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Deceit, Pretext, and Trickery: Investigative Lies By the Police

A lie is a statement meant to deceive. Many police, like many other people, lie occasionally, and some police, like some other people, lie routinely and pervasively. Police lie to protect innocent victims, as in hostage situations,[1] and they tell "placebo lies" to assure or placate worried citizens.[2] They tell

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[1] Tom Barker & David Carter, *"Fluffing Up the Evidence and Covering Your Ass:" Some Conceptual Notes on Police Lying*, 11 DEVIANT BEHAV. 61, 64 (1990).

[2] Carl B. Klockars, *Blue Lies and Police Placebos: The Moralities of Police Lying*, 27 AM. BEHAV. SCI. 529, 535 (1984) (giving, as one example of a "placebo" lie,

lies to project nonexistent authority,[3] and they lie to suspects in the hopes of gathering evidence of crime.[4] They also lie under oath, to convict the guilty,[5] protect the guilty,[6] or frame the innocent.[7]

Some of these lies are justifiable. Some are reprehensible. Lying under oath is perjury and thus rarely permissible.[8] On the other hand, lying that is necessary to save a life may not only be acceptable but is generally applauded (even if it constitutes perjury). Most types of police lies are of murkier morality, however. In particular, considerable disagreement exists over the permissibility of lying to suspects as a means of gathering evidence.[9] If the police want to uncover a conspiracy, search a house, or obtain a confession, may they lie in an effort to do so?

The principal objective of this Article is to evaluate the latter type of deceit—what this Article will call "investigative" lies. Part I of the Article describes the various types of investigative

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police assurance to complainants that "suspicious characters" will be checked out when police have no intention of doing so).

[3] Joseph M. Livermore, *Policing*, 55 MINN. L. REV. 649, 676 n.24 (1971) (describing police efforts to halt a domestic squabble by threatening to arrest one or both spouses if the bickering continues, despite the fact they have no legal authority to arrest unless an assault takes place).

[4] *See infra* Part I.

[5] This type of lying has become known as "testilying," and is quite prevalent in some quarters. *See, e.g.*, Myron W. Orfield, Jr., *Deterrence, Perjury and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 107 (1992) (survey showing that prosecutors, defense attorneys, and judges believe perjury occurs on Fourth Amendment issues in from 20% to 50% of all suppression hearings).

[6] Police lying to protect themselves or their colleagues from criminal penalties is well-documented. *See* Barker & Carter, *supra* note 1, at 69 ("Lying and/or perjury in court is an absolute necessity in departments where corrupt acts occur on a regular basis. Sooner or later every police officer who engages in corrupt acts or observes corrupt acts on the part of other officers will face the possibility of having to lie under oath to protect him/herself or fellow officers.").

[7] For one example of the latter, see Don Terry, *Philadelphia Shaken by Criminal Police Officers*, N.Y. TIMES, Aug. 28, 1995, at 1 (describing conviction of innocent woman based on testimony of officers who planted evidence in her house because her sons were suspected of a drug-related murder).

[8] In another piece, I have analyzed the phenomenon of police perjury and ways of inhibiting it. Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 COLO. L. REV. 1037 (1996) (symposium issue).

[9] This disagreement exists in the literature, see *infra* note 174, and among the *hoi polloi*. A study conducted by students in a University of Florida Social Science in Law class found significant disagreement within the demographically diverse group surveyed over the permissibility of certain types of lies that fall in this category, including lying to a person under interrogation, pretextual stops, and certain types of undercover work. Study on file with author.

lies the police tell in three areas: undercover work, searches and seizures, and interrogation. Relying principally on the work of the noted moral philosopher Sissela Bok,[10] Part II sets up a framework for evaluating this type of police deception and begins an assessment of its application to police work. Part III then explores the framework's implications for investigative lying in more detail. It also draws some conclusions about the extent to which the outcome of this analysis can be reconciled with current constitutional doctrine, which by and large has acquiesced in, if not affirmatively sanctioned, police deception during the investigative phase.

It turns out that, even when viewed from Bok's relatively Kantian perspective, some types of lies may be justified during the investigative process. Specifically, this Article argues that when the dupes of the lying are publicly targeted suspects—as is often the case with persons subjected to interrogation, for instance—lying is not necessarily wrong. At the same time, this justification for lying, if accepted, means that some aspects of current constitutional doctrine—particularly those having to do with intrusive undercover operations and pretextual searches and seizures—need to be significantly modified if we are serious about curtailing immoral lying by the police. This analysis also suggests that lying is most appropriate when there is significant evidence that the dupe is guilty and least appropriate when there is little such evidence, a position that happens to coincide with recent scholarship arguing that the U.S. Constitution is primarily meant to protect the innocent.[11]

Whether or not one agrees with these specific conclusions, some of which are admittedly radical, the philosophical approach to police practices proffered in this Article is worth pursuing. Substantively, it provides insights into the morality of police work that legal analysis does not. In process terms, it focuses debate on an aspect of police conduct that has received very little professional, judicial, or legislative oversight. In short, if taken seriously, a more theoretical approach would force policymakers and police to be less nonchalant about deceptive law enforcement, whatever their ultimate conclusions about it might be.

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[10] SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1978).

[11] *See generally*, AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997).

I

THE NATURE OF INVESTIGATIVE LIES AND WHY THEY OCCUR

Of the many varieties of lies police tell,[12] the most prevalent type is probably the lie told to catch a criminal, if only because apprehending perpetrators of crime is a primary job of the police. Of course, lies to catch criminals can be directed at nonsuspects whom the police believe have useful information. Most, however, are aimed at the suspects themselves and occur in one of three contexts: undercover work, searches and seizures, or interrogation. In each of these three contexts, the following discussion borrows from the sociological literature in exploring the nature and causes of police lies and then briefly reviews the law's (usually accommodating) response to them.

A. Undercover Work

Undercover work is by definition deceptive. It normally involves outright lies. Typically, an undercover agent gives or presents a fake identity and a fabricated history, denies any involvement with the police, and engages in any number of other lies. For example, an agent might pose as a lover, a prisoner, a priest, or a member of the Mafia;[13] in playing such roles, lying is inevitable and extensive.

Law enforcement's justification for this type of deception is twofold. First, certain types of crime—for instance, so-called "victimless crime," fraud, narcotics sales, organized crime, and terrorism—are considered difficult to detect or prevent through other means.[14] Second, independently from solving a particular crime, undercover agents and informants gather general information about criminal activity and the key figures in it that is

[12] *See supra* text accompanying notes 1-7. As the first sentence of this Article defines it, a lie "is a statement meant to deceive." This definition encompasses not only affirmative misstatements but also, as the following discussion will make clear, partially truthful statements (e.g., "I am stopping you because you have violated a traffic law," when the primary purpose for the stop is some other, illegitimate reason) and truthful statements made with knowledge that the hearer will be misled (e.g., "You don't have to sign your confession," when the person making the statement knows the person hearing it will believe the confession will therefore not be admissible in evidence).

[13] GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 61-62 (1988) (listing examples). Chapters four and eight of this book contain the best descriptions of the various deceptive roles an undercover agent must play.

[14] *Id.* at 34, 37-40.

thought to be otherwise inaccessible.[15] These objectives have led every major police department to devote significant resources to undercover work by police officers and by "snitches" recruited to work for the police.[16]

The Supreme Court has given wide leeway to this type of deceptive activity. Indeed, even the Warren Court—popularly perceived as the most liberal group of justices in the Court's history on the subject of criminal suspects' rights—expressed a strong aversion to regulating undercover work.[17] The established basis for this stance, found in a number of Court decisions,[18] is that one assumes the risk that one's acquaintances are government agents; any expectation to the contrary is unreasonable and therefore not protected by the Fourth Amendment. Accordingly, as a constitutional matter, police need neither a warrant nor any level of suspicion before engaging in undercover operations.

Such operations *are* regulated by three other judicially created doctrines, but only in a minimal way that is unlikely to prohibit most types of undercover deception. One source of regulation is the entrapment defense, the most widely accepted test for which prohibits the police from inducing a person to commit a crime he or she is not predisposed to commit.[19] Although the courts occa-

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[15] *Id.* at 39 ("Offenses that may not become manifest until years later require a preventive and anticipatory enforcement ethos.").

[16] *Id.* at 13 (describing significant increases in spending on police work related to undercover activities).

[17] *See, e.g.*, Lewis v. United States, 385 U.S. 206 (1966) (Fourth Amendment not implicated when undercover agent calls suspected drug dealer, arranges to buy marijuana at dealer's home, and does so. The Court explained: "[w]ere we to hold the deceptions of the agent in this case constitutionally prohibited, we would come near to a rule that the use of undercover agents in any manner is virtually unconstitutional per se."). *Id.* at 210. *See also* Hoffa v. United States, 385 U.S. 293 (1966) (Fourth Amendment not implicated when government asked a colleague of Hoffa's to report conversations about jury tampering).

[18] In addition to *Lewis*, 385 U.S. 206, and *Hoffa*, 385 U.S. 293, see Smith v. Maryland 442 U.S. 735 (1979) (Fourth Amendment not implicated by phone company release to prosecution of phone records); United States v. Miller, 425 U.S. 435 (1976) (Fourth Amendment not implicated by bank's release to prosecution of information voluntarily surrendered to bank); United States v. White, 401 U.S. 745 (1971); On Lee v. United States, 343 U.S. 747 (1952) (Fourth Amendment not implicated when police heard defendant's conversation over a body bug on a police agent).

[19] The predisposition, or "subjective," test is used in the federal courts, *United States v. Russell*, 411 U.S. 423 (1973), and most state courts. WAYNE LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE § 5.2(a) (1992) (referring to the predisposition test as the "majority view"). An alternative test, known as the "conduct of

sionally overturn a conviction on entrapment grounds, they do so only if the deception is particularly intense;[20] after all, if the undercover operation is aimed at a known criminal or a crime-ridden area, as is usually the case, predisposition is likely to exist before any deception takes place.[21] A second source of regulation is the Due Process Clause, which has been construed to ban police activity that "shocks the conscience."[22] But this perilous spiritual condition has afflicted very few courts; as even proponents of the due process test have made clear, deception alone is unlikely to violate the Constitution.[23] Finally, the Supreme Court has held that the Sixth Amendment's guarantee of counsel prevents surreptitious elicitation of information from a formally charged defendant.[24] Although this rule is generally rigidly enforced,[25] it affects very few undercover jobs, which normally are

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authorities" or "objective" test, focuses on whether the government "employ[s] methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." MODEL PENAL CODE § 2.13(1)(b) (1985). Although the rationale for the two tests are quite different (with the first focusing on the defendant's culpability and the second on the culpability of the police), in practice these tests are almost indistinguishable. *See* Paul Marcus, *Presenting Back from the [Almost] Dead, The Entrapment Defense*, 47 FLA. L. REV. 205 (1995).

20 CHARLES WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 478 (3d ed. 1993) ("very few courts, regardless of the test used, have found the defense to exist in a particular case").

21 Even advocates of the objective test would permit deception. As Justice Stewart stated in his dissent in *Russell*, "the Government's use of undercover activity, strategy, or deception is [not] necessarily unlawful. Indeed, many crimes, especially so-called victimless crimes, could not otherwise be detected." 411 U.S. at 445 (Stewart, J., dissenting) (citation omitted).

22 This test, which essentially is a narrower version of the objective test, *see supra* note 19, has occasionally resulted in dismissal of charges by a lower court. *See, e.g.*, United States v. Twigg, 588 F.2d 373 (3d Cir. 1978). Although the Supreme Court has not explicitly endorsed such a test, the majority in *Russell* acknowledged that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." 411 U.S. at 431-32.

23 In his concurring opinion in *Hampton v. United States*, 425 U.S. 484, 491-93 (1976), Justice Powell voiced support for a due process defense, but the examples he gave of situations in which it might arise—obtaining evidence through physical force, the commission of a serious crime, or outrageous "overinvolvement" in a crime—do not contemplate the deception typically involved in undercover operations. *See also* United States v. Archer, 486 F.2d 670 (2d Cir. 1973).

24 Massiah v. United States, 377 U.S. 201 (1964).

25 *See, e.g.*, Michigan v. Jackson, 475 U.S. 625 (1986) (request for counsel at arraignment triggers Sixth Amendment right); Maine v. Moulton, 474 U.S. 159 (1985) (Sixth Amendment violated despite no coercion); United States v. Henry, 447 U.S. 264 (1980) (Sixth Amendment violated despite defendant's initiation of conversation

completed before, and indeed are often responsible for, the indictment. Even taken together, then, these three doctrines apply in very few cases. 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.[26]

B. Searches and Seizures

Lying meant to effectuate a search or a seizure is routine practice for many police officers. Such lies come in at least two varieties. The first involves lying about police authority to conduct the search or seizure. For instance, police may state that they do not need a warrant when they know the law requires they have one,[27] assert they have a warrant when they do not,[28] or state they can get a warrant when in fact they know they can not.[29] This last ruse, designed to encourage acquiescence from an otherwise unwilling person, is one among many deceitful ways of obtaining consent; police have also been known, for instance, to get motorists to sign a consent form for a car search by misrepre-

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with informant); Brewer v. Williams, 430 U.S. 387 (1977) (Sixth Amendment violated despite no coercion). *Cf.* Kuhlmann v. Wilson, 477 U.S. 436 (1986) (not deliberate elicitation in violation of Sixth Amendment when informant merely engages in conversation with defendant).

[26] A few other doctrines could conceivably affect undercover police work, including equal protection analysis to the extent undercover operations result in selective prosecution, and duress, if the undercover agent forces criminal activity. However, "[i]n practice, these are difficult to prove and appear to have had almost no impact." MARX, *supra* note 13, at 190.

[27] Sociologist Peter Manning recounts the story of a sergeant who, when asked for a warrant by the target of the search, falsely responded, "[u]nder paragraph 721 of the Police General Orders—Criminal Code, officers are not required to show a warrant during a preliminary investigation." Peter K. Manning, *Lying, Secrecy, and Social Control*, *in* POLICE DEVIANCE 106 (Thomas Barker & David L. Carter eds., 1986). This officer told Manning he often referred to some "fictitious passage in the code" and even "quoted" it if asked. *Id.*

[28] The best known example of this scenario is *Mapp v. Ohio*, 367 U.S. 643 (1961). In that case, the police flourished a paper they claimed was a warrant but hastily retrieved it when Ms. Mapp snatched it from them. Although at trial one of the officers insisted they'd had a warrant, he later admitted that this was a lie. FRED W. FRIENDLY & MARTHA J.H. ELLIOTT, THE CONSTITUTION: THAT DELICATE BALANCE 132 (1984).

[29] *Cf.* RICHARD VAN DUIZEND, L. PAUL SUTTON & CHARLOTTE A. CARTER, THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS AND PRACTICES 17-19 (National Center for State Courts, 1985) [hereinafter NCSC Report] (One detective interviewed "suggested that as many as 98% of the searches were by consent. Ironically, this may be obtained through an officer's mere threat to secure a warrant should the party refuse voluntarily to grant admission to the premises.").

senting the form as a ticket.[30] Finally, the police may simply make up a reason for conducting a search and seizure, such as when they fabricate a traffic violation as a ground for stopping a car.[31]

The second type of lie misrepresents the police's purpose, not the police's authority. These so-called "pretextual" actions arise in a number of contexts. For instance, the police might ask for permission to enter a house for some innocuous purpose (such as investigation of a nonexistent burglary), when their actual intent is to conduct a search of its interior once inside.[32] A similar, extremely common ruse is an effort to get a better look at a car's occupants and contents by stopping the car for a traffic violation, one which is not made up (as described in the preceding paragraph) but which is never or rarely enforced except in pretextual situations.[33] In the same pretextual vein is a lie to get a suspect

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[30] Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 523-24 n.291 (1991) (defendants arrested by Officer Durnan of Delaware state police routinely testify that Durnan told them he was giving them a ticket when in fact they were signing a consent form). *See also* CHRISTOPHER SLOBOGIN, REGULATION OF POLICE INVESTIGATION: LEGAL, HISTORICAL, EMPIRICAL AND COMPARATIVE MATERIALS 218-19 (1993) (describing Iowa state police procedure in which officer first asks whether driver has any contraband in car and, once a negative answer is received, ask if car can be searched). A variant of these ploys is to tell a detained motorist that, if he or she doesn't consent, police will obtain a drug-sniffing dog, despite the likelihood that the time necessary to obtain the dog would result in detention beyond that permitted by the Fourth Amendment. *Cf.* United States v. Place, 462 U.S. 696 (1983) (90-minute detention of defendant's luggage to arrange a dog sniff unconstitutional).

[31] The Mollen Commission, named after its head, Judge Milton Mollen, detailed several different types of police lies. THE CITY OF NEW YORK COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT COMMISSION REPORT 36-39 (July 7, 1994) [hereinafter Mollen Report]. For instance, the Report stated, "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 they subsequently saw contraband in the car in plain view." *Id.* at 38. As this excerpt suggests, this type of fabrication may often occur for the first time at the suppression hearing rather than in the street, where police simply conduct the illegal search without bothering to fabricate a reason for doing so.

[32] *E.g.*, United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974); *see also* Manning, *supra* note 27, at 105 ("officers may gain entrance to an apartment, house, or car by asking permission to enter and then engaging in a search").

[33] *See generally* Wayne R. LaFave, *The Present and Future Fourth Amendment*, 1995 U. ILL. L. REV. 111, 117-19 ("In an incredible number of drug cases, the encounter with the police commenced with a seemingly innocuous traffic violation, such as a momentary movement of a tire onto the fog line at the right edge of the highway or a breaking of the 65 m.p.h. speed limit by but a few miles, well short of

to "come quietly" rather than risk a violent arrest[34] or a police "suggestion" that a person have a "short chat" with officers, whose real intentions are to seize the individual for a much longer period of time.[35] In all of these situations, the police have the technical legal authority to engage in the act based on consent or some minor violation of the law but are dissembling their purpose.

As with undercover work, the primary police justification for both types of deceptive searches and seizures is their efficacy at catching criminals. According to Jerome Skolnick, a veteran observer of the police, the typical police officer believes that he has "the ability to distinguish between guilt and innocence"[36] and that once he has decided that someone is guilty (or suspicious), he "ought to be free to employ the techniques of his trade."[37] Skolnick implies that lies to suspects about police authority or purpose are, as far as the police are concerned, "techniques of the trade" that should be fostered rather than criticized.[38]

This assertion is borne out by the observations of sociologists Thomas Barker and David Carter,[39] who also conclude that many police endorse an "end justifies the means" approach to deception.[40] One statement they report seems particularly illuminative on this score. Told that his description of police methods for obtaining consent sounded like "a lot of lies," one officer

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the customary tolerance."). As one example, consider *United States v. Smith*, 799 F.2d 704 (11th Cir. 1986), where an officer stopped a car driven by two young men on an interstate highway with out-of-state tags. They had been going fifty miles per hour in an "overly cautious" manner and did not look at the officer as he drove past, actions which the officer later claimed fit a "drug courier profile." But the "official" reason for the stop was that their car had crossed six inches over the emergency lane line and then veered to the other side of the lane and weaved inside the lane two more times.

[34] Klockars, *supra* note 2, at 536.

[35] Manning, *supra* note 27, at 105. *See also* MAURICE PUNCH, CONDUCT UNBECOMING: THE SOCIAL CONSTRUCTION OF POLICE DEVIANCE AND CONTROL 136 (1985) ("A normal tactic of the police is to play someone along as if he is a witness until they can confirm that he is a suspect.").

[36] JEROME SKOLNICK, JUSTICE ON TRIAL 196-97 (2d ed. 1975).

[37] *Id.* at 195-96.

[38] As Skolnick says, "[l]ike other doers, [the officer] tends to be resentful of critics who measure his value by abstract principles rather than the 'reality' of the world he knows and lives and sees." *Id.* at 196-97. In another work, Skolnick states that policy perjury is "systematic." Jerome H. Skolnick, *Deception by Police*, CRIM. JUST. ETHICS, Summer/Fall 1982, at 40, 42.

[39] *See* Barker & Carter, *supra* note 1.

[40] *Id.* at 67.

responded: "It is not police lying; it is an art. After all the criminal has constitutional protection. He can lie through his teeth. Why not us? What is fair is fair."[41]

The sentiment that "it takes a liar to catch a liar" apparently resonates with many police officers.[42] Particularly interesting is the officer's reference to police lying as an "art," which dovetails with Skolnick's observation that police see fabrication as part of their craft. It suggests that, in this investigative context, police do not think they are "lying" at all; they are merely playing a role.[43]

In short, police view deceitful searches and seizures as a professional investigative tool—the moral equivalent to undercover investigation. While courts presumably disagree with this stance when the lies are about police authority (because if the claimed authority did not exist, then the Fourth Amendment is violated), most have put their imprimatur on the much larger category of pretextual searches and seizures.[44] After intimating it would do so on more than one occasion,[45] the Supreme Court itself re-

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[41] *Id.*

[42] This view is echoed throughout the sociological literature. Manning, who works out of England, has stated that one reason police lie is that they inhabit a world of suspiciousness and distrust. As he puts it, "[o]nce others are seen as untrustworthy . . . they become . . . objects to be controlled, manipulated, coerced, and perhaps lied to." Manning, *supra* note 27, at 101-02. Gary Marx recounts the reaction of one officer to legal rules concerning covert investigation as follows: "That's . . . interesting stuff. But frankly I don't know if I give a shit. I have a job to do. How can you be ethical when you deal with unethical people?" MARX, *supra* note 13, at 186.

[43] Another end which some police may feel justifies lying in connection with searches and seizures (and other investigative contexts as well) is the need to produce "activity" that will satisfy superiors and, through them, the public. In many departments, unless an officer makes a certain number of stops and arrests, he loses out on promotion, overtime pay (for court appearances) and other "perks." JONATHAN RUBINSTEIN, CITY POLICE 43 (1973). This pressure to produce creates an incentive to lie, to the extent it helps create "collars." Indeed, according to Rubinstein, among those assigned to control gambling, prostitution, drugs and other "vice" crime, "[e]very patrolman learns that he must be a liar and a conspirator if he wants to remain a district policeman." *Id.* at 387.

[44] *See, e.g.*, United States v. Trigg, 878 F.2d 1037 (7th Cir. 1989) (legality of arrest depends solely on whether there is authority for it); United States v. Basey, 816 F.2d 980, 991 (5th Cir. 1987) (same); Marbury v. United States, 540 A.2d 114, 115-16 (D.C. 1985) (same); State v. Olaiz, 786 P.2d 734 (Or. Ct. App. 1990) (same); Williams v. State, 726 S.W.2d 99, 101 (Tex. Crim. App. 1986) (same).

[45] *See, e.g.*, Horton v. California, 496 U.S. 128 (1990) (seizures of items not listed in warrant but known to officer before search not a violation of Fourth Amendment); United States v. Villamonte-Marquez, 462 U.S. 579 (1983) (boarding of a boat by customs officials for ostensible purpose of checking documents not violative of Fourth Amendment despite fact that the customs agents were accompanied by a state law enforcement officer and testimony by the boarding officers that they were looking for narcotics and had an anonymous tip that a boat in the vicinity was carry-

cently affirmed that the typical pretextual police action does not violate the U.S. Constitution. In *Whren v. United States*,[46] which explicitly upheld a concededly pretextual traffic stop, the Court stressed that the subjective mental state of the police is irrelevant to Fourth Amendment analysis in most situations.[47] As a result of decisions like these, the police know that as long as they have a legal explanation for their action, any duly limited entry, stop or seizure will usually be considered constitutional regardless of the hidden agenda.

C. *Interrogation*

As with undercover work, fabrication in the interrogation context is openly acknowledged by the police today. Indeed, the leading interrogation manual, authored by Inbau, Reid, and Buckley,[48] continues to preach vigorously the merits of deceptive interrogation techniques, despite the Supreme Court's implicit criticism of one of its earlier incarnations in *Miranda v. Arizona*.[49] The techniques they espouse include: (1) showing fake sympathy for the suspect by becoming his "friend" (e.g., by falsely telling a person suspected of rape that the interrogator himself had "roughed it up" with a girl in an attempt to have intercourse with her);[50] (2) reducing feelings of guilt through lies (e.g., by telling a person suspected of killing his wife that he was

ing narcotics); Scott v. United States, 436 U.S. 128 (1978) (subjective intent of officers conducting electronic surveillance is not relevant to reasonableness analysis under the Fourth Amendment).

[46] 116 S.Ct. 1769 (1996).

[47] The Court did suggest there may be three situations in which subjective intent is relevant: (1) where the stop is racially motivated; (2) where the purported basis for the police action is not probable cause (e.g., inventory searches); and (3) where the police action works some significant harm (e.g., forced entry into a house). *Id.* at 1771-72.

It could be argued that, after *Whren*, police have no need to lie; so long as they have probable cause for some violation, they can reveal with impunity their hidden agendas. But police are unlikely to do so, because telling the target about their hunches will prevent the next, crucial step—the gathering of evidence. The typical pretextual car stop, for instance, accomplishes only half the job; obtaining the gun, drugs, or other contraband usually depends on consent, which is unlikely to be forthcoming if the pretext (e.g., "we have a hunch you're a drug mule") is revealed.

[48] FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1986).

[49] 384 U.S. 436, 448-58 (1966) (describing interrogation techniques advocated by Inbau et al. and others and concluding that "[t]he current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself").

[50] INBAU, ET AL., *supra* note 48, at 98.

not as "lucky" as the interrogator, who had recently been on the verge of seriously harming his nagging wife when the doorbell rang);[51] (3) exaggerating the crime in an effort to prod the suspect into negotiating or in hopes of obtaining a denial which will indirectly inculpate the suspect (e.g., accusing the suspect of stealing $40,000 when only $20,000 was involved);[52] (4) lying that suggests the futility of denying the truth (e.g., statements that sufficient evidence already exists to convict when it does not);[53] and (5) playing one codefendant against another (e.g., leading one to believe the other has confessed when no confession has occurred).[54]

Many other deceptive techniques, somewhat less openly acknowledged, are associated with giving the warnings mandated by *Miranda*.[55] For instance, police might tell the suspect that "whatever you say may be used *for* or against you in a court of law," despite the fact that police are extremely unlikely to testify for the defense in any subsequent prosecution.[56] They might also mislead the suspect into believing that only written statements are admissible[57] or that a state-paid attorney will be provided only once the individual is in court.[58]

As with the other investigative lies discussed, the police believe these techniques are necessary to catch criminals, in this situation because of the suspect's natural reluctance to respond to

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[51] *Id.* at 100.

[52] *Id.* at 122-3.

[53] *Id.* at 131 ("With all offenders, in particular the nonemotional type, the interrogator must convince the suspect that not only has guilt been detected, but also that it can be established by the evidence currently available or that will be developed before the investigation is completed.").

[54] *Id.* at 132.

[55] *Miranda* mandated that, prior to any interrogation, the police tell suspects that they have the right to remain silent, that anything they say can be used against them in subsequent legal proceedings, that they have a right to counsel during the interrogation and that counsel will be appointed for them prior to the interrogation if they desire legal counsel but cannot afford one. 384 U.S. at 479.

[56] Michael Wald, et al., *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1552 (1967).

[57] *See, e.g.*, Connecticut v. Barrett, 479 U.S. 523 (1987) (suspect stated that he would not give a written statement in the absence of counsel, but would be willing to make oral statements without a lawyer present); North Carolina v. Butler, 441 U.S. 369 (1979) (suspect said he understood rights but insisted he would not sign any form).

[58] *See, e.g.*, Duckworth v. Eagan, 492 U.S. 195, 198 (1989) (suspect given warnings form which included the statement "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.").

direct questions and the general prohibition on physically coercive interrogation practices.[59] As with undercover work and pretextual searches, the courts generally have not interfered with these practices.[60] The Supreme Court has implicitly upheld, against Fifth Amendment challenges, the two scenarios just described—lying about the admissibility of oral statements and the availability of an attorney.[61] Other Supreme Court decisions have found nothing unconstitutional about police statements that misrepresent the real focus of the interrogation[62] or distort the amount of incriminating evidence against the accused.[63] Only if such trickery takes place after formal charging is it likely to be prohibited, and here the source of the prohibition is not the Fifth but the Sixth Amendment, which has been construed to bar interference with one's right to counsel once the "criminal prosecution" to which the Sixth Amendment refers has commenced.[64]

The predicate for the Court's Fifth Amendment decisions is that so long as a person is told of and understands the right to remain silent and the right to counsel, any ensuing statement he makes is admissible unless "coerced" by the police.[65] The Court appears to believe that trickery and deception of the type de-

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[59] According to Richard Leo, who has studied police interrogation techniques closely, "[t]he use of deception has, in effect, become a functional alternative to the use of coercion." Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME, L. & SOC. CHANGE 35, 37 (1992).

[60] *See generally*, Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 429-32 (1996) (providing citations to lower court cases refusing to exclude confessions obtained after suspect is exposed to lies about the strength of the case, fabricated evidence, suggestions that the defendant is not culpable, and lies about the identity of the interrogator and other circumstances of the interrogation).

[61] *See* cases cited *supra* notes 57 & 58.

[62] Colorado v. Spring, 479 U.S. 564 (1987).

[63] Oregon v. Mathiason, 429 U.S. 492 (1977) (police falsely stated that suspect's fingerprints had been found at the crime scene); Frazier v. Cupp, 394 U.S. 731, 738 (1969) (police falsely state that co-defendant has confessed and also tell defendant, before he has confessed, that "[y]ou couldn't be in any more trouble than you are now.").

[64] *See* Massiah v. United States, 377 U.S. 201 (1964) (banning undercover questioning after formal charging). The Court has also indicated, in dictum, that post-charge lying about an attorney's attempt to see the suspect violates the Sixth Amendment, Patterson v. Illinois, 487 U.S. 285 (1988), and has assumed without deciding that undercover contact that disparages counsel is a violation of the Sixth Amendment (but may also be harmless error). United States v. Morrison, 449 U.S. 361 (1981).

[65] *See* WHITEBREAD & SLOBOGIN, *supra* note 20, at 404 (discussing distinction between trickery and coercion).

scribed above is not coercive; rather, as William Stuntz has explained, it merely leads "the suspect either to forget or temporarily ignore the fact that he is making incriminating disclosures to people who are trying to convict him of a crime."[66] To use the language of Inbau, Reid, and Buckley, these techniques are not "apt to make an innocent person confess."[67]

II

WHICH POLICE LIES ARE O.K.?

The remainder of this Article tries to answer this question: Which, if any, of these lies are justifiable? In addressing this issue, this section takes a philosophical perspective, without reference to constitutional doctrine. Part III then explores the extent to which the rules suggested by moral philosophy conflict with the Supreme Court's rules regarding police use of deception.

Philosophers have come up with many different approaches to lying. At one extreme are Kant and St. Augustine, who argued that no lie is justified.[68] At the other is Machiavelli, who seemed to believe that lies that achieve their intended end are to be applauded.[69] There are obviously several positions between these two.

In recent times, probably the best known treatment of lying and its justification is the work by the moral philosopher Sissela Bok.[70] Because her framework for evaluating deception throws

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[66] William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 817 (1989).

[67] INBAU ET AL., *supra* note 48, at xvii.

[68] According to Bok, St. Augustine "claimed that God forbids all lies and that liars therefore endanger their immortal souls." BOK, *supra* note 10, at 35. *See also id.* at 267-71 (appendix containing excerpt from St. Augustine, *Against Lying*, *in* TREATISES ON VARIOUS SUBJECTS (R.J. Deferrari ed., 1952)). Kant categorically stated, "[t]ruthfulness in statements which cannot be avoided is the formal duty of an individual to everyone, however great may be the disadvantage accruing to himself or to another." IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY 347 (Lewis White Beck ed., 1949).

[69] MACHIAVELLI, THE PRINCE 64 (1950) ("[A] prudent ruler ought not to keep faith when by so doing it would be against his interest . . . as [men] would not observe their faith with you, so you are not bound to keep faith with them. . . . [I]t is necessary to be able to disguise this character well, and to be a great feigner and dissembler. . . .").

[70] The particular focus of this article will be Bok's book, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE, *supra* note 10, which was published in 1978 and republished by Vintage Books in 1989. Page references will be to the 1978 version. Other work by Bok that covers or touches on the subject of lying includes SISSELA BOK, ON THE ETHICS OF CONCEALMENT AND REVELATION (1982); Sissela Bok, *Can*

considerable light on the nature and moral viability of police lying, this Article will rely primarily on her work, although the views of other philosophers and commentators will occasionally be noted. No attempt will be made here to justify Bok's framework within the broader context of philosophy or to prove that it is the best approach to analysis of deception.[71] Rather, just as many authors before me have relied on her work to explore issues as diverse as lawyer ethics,[72] international canons,[73] administrative law,[74] and the practices of journalists,[75] I use her writings as a way of getting at the moral dilemmas posed by police lying.

A. Bok's Framework

Bok begins by asserting that lies require a reason.[76] They require a reason because, more so than truth, they have routine deleterious effects on the hearer of the statement, the maker of the statement, and society at large. The duped, she notes, often "feel wronged . . . [and] are wary of new overtures."[77] Their autonomy is also denigrated by the lying, because they have been deprived of the ability "to make choices for themselves according

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Lawyers be Trusted?, 138 U. PA. L. REV. 913 (1990); Sissela Bok, *The Ethics of Giving Placebos*, 231 SCI. AM. 17 (1974).

[71] For criticism of Bok, see David Good, *Individuals, Interpersonal Relations and Trust*, *in* MAKING AND BREAKING COOPERATIVE RELATIONS 31 (Diego Gambetta ed., 1988).

[72] *See, e.g.*, Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1 (1992); Thomas L. Shaffer, *On Lying for Clients*, 71 NOTRE DAME L. REV. 195 (1996); R. George Wright, *Cross-Examining Legal Ethics: The Roles of Intentions, Outcomes, and Character*, 83 KY. L.J. 801 (1995); Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1 (1995); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 33 WM. & MARY L. REV. 1303 (1995).

[73] Rachael E. Schwartz, *Chaos, Oppression, and Rebellion: The Use of Self-Help to Secure Individual Rights under International Law*, 12 B.U. INT'L L.J. 255 (1994); Geoffrey R. Watson, *The Death of Treaty*, 55 OHIO ST. L.J. 781 (1994).

[74] Richard Craswell, *Regulating Deceptive Advertising: The Role of Cost-Benefit Analysis*, 64 S. CAL. L. REV. 549 (1991); Brian C. Murchison, *Misrepresentation and the FCC*, 37 FED. COMM. L.J. 403 (1985).

[75] Lyrissa C. Barnett, Comment, *Intrusion and the Investigative Reporter*, 71 TEX. L. REV. 433 (1992).

[76] BOK, *supra* note 10, at 32 ("I believe that we must at the very least accept as an initial premise Aristotle's view that lying is 'mean and culpable' and that truthful statements are preferable to lies in the absence of special considerations. This premise . . . places the burden of proof squarely on those who assume the liar's perspective.").

[77] *Id.* at 21.

to the most adequate information available."[78] As to the negative effects of lying on those who perpetrate the lie, Bok points out how lying can become an intrinsic part of one's personality: "[p]sychological barriers wear down; lies seem more necessary, less reprehensible; the ability to make moral distinctions can coarsen; the liar's perception of his chances of being caught may warp."[79] Further, others will trust the liar less. Also, "[p]aradoxically, once his word is no longer trusted, he will be left with greatly *decreased* power—even though a lie often does bring at least a short-term gain in power over those deceived."[80] Finally, lying harms society:

> The veneer of social trust is often thin. As lies spread—by imitation, or in retaliation, or to forestall suspected deception—trust is damaged. Yet trust is a social good to be protected just as much as the air we breathe or the water we drink. When it is damaged, the community as a whole suffers; and when it is destroyed, societies falter and collapse.[81]

The theme that lying threatens the social fabric has been a particular emphasis of many other commentators as well.[82]

Bok next postulates an apparatus for assessing the reasons that might be given for lying. Her principal assertion here is that lies that cannot be justified *publicly* are not justifiable.[83] Furthermore, she asserts, the "public" which assesses the lie must be composed of "reasonable persons" taken from all walks of life, including "those representing the deceived or others affected by the lie;"[84] this public assessment is particularly important where lying by the government is involved.[85] Finally, she develops

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[78] *Id.* at 22.

[79] *Id.* at 27.

[80] *Id.*

[81] *Id.* at 28.

[82] *See, e.g.*, Carol M. Rose, *Trust in the Mirror of Betrayal*, 75 B.U. L. REV. 531, 540 (1995) (discussing the poisonous atmosphere created by a lack of trust); Noelie Rodriguez & Alan Ryave, *Telling Lies in Everyday Life: Motivational and Organizational Consequences of Sequential Preferences*, 13 QUALITATIVE SOC. 195 (1990) (noting the social damage caused by white lies and expedient lies).

[83] BOK, *supra* note 10, at 97 (borrowing from JOHN RAWLS, A THEORY OF JUSTICE 133 (1971)).

[84] *Id.* at 100.

[85] *Id.* at 101 ("In concrete problems of any gravity . . . publicity requires us to go beyond merely turning to our conscience or to imagined others for the justification of our lies. This is especially true for deceptive *practices*, as in government, where those who deceive occupy positions of trust.").

three steps these reasonable persons should pursue in assessing the worth of the lie.

First, those who evaluate the lie must "look carefully for any alternatives of a non-deceptive nature available to the liar."[86] They should only begin to consider excuses for a lie after determining that no truthful statement would do.

If no such alternatives present themselves, the second step involves "weighing . . . the moral reasons for and against the lie."[87] Bok identifies four conceivable justifications for lying: (1) preventing harm; (2) producing benefit; (3) fairness, which includes giving people what they deserve, correcting injustice, and simple revenge; and (4) veracity itself, in the sense that telling a lie may protect the truth.[88] However, Bok is very leary of any of these justifications, given the ease with which a liar can manipulate these concepts to justify any lie. Thus, she emphasizes that reasonable persons evaluating a lie should "share the perspective of the deceived and those affected by lies."[89] They should "be much more cautious than those with the optimistic perspective of the liar [and] value veracity and accountability more highly than would individual liars or their apologists."[90]

Third, in evaluating the moral reasons for and against the lie, reasonable persons should be particularly attentive to identifying its potential ill effects on those not directly involved in the lie:

> [U]nder all circumstances, these reasonable persons would need to be very wary because of the great susceptibility of deception to spread, to be abused, and to give rise to even more undesirable practices. . . . Spread multiplies the harm resulting from lies; abuse increases the damage for each and every instance. Both spread and abuse result in part from the lack of clear-cut standards as to what is acceptable. In the absence of such standards, instances of deception can and will increase, bringing distrust and thus more deception, loss of personal standards on the part of liars and so yet more deception, imitation by those who witness deception and the rewards it can bring, and once again more deception.[91]

The potential for spread and abuse, Bok writes, is particularly

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[86] *Id.* at 109.

[87] *Id.*

[88] *Id.* at 78-86 (describing the four different justifications).

[89] *Id.* at 103.

[90] *Id.*

[91] *Id.* at 104.

likely when the lies are told by people in power.[92] Thus, she concludes, reasonable persons need to construct the "clearest possible standards and safeguards in order to prevent these [government] liars from drifting into more and more damaging practices—through misunderstanding, carelessness, or abuse."[93]

B. Bok's Lying Scenarios

The rest of Bok's book applies this analytical framework to various recurring situations. Those most pertinent to police work are what she calls "Lies in a Crisis," "Lying to Liars," and "Lying to Enemies."[94] The theme with respect to each of these scenarios is similar. While lies may occasionally be permissible in these situations, the danger that the exception will swallow the rule (against lying) counsels in favor of very narrow interpretations of each.

Of all lies, Bok finds lies in a crisis to be the most justifiable. The classic crisis, of course, occurs when life is imminently threatened.[95] Telling a lie to prevent such harm is justifiable because little time exists to consider alternatives, the negative effects of the lie are outweighed by the fact that an innocent life will be saved, and those effects are negligible in any event.[96] Lies of this type are so extraordinary that they "would neither be likely to encourage others to lie nor make it much more likely that the person who lied to save a life might come to lie more easily or more often."[97] Whether lies could be told to avert less immediate or less significant harms would depend upon a number of factors, especially whether the use of force is the only alternative.[98] In general, however, Bok resists enlarging this exception without a careful public assessment of the claim of crisis from the perspective of the deceived.[99] Liars making this claim, she cautions, can be counted upon to exaggerate the threat, its

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92 *Id.* at 105.

93 *Id.*

94 A fourth category, "Lies for the Public Good," *id.* ch. 12, could conceivably apply to investigative lies, but is not as directly relevant as the three noted in the text.

95 *Id.* at 108-09.

96 *Id.* at 109.

97 *Id.*

98 *Id.* at 107-22 (Chapter Eight).

99 *Id.* at 113-19 (describing how the "test of publicity" is needed to carry out "line-drawing").

immediacy, or its need.[100]

Put in terms of Bok's four possible excuses for lies, lying in a crisis is best seen as a way of preventing harm and to a lesser extent as a means of producing benefit. In contrast, Bok says that the claim that lying to liars is permissible derives primarily from a fairness or "just deserts" excuse. For instance, some philosophers, such as Hugo Grotius, believe that lying to liars is justified because the latter have lost their right to the truth.[101] Although Bok acknowledges this claim as persuasive on the surface, she ultimately agrees with St. Augustine that to lie simply because the recipient is a liar is unjustifiable on fairness grounds.[102] St. Augustine held that lying to combat lying would be like countering robbery with robbery, sacrilege with sacrilege.[103] Bok adds that even if liars do not deserve the truth, *their* character is not all that is at issue. As Bok says, to justify lying simply because the recipient is a liar "would be to make oneself entirely dependent on the character deficiencies in others, and to stoop always to the lowest common denominator in reciprocating lies for lies."[104] Further, of course, we may be wrong about when someone is lying. For this reason, lying to people we think are liars is "likely to invite vast increases in actual deception and to escalate the seriousness of lies told in retaliation, . . . a notion [that] would not stand up well under the test of publicity."[105]

Lying to a liar might also be grounded on the veracity excuse to the extent lying is meant to reveal the mendacity of the recipient of the lie. Here again, Bok agrees with St. Augustine, who stated that "mendacity is best rebutted, not imitated."[106] Truthful alternatives generally exist for exposing a lie. Even if there are none, the damage caused to the character of the liar and society at large by routinely lying to people thought to be liars out-

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[100] *Id.* at 119-22 (speaking in particular of the need for professionals who routinely experience emergency situations to think through the need for lying).

[101] 3 HUGO GROTIUS, ON THE LAW OF WAR AND PEACE, chs. I & II (Francis W. Kelsey et al. trans., Clarendon Press 1925) (1646).

[102] SAINT AUGUSTINE, AGAINST LYING, *in* TREATISES ON VARIOUS SUBJECTS 125-26. While Bok would part with St. Augustine when the one lied to has precipitated a crisis of the type just described, this type of lying would be justified not on fairness or veracity grounds but to prevent the crisis.

[103] *Id.* at 125-26.

[104] BOK, *supra* note 10, at 127.

[105] *Id.*

[106] AUGUSTINE, *supra* note 102, at 127.

weighs the veracity excuse.[107]

The claim that lying to enemies is justifiable is closely related to the previous two types of claims. An enemy often precipitates crises and will often lie to win. In terms of excuses, lying to an enemy might both prevent harm and promote fairness. While Bok is more hospitable to this claim, she again argues for caution. Both the fairness and prevention of harm excuses are, in her mind, very prone to abuse.

As Bok notes, the fairness excuse takes on added allure here because not only is an enemy usually a liar but he is also perceived as bad—outside the "social contract" as Bok puts it[108]—and thus arguably less worthy of truthfulness. Yet, as Bok points out, the identification of enemies, like the identification of liars, is a treacherous task, easily tainted by bias and prejudice.[109] Further, many liars invoking this excuse tend to avoid the public scrutiny necessary to justify the lie. For these people, "paranoia governs them to such an extent that they imagine that the public itself constitutes the conspiracy they combat."[110]

Lying to enemies to prevent harm raises the same types of concerns. To the liar, enemies are too readily perceived. Furthermore, even when enemies are clearly identified, lies to them may be heard by and can deceive friends as well, with a consequent serious loss of trust when the deception is unveiled. In particular, Bok points out that "[w]hen a government is known to practice deception, the results are self-defeating and erosive."[111] Here she quotes Hannah Arendt, the astute observer of totalitarian states, who argues that government deceit over the long run results in "the absolute refusal to believe in the truth of anything, no matter how well it may be established."[112] Eventually, it destroys "the sense by which we take our bearings in the real world."[113]

Bok does concede, consistent with the discussion on lies in a crisis, that "[w]henever it is right to resist an assault or a threat

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107 BOK, *supra* note 10, at 127-29.

108 *Id.* at 138.

109 *Id.* at 139 (speaking of the "casual way in which enemyhood is so often bestowed" and calling for "clear and public evidence" of enemy status).

110 *Id.* at 139.

111 *Id.* at 142.

112 Hannah Arendt, *Truth and Politics*, *in* PHILOSOPHY, POLITICS AND SOCIETY 104, 128 (Peter Laslett & W.G. Runciman eds., 1967) (Third Series).

113 *Id.*

by force, it must then be allowable to do so by guile."[114] Thus, says Bok, deceiving a kidnapper may be justifiable when deceiving enemies in business is not.[115]

Moreover, in a passage that has direct implications for police lying, Bok is willing to countenance lying to an enemy in one nonemergency situation: when a public declaration of hostilities against the alleged enemy is made.[116] She reasons that:

> Such open declarations lessen the probability of error and of purely personal spite, so long as they are open to questioning and requests for accountability . . . . [T]he more openly and clearly the adversaries, *such as criminals*, can be pinpointed, and the more justifiable, therefore, the criteria for regarding them as hostile, the more excusable will it be to lie to them if honesty is of no avail.[117]

She goes on to say:

> If the designation of a foe is open, as in a declaration of war, deception is likely to be expected on all sides. While it can hardly be said to be *consented* to, it is at least known and often acquiesced in. But the more secret the choice and pursuit of foes, the more corruptible the entire process, as all the secret police systems of the world testify. There is, then, no public control over who counts as an adversary nor over what can be done to him. The categories of enemies swell, and their treatment grows increasingly inhumane.[118]

Even with such an open declaration, however, Bok worries that the public will be swept up by the mere fact that hostilities have been declared and not remain reasonable and objective in evaluating whether lying is permissible. Because such declarations do not "lessen the possibility of joint discrimination by members of a group or society [they] ought therefore to function only in combination with a strong protection of civil rights."[119]

C. Bok and the Police

Overall, Bok makes a provocative case against lying in most instances. Except for lying in imminent crises and lying to publicly declared enemies, most lying is to be avoided.[120] Unfortu-

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114 Bok, *supra* note 10, at 144.

115 *Id.*

116 *Id.*

117 *Id.* (emphasis added).

118 *Id.*

119 *Id.*

120 Other exceptions to the prohibition on lying, not directly relevant here, are

nately, Bok only fleetingly reflects on the applicability of these conclusions to lying by the police. Indeed, with the exception of a brief discussion of the use of unmarked police cars (which Bok believes is permissible if the public agrees),[121] all references from her on that topic have been mentioned. Nonetheless, as the discerning reader will have noticed, her analysis is rich in implications for police deceit, and in particular investigative lying. These implications will be sketched out briefly here and then discussed in detail in Part III.

First, we must inquire into whether the reasons for Bok's general injunction against lying make sense in the law enforcement context. Bok's premise that lying should generally be avoided is based on the assertion that deceit harms the dupe, the liar, and society. That assertion tends to be borne out by social science research indicating that in many situations trust is crucial to one's own sense of self-worth and the formation of relationships.[122] But does *investigative lying by the police* produce these three harms to any significant extent?

Very likely it does, even when one focuses solely on investigative lying that is viewed as necessary because truthful, noncoercive alternatives are not available.[123] First, almost by definition, deception during undercover operations, searches and seizures, and interrogation diminishes the dignity and autonomy of the dupe. In each of these situations, the dupe will be making decisions about whether to disclose embarrassing or incriminating knowledge or whether to allow access to private areas while lacking information that is potentially highly relevant to such decisions (e.g., the identity or motives of the liar or the scope of one's rights).

To a Kantian, this fact alone might justify a ban or substantial limitations on investigative lying. To one of a more utilitarian

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inter alia some types of "white lies" and some types of deception in social science research. *See id.* chs. 5 & 13.

121 *Id.* at 99.

122 *See, e.g.*, BERNARD BARBER, THE LOGIC AND LIMITS OF TRUST 11-14 (1983) (describing Harold Garfinkel's work finding that trust is a critical aspect of individual relationships); Julian B. Rotter, *Interpersonal Trust, Trustworthiness, and Gullibility*, 35 AM. PSYCHOLOGIST 1 (1980) (those who trust others are less likely to lie, cheat, or steal and are likely to be better adjusted).

123 As indicated earlier, *supra* text accompanying note 86, Bok would not permit lying when a good truthful alternative exists. The assumption here is that no such alternative exists (e.g., probable cause for a search warrant cannot be obtained, or the interviewee won't talk), or that the alternative would be difficult to achieve.

bent, however, greater harm from investigative lying will probably need to be identified to outweigh the benefit that comes from deceitful police work that is necessary (i.e., for which there is no truthful, noncoercive alternative). In other words, the assessment of costs associated with investigative lying must focus on the second and third potential harms Bok identifies—those inflicted on the liars (in this case the police) and on society at large.

The latter costs are likely to be the heaviest. There is no doubt, for instance, that the deceit connected with covert investigation can undermine trust in government not only in those who are targets of the deceit but among those duped by it. Typically, undercover work is relegated to the underworld and is rarely exposed to the rest of us.[124] When it is, however, the feeling of betrayal can be significant. For example, when citizens of a midsize midwestern community discovered that a local executive had been an undercover spy for an FBI investigation of his company, many were outraged. As a reverend stated in explaining the reactions of his congregation to the news:

> The biggest feeling here right now is a sense of being violated. It's as though I became a good friend of your family, came over to your house all the time, then started rifling through your drawers. . . . It's not an intruder, though. It's someone who's trusted—by a company and by an entire community.[125]

A member of the same church condemned the federal government with the words "[t]hey're about as underhanded as anybody."[126]

Knowledge of undercover work not only undermines trust in

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[124] Indeed, the police resist such exposure out of fear that revelation of their informants would destroy their information network. VAN DUIZEND, *supra* note 29, at 24 ("Law enforcement officers and prosecutors prefer to forgo the possibility of a conviction rather than to jeopardize the safety of informants by divulging their identity.").

[125] Carl Quintanilla & Anna D. Wilde, *You Dirty Rat, Says Decatur, Ill., of Mole at Archer-Daniels*, WALL ST. J., July 13, 1995, at A1 (quoted in Tracey Maclin, *Informants and the Fourth Amendment: A Reconsideration*, 74 WASH. U. L.Q. 573, 575 n.6 (1996)).

[126] *Id.* Although in some ways the underlying situation is not analogous, the criticism of and $5.5 million punitive award against the American Broadcasting Corporation for planting its reporters as workers in various Food Lion stores is another recent demonstration of the hostility with which undercover operations might be greeted. *See* Dorothy Rabinowitz, *ABC's Food Lion Mission*, WALL ST. J., Feb. 11, 1997, at A20 ("Many journalists continue to believe that they are involved in a calling so high as to entitle them to rights not given ordinary citizens, among them the right to deceive without consequence.").

government but can be deeply inimical to a democratic society. Carried to its "Big Brother" extreme, as it has been in some countries, government snooping chills speech, association, and the general openness of society.[127] Although the possibility that one's acquaintance is a government agent is a risk the Supreme Court tells us we must assume,[128] empirical research strongly suggests that it is not a risk most people *want* to assume.[129]

Just as clear is the sense of betrayal, as well as outright hostility, on the part of those subjected to pretextual police actions, reactions which again lead to antipathy not only toward police but also the government they represent. Perhaps one of the most damning examples of this phenomenon is the fact that African Americans in Los Angeles and other urban areas cynically joke about the "offense" of "driving while black."[130] As one court bluntly described the inherent risk of pretextual actions:

> Some police officers will use the pretext of traffic violations or other minor infractions to harass members of groups identified by factors that are totally impermissible as a basis for law enforcement activity—factors such as race or ethnic origin, or simply appearances that some police officers do not like, such as young men with long hair, heavy jewelry, and flashy clothing.[131]

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[127] *See, e.g.*, MARX, *supra* note 13, at 100 ("The duplicity and betrayal inherent in covert operations trades in and debases the trust that is essential to, and characterizes, primary relations.").

[128] *See supra* notes 17 & 18 and accompanying text.

[129] In research that I conducted with Joseph Schumacher, 217 individuals were asked to rate the "intrusiveness" of 50 different police actions on a scale of 1 to 100. Based on their answers, the 50 scenarios were ranked according to intrusiveness, with 1 (looking in foliage in a public park) being the least intrusive and 50 (body cavity search at the border) being the most intrusive. Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society"*, 42 DUKE L.J. 727 (1993). The two "undercover" scenarios—using a chauffeur as an undercover agent and using a secretary as an undercover agent—were ranked 31 and 34 respectively. These rankings were well above those received by other scenarios depicting "non-searches" (e.g., inspecting the exterior of a car (ranked 4) and looking through garbage (ranked 13)). Indeed, the undercover rankings were the statistical equivalent of those associated with search of a car trunk, search of a footlocker found in a car, search of a yacht at sea and search of a garage. *Id.* at 762-63 (Table 3). The latter actions all require probable cause and thus are not risks that we "assume," absent some suspicion of illegal activity.

[130] *See* Peter Arenella, *Foreword: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1262-63 n.73 (1996).

[131] United States v. Scopo, 19 F.3d 777, 786 (2d Cir. 1994) (Newman, C.J., concurring) (quoted in LaFave, *supra* note 33, at 118-19).

The belief that police lie during interrogation can also have harmful effects. As several commentators have pointed out,[132] betrayal in the interrogation room might not only taint the police and society generally but also undermines the effectiveness of interrogation itself. A suspect's discovery that a promise or statement is false might lead to subsequent resistance even to legitimate offers, thus possibly resulting in loss of a confession. On a more systemic level, knowledge that police interrogators lie may make all suspects more reluctant to talk, for fear that police importunings are based on fabrication. A general distrust of police interrogators might even create an unwillingness on the part of *non*suspects to cooperate with authorities.[133]

As a general summary of these points, Maurice Punch's observations are apt:

> [Police] deviance elicits a special feeling of betrayal. In a sense, they are doubly condemned; that is, not just for the infringement itself but even more for the breach of trust involved. Something extra is involved when public officials in general and policemen in particular deviate from accepted norms: "That something more is the violation of a fiduciary *relationship*, the corruption of a public *trust*, of public *virtue*."[134]

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[132] Margaret L. Paris, *Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL. & L. 3, 15-44 (1996) (arguing that if suspects are betrayed during interrogations "[t]he suspect will become embittered and unwilling to enter future relationships of trust, the foundations of democracy will be severely diminished, the government will have acted immorally, and the community will have lost a valuable opportunity to teach the very value that it finds so objectionably lacking in the suspect," *id.* at 44.); Young, *supra* note 60, at 456-71 (arguing that lying by interrogators results in "loss of potential evidence from citizens, obtaining less reliable evidence from citizens, police perjury and falsification of evidence, and obtaining less reliable confessions from suspects and defendants," as well as a loss of systemic and institutional integrity); R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 41 (1981) ("[I]f citizens were commonly questioned by officials about their possible commission of . . . garden variety crimes, such as petty theft and income tax evasion, an unhealthy atmosphere of resentment and distrust would result.").

[133] *See* Stuntz, *supra* note 66, at 824.

> [A] witness who has valuable information may be more reluctant to believe police assurances that he is not "in trouble" if he knows that police sometimes lie to suspects and then use their statements against them in court . . . [Although this is not likely to affect innocent persons], many people are guilty of low-level offenses that are rarely, yet occasionally, prosecuted. Such people may well be more prone to distrust the police than they would be if deception were forbidden, and that distrust is costly whenever the police question them about more serious crimes.

[134] PUNCH, *supra* note 35, at 8 (quoting from Albert J. Reiss, Jr., *Foreword in* ANTHONY E. SIMPSON, THE LITERATURE OF POLICE CORRUPTION ix-x (1977)).

These effects of police deceit are especially likely in communities which routinely interact with the police.[135]

Perhaps less obvious than its effects on the duped and on society is the insidious impact of investigative lying on the police themselves. For the reasons discussed in Part I, police may genuinely believe that this type of lying is morally justified. However, as Klockars has pointed out, "as the police officer becomes comfortable with lies and their moral justification, he or she is apt to become casual with both."[136] Thus, as Bok would predict, police lying feeds on itself.[137] It can also lead to other effects. Barker and Carter assert that "[p]olice lying contributes to police misconduct and corruption and undermines the organizatio[n's] discipline system."[138] In the undercover context, Marx has documented even more dramatic impacts, including accounts of officers whose undercover role is so all-consuming that they become criminals themselves.[139] Police clearly are not immune from the corrupting influence of deceit that Bok describes.

In short, investigative lying can produce significant negative consequences of the type hypothesized by Bok and should therefore, under Bok's scheme, presumptively be avoided even if truthful alternatives are not available. However, this conclusion does not mean that such lying is impermissible in all instances. Recall that the two scenarios in which Bok is most likely to countenance lying involve lies in "crisis" and lying to publicly declared "enemies." Both might occur during police investigation, the first occasionally, the second with some regularity.

The crisis exception might apply, for instance, when police believe they need information to avert harm to themselves or someone else (e.g., a kidnapping situation). Indeed, given the general maxim about the relationship of force and deception subscribed

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135 *Cf.* Tracey Maclin, *Seeing the Constitution from the Backseat of a Police Squad Car*, 70 B.U. L. REV. 543, 574 n.114 (1990) (book review) (citing evidence that people from heavily policed urban areas are more reluctant to help police when they think police are abusing their discretion).

136 Klockars, *supra* note 2, at 543.

137 Jerome Skolnick has even hypothesized that the atmosphere created by judicial condonance of investigative lying, particularly in the interrogation context, directly leads to police perjury under oath. Jerome H. Skolnick, *Deception by Police*, CRIM. JUST. ETHICS, Summer/Fall 1982, at 40, 45.

138 Barker & Carter, *supra* note 1, at 71.

139 MARX, *supra* note 13, at 163-68 (describing how, "[a]s lying becomes a way of life, the agent may become confused about his or her true identity" and "cross over," i.e., commit crimes, or begin to think and act like the criminals being investigated).

to by Bok, lying would be permissible in any situation in which the police are authorized to use physical coercion (e.g., lying to get a suspect to "come in quietly"). At the same time, the crisis exception should not be stretched to cover every effort to apprehend criminals who *might* harm another. Bok, at least, would require some showing of imminent danger to another person's interests before recognizing a crisis. In many cases in which lying to catch a criminal is practiced, police are not even sure their prey is a criminal, much less that harm is imminent.

Of considerably more significance to investigative lying is Bok's "open declaration of hostilities" scenario, the primary exception to the notion that lying to liars and to enemies in non-crisis situations is unjustifiable. As indicated above,[140] Bok herself uses criminals as an example of an "enemy," who if openly pinpointed as such, can be foiled through lying, at least if truthful alternatives do not exist. However, unless applied with caution, this exception too could easily swallow the rule against lying. Recall that, according to Bok, identification of the person as a criminal must be a *public* enterprise, so as to minimize the possibility that he will be the target of personal spite or prejudice. Simply asserting that there is a "war on crime" and handing over to the police discretion to decide who is the enemy in that war (and who is lying about not being one) obviously does not meet Bok's demands in this regard; as she notes, discrimination can only be combatted by removing that discretion through public evaluation.[141] The issue thus becomes how to effectuate this public identification of the criminal.

III

IMPLEMENTING THE PUBLIC IDENTIFICATION PREDICATE

Based on Bok's work, the principle most relevant to analyzing investigative lying seems to be the moral need to identify publicly the "enemy"—the criminal—before engaging in deception. If this public identification occurs, investigative deception that has no good, truthful alternative can be used against the person so identified. If it does not, deception is much less likely to be morally justifiable under Bok's scheme.

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[140] *Supra* text accompanying note 117.

[141] *See supra* text accompanying notes 83-85, 104.

The difficulty arises in operationalizing the public identification idea in the investigative context. Of course, the legislature, presumably through public debate, has already identified the conduct that is criminal (and is therefore "enemy") conduct. However, as suggested in Part II, a public vote authorizing police to use deception to "apprehend criminals" is insufficient because it begs the all-important question of who (as opposed to what) is criminal. At the same time, public debate about the criminality of particular individuals would not only be cumbersome but counterproductive; it would alert the targets to the fact they are under suspicion. The best compromise between these two positions is a requirement of *ex ante* review by a judge, analogous to what occurs in the warrant process. After explaining this conclusion, the rest of this Article applies it to deception used in undercover operations, searches and seizures, and interrogation.

A. The Case for Judicial Review as a Proxy

One way to avoid the inefficiency and counterproductiveness of a public debate about particular suspects is to focus the discussion on particular police "practices." This is, in fact, the approach Bok suggests with respect to use of unmarked police cars. She asserts that the propriety of this investigative technique should be publicly debated and that it should be permitted only if a consensus develops in its favor. If the technique is eventually adopted, not only does the public debate enhance its acceptability, but it ensures that "those who still choose to break the speed laws will be aware of the deceptive practice and can decide whether to take their chances or not."[142]

However, in contrast to use of unmarked police cars, many deceptive police practices cannot be discussed without reference to what the police know about the target of the practice. The public's response to decoy stings, pretextual stops, or trickery during interrogation is likely to vary greatly depending upon whether these practices are used randomly or aimed at people thought to be guilty. Should the police be able to pose as door-to-door encyclopedia salespeople? The answer might be yes if they use the ruse to gain entry into the house of a person suspected of kidnapping children but no if they simply go door-to-door to see what they can find. Should the police be able to stop a car for violation of a minor traffic law that is usually not enforced to get a

[142] BOK, *supra* note 10, at 99.

peak into the backseat or consent to a full search? The answer might be yes if the police suspect the car driver of being a drug courier but no if the police stop any violators they "feel like" stopping. Should police be able to lie to someone about finding his fingerprints at the scene of the crime to scare him into confessing? The answer might be yes if he's arrested but no if investigators with few or no leads come to the person's house and make the statement simply to see how he'll respond.

To the extent the public cares about all its members (including, as Bok requires, those who will be duped), it will want to take steps that limit investigative lying to those likely to be criminals. If a "practice" can be defined to meet that goal, then no further guidance is necessary. If, on the other hand, the practice as defined could be used against anyone, then some further effort at ensuring that it will be employed only against authentic suspects should be attempted.

One method of doing so would be to say to the police: "Make sure you use this technique only against suspects." However, leaving identification of the criminal up to the police—those who will do the lying—violates Bok's notion of public debate among reasonable persons.[143] This would be so even if we added a requirement that the individual officer seek a second opinion from another officer. As she notes, "[m]ore than [mere] consultation with chosen peers is needed whenever crucial interests are . . . at stake."[144] People of all allegiances should be consulted so as to avoid the impact of prejudice and personal spite on the decision to deceive.

We are thus again back to the original dilemma: how to obtain public input about who is to be considered a criminal-enemy, when public input would be cumbersome and might alert the enemy. Another answer is to appoint a proxy for the public, who would act as a check on police discretion on the public's behalf. Although not an entirely satisfactory solution, the proposition defended here is that the magistrate—the person who, in our current system, makes probable cause decisions and issues search and arrest warrants—can fulfill this role.

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[143] Except when, as in Bok's unmarked car example, the publicly authorized practice is such that suspects can be identified with little or no exercise of discretion. *Id.* In that example the entire public is ("willingly") duped by the deception but only speeders are affected by it. Non-speeders will not be stopped, and thus will not feel betrayed or that the government abusing its powers of deception.

[144] *Id.* at 97 (using the decision to invade the Bay of Pigs as an example).

One must first anticipate the argument that, if a magistrate is a proxy for anything, it is for law enforcement rather than the public. This point cannot be lightly dismissed, for judicial rubber-stamping does exist.[145] At the same time, even a simple requirement that the officer explain the need for deception to someone who is not in front-line law enforcement should have some of the effect intended by Bok's public debate requirement.[146] Further, to the extent a practice can be debated in the abstract (e.g., the efficacy of fake-fence operations or whether prosecutors should be permitted to lie to suspects[147]), the judicial decision can be informed by that debate. At bottom, however, the best answer to this complaint might simply be that judicial review is better than no review and is the only reasonable way of implementing, in individual cases, Bok's principle that criminals be identified from a perspective other than the liar's.[148]

Furthermore, the involvement of a judge should assure the public that deceit by the executive branch is cabined. The fact that a judge, presumptively divorced from law enforcement, has signed off on a particular use of investigative lying should extinguish or at least significantly diminish any feelings of betrayal. Indeed, its effect might be analogous to the way in which a warrant guarantees the propriety of overt police actions.[149] For instance, the citizens described earlier who were outraged over the executive spy might have been more understanding and even approving if a judge had sanctioned the spy's infiltration of the company based on a probable cause finding that criminal activity was taking place and that other methods of investigation had or were likely to fail.

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145 *See* NCSC report, *supra* note 29, at 47-49 (describing tendency of some officers to seek out certain magistrates).

146 *Cf. id.* at 148-49 (finding that, in the cities studied, the warrant requirement made the police "at least contemplate" the probable cause requirement before a search, and thus induced a higher standard of care than would otherwise be used). Indeed, one might assert that if a judicial check is good enough for Fourth Amendment purposes, it ought to be sufficient in this context.

147 More is said about these issues later in this article. *See infra* text accompanying note 150 (sting operations) & note 184 (prosecutorial lying).

148 Another proxy for public opinion is a group of citizens organized to make ex parte decisions. If such a system could be made practical (i.e., efficient and confidential), it might be preferable to a judge, although the latter would presumably be more expert at identifying "enemies" (i.e., finding probable cause).

149 The warrant assures "the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." United States v. Chadwick, 433 U.S. 1, 9 (1976).

The assumption I will make, then, is that the judicial or "official" identification of a person as a criminal is both necessary and sufficient to meet Bok's demand for public debate as to whether a person is an "enemy." If this official identification occurs (the cause showing), then the police are morally justified in using deceit to gather evidence from the identified individual, at least when good truthful alternatives are not available (the necessity showing). If, on the other hand, the judge is not willing to label the person a suspect, or finds that deceit isn't necessary to investigate him further, then deception would not be permissible. The concrete implications of this official-identification predicate are several.

B. Distinguishing Passive and Active Undercover Work

Consider first the implications of the official identification idea for undercover work. To understand these implications, it is useful to divide covert investigative techniques into two types: passive and active. Passive covert investigation would not require judicial authorization, whereas active undercover work would.

Passive undercover operations are those which merely provide people with the opportunity to commit the crime, without importuning any particular person. Posing on a street corner as a prostitute waiting for a john is an example of a passive operation, as is putting out the word that cocaine can be bought in a particular alley or that stolen property can be sold at a specified location. These types of passive-undercover operations *can* be meaningfully debated in the abstract: should citizens be tempted by police posing as prostitutes, drug dealers, or fences? If it were determined, after such debate, that a certain kind of baiting operation is or may be efficacious,[150] any particular operation of that kind need not be preceded by judicial authorization, since people who

[150] It is worth noting that if a true public debate about these stings did occur their use might be significantly curtailed, in light of empirical work showing that they do not significantly decrease crime and usually end up nabbing people who have been caught before, using overt (i.e., truthful) methods. *See* Carl B. Klockars, *Police and the Modern Sting Operation*, *in* CONTROVERSIAL ISSUES IN CRIME AND JUSTICE 95, 106 (Joseph E. Scott & Travis Hirschi eds., 1988) (pointing out that in only one out of five cities in which the efficacy of federally funded sting operations was studied was there a statistically significant decrease in crime during the time of the sting operation, and in one of the five there was a statistically significant increase in crime; further, while those who were arrested as a result of the sting had prior records, their previous arrests were effected through traditional means). *See generally*, *supra* note 30, at 457-59.

take the bait are likely to be criminals. Like the use of an unmarked police car to catch speeders, the only people against whom the police intervene are those they know to be committing crime. Abuse of discretion and the potential for betraying innocent people and damaging citizen trust in government are minimized.

These potential harms are much greater, however, when the undercover operation takes on an active mode by going after a specific target or targets thought to be criminal rather than seeking to lure criminals out of the general population.[151] The propriety of infiltrating a particular organization or establishing an intimate relationship with a particular individual cannot be the subject of an abstract public debate. Moreover, there is no guarantee that the direct impact of such covert deception will be visited only on those who are clearly criminals, making the potential for the discrimination that Bok fears much greater. Thus, where active undercover operations are contemplated, judicial authorization should be obtained. The police should not be able to use such techniques unless the public, in the form of the judge, decides that good reason to do so exists and that more straightforward methods are not likely to work.[152]

These suggestions are not foreign to our legal system, despite the fact that judicial decisions to date have been unwilling to contemplate them. The FBI itself requires *ex ante* review of covert operations, albeit solely on an internal basis, to ensure they occur only when "there is a reasonable indication" that the target is involved in illegal activity (active cases) or they are "structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity" (passive cases).[153] The FBI's rules also recognize a necessity principle, by requiring a showing that the operation will "obtain information or evidence necessary for paramount prosecutive purposes."[154]

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[151] Gary Marx has made a similar distinction between "light" and "deep" undercover operations. The former he characterizes as "[o]perations directed against persons who have behaved autonomously, where the opportunity for self-selection is maximized, where the nature of the criminal activity is clear, and where the undercover agent's role is passive, or at least, not highly facilitative. . . ." MARX, *supra* note 13, at 205.

[152] For a similar proposal, *see id.* at 194.

[153] *Guidelines on FBI Undercover Operations* (Dec. 31, 1980), *reprinted in* S. REP. NO. 97-682, at 55 (1982).

[154] *Id.* at 54.

Further, the distinction between passive and active undercover operations jibes with the privacy notions that theoretically underlie Fourth Amendment jurisprudence. If the police merely set out a "honey pot,"[155] they are likely to discover only criminal aspects of a person's life.[156] If, on the other hand, they use covert operations to surveil a person's everyday actions and learn his or her thoughts, they are practicing a significant invasion of privacy which, like electronic surveillance,[157] should be regulated judicially, both in cause and necessity terms.[158] The proposal would also limit the application of the entrapment doctrine which, as many have pointed out,[159] is an extremely cumbersome way of regulating undercover operations (to the extent it regulates at all). In passive cases, that doctrine would still be rele-

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155 This is the descriptive phrase used by Melvin Weinberg, one of the instigators of the ABSCAM sting that resulted in the arrest of several congresspeople. *See* United States v. Kelly, 539 F. Supp. 363, 366 (D.D.C. 1982).

156 The nature of the object discovered during a police action has heavily influenced the degree of Fourth Amendment protection. *See, e.g.*, United States v. Place, 462 U.S. 696, 707 (1983) (dog sniff of luggage not a search because only detects contraband); United States v. Jacobsen, 466 U.S. 109, 129 (1984) (government replication of private intrusion into a package containing only contraband not a search). Indeed, the distinction advanced here has a long-established pedigree. *See, e.g.*, James B. White, *The Fourth Amendment as a Way of Talking About People: A Study of* Robinson *and* Matlock, 1974 SUP. CT. REV. 165, 230 (discussing a standard under which "police spying" would be permitted only of those who "express to strangers a willingness to engage in criminal activity.").

157 The federal wiretapping statute, applicable nationwide, provides that before a wiretap order may issue a judge must find both traditional probable cause that evidence of criminal activity will be obtained through the wiretap and cause to believe that "other investigative procedures have been tried and failed or [that] they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(3) (1995). A similar standard might work well in connection with active undercover activity.

158 I have developed this point elsewhere, Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 103-106 (1991), but was certainly not the first to do so. *See, e.g.*, Daniel Rothenberg, *The Police Detection Practice of Encouragement:* Lewis v. United States *and Beyond*, 4 HOUS. L. REV. 609, 618-19 (1967) ("When the police encourage they are 'searching' for a crime[,] and doing so without proper grounds is an improper interference with a person's right to be free from unreasonable searches and seizures of the person.").

Note that, if judicial review of this sort is obtained, undercover operations against a formally charged defendant would be permitted, a practice which Sixth Amendment law currently prohibits. However, it may be that most judges would not sanction post-indictment undercover work, if only because the government already has developed its case using other methods. *See infra* text accompanying notes 179-180.

159 *See, e.g.*, Louis Michael Seidman, *The Supreme Court, Entrapment and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111, 128 (arguing that an entrapment defense, enforced through jury decision-making, is a very inefficient way of regulating government inefficiency).

vant, but in all other cases the pertinent inquiry would now be whether appropriate authorization was sought, not whether there was predisposition.[160]

C. *Curtailing Pretextual Actions*

Ex ante judicial authorization would also be required for deceptive searches and seizures. As with active undercover operations, a search or seizure requires the police to target a particular individual. Thus, police should not be able to use deception to effectuate such an action unless the target has been identified as a potential criminal by the public's proxy, the judge.

This second proposal is in some ways more radical than the previous one, since in effect it would eliminate almost all deception in connection with overt searches and seizures. In situations in which the police misrepresent their authority (e.g., by saying they do not need a warrant when in fact they do), they usually lack sufficient suspicion to authorize their action. Assuming so, a judge is unlikely to find the target is a criminal-enemy to whom police can lie. Pretextual actions misrepresenting the motivations of the police would also be significantly curtailed. Because the latter are also usually based on hunches rather than articulable suspicion approval of a pretextual action would seldom be sought and, if sought, would seldom be granted.

As indicated earlier,[161] the first result conforms with the caselaw, while the second does not. Yet a virtual ban on pretextual actions is not only more consistent with Bok's scheme, it is also more consonant with the Fourth Amendment, in two ways. First, it adheres more closely to the implicit requirement that searches and seizures be based on cause to believe evidence of crime will be found.[162] In the typical pretextual situation, such cause does not exist or exists only with respect to evidence or areas which are not the real targets of the police action. Second, because it inhibits stops based on minor infractions, the proposed approach may also better reflect the underlying spirit of the

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[160] Of course, the entrapment inquiry and the inquiry suggested here might overlap, since evidence that might establish suspicion that a person is a criminal may also establish predisposition.

[161] *See supra* text accompanying notes 44-47.

[162] While the Fourth Amendment literally requires only that searches and seizures be reasonable and that warrants be based on probable cause, the U.S. Supreme Court has consistently held that all but the most minimal searches require probable cause or at least reasonable suspicion. SLOBOGIN, *supra* note 30, at 39-43.

Fourth Amendment's particularity requirement.[163] Indeed, in the car-stop situation, some have suggested a much more far-reaching proposal: complete elimination of police authority to conduct searches pursuant to traffic violations.[164] Without such a prohibition, these commentators argue, the ubiquity of such violations, along with police willingness to use them pretextually, creates a modern variant of the general warrant so abhorred by the colonists.[165]

Thus, the argument that pretextual actions are immoral adds one more reason, to an already long list, for banning such actions. Of course, enforcing a ban on warrantless pretextual searches and seizures is very difficult. By definition, police will be able to point to a legitimate reason for their actions in such cases. Unless the police admit to a hidden agenda, inferences about police intentions must be drawn. Further, the police themselves may at times be unsure of the true motivation for their actions. As John Burkoff and others have suggested,[166] however, patterns of practice and the circumstances surrounding the police action can often establish when hidden agendas played a role in the police action with reasonable certainty. In such cases, the action should not be countenanced.

While application of Bok's analysis of lying suggests that pretextual and otherwise deceptive searches and seizures should generally be permitted only upon a judicial determination of cause and necessity, it also suggests an exception to that rule (as well as the analogous rule governing active undercover work). In the typical search and seizure case, the *ex ante* review requirement is tempered by the notion that a warrant need not be

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163 "Warrants shall . . . particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

164 *See, e.g.*, Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L.Q. 221, 274 (1989); Edwin J. Butterfoss, *Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications in the Supreme Court's Fourth Amendment Pretext Doctrine*, 79 KY. L.J. 1, 52 (1990).

165 Salken, *supra* note 164, at 274 ("As with the power of the writs of assistance, the power to conduct the search [following a minor traffic violation] . . . is the product of a grant of authority that permits indiscriminate and arbitrary exercise."); *see also* Butterfoss, *supra* note 164, at 46-58.

166 John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 72-84 (1982); WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.4(e) (2d ed. 1987).

sought in exigent circumstances.[167] A Bokian approach to deceptive investigative practices supports an exigency exception as well, although one that would be narrower than the exception recognized under Fourth Amendment law. Consistent with Bok's resistance both to unnecessary lies and to government control over excuses for lying, exigency obviating a warrant for deceptive practices would exist only when Bok's crisis exception applies. In short, police would not be able to engage in active undercover operations or deceitful searches and seizures unless a judge found they had reasonable cause for doing so, or unless deception were necessary to protect human life or enabled police to avoid the use of force they could legitimately use.[168]

D. Trickery during Interrogation: Pre- and Post-Arrest

While the public identification predicate leads to rules that significantly conflict with current law regarding undercover and pretextual actions, its implications for deceit during interrogation do not stray as far from the Supreme Court's rulings, at least those construing the Fifth Amendment. This relative conformity with the case law results from one crucial fact: in contrast to the typical undercover operation or search and seizure, most interrogation in which deceit is practiced takes place after a person has been taken into custody. It thus follows either an indictment, a judicially issued arrest warrant, or a formal assertion by the police that they believe the interrogated person is a criminal, an assertion they know will be tested in front of a judge within a short timespan.[169] As a result, the public declaration that is the cornerstone of Bok's enemy exception either precedes or hangs over the typical interrogation process, at least if one accepts the notion of the judge acting as the public's proxy. Furthermore, in contrast to the *ex parte* nature of undercover and search and seizure actions, the official identification here is overt. Thus, as

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[167] For a list of the exceptions, see WHITEBREAD & SLOBOGIN, *supra* note 20, at § 4.05(d).

[168] Of course, in the latter circumstance Fourth Amendment jurisprudence might still require a warrant where exigency is lacking (for instance, where police know well beforehand that a suspect will violently resist arrest and want to use deception—e.g., a fake complaint from a neighbor—to get him to come to the door peacefully).

[169] The U.S. Supreme Court has held that when an arrest is not authorized by warrant or indictment, its validity must be reviewed by a judicial officer within 48 hours of detention. Gerstein v. Pugh, 420 U.S. 103, 123-24 (1975); Riverside County v. McLaughlin, 500 U.S. 44, 56 (1991).

Bok would prefer,[170] the person subjected to interrogation is on notice that the police view him or her as an enemy.

One obvious objection to this characterization of the issues is that for the lion's share of interrogations—those interrogations that are not preceded by an indictment or an arrest warrant—the identification of the suspect at the time of questioning has in fact been left entirely up to the police. Again, however, the police know that within forty-eight hours of arrest, this identification will be subject to a judicial check.[171] Furthermore, the police know this check is supposed to be based solely on prearrest facts (and not, for instance, on a postarrest, deception-induced confession). Indeed, the Supreme Court has held that if the police do not have probable cause at the time of arrest, their subsequent questioning will be for naught.[172]

In short, under Bok's framework as interpreted in this Article, a good case can be made for the proposition that postarrest trickery is permissible.[173] Because the arrest threshold both limits police deception to openly identified "enemies" and alerts the potential dupe to the adversarial relationship, such trickery is not inherently immoral, at least when, as will often be the case,[174] a colorable claim can be made that direct questions will not obtain the desired information. As noted above, this position coincides with much of the Supreme Court's interrogation jurisprudence (which, it will be remembered, appears to take a permissive attitude toward deceptive interrogation techniques[175]).

However, the position taken here does potentially conflict with constitutional doctrine in two areas. First, in contrast to the import of at least one Supreme Court case,[176] a Bok-based approach clearly would not permit deceit during precustodial

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170 *See supra* text accompanying note 118.

171 *See supra* note 169.

172 Dunaway v. New York, 442 U.S. 200, 214-19 (1979) (holding that nonconsensual stationhouse questioning requires probable cause and that statements obtained during questioning that violates this rule will be excluded).

173 Other commentators have suggested the same general rule, albeit on different grounds. *See* Stuntz, *supra* note 66, at 822-26; JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 114 (1993).

174 Richard Leo, who has witnessed hundreds of interrogations, has stated that "deceptive interrogation techniques may be a necessary evil in modern society." Leo, *supra* note 59, at 54. *But see* Young, *supra* note 60, at 471-75 (arguing that confessions are seldom necessary and that deception-induced confessions are even less so).

175 *See supra* notes 60-67 and accompanying text.

176 In Oregon v. Mathiason, 429 U.S. 492, 495 (1977), the police lied to the inter-

questioning, unless a crisis, as defined above, exists. Thus, police wishing to interrogate someone who has not been arrested would generally need either to develop probable cause to arrest or to conduct the interrogation without using deceit. Although apparently not consonant with current Fifth Amendment law, this rule might, as a practical matter, deter "fishing-expedition" interrogations, which could at least be said to conform to the spirit of the Fourth Amendment.[177] It would also prohibit deception in questioning nonsuspects and witnesses, and thus avoid another risk said to be associated with deceptive interrogation.[178]

At the same time the official identification predicate provides somewhat greater protection against police deceit than Fifth Amendment doctrine, it seems to permit considerably more deception than does Sixth Amendment law, at least on first analysis. The Sixth Amendment, it will be remembered,[179] prohibits undercover questioning and at least some forms of interrogation trickery once formal charging has taken place. Yet the foregoing discussion suggests that both types of deception should be permitted. If arrest is sufficient authorization to practice deceit against a suspect, then surely the public pronouncement of suspicion that accompanies charging should provide enough license.

Recall, however, that Bok would permit deceit only when a truthful alternative is not available. By the time of formal charging (in contrast to the time between arrest and charging) the state presumably has developed a prima facie case against the defendant. At this point, then, interrogation of any type, with or without trickery, should not be necessary to fulfill the state's objective. If this is so, similar to the outcome under Sixth Amendment law, formal charging should mark a cut-off beyond which investigative lies of any sort are not allowed.[180]

Two other caveats to this discussion of interrogation trickery must be made. First, Bok's admonition that deceptive practices should be publicly debated is especially pertinent here.

viewee about evidence found at the scene. Yet the U.S. Supreme Court held that his subsequent statements were admissible because he was *not* in custody.

177 *Cf.* Dunaway v. New York, 442 U.S. 200, 211-16 (1979) (holding that one-hour questioning in stationhouse preceded by *Miranda* warnings requires probable cause).

178 *See supra* text accompanying notes 132-33.

179 *See supra* note 25 and note 64 and accompanying text.

180 Note too that, under the approach advocated here, the government could never lie to defense counsel, as opposed to the defendant. Defense counsel is not a publicly identified "enemy."

Although the official identification of particular individuals as enemies probably must, by default, fall on judges, various interrogation practices can also be the subject of scrutiny in the abstract. Indeed, the public could decide, contrary to what has been argued to this point, that all deception during interrogation is improper. Certainly, plausible arguments have been advanced in this regard.[181] More specifically, public debate might focus on certain types of practices. For instance, one deceptive technique that has occasioned much comment involves a police officer posing as another type of professional, say the defendant's court-appointed lawyer, a clergyperson, or a psychiatrist.[182] As Joseph Grano has argued,[183] the virtually universal legislative recognition of lawyer-client and psychiatrist-patient privileges could be construed to stand for a decision by the public that statements made to these individuals are confidential and that therefore police cannot learn of them through deception. Public debate might also address whether prosecutors, as distinct from the police, can ever lie to suspects. Perhaps, as officers of the court and members of the bar, they should be prohibited from doing so.[184] Obviously, a number of other general issues of this sort can and should be debated.

A final consideration in determining what types of deception, if any, might be permitted during interrogation is the degree of coercion created by the deceptive practice. The Supreme Court itself has recognized that certain types of deceit can render a confession involuntary.[185] Bok also notes that deception can create coercive circumstances, particularly when it limits knowledge of

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181 Paris, *supra* note 132 (arguing for a ban on all deception during interrogation); Young, *supra* note 60 (same).

182 *Cf.* Leyra v. Denno, 347 U.S. 556 (1954) (state-employed psychiatrist introduced to the accused as a "doctor" brought to provide medical relief); United States *ex rel.* Lathan v. Deegan, 450 F.2d 181 (2d Cir. 1971) (police officer impersonated an army officer to obtain a confession from a man on furlough from the Army).

183 GRANO, *supra* note 173, at 110-12.

184 Since prosecutors usually do not deal with defendants until after formal charging, this approach would also be consistent with Sixth Amendment jurisprudence.

185 A number of the early due process cases support the idea that deception can be coercive enough to make the ensuing statement involuntary. *See, e.g.*, Spano v. New York, 360 U.S. 315, 319-24 (1959) (violation of due process for officer to tell suspect that if he did not make a statement the officer's job was in jeopardy, with disastrous consequences for his family); Leyra v. Denno, 347 U.S. at 561 (violation of due process to have state-employed psychiatrist pose as a medical doctor and, under the guise of being a "helping" professional, continue the interrogation of a sleep-deprived suspect with a painful sinus condition).

one's alternatives.[186]

As others have demonstrated,[187] however, defining "coercion" in this context is extremely difficult. My only effort at addressing this complex issue will be to provide what I believe are clear examples of coercive deception, not just from the interrogation context, but from the undercover and search and seizure settings as well. An undercover agent who suggests to a mark that unless he buys cocaine from the agent his family will be "in trouble" is

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[186] BOK, *supra* note 10, at 19-23 (concluding that "[d]eception . . . can be coercive [because] it can give power to the deceiver—power that all who suffer the consequences of lies would not wish to abdicate."). This conclusion should not mean that every deception that creates ignorance of alternatives is "coercive," however. Kent Greenawalt has argued that deception regarding crucially relevant facts, like the strength of the prosecution's case, "hardly accord[s] with respect for [individual] autonomy and dignity." Greenawalt, *supra* note 132, at 40-41. But this argument proves too much; all lying shows disrespect for the autonomy and dignity of the dupe. Concepts like autonomy and dignity, by themselves, are not much help in analyzing the morality of police lying. Only if such lies, whether about "crucially relevant facts" or not, leave the dupe little choice but to confess could they be said to be coercive. Lying about the facts of the prosecution's case generally would not approximate such coercion.

Nor is it likely to create false confessions, contrary to the assertions of researchers such as Richard Ofshe and Richard Leo. *See* Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. L., POL. AND SOC'Y 189, 196-203 (1997). Their own assessment of this technique is that it "sets the stage for eliciting an admission of guilt in exchange for the smallest of benefits." *Id.* at 198. If the benefit is so small, one wonders why an innocent person (at least one who is not mentally retarded and therefore particularly suggestible) would confess. Paul Cassell has argued that the number of wrongful convictions attributable to police interrogations *of any type* is probably close to 10 per year, which would make the number of false confessions obtained through trickery minuscule. Paul Cassell, *Protecting the Innocent from Confessions and Lost Confessions—and From* Miranda, 88 J. CRIM. L. & CRIMINOLOGY (forthcoming 1997). In any event, nothing about the proposal advanced here is meant to prevent courts from excluding unreliable confessions, however obtained. Unreliability will often be easy to ascertain by virtue of the suspect's inability to provide detail that the perpetrator should know.

[187] *See, e.g.*, Joseph D. Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 VA. L. REV. 859 (1979). Grano argues that a voluntariness test should replace *Miranda*. In developing this voluntariness test, he acknowledges that deception might undermine the voluntariness of a confession in a small subset of cases, and concludes that it should be prohibited when the ploy is used against "those least able to recognize and protect their own interests." *Id.* at 918. Yet his discussion defining this latter group is far from concrete, leaving the ultimate relationship of trickery and voluntariness in large part unresolved. *See id.* at 900-09. *See also*, GRANO, *supra* note 173, for an elaboration of these points. To the same effect is Professor Alschuler's equation of coercion with "offensiveness." Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957 (1997) (arguing that offensiveness should be the touchstone for analyzing when police interrogation techniques are coercive under the U.S. Constitution).

clearly using deception coercively.[188] A representation that failure to consent to a search will constitute probable cause is in effect coercing consent.[189] Similarly, as others have pointed out,[190] any deception during interrogation that leads the suspect to believe he has no right to remain silent, and thus that he must talk, would be impermissible.[191] In these situations, given the obvious coerciveness involved, the deception should be considered immoral even if the framework set out above is not accepted or does not apply.

CONCLUSION

A central lesson of Sissela Bok's analysis is that, once lying becomes a practice, it is rarely justifiable.[192] Routine deceit coarsens the liar, increases the likelihood of exposure, and when exposed, maximizes the loss of trust. When the deceptive practice is carried out by an agent of the government, it is even more reprehensible, both because the liar wields tremendous power and because government requires trust to be effective.[193] Thus, limitations on police lying are justifiable and perhaps necessary. This Article has been a preliminary effort at identifying those limitations in connection with one specific type of lie—investigative lies, or lies told to people in an effort to gather evidence against them.

The extrapolation of Bok's analysis developed in this Article suggests that once an individual has been identified as a suspect through the public proxy of a judge, noncoercive deception in the investigative setting is often permissible. On the other hand, in the absence of such an identification, or when deception leads

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[188] This example is taken from MARX, *supra* note 13, at 130.

[189] *Cf. supra* note 29.

[190] *See, e.g.*, Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 586, 608-11 (1979). *See also id.* at 617-23 (describing as a "threat" various ruses, such as placing a suspect in a reverse lineup which results in an fictitious "eyewitness" fingering him for crimes he did not commit).

[191] However, lying about the right to counsel to which an interrogated person is entitled under the Fifth and Sixth Amendments may not be coercive. The question would be whether one who believes, as a result of police deceit, that an attorney cannot be consulted would also believe that one must talk to the police.

[192] BOK, *supra* note 10, at 111 (in conducting the debate over the justifiability of a lie, reasonable persons should pay particular attention to "the practices of deception rather than to the individual instances alone.").

[193] *Id.* ("reasonable persons might be especially eager to circumscribe the lies told by all those whose power renders their impact on human lives greater than usual."). *See also supra* text accompanying note 134.

the dupe to believe he has no choice but to provide the sought-after evidence, investigative lying is wrong and should be prohibited. On this premise, warrantless "active" undercover operations and pretextual police actions are improper, unless necessary to save a life or useful as a substitute for legitimate use of force. On the other hand, deception associated with passive, bait-type stings is proper, so long as the general propriety of the sting has been subject to public debate. Trickery in connection with postarrest, precharge interrogation is also proper, so long as it does not coerce the dupe.

Whether these rules should trump current constitutional doctrine where they conflict with it (or result in exclusion where impermissible deception is used) is left unresolved in this Article.[194] It is interesting to note, however, that these rules do not uniformly reinforce either a "due process" or a "crime control" orientation toward constitutional protections.[195] Rather, they focus on the status of the dupe—specifically, the extent to which the target of the deceit is officially believed to be a criminal. Thus, they coalesce with criminal procedure scholarship suggesting that constitutional regulation of the police is designed primarily to protect the innocent, not the guilty.[196]

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[194] I have argued elsewhere that the exclusionary rule itself might be a significant precipitant of police lying (given prosecutorial reluctance to risk loss of a confession) and that its replacement with a damages remedy might promote greater deterrence of police misconduct, including lying. Slobogin, *supra* note 8, at 1057-59.

[195] *See* Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 5-6 (1964) (describing the crime control and due process models).

[196] In addition to AMAR, *supra* note 11, *see* Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1491-95 (1996); Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1248-56 (1983); William J. Stuntz, *Lawyers, Deception and Evidence Gathering*, 79 VA. L. REV. 1903, 1956 (1993) (criminal procedure rules should not just attempt to regulate police and prosecutors but also "facilitat[e] the central mission of the criminal process—the separation of the innocent from the guilty.").