as others have argued elsewhere. As Paul Cassell writes, the Supreme Court has become more explicit, post-*Miranda*, in recognizing such concerns.¹⁰⁰ He notes that the Court now openly describes the *Miranda* prophylactic rule against involuntary or coerced statements as a “carefully crafted balance designed to fully protect *both* the defendant’s and society’s interest.”¹⁰¹ Accepting the Court’s framing that public safety must be weighed against other concerns, we argue for a broader conception of public safety that goes beyond the apprehension of a particular suspect but that also accounts for the effect of the de-legitimization of the police and of the criminal law.

III: HOW POLICE DECEPTION UNDERMINES POLICE LEGITIMACY

A. *The Problem*

Our claim is straightforward: police deception in interrogation undermines procedural justice.¹⁰² At least when police lies are detected, as must frequently be the case, they reveal the police to be dishonest and untrustworthy—exactly the opposite of what procedural justice requires.¹⁰³ When a pattern of police deception is sanctioned by courts and other actors in the criminal justice system, it suggests that the entire system is similarly

Lies, and Interrogation, 3 VA. J. SOC. POL’Y & L. 3, 44 (1995) (proposing a rule against police lies in interrogation).

95. See Paul G. Cassell, *The False Confession Problem: A Brief Comment on Ofshe, Leo and Alschuler*, 74 DENV. U. L. REV. 1123, 1125 (2021) (discussing Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 974 (1997)).

96. *Id.* at 1125–27 (commenting on Ofshe & Leo, *supra* note 52, at 1118).

97. *Id.* at 1123–24 (describing the tradeoff between treating suspects fairly and convicting fewer guilty people).

98. Magid, *supra* note 75, at 1172.

99. *Id.*

100. Cassell, *supra* note 95, at 1124.

101. *Id.* (quoting *Moran v. Burbine*, 475 U.S. 412, 433 n.4 (1986)).

102. See generally Final Report, *supra* note 8, at 10.

103. *Id.*

untrustworthy.¹⁰⁴ Police lying might help to extract confessions in the short run but at the cost of damaging police legitimacy in the long run.¹⁰⁵ Some careful consideration is needed to decide whether a given use of deception is worth the cost.¹⁰⁶

Given the strong focus on procedural justice in recent years,¹⁰⁷ there has been surprisingly little attention to the role that interrogation might play in the creation or destruction of police legitimacy.¹⁰⁸ The Final Report, for example, mentions stops, frisks, searches, summons, arrests, racial profiling, and excessive force but not interrogation.¹⁰⁹ The same omission occurs in nearly all of the procedural justice scholarship, which is relentlessly focused on street policing, not what happens in police stationhouses.¹¹⁰ At the same time, those who criticize police deception in custodial interrogation almost never do so on the grounds that it undermines procedural justice.¹¹¹ Yet there seems to be no reason that interrogation practices cannot also earn or squander police legitimacy.¹¹²

The connection between legitimacy and police honesty should be clear from what we reviewed above.¹¹³ Recall that Tyler states that legitimacy of police “involves the belief that the police are honest.”¹¹⁴ Recall also, that the Final Report describes the empirical literature as finding legitimacy gains when “the community trusts that officers are[, among other things,] honest.”¹¹⁵ More generally, that report described the requirements for

104. See Simon-Kerr, *supra* note 6, at 38–43.

105. *Id.*

106. *Id.*

107. Final Report, *supra* note 8, at 15 (“In recent years, agencies across the county have begun to institutionalize community trust building endeavors. . . . Joint community and law dialogues and truth telling, as well as community and law enforcement training in procedural justice and bias, are also occurring nationally.”).

108. Notwithstanding some references to police interrogation, Tyler generally does not comprehensively apply procedural justice to police interrogation. See Tom R. Tyler, *Reducing Corporate Criminality: The Role of Values, Legitimacy and the Maintenance of Public Order*, 51 AM. CRIM. L. REV. 267, 288–89 (2014) (“Interrogation is thus similar to policing in general: the most effective method for achieving the desired behavior is ensuring that the individual is voluntarily motivated to comply. In short, just as the police need willing cooperation, so do interrogators.”). In the last sentence, Tyler seems to distinguish *police* from *interrogators*, which might be because he is focusing on terrorism suspects, which are not carried out in the United States by ordinary local police (although the FBI are still *police*). See *id.* But of course, for most criminal interrogations in the United States, the interrogators are local police. See *id.*

109. See generally Final Report, *supra* note 8.

110. Along with Tom Tyler, the leading law professor of procedural justice is Tracey Meares, who discusses the excessive use of “field interrogations” as part of the problem of excessive investigatory stops under *Terry v. Ohio* but does not discuss the connection between procedural justice and deceptive station house interrogations. See Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frist as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 162–63, 178 (2015).

111. But see Simon-Kerr, *supra* note 6, at 625–31.

112. See *id.*

113. See generally *id.*

114. Tyler, *supra* note 3, at 9.

115. Final Report, *supra* note 8, at 10.

procedural justice as including that police “treat[] people with dignity and respect” and “convey[] trustworthy motives,” neither of which is remotely consistent with police lying to suspects about the nature of the evidence, suspects’ interests in asserting their rights, or whether the police sympathize with suspects’ reasons for committing a crime.¹¹⁶

Other procedural justice material makes the same connection.¹¹⁷ Criminologist Kristina Murphy notes:

Police legitimacy has traditionally been conceptualized in the procedural justice literature as reflecting two judgments. The first is public trust and confidence in the police. Such confidence involves the belief that the police are *honest* and that they try to do their jobs well and are able to protect the community against crime and violence.¹¹⁸

Julia Simon-Kerr is the only scholar we have found to have linked what she calls perceived legitimacy (which she notes includes procedural, moral, and pragmatic legitimacy)¹¹⁹ with deceptive interrogations in particular.¹²⁰ She urges further scholarly research in service of the question: “Does [deception] in fact affect our perception of the police?”—a question she argues is linked to public trust and compliance with the law.¹²¹ Indeed, a number of studies have tried to assess how a community perceives the police by asking, among other things, whether the police are honest.¹²² One such study investigated whether teenage perceptions of the police—including perceptions of police honesty—are related to a teenager’s willingness to report a crime.¹²³ The study found a negative relationship (i.e., that negative perceptions of police undermine willingness to report crime).¹²⁴ In other words, the study implies that the strength of an anti-snitching norm is related to beliefs about whether

116. *Id.*

117. See generally Kristina Murphy, *Procedural Justice, Legitimacy, and Policing*, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE (Gerben Bruinsma and David Weisburd eds., 2014).

118. *Id.* at 4028 (emphasis added).

119. Simon-Kerr, *supra* note 6, at 665–66.

120. *Id.* at 666–77.

121. *Id.* at 692.

122. See generally Ling Ren et al., *Linking Confidence in Police with the Performance of the Police: Community Policing Can Make a Difference*, 33 J. CRIM. JUST. 55 (2005); David Weisburd et al., *Risk-focused Policing at Places: An Experimental Evaluation*, 25 JUST. Q. 163 (2008); Tom R. Tyler et al., *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men’s Legal Socialization*, 11 J. EMPIRICAL LEGAL STUD. 751 (2014); Jeffrey Fagan & Alex R. Piquero, *Rational Choice and Developmental Influences on Recidivism Among Adolescent Felony Offenders*, 4 J. EMPIRICAL LEGAL STUD. 715 (2007).

123. Lee Ann Slocum et al., *Neighborhood Structural Characteristics, Individual-level Attitudes, and Youths’ Crime Reporting Intentions*, 48 CRIMINOLOGY 1063, 1063–66 (2010).

124. *Id.* at 1082, 1086–87.

the police are, among other things, honest.¹²⁵ Note that some racial minorities are less likely to believe the police are honest.¹²⁶ This result might have many causes, but it is not surprising if we assume that racially disproportionate enforcement includes racially disproportionate interrogation, which tends to expose individuals to police deception.¹²⁷

B. *The Solution(s)*

What is to be done? We have not come to a final conclusion as to the solution, but we will outline the options. First, for those who have advocated for a complete ban on police deception (at least in interrogation),¹²⁸ our procedural justice concern is one more reason for a prohibition.¹²⁹

Obviously, if the objection to deception in interrogation is a strong principle of honest government based on deontological objections to government deception, then it adds nothing to raise a consequentialist concern with police deception.¹³⁰ However, some of the existing objections are consequentialist, such as the powerful concern that police deception in interrogation contributes to the frequency of false confessions.¹³¹ In addition, some have observed the simple idea that police work is made more difficult when police lose credibility.¹³² Police officers hope to be perceived as sincere when they state to a potential witness to a serious crime that the police have no interest in the witness's minor criminal violations that would be disclosed by answering the police questions or that the police would make sure to conceal the witness's identity to avoid retaliation by whoever the witness implicates. But if the witness does not trust the police to keep their promises, the lack of police credibility will give the witness a strong reason not to cooperate, impeding their ability to investigate crime.¹³³ One can now add to these two consequentialist concerns—false confessions and the absence of credibility—the danger that police deception violates procedural justice and

125. *Id.* at 1078, 1086–87, 1097.

126. Sutham Cheurprakobkit, *Police-Citizen Contact and Police Performance: Attitudinal Differences Between Hispanics and Non-Hispanics*, 28 J. CRIM. JUST. 325–36 (2000).

127. See generally Sutham Cheurprakobkit, *The Impact of Race, Police Experience, and Feeling of Safety on Attitude Toward Police*, 21 J. POLICE CRIM. PSYCH. 55 (2006).

128. See, e.g., Margaret L. Paris, *Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3, 9, 44 (1995).

129. See *id.*

130. See *id.*

131. See e.g., Stephen A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 918–19 (2004) (“The primary psychological cause of most false confessions is, therefore, the investigator’s use of improper, coercive interrogation techniques.”); see generally Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998).

132. See generally William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761 (1989).

133. *Id.* at 824.

undermines police legitimacy.¹³⁴ Possibly, the gains from police deception are not ever worth the costs.¹³⁵

We are not so sure. Others who have criticized the pervasive use of deceptive interrogation tactics have, nonetheless, acknowledged that there are some specific cases where their use is justified.¹³⁶ For example, if the police have exhausted the non-interrogation means of gathering evidence and other means of interrogation, it may be that deception is the only tool that can work. If a murderer or rapist will otherwise escape criminal liability, then the benefits of certain types of deception in certain circumstances plausibly outweigh its costs. On this view, the problem is that the police currently proceed as if there are no costs to deception and use the tactic pervasively and indiscriminately without regard to the severity of the crime, the likely success of non-deceptive interrogation, or the availability of other sufficient evidence to convict.¹³⁷ The police use deception reflexively, as a first step, and not deliberately, as a last step. At a minimum, we propose moving to a more calculated determination that takes into account the costs and benefits of deceptive practices before such practices are employed. We note that the results of the cost-benefit analysis we support would vary depending on the nature of the deception and the likelihood that it would be uncovered, the seriousness of the offense, the circumstances of the suspect and the alternatives at the interrogator's disposal.¹³⁸

If the current failure to conduct any such a calculus is, in part, the nature of the problem, Christopher Slobogin has proposed an intermediate solution (for reasons other than procedural justice), that police should be able to use deception in interrogation only under certain circumstances: roughly, after arrest when there is a judicial determination of probable cause to believe the suspect has committed a felony.¹³⁹ Such a rule would forbid deception prior to arrest, as in non-custodial interviews with suspects.¹⁴⁰ The rule would ban deception in misdemeanor investigations.¹⁴¹ One might also favor prohibiting deceptive practices in cases involving juveniles and other vulnerable populations, who are particular risks for false confessions, as others have

134. See Leo & Ofshe, *supra* note 131, at 493–94; Stuntz, *supra* note 132, at 824.

135. See, e.g., Paris, *supra* note 128, at 43–44.

136. Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigation Lies by Police*, 76 OR. L. REV. 775, 778–88 (1997).

137. *Id.* at 790.

138. See *id.* at 796.

139. See *id.* at 803–04, 810 (recommending and discussing a judge's ability to approve police deception); Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH L. REV. 1275, 1277–79 (2007) (proposing probable cause as a prerequisite for allowing deceptive interrogation tactics).

140. See Slobogin, *supra* note 136, at 811–12 (explaining that probable cause would be required to use deceptive police tactics).

141. See Slobogin, *supra* note 139, at 1279.

argued.¹⁴² We note the additional concern that police officers who use their position of authority and their experience to trick a suspect with diminished capacity may cause more public revulsion that greatly endangers police legitimacy.¹⁴³

The need for a judicial determination would not leave the issue of probable cause entirely in the hands of police who may overestimate the probability of the suspect's guilt.¹⁴⁴ Judicial review, however, is complicated by the problem of defining deception.¹⁴⁵ Even if courts can effectively define deception, there are limits to judicial competence that come into play.¹⁴⁶ For example, even in serious cases where the suspect is a competent adult, and there are no non-interrogation avenues for evidence, it might be better that police refrain from deception until they have made some efforts at interrogation without deception.¹⁴⁷ But, experienced interrogators might be better than judges at defining what constitutes *some efforts*.¹⁴⁸ So if deception is ever to be permitted, in addition to some judicially enforced limits on deception, as Slobogin advocates, it might be desirable for police departments to adopt policies limiting when deception can be used.¹⁴⁹

One expects that police would resist any such limitations—as they resist other reforms—but the argument made here is addressed directly to police.¹⁵⁰ Although police detectives might quarrel with the unflattering depiction of Saul Kassin's statement decades ago that an interrogator is “a salesman, a huckster as thieving and silver-tongued as any man who ever moved used cars or aluminum siding,”¹⁵¹ they understand, as salespeople do, that

142. See Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 308 (2006) (“[P]rolonged interrogation[—]especially in conjunction with youthfulness, mental retardation, or other psychological vulnerabilities[—]is strongly associated with eliciting false confessions.”) (footnote omitted); see also Steven A. Drizin & Beth A. Colgan, *Tales from the Juvenile Confession Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions from Juvenile Suspects*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 153–55 (G. Daniel Lassiter ed., 2004). At least one state legislature has heeded these concerns and passed a bill to outlaw such tactics. See Michael Levenson, *Illinois Lawmakers Bar Police from Using Deception When Interrogating Minors*, N.Y. TIMES (May 31, 2021), <https://www.nytimes.com/2021/07/16/us/illinois-police-deception-interrogation.html>.

143. See generally Feld, *supra* note 142.

144. See *id.* at 261.

145. See e.g., Thomas, *supra* note 79, at 1295–96 (discussing the difficulties of regulating police deception in interrogation and noting: “[T]he deception line is difficult to draw. Would it be deception to tell a suspected child molester that the interrogator felt sorry for him or that he needed treatment?”).

146. See Slobogin, *supra* note 139, at 1279 (referring to probable cause as a judicial limitation).

147. See Slobogin, *supra* note 136, at 803 (advocating that deceptive methods are used only against authenticated suspects).

148. But see *id.* at 804 (suggesting that judicial review is a better alternative than police determination or no review at all).

149. See generally Brandon L. Garrett, *Interrogation Policies*, 49 RICH. L. REV. 895 (2015).

150. See generally Slobogin, *supra* note 139.

151. Saul M. Kassin, *The Psychology of Confession Evidence*, AM. PSYCH. 221, 222 (1997) (quoting DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 201 (1991)).

credibility matters.¹⁵² If the common wisdom within a community is not to trust a single word a police officer says, the police have perhaps won some interrogation battles but lost the war for legitimacy.¹⁵³ There is no point in expensive and time-consuming efforts to gain the trust and respect of the community if the police are at the same time engaged in a reasonably well-known practice (though not at first to all suspects) of pervasively lying to suspects. If police deception is a necessary evil, then it must be treated like one and employed with parsimony and judgment.¹⁵⁴

Without resolving the exact place to draw the line, we believe that the costs of police deception require that a new line be drawn, one making police deception in interrogation less common, if it must exist at all.¹⁵⁵

152. See *supra* notes 131–35 and accompanying text (discussing how a lack of credibility impedes police ability to investigate).

153. See *supra* notes 113–23 and accompanying text (discussing how police legitimacy is linked to honesty and studies that show a negative perception of police results in a person’s unwillingness to report a crime).

154. See Simon-Kerr, *supra* note 6, at 671 n.78.

155. See generally *id.*