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Voluntariness with a Vengeance: The Coerciveness of Police Lies in Interrogations

Amelia C. Hritz

NOTE

"VOLUNTARINESS WITH A VENGEANCE"[1]: THE COERCIVENESS OF POLICE LIES IN INTERROGATIONS

Amelia Courtney Hritz†

INTRODUCTION

Police often find themselves navigating difficult moral situations.[2] They may find it necessary to tell lies despite moral reservations because lies can be a useful tool in controlling situations and avoiding the use of force.[3] Police may also justify lies when they lead to a desirable outcome. When police

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1 Miranda v. Arizona, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).

† PhD/JD candidate, Developmental Psychology and Law, Cornell University; Editor-in-Chief, *Cornell Law Review*, Volume 102. I would like to thank Stephen Garvey for his guidance and thoughtful comments during the writing of this Note and the members of the Cornell Law Review; especially Victor Pinedo, Sue Pado, Evan Hall, Anthony Wu, Caisa Royer, and Lex Varga; for their detailed editing. I am also grateful for the mentorship of Valerie Hans, John Blume, and Stephen Ceci. Their work inspired me to write this Note. And as always, thank you to my family; especially Suzan Courtney, George Hritz, Mary Beth Hritz, Alex Bodell, Chuck, and Pierre; for their support throughout my time at Cornell.

2 *See* Carl B. Klockars, *Blue Lies and Police Placebos: The Moralities of Police Lying*, 27 AM. BEHAV. SCI. 529, 532–33 (1984).

3 *See id.* at 543; Jerome H. Skolnick & Richard A. Leo, *The Ethics of Deceptive Interrogation*, CRIM. JUST. ETHICS, Winter/Spring 1992, at 3, 7–9.

use lies to obtain evidence, police may justify the harm caused by lies as outweighed by the good from catching wrongdoers.

During interrogations, however, we must closely scrutinize police practices. In the interrogation room, police officers have a superior bargaining position because they control the environment and place the suspect in a heightened state of vulnerability.[4] In addition, police have a powerful tool of persuasion: they can threaten the suspect with punishment. Through lies, police are able to manipulate suspects by altering their perception of their options. This manipulation shows disrespect for the suspect's individuality, undermines the trust in police, and violates the presumption of innocence.

Even in the hypothetical case in which a guilty suspect is *Mirandized*; knowingly, willfully, and voluntarily waives his *Miranda* rights; is lied to by police; and confesses truthfully, I argue his confession should be excluded because the police lie renders the confession involuntary. In the context of interrogations, police lies are prima facie wrongful and should be completely banned unless necessary to avoid an imminent harm.[5]

Police suspected Adrian Thomas, a twenty-nine-year-old man with a tenth-grade education, of critically injuring his infant son based on the emergency room doctor's opinion that the child's skull was fractured.[6] Police interrogated Thomas for hours, admittedly doing whatever they could to convince him to tell them what they believed to be "the truth." Toward that end, the police told Thomas multiple lies. They told him he could save his child's life if only he explained how his child's head became injured, even though the child was brain-dead and had no hope of recovery. After many hours of denying that he had ever harmed his son, and police telling him that he could save his son's life twenty-one times, Thomas agreed that he may have dropped his son. After further questioning, Thomas agreed that he threw his son on the ground. Eventually Thomas reenacted the crime for the police by throwing a binder on the ground. The police also repeatedly told Thomas that if he confessed he would not be arrested and could go home. The police even solemnly promised Thomas that they were not lying to him. The trial court admitted Thomas's confession and the

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4 *See Miranda*, 384 U.S. at 449–59.

5 Even in a situation where the lie would promote public safety and the imposition of just deserts, it is still an unjustified wrong and should not be employed by state actors. For a discussion of the utilitarian standard regarding deception, see Skolnick & Leo, *supra* note 3, at 88.

6 SCENES OF A CRIME (New Box Prod. 2011).

jury convicted, despite all of these lies and medical evidence that the son's skull was not broken and that he may have died of an infection, not a head injury.

The psychological techniques used by the police during the interrogation of Thomas are not unique; police have been employing them to extract confessions for decades.[7] While police deception rarely renders a confession inadmissible, the New York Court of Appeals held that Thomas's confession should have been suppressed.[8] The court noted that not all of the lies that the police told Thomas were coercive, but some of them were, including the statement that Thomas could save his son's life by confessing.[9] The court held these extreme forms of deception were overly coercive, so the statements that Thomas made in response were involuntary.[10] This holding should be expanded to recognize that *all* forms of police lies to suspects during interrogations are coercive, and all confessions resulting from these lies should therefore be excluded at trial.

I
THE LAW'S NARROW UNDERSTANDING OF COERCION

Throughout history, police in the United States and England commonly used force to coerce suspects into confessing (the "third degree").[11] The reliability of confessions was naturally suspect, but the practice did not end in the United States until the Supreme Court's 1936 decision in *Brown v. Mississippi*.[12] Many countries have banned the third degree as it "brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public."[13] Without the availability of force, police have turned to psychological methods such as trickery and lies

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7 Dorothy Heyl, *The Limits of Deception: An End to the Use of Lies and Trickery in Custodial Interrogations to Elicit the "Truth"?*, 77 ALB. L. REV. 931, 935 (2013).

8 People v. Thomas, 8 N.E.3d 308 (N.Y. 2014).

9 *Id.* at 314–15.

10 *Id.* at 316.

11 Examples of torture include waterboarding, putting lighted cigars on a suspect's body, and depriving the suspect of sleep, food, and other needs. Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo & Allison D. Redlich, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 6 (2010).

12 297 U.S. 278, 285–87 (1936); Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168, 1172–73 (2001).

13 Miranda v. Arizona, 384 U.S. 436, 448 (1966) (quoting IV NAT'L COMM'N LAW OBSERVANCE AND ENF'T, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 5 (1931)).

to compel confessions.[14] Recognizing the comparable harm lies cause, Great Britain and most other European nations have also banned police from lying in interrogations.[15] In the United States, the Supreme Court has not extended the ban to lies.[16]

While police are able to lie and use trickery to obtain confessions in the United States, they are not able to "coerce" suspects to confess. The Supreme Court acknowledged that lies as well as force can be coercive in custodial interrogations, but rather than ban all police lies, the Court required police to give the *Miranda* warnings.[17] Thus, two safeguards are currently in place to prevent police coercion. First, when police have suspects in custody, they must provide *Miranda* warnings before they can interrogate.[18] This is designed to ensure that suspects are aware of their right to remain silent and their right to an attorney. Second, under the Due Process Clause, suspects must confess voluntarily.[19] The requirement that a confession be voluntary is separate from the *Miranda* warnings.[20] For confessions to be voluntary, the state must prove they were not products of coercion, either physical or psychological,[21] and were given as a result of "free and unconstrained choice by [their] maker."[22]

To determine whether the confession was the product of the maker's own choice, courts examine the totality of the circumstances.[23] Under the totality of the circumstances test,

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14 *Id.* ("[T]he modern practice of in-custody interrogation is psychologically rather than physically oriented.").

15 Kassin et al., *supra* note 11, at 17.

16 *Miranda*, 384 U.S. at 448.

17 *Id.* at 448 ("[C]oercion can be mental as well as physical . . . [T]he blood of the accused is not the only hallmark of an unconstitutional inquisition.") (quoting Blackburn v. Alabama, 361 U.S. 199, 206 (1960)); *see also* FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, CRIMINAL INTERROGATION AND CONFESSIONS 343 (5th ed. 2013) ("[N]o confession following interrogation is completely voluntary in the psychological sense of the word.").

18 Daniel Harkins, *Revisiting* Colorado v. Connelly*: The Problem of False Confessions in the Twenty-First Century*, 37 S. ILL. U. L.J. 319, 330 (2013).

19 Colorado v. Connelly, 479 U.S. 157 (1986); Rogers v. Richmond, 365 U.S. 534 (1961).

20 Paul Marcus, *It's Not Just About* Miranda: *Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 602–03 (2006).

21 *See Miranda*, 384 U.S. at 503; *see also* Culombe v. Connecticut, 367 U.S. 568, 602 (1961) ("The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession."). For a review of the law of voluntariness of confessions, see Marcus, *supra* note 20.

22 *Culombe*, 367 U.S. at 602.

23 Frazier v. Cupp, 394 U.S. 731, 739 (1969).

courts consider the behavior of the police officers, the location and length of the interrogation, and the characteristics of the suspects.[24] Relevant characteristics of suspects include age, intellectual function, maturity, mental health, and physical condition (including states like intoxication).[25] The totality of the circumstances also includes whether the suspects were properly *Mirandized* and voluntarily waived their rights.[26] The reliability, or unreliability, of the confession is not itself a part of the due process analysis.[27]

Even though the requirement that suspects confess voluntarily is separate from the requirement that they be *Mirandized,* when courts assess voluntariness, they often place great weight on the *Miranda* warnings.[28] If suspects are properly *Mirandized*, courts rarely deem their confessions involuntary.[29] Relying on *Miranda* to ensure voluntariness is misguided. Asserting one's *Miranda* rights connotes guilt: people only invoke *Miranda* when they have something to hide, or so the thinking goes. Consequently, most suspects waive their *Miranda* rights, leaving *Miranda* with little power to protect against police coercion.[30] Moreover, suspects' decisions to waive *Miranda* can then be used against them to establish the due process voluntariness of any resulting confessions.[31]

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24 *Connelly*, 479 U.S. at 164 (holding that a suspect's mental illness is not sufficient to render a confession involuntary; there must be state-imposed coercion).

25 Withrow v. Williams, 507 U.S. 680, 693–94 (1993).

26 *Id.*

27 *Connelly*, 479 U.S. at 167; Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions,* 32 HARV. C.R.-C.L. L. REV. 105, 106 (1997).

28 *See* Heyl, *supra* note 7, at 938 ("The overwhelmingly common approach is to evaluate the due process of a custodial interrogation only in terms of whether proper *Miranda* warnings were provided, understood, and intelligently waived, and not to evaluate the coercive effect of the psychological techniques."); *see also* Gerard E. Lynch, *Why Not a* Miranda *for Searches?*, 5 OHIO ST. J. CRIM. L. 233, 234 (2007) ("It is a firmly established aspect of the *Miranda* story that the decision was the product, in part, of judicial frustration with the difficulty of applying a 'totality of the circumstances' test for determining the voluntariness of confessions.").

29 Magid, *supra* note 12, at 1175–76. (stating that, after *Miranda,* the Supreme Court's decisions have been more favorable toward police interrogations and confessions).

30 *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 286 (1996) (observing 182 police interrogations and finding that 78% of suspects waived their *Miranda* rights); *see also* Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their Miranda Rights: The Power of Innocence*, 28 L. & HUM. BEHAV. 211, 215–17 (2004) (finding that 81% of innocent people waived their *Miranda* rights compared to 36% of guilty people in an experimental study).

31 Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1093 (2010).

Consistent with courts' deference to the *Miranda* safeguard, once suspects have been *Mirandized*, courts have deemed confessions to be voluntary despite police lies regarding the seriousness of the charges, promises of leniency, and the presence of physical evidence and accomplice statements.[32] Courts generally do not deem lies to be coercive so long as they do not impact suspects' decisions regarding waivers of *Miranda* rights.[33] A few courts have noted that police lies are improper, but they rarely hold that the lies caused suspects to confess involuntarily.[34] For example, the Supreme Court held that a confession was voluntary in *Frazier v. Cupp* when an adult suspect of average intelligence confessed in response to a police officer's lie about an accomplice confessing during a brief interrogation.[35] As this type of lie is very common in police interrogations, *Frazier* established that police deception is not enough to render a confession involuntary.[36]

The Supreme Court has declined to clearly define when police deception can be overly coercive.[37] The Court characterized most police deception as merely strategic and not "ris[ing] to the level of . . . coercion to speak."[38] Some lower courts have held that certain forms of deception may be so egregious that they violate due process.[39] For example, courts have held that the fabrication of evidence (rather than merely falsely asserting the presence of evidence) is impermissible.[40] This is motivated

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32 For a review of these cases, see Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 795–803 (2006).

33 *Id.* at 795; *see also* Marcus, *supra* note 20, at 612 (finding a "stunning" number of cases in which judges held confessions to be valid when government officials lied to defendants about significant matters to induce the incriminating statements). In a thorough review, Marcus found only two courts that expressed concern about police lying about evidence: *United States v. Orso*, 266 F.3d 1030, 1039 (9th Cir. 2001) (finding the lie to be "reprehensible," and *State v. Register*, 476 S.E.2d 153, 158 (S.C. 1996) (finding the lie to be "deplorable"). Despite their critiques of the lies, in both cases the confessions were admitted into evidence. Marcus, *supra* note 20, at 612.

34 Marcus, *supra* note 20, at 638 (stating that the voluntariness determination is very fact specific and difficult to predict).

35 394 U.S. 731, 739 (1969).

36 Kassin et al., *supra* note 11, at 13.

37 Heyl, *supra* note 7, at 937 (noting that the Supreme Court did not specify means to identify or deter coercive interrogations, such as by requiring time limits on interrogations).

38 Illinois v. Perkins, 496 U.S. 292, 297 (1990).

39 State v. Rettenberger, 984 P.2d 1009, 1015 (Utah 1999) (finding that police misrepresentations must be "sufficiently egregious to overcome a defendant's will so as to render a confession involuntary").

40 Kassin et al., *supra* note 11, at 13.

by a concern that the fabricated evidence could later be mistaken for real evidence by a court.[41]

In addition, courts have acknowledged that other forms of deception may violate due process when the egregiousness of the techniques combines with certain characteristics of the suspect.[42] For example, in *People v. Thomas*, the court held that police lies were coercive when police told Thomas that if he confessed he could save his son's life, his wife would not be picked up for questioning, and police would view what happened to his son as accidental.[43] The court identified numerous other lies that police told Thomas, but found that only these three were improperly coercive. The court reasoned that because these lies threatened to deprive Thomas of vital interests (his wife and child), the combination of the lies were "sufficiently potent to nullify individual judgment."[44] With respect to the lie that a confession could save his son's life, the court noted that it would make the option of remaining silent "seem valueless" to a parent.[45] Moreover, the court considered that Thomas was "unsophisticated" and had no experience with the criminal justice system.[46] The court relied on the totality of the circumstances, finding that a lie on its own was not sufficiently coercive to overcome Thomas's judgment.[47] The holding in *Thomas* should be expanded to include all lies told by police during custodial interrogations as coercive and in violation of due process.[48] In the next sections, I argue that all lies told by police during interrogations are coercive and wrongful. The confessions that result from these lies should be held involuntary as a matter of law.

II
THE WRONGFULNESS OF DECEPTION

The Supreme Court's narrow definition of coercion ignores the wrongfulness and persuasiveness of police lies during in-

41 *Id.*

42 Miller v. Fenton, 474 U.S. 104, 109 (1985) ("[C]ertain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment.").

43 8 N.E.3d 308, 311–16 (N.Y. 2014).

44 *Id.* at 314; Heyl, *supra* note 7, at 941, 947.

45 *Thomas*, 8 N.E.3d at 315.

46 *Id.* at 314.

47 Heyl, *supra* note 7, at 949.

48 The current lack of a bright-line rule has given police little guidance on the limits on deceptive interrogation techniques. *Id.* at 939.

terrogations.[49] In determining whether lies by police during interrogations are wrongful, I will first evaluate the extent to which they are coercive. Under the current legal framework, confessions are not admissible at trial when they overcome the suspect's will.[50] Apart from physical force, no other form of police coercion is unmistakably banned.[51] Nonetheless, force and lies are both sufficiently coercive that they should be banned from interrogations.

A. When State Action Is Coercive

Under a broad understanding of coercion, coercion is a technique employed to induce a target to do or not do something. In that way, coercion diminishes the target's freedom and responsibility. On the other hand, coercion is also a useful device in regulation. In fact, coercion is a fundamental tool that governments use to enforce laws. Threats of punishment induce the target to follow the law and limit the target's freedom to acting in the manner the coercer wishes.[52] Therefore, threats of punishment are a form of coercion. Threats of punishment are not wrongful because they are necessary to prevent private acts that have a greater impact on freedom, such as acts of violence and theft of property.[53] To that end, the state's use of coercion facilitates private cooperation and peaceful coexistence. Furthermore, those who are governed have consented to the state having this coercive power for the stability it creates in society.[54] Because coercion is a powerful tool that the citizens have granted the government, it is also important to have measures in place that guide and justify the

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49 *See*, *e.g.*, Commonwealth v. DiGiambattista, 794 N.E.2d 1229, 1232–33 (Mass. App. Ct. 2003) (disapproving of the use of lies to make the suspect believe there was video evidence against him, but finding the confession voluntary). Before *Miranda*, courts were more likely to find that forms of police deception could render coercions involuntary per se. Gohara, *supra* note 32, at 801.

50 Culombe v. Connecticut, 367 U.S. 568, 602 (1961).

51 Miranda v. Arizona, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).

52 THOMAS HOBBES, LEVIATHAN 246 (1651), http://www.gutenberg.org/ebooks/3207?msg=welcome_stranger [https://perma.cc/FJ7C-3R3X] (stating that in a civil state there is a power set up to constrain those that would otherwise violate their faith).

53 JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1689), *reprinted in* THE WORKS OF JOHN LOCKE 5, 106 (1823), http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/locke/government.pdf [https://perma.cc/H9NG-MLKU].

54 *See id.* at 155–56; *see also* Scott Anderson, *Coercion*, STAN. ENCYCLOPEDIA PHIL. 1, 9 (2015) (discussing how the coerced party has consented to government coercion in certain circumstances), http://plato.stanford.edu/archives/sum2015/entries/coercion/ [https://perma.cc/SX55-JULC].

coercive actions.[55] Otherwise, a tyrannical government could arrest innocent people by deeming them criminals.[56] In order to determine where governmental coercion should be limited, first I examine when coercion is wrongful.

Coercion typically takes the form of a conditional threat. The coercer claims that he or she will bring about undesirable consequences unless the target does a certain action. This is similar to the structure of an ordinary offer, which is not coercive or wrongful. An offer is not coercive because, unlike a threat, the consequences of an offer are typically desirable to the target. Both coercion and offers are commonly accepted parenting practices. For example: "If you do not clean your room, you cannot watch television," or "If you eat your vegetables, you can have dessert."

The difference between a threat and an offer also rests on the relationship between the proposal and external factors. Robert Nozick illustrates the distinction in his distressing slave owner hypothetical.[57] In this example, the slave owner regularly beats his slave, and one day he tells his slave that he will spare him a beating if the slave does a specified action. Although the offer of sparing the slave a beating will make the slave better off, we typically see this as coercive, and so it is a threat instead of an offer. In this example, the slave would be coerced to do the action in light of the slave owner's regular threat of beatings. Thus, context is also an important factor in determining whether a proposal is coercive.

In addition to the threat and offer distinction, another way to determine whether a proposal is coercive is to examine the relative bargaining power of the parties. We can classify the slave owner's proposal as coercive because the slave owner has superior bargaining power over the slave.[58] Under this analysis, proposals are coercive when two factors are present: (1) the weaker party is dependent on the stronger party (the weaker party has no other options and cannot exchange bargaining partners) and (2) the stronger party has influence over whether some evil will occur to the weaker party (loss of life, health, security).[59] When both of these conditions are present, the stronger party's advantage in bargaining is so strong that the

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55 *See* LOCKE, *supra* note 53, at 165.

56 *See id.* at 165.

57 *See* Anderson, *supra* note 54, at 23 (citing ROBERT NOZICK, *Coercion*, *in* PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440 (1969)).

58 *See id.* at 14 (citing Joan McGregor, *Bargaining Advantages and Coercion in the Market*, 14 PHIL. RES. ARCHIVES 23, 25 (1989)).

59 *Id.*

target's choice will be non-free. If stronger parties take advantage of this by doing something seen as harmful or distasteful, the coercion is wrongful. The next section will apply this framework to evaluate when police actions are coercive and wrongful.[60]

Force can also be a means of coercion when it is used to alter or constrain the target's actions. Unlike conditional threats, force employs domination that is physical rather than mental.[61] While threats influence the targets by limiting their choices, force removes choice altogether. The United States now prohibits the use of force to induce suspects to confess. I will compare force and deception in the evaluation of the wrongfulness of police lies.[62]

B. When State Coercion Is Wrongful

Coercion by the state is not per se wrongful as it is deemed necessary to enforce laws, which protect freedom and promote stability.[63] Moreover, not all coercion impedes the target's free will. For example, threats of punishment are justified to coerce individuals to act in manners consistent with the law. On the other hand, coercion is very potent and prone to abuse. State coercion is wrongful when it goes beyond the enforcement of laws and enhances the already superior bargaining power of the state to the detriment of the individuals.

Using the framework for evaluating whether statements are coercive based on the relative bargaining power of the parties,[64] police statements in interrogations can be coercive. The police officer is in a superior bargaining position based on both factors. First, during interrogations the police are in complete control of the environment. When suspects are in custody, the police restrict their ability to freely leave. In addition, the environment of the interrogation is unpleasant.[65] Police can question suspects menacingly for hours in an unfamiliar atmosphere. Furthermore, the suspects are not generally in a position to choose the police officer with whom they speak. Thus, while they are in custody, the suspects are dependent on the police officers. Second, the officer is in control of whether

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60 *See infra* subparts II.B and D.

61 Klockars, *supra* note 2, at 532.

62 *See infra* subpart II.D.

63 *See supra* subpart II.A.

64 *See supra* subpart II.A.

65 Miranda v. Arizona, 384 U.S. 436, 455 (1966) ("[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.").

the suspect goes to prison, and therefore they have power over an evil that may occur to the suspect. Under the bargaining power framework, because (1) suspects are dependent on police officers and (2) police officers have power over whether the suspect goes to prison, all offers that police make during interrogations are coercive.

In light of the power imbalance between the police officer and the suspect, the police officer must not take advantage of that imbalance; otherwise, the coercive offers made by police are wrongful. Police officers do not take advantage of their power when they only seek to punish crimes to the extent that they are allowed under the law. It is not wrongful for police to offer legal incentives to suspects to confess, which may cause a confession to be in the best interests of the suspect and the police officer. In addition, police may say that they will charge the suspect with a more serious crime if the suspect does not confess. When the more serious punishment is legally acceptable in light of the crime, this is not a wrongful proposal because the police have the authority to impose heightened punishment. Furthermore, the target can make an informed decision about which option to take. In this way, truthful police incentives in interrogations are coercive, but they are not wrongful when they do not go beyond the power of police to enforce the law.

Furthermore, threatening the suspect with undesirable consequences (sanctioned by law) is not wrongful. We have authorized police to make certain choices less appealing than they would be otherwise (like the choice to engage in criminal activity). As a society, we do not feel that we are less free just because our choices to do certain types of behavior have undesirable consequences (particularly behaviors that impinge on the freedom of others).

C. When Lies Are Wrongful

Like conditional threats, lies can limit targets' freedom when agents use lies to induce targets to do or not do something.[66] Individuals make choices based upon estimates of their current situation, and these estimates often rely on information from others.[67] Lies can distort this information and

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66 One definition of a lie is an intentionally deceptive message which is stated. *See* SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 13 (1978); *see also* Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 789–801 (1997) (applying Bok's framework to police lies).

67 BOK, *supra* note 66, at 19–20.

therefore distort the situations as the targets of the lies perceive them.[68] Thus, lies can vary targets' estimates of the costs and benefits of a course of action. For example, lies may foster an unnecessary loss of confidence in the targets' best option. In addition, lies may eliminate or obscure the targets' perception of relevant alternatives.[69] This invades the targets' autonomy and ability to make decisions and gives the liar power over the targets' choices. Thus, lies can also be a form of coercion. The coercive quality of lies and our vulnerability to it underlie the importance of truthfulness in our society.

As with all forms of coercion, lies are powerful tools ripe for abuse. Lies are similar to force in that both can influence the way the target behaves and therefore disrespect the target's autonomy.[70] While lies influence the targets' perceptions of their choices, force removes all choice. In addition, both methods can be unreliable and are subject to resistance from the target, either through disbelief in the context of lies or through defiance in the context of force.[71]

Unlike threatening punishment, police do not need to lie to enforce laws. Instead, police can only justify lies based on the possibility that they may achieve a greater good. In light of the harms to society, I first presume lies are wrongful. One need not rule out all lies due to the initial negative weight given to them, however. To that end, one may justifiably lie when there is no other good and truthful alternative, and the harms caused by the lie are outweighed by its benefits.[72] Lying is harmful because it can denigrate the target, coarsen the liar, and diminish the level of trust in society as a whole.[73] Justifications for lying include preventing harm, producing a benefit, contributing to fairness, and correcting injustice.[74] For example, one can justify a lie when it is the only way to save an innocent life. In this situation, one could also justify the use of force. In fact, when force is justifiable, one would always prefer lies if they are a viable alternative.[75]

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68 *Id.*

69 *Id.* at 19–20.

70 Klockars, *supra* note 2, at 532; *see also* BOK, *supra* note 66, at 18 ("Deceit and violence—these are the two forms of deliberate assault on human beings.").

71 Klockars, *supra* note 2, at 532.

72 BOK, *supra* note 66, at 78–86.

73 *Id.* at 21.

74 *Id.* at 78–86.

75 *Id.* at 41 ("Surely if force is allowed, a lie should be equally, perhaps at times more, permissible.").

Even in these limited situations, society must be wary of sanctioning lying because a liar can easily manipulate these concepts to justify any lie. In order to safeguard against the potential for the spread and abuse of lies, moral philosopher Sissela Bok emphasized that lies must be public so that reasonable people who share the perspective of the deceived and those affected by the lies can evaluate the lie.[76] When people in power tell lies, the potential for spread and abuse is magnified, thus giving rise to the need for clear standards and safeguards.

D. When Police Lies Are Wrongful

The goal of modern American police interrogations is to communicate that a suspect's resistance is futile because the outcome is inevitable, and therefore it is in the suspect's interests to confess.[77] Police will lie to further these goals by minimizing the seriousness of the offense and misrepresenting the strength of the evidence.[78] Lies about the strength of the evidence include presenting supposedly incontrovertible evidence of the suspect's guilt and stating that a codefendant has already confessed.[79] The leading police interrogation manual recommends these practices, which are also known as the "Reid Technique."[80]

In evaluating the wrongfulness of police deception in interrogations, I will examine the extent to which certain forms of coercion improperly constrain the freedom of the suspect. Before examining police lies, I will use these factors to examine police force, which has been banned in interrogations in the United States.

1. *Why Police Force Is Wrongful*

Police force is both coercive and wrongful when used during interrogations. As discussed previously, police are in a superior bargaining position when suspects are in custody.[81] When police have a suspect in custody, the police are in complete control over the suspect's environment and have power over whether the suspect will go to jail. Because of the power imbalance in interrogations, offers that police make to suspects during interrogations are coercive. Coercive offers are only

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76 *Id.* at 91.
77 Kassin et al., *supra* note 11, at 16–17.
78 Slobogin, *supra* note 66, at 785–86.
79 Kassin et al., *supra* note 11, at 17.
80 INBAU ET AL., *supra* note 17, at 351–52.
81 *See supra* subpart II.B.

wrongful when police take advantage of their superior bargaining power. For example, police do not take advantage of their superior bargaining power when they make truthful offers to suspects that are consistent with enforcing the law.[82] While truthful offers may limit a suspect's options, the use of force takes away those options altogether. The use of force in interrogations involves inflicting physical or mental pain to extract confessions, such as physical violence and torture.[83] Thus, the police are using their already superior power to gain an even greater advantage over the suspect at the expense of the dignity of the suspect. In addition, police use of force damages our trust in the government. As state actors charged with enforcing the law, police are held to a higher moral standard than average citizens.[84] The use of force conflicts with this high standard.

Furthermore, the use of force conflicts with the intent of the privilege against self-incrimination. The privilege developed in response to the use of violence in interrogations throughout Europe in the sixteenth and seventeenth centuries.[85] Seventeenth-century interrogations were often a fishing expedition to elicit incriminating statements from suspects confronted with charges on little evidence. In addition, interrogators employed methods such as torture, detention for long periods, imprisonment in a pillory, and mutilation. The privilege was a major constitutional landmark in the United States Constitution and the Bill of Rights, in contrast to England, where it "slowly 'crept'" into the system.[86] In the United States, the privilege was deemed essential to political freedom in the McCarthy hearings of the 1950s and was reaffirmed in *Miranda v. Arizona* in 1966.[87] This reflects "our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'"[88] Because of the violation of the

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82 *See supra* subpart II.B.

83 *See* Miranda v. Arizona, 384 U.S. 436, 448–49 (1966).

84 *Cf.* Spano v. New York, 360 U.S. 315, 320–21 (1959) ("The abhorrence of society to the use of involuntary confessions . . . turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves").

85 SUSAN EASTON, SILENCE AND CONFESSIONS: THE SUSPECT AS THE SOURCE OF EVIDENCE 5 (2014).

86 *Id.* at 6.

87 *Miranda*, 384 U.S. 436; *see also* EASTON, *supra* note 85, at 6 (summarizing the development of the privilege against self-incrimination in the United States).

88 Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964) (quoting Quinn v. United States, 349 U.S. 155, 162 (1955)).

suspect's dignity, the diminished trust in government, and the conflict with the presumption of innocence, the use of force is wrongful in interrogations.

Like the use of force, forms of police lies in interrogations are also wrongful for the same reasons. As I have already established that police are in a superior bargaining position during interrogations, the remainder of this Part will examine when police lies are an abuse of their power. At the outset, lies should be presumed to be an abuse of police power. Both lies and force are rarely legitimate in societies that respect the autonomy of individuals. In fact, police maintain the only occupation that has the power to use both lies and force.[89]

2. *Why Police Lies Are Wrongful*

Under Bok's framework for evaluating the justifications of lying, I consider the harms of police lies during interrogations. As with force, the harms of police lies include diminished dignity and autonomy of the suspect, damage to our trust in government, and the violation of the presumption of innocence.[90]

The action of deceiving suspects in order to obtain confessions diminishes the dignity of the suspect.[91] When suspects confess in response to police lies, they are not accurately informed of their situations and therefore cannot make intelligent legal decisions. This is in sharp contrast to a defendant's decision to testify at trial. In this situation, the defendant is likely to consider advice from an attorney; and a prosecutor, who is not allowed to lie, will question the defendant.[92] Preventing police from lying will preserve suspects' abilities to make knowing decisions to confess based on circumstances as they correctly believe them to be.

In addition, because police are held to a higher moral standard, the notion that a police officer would lie should cause concern.[93] The assumption that police follow a higher standard makes police lies particularly persuasive. In addition, because suspects are in a state of heightened vulnerability in

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89 *Id.*

90 *See* Slobogin, *supra* note 66, at 796–800.

91 *See id.* at 796.

92 MODEL RULES OF PROF'L CONDUCT r. 3.4(b) (AM. BAR ASS'N 2014), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_4_fairness_to_opposing_party_counsel.html [https://perma.cc/98LA-5EPJ].

93 After reading thousands of opinions on confessions, Marcus described feeling "unclean and tainted by government activities that are not honorable even given the environment needed for interrogations." Marcus, *supra* note 20, at 643.

an interrogation setting, they are more likely to accept police statements on their face.[94]

Finally, as with the use of force, police lies conflict with the intent of the privilege against self-incrimination. Current interrogation techniques are often premised on obtaining a confession rather than simply gathering evidence. The creators of the "Reid Technique" advise interrogators that they must possess "a great deal of inner confidence in [their] ability to detect truth or deception, elicit confessions from the guilty, and stand behind decisions of truthfulness."[95] Thus, by definition, interrogation is a process in which the interrogators presume the guilt of the interrogated, direct the interaction based on their own theory, and measure success by the extraction of an admission from that suspect.[96] This is evident in the interrogation of Thomas when police admittedly did everything they could to get him to tell "the truth."[97] Police may mistakenly assume that lies, like false evidence ploys, will only deceive guilty suspects because innocent suspects will realize that the police are lying. Thus, when police lie to suspects, they often have presumed that the suspect is guilty and are searching only for evidence that confirms their beliefs.

In reality, lies distort the suspect's estimates of the costs and benefits of confessing.[98] For example, when a police officer lies about the presence of evidence, an innocent person may feel that it is necessary to confess to avoid conviction of a more serious offense. Therefore, lies allow police to make conditional offers that attempt to induce the suspect to confess based on false information about the suspect's legal situation. Like force, police lies are an abuse of power because they give police an even greater advantage over the suspect. In light of the harms of police lies, police must never lie unless no truthful, non-coercive alternatives are available.[99]

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94 *See* Miranda v. Arizona, 384 U.S. 436, 461 (1966) (recognizing the heightened vulnerability that suspects' experience when they are in custody); *see also* Bram v. United States, 168 U.S. 532, 556 (1897) (describing the inherently coercive atmosphere of interrogations).

95 Saul M. Kassin, *A Critical Appraisal of Modern Police Interrogations*, *in* INVESTIGATIVE INTERVIEWING 214 (Tom Williamson ed., 2006); *see also* INBAU ET AL., *supra* note 17 (instructing investigators on the Reid Technique).

96 *See* Slobogin, *supra* note 66, at 796–800.

97 *See supra* note 6 and accompanying text.

98 *See, e.g.*, Magid, *supra* note 12, at 1175 (stating that in *Miranda,* the Court "observed that [deceptive interrogation] techniques created or increased the disadvantage most suspects had in matching wits with their interrogators").

99 Slobogin also noted that lies may encourage police to lie more often in other situations, which could foster corruption. Slobogin, *supra* note 66, at 800.

When a suspect attempts to use knowledge of his or her criminal activity to gain an advantage over the police in the interrogation, police lies do not rise to the same level of coercion. This may occur when suspects have knowledge of the location of a victim and use this to obtain bargaining power in the interrogation. Here, the suspect may be able to coerce the police and exert power over police decision-making. In this situation, police lies are no longer an abuse of power because the police are not in a superior bargaining position.

III
WEIGHING THE BENEFITS OF DECEPTION

Despite the wrongfulness of lying, one might nonetheless believe deception is justified if it comes with some overriding benefit. For example, police lies in interrogations may be justified when lies are necessary to avoid a serious crisis.[100] In a crisis context, it is important to keep in mind that liars can be "counted upon to exaggerate the threat, its immediacy, or its need."[101] Therefore, there must be some showing of imminent danger to another person's interests before recognizing a crisis. These situations should be rare because in most investigations, police are not even sure the suspect is a criminal, much less that harm is imminent.[102]

Police lying may also be justified when it is necessary to protect society from an "enemy."[103] In order to determine that a suspect (who has not been convicted of the crime) is truly an enemy, there must be a public expression of the suspect as the enemy. In order to comply with this requirement, Christopher Slobogin suggested a requirement of ex ante review by a judge, similar to the warrant process, before a police officer may engage in deception. This recognizes the difficultly of having a public debate about whether a suspect who has not been convicted of the crime is a criminal. This suggestion weakens the requirement of the presumption of innocence.[104] In addition, the extent to which lies are necessary to protect society from criminals is hotly debated.

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100 *See id.* at 792–93.
101 *Id.* (citing BOK, *supra* note 66, at 119–22).
102 *Id.* at 801.
103 *Id.* at 794–95.
104 *See supra* section II.D.2.

A. Empirical Evidence Examining the Benefits of Police Lies

Proponents of police deception argue that even though lying is wrongful, in interrogations it is a necessary evil because of the importance of lies in eliciting confessions,[105] which play an important role in solving crimes.[106] Indeed, confessions are often referred to as the "gold standard" in evidence.[107] Lies are fundamental to modern American interrogation techniques, which are designed to persuade a rational person to confess instead of denying culpability, even when confessing is not in the person's best interests. To that end, police must manipulate suspects' perceptions of their best interests and their viable alternatives.[108] Police may do this by leading suspects to believe that the evidence against them is overwhelming, that they will be convicted regardless of their confession, and that they will receive advantages from confessing.[109] For example, suspects often report that they confessed because they perceived the evidence against them to be overwhelming.[110]

In observations of 182 police interrogations, Richard Leo noted that police officers began interrogations by confronting the suspects with true evidence in 85% of cases but lied about the presence of evidence in 30% of cases.[111] In addition, police offered suspects incentives to confess in 88% of the observed

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105 *See* Gohara, *supra* note 32, at 809 ("[T]he *Inbau Manual* makes it clear that employing trickery and deceit is essential to an interrogator's strategy for eliciting a confession."); *see also* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 985 (1997) (describing contemporary American methods of interrogation that seek to "manipulate the individual's analysis of his immediate situation and his perceptions of both the choices available to him, and of the consequences of each possible course of action"); Miller W. Shealy, Jr., *The Hunting of Man: Lies, Damn Lies, and Police Interrogations*, 4 U. MIAMI RACE & SOC. JUST. L. REV. 21, 38–43 (2014).

106 *See* Marcus, *supra* note 20, at 607 ("[C]onfessions are 'essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'") (quoting *Moran v. Burbine*, 475 U.S. 412, 426 (1986)); Shealy, *supra* note 105, at 39 (highlighting that forensic evidence is not always present); *see also* Ofshe & Leo, *supra* note 105, at 983–84 ("A confession—whether true or false—is arguably the most damaging evidence the government can present in a trial.").

107 Kassin et al., *supra* note 11, at 4.

108 *See, e.g.*, Ofshe & Leo, *supra* note 105, at 985 (observing that interrogators must make a suspect believe that confessing to a crime is "rational and appropriate").

109 *See id.* at 985–86.

110 Gisli H. Gudjonsson & Jon F. Sigurdsson, *The Gudjonsson Confession Questionnaire-Revised (GCQ-R): Factor Structure and Its Relationship with Personality*, 27 PERSONALITY & INDIVIDUAL DIFFERENCES 953, 954 (1999).

111 Leo, *supra* note 30, at 279 (describing what Leo found after observing 122 interrogations in person and sixty by videotape).

interrogations. In the end, suspects confessed in 64% of the interrogations. This rate increased to 76% when Leo excluded cases in which suspects invoked their *Miranda* rights (leading police to terminate the interrogation). The most successful interrogation techniques included appealing to the suspect's conscience, identifying contradictions in the suspect's story, using praise or flattery, and offering moral justifications for the crime.[112] Lying about the presence of evidence did not significantly increase the probability of soliciting a confession.[113] These results suggest that lies are not necessary for successful police interrogations.

Lies are not only unbeneficial to interrogations; they can actually be harmful, as police lies are likely to encourage an innocent person to confess. Suspects respond to police lies by falsely confessing for two main reasons: social compliance[114] and memory failure.[115] In the case of social compliance, police lies may make it clear to suspects that the police want a confession, which may cause the suspects to tell the police what they want to hear, if only to put an end to the interrogation.[116] Alternatively, the false evidence may persuade a suspect that their chances of exoneration are hopeless and thus confessing is in their best interest if it would lead to a lighter sentence.[117] Police lies about evidence and the strength of their case may also affect cognition by convincing vulnerable suspects that they are guilty even though they have no memory of committing

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112 *Id.* at 293–94 (finding that these tactics elicited a confession in 90–97% of cases and were the only tactics that made confessions significantly more likely).

113 *Id.* at 294 (finding that false evidence elicited a confession in 83% of cases, which was not significantly higher than the baseline of 76%, which reflects the sample of interrogations after a *Miranda* waiver).

114 This is labeled a "coerced-compliant" false confession. *See* Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 125 (1996).

115 This is labeled a "coerced-internalized" false confession. *Id.*

116 For example, Kharey Wise, a member of the exonerated "Central Park Five," said that after police falsely told him that his friends said he was present at a crime scene, he made up facts "just to give them what they wanted to hear." Gohara, *supra* note 32, at 792 (quoting *House of Cards: Experts Say Interrogation Techniques Can Encourage False Confessions* (ABC News television broadcast Sept. 26, 2002)).

117 *See* Ofshe & Leo, *supra* note 105, at 1045–50.

the crime.[118] Police often encourage this belief by telling suspects they may have repressed their memories of the crime.[119]

For example, police repeatedly told Adrian Thomas various lies during the interrogation, including that information he provided about how his son was injured could help save his son's life, even though his son was already brain-dead.[120] This type of police deception left Thomas with little room for dispute since the police said their beliefs were supported by medical evidence.[121] Thomas did not have a background in medicine and likely felt that the medical evidence could not be wrong.

When Thomas said he had no memory of injuring his son, the police officer suggested that Thomas may have repressed his memory.[122] In addition, the officer said: "You better find that memory right now, Adrian, you've got to find that memory. This is important for your son's life man."[123] In this way, the police tried to convince Thomas that he was guilty even though he had no memory of committing the crime.[124] For suspects who are less trusting of their memory due to young age, mental illness, intellectual disability, or a history of drug and alcohol abuse, this type of lie can be highly persuasive.[125] Even if this was not persuasive to Thomas, it was impossible for him to prove he was not repressing his memory.

Throughout the interrogation, the police gave Thomas details suggesting what they believed happened to his son.[126] In fact, every incriminating statement that Thomas made was previously stated by police.[127] The police asked Thomas to reenact what had happened and gave Thomas a binder to represent his son. The police asked Thomas to throw the binder on the ground in the same way he threw his son. By this point, however, police had already told Thomas how they thought

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118 *See, e.g.*, Amelia Courtney Hritz, JoAnn, Video Presentation at the Convicted by Law, Acquitted by Social Science Panel during Cornell University's Charter Day Weekend (Apr. 25, 2015), https://youtu.be/WkghguFOl9Y [https://perma.cc/6HUY-R5CS] (describing how JoAnn Taylor developed false memories of committing a crime after repeated interrogations by police in which they presented her with false evidence).

119 *See* Ofshe & Leo, *supra* note 105, at 1000.

120 SCENES OF A CRIME, *supra* note 6.

121 Ofshe & Leo, *supra* note 105, at 1031.

122 SCENES OF A CRIME, *supra* note 6.

123 People v. Thomas, 8 N.E.3d 308, 311 (N.Y. 2014).

124 Ofshe & Leo, *supra* note 105, at 1044.

125 Kassin et al., *supra* note 11, at 30.

126 Heyl, *supra* note 7, at 951.

127 *Id.*

Thomas's son sustained his injuries.[128] In addition, this made it clear to Thomas that when the police told him that they wanted the "truth," in reality they wanted him to confess, whether he was guilty or not. As a result, Thomas's confession could not be corroborated with other evidence gathered in the case.

In addition, police repeatedly told Thomas that if he confessed, he would not be arrested and could go home.[129] The police sensed that Thomas did not believe this, so they told him they would solemnly swear that they were not lying. At the beginning of the interview, Thomas may have thought that the cost of confessing was high, but after these lies, he likely saw little harm in it and thought he could gain the immediate advantage of being able to leave the long interrogation.[130]

In critiquing the reliability of Thomas's confession, the court benefitted from a videotape of the entire interrogation.[131] In general, proving that police lies are a contributing factor in eliciting a wrongful confession is very difficult because of the characteristics of false confessions. If police correctly identify the confession as false, they often do not keep a record of it.[132] If police incorrectly identify the confession as true, the case will continue, and the confessor will often plead guilty or be convicted at trial.[133]

Once confessors are convicted, indisputably proving their innocence is difficult.[134] In fact, confessions can only be proven false in rare situations.[135] First, it may be objectively established that the crime did not happen. An example would be if a person who was thought dead turns up alive. Second, it may be objectively established that the defendant could not have committed the crime. For example, direct evidence may suggest that the defendant was in a different location at the time of the crime. Third, authorities may objectively prove the

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128 The court noted that due to all of the details that the police fed Thomas, the "confession provided no independent confirmation that he had in fact caused the child's fatal injuries." *Thomas*, 8 N.E.3d at 316.

129 *Id.* at 311–12.

130 *See* Ofshe & Leo, *supra* note 105, at 1053.

131 Heyl, *supra* note 7, at 951.

132 *See* Kassin et al., *supra* note 11, at 5 (stating that no governmental or private organizations keep records of false confessions).

133 Ofshe & Leo, *supra* note 105, at 984.

134 *Id.*

135 *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 925–27 (2004) (describing the four rare situations in which a disputed confession can be classified as proven to be false beyond any doubt).

guilt of the true perpetrator. Finally, scientific evidence, such as DNA, may conclusively establish the defendant's innocence. Factually innocent defendants have no control over whether these circumstances are present in their case.[136] In the majority of cases, completely removing doubt of a defendant's innocence is impossible. Just as investigators struggle to find objective evidence to convict a defendant (hence the need for confessions), innocent defendants also struggle to find objective evidence to prove their innocence. For example, despite its prevalence on television, it is rare to find scientific evidence like DNA.[137] It is even more difficult to review cases involving minor crimes when there is no post-conviction scrutiny and juvenile cases where files are closely guarded for confidentiality.

DNA exonerations have revealed that police-induced false confessions are one of the leading causes of wrongful convictions. Of the first 325 convictions to be overturned by DNA evidence, 88 (27%) were based on false confessions or admissions.[138] DNA exonerations only include a small subset of cases involving police interrogations, and therefore there is no generally accepted estimate of the prevalence of false confessions.[139] Even with DNA exonerations, confessions are difficult to study because in many cases police record only confessions and not the prior questioning, if they record at all. Other records that could illuminate characteristics of the circumstances leading to the confession are often lacking. This also makes it difficult for researchers to compare true and false confessions.

Researchers have designed experimental studies to examine the relationship between police lies and false confessions. Due to ethical considerations, researchers cannot go to the same lengths that police may go to in pursuit of a confession. On the other hand, they also do not raise the stakes of confessing to the same level that suspects face in criminal cases.[140] A laboratory experiment performed by Kassin and Kiechel demonstrated that misrepresentations about evidence can cause significantly more suspects to confess to an act they

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136 *Id.* at 927.

137 *Id.* at 925–27.

138 THE INNOCENCE PROJECT, *The Causes of Wrongful Conviction*, http://www.innocenceproject.org/causes-wrongful-conviction [https://perma.cc/V4JSA8TC].

139 Kassin et al., *supra* note 11, at 5.

140 *See, e.g.*, Kassin & Kiechel, *supra* note 114, at 127 (differentiating between experiment subjects being accused of mere unconscious acts of negligence and crime suspects being accused of explicit criminal acts).

did not commit.[141] Overall, 69% of the participants signed a confession admitting to hitting a computer key despite warnings that it would cause an error in the computer system, 28% of the participants displayed an internalization of guilt by telling a stranger that they were responsible, and 9% confabulated details when recreating the event with the experimenter. When a witness falsely confirmed that the participants had hit the computer key, the rates of signing a confession and internalizing guilt increased significantly.[142] When the false evidence was combined with increased typing pace (causing the participants to be more vulnerable because they were in a heightened state of uncertainty about their guilt), 100% signed a confession, 65% internalized, and 35% confabulated details. These results support both the social and cognitive factors involved in false confessions, as suspects signed confessions in response to social pressure but also maintained a belief in their guilt when speaking with a stranger in the absence of the social pressure.[143] The measure of confabulation also displays how false confessions can contain details of the crime, which may make them difficult to differentiate from true confessions.

The Kassin and Kiechel study is limited in that it is highly plausible that the participants accidently hit the computer key and thus may have been uncertain of their innocence.[144] This limitation is minimized in another experimental paradigm in which participants are induced to cheat on a problem-solving task by a confederate.[145] Using this paradigm, Russano and colleagues found that 72% of people who were guilty of cheating confessed and 20% of people who were innocent confessed.[146] Interrogation techniques such as minimization and offering deals increased rates of confession among both inno-

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141 *Id.*

142 Kassin et al., *supra* note 11, at 17 (describing how the Kassin & Kiechel findings showed that "false evidence nearly doubled the number of students who signed a written confession, from 48 to 94%").

143 Multiple studies have used this paradigm to examine false confessions. For a review, see Christian A. Meissner, Allison D. Redlich, Stephen W. Michael, Jacqueline R. Evans, Catherine R. Camilletti, Sujeeta Bhatt & Susan Brandon, *Accusatorial and Information-Gathering Interrogation Methods and Their Effects on True and False Confessions: A Meta-Analytic Review*, 10 J. EXP. CRIMINOLOGY 459 (2014).

144 Melissa B. Russano, Christian A. Meissner, Fadia M. Narchet & Saul M. Kassin, *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 482 (2005).

145 *See id.* at 483.

146 *Id.* at 484.

cent and guilty people.[147] While this experiment did not measure police lies explicitly, police often lie when using minimization techniques; for example, they may misrepresent the seriousness or nature of the offense.[148] Multiple studies have replicated both the Kassin and Kiechel typing paradigm and the Russano et al. cheating paradigm with various manipulations and have also found that participants are more likely to falsely confess when presented with false evidence.[149]

Despite the difficulty in studying confessions and the various limitations that exist within each method, research has consistently demonstrated that innocent people confess.[150] Furthermore, because false confessions have been demonstrated across a wide array of research methods, the magnitude of various limitations is decreased.[151] There is enough evidence to raise concern about the legitimacy of the *Inbau Manual*'s claim that self-preservation will cause innocent suspects to stand up to interrogation techniques such as deception.[152] In addition, the use of false evidence has been implicated in the vast majority of documented false confessions.[153] At the very least, we do not know the full effects of police deception.[154] As I have shown, deception is *prima facie* wrongful, so the burden is on the people promoting deception to prove that the benefits of lies outweigh the many harms.

CONCLUSION

In order to preserve individual liberty in the interrogation room, police lies should be banned unless warranted by imminent necessity. Like the use of force, evidence of police lies should be sufficient to determine that a confession is not vol-

147 Minimization involves offering sympathy or concern, offering justifications for the transgression, and suggesting it was in their interest to cooperate. *Id.* at 482–83.

148 Skolnick & Leo, *supra* note 3, at 6.

149 *See* Kassin et al., *supra* note 11, at 17 (describing follow-up studies that manipulated the plausibility of the typing error by suggesting that the participant hit a more distant key, increased the harms of confessing by introducing financial consequences, and increased the credibility of the false evidence by introducing fabricated video evidence).

150 For a review, see *id.* at 5.

151 *Id.*

152 INBAU ET AL., *supra* note 17, at 351 ("The ordinary citizen is outraged and indignant when presented with supposed 'evidence' of an act he knows he did not commit."); *see also* Gohara, *supra* note 32, at 825 (noting that the *Inbau Manual* does not back up their claims with empirical evidence).

153 Kassin et al., *supra* note 11, at 12.

154 *See, e.g.*, Shealy, *supra* note 105, at 64–65 (arguing that DNA exonerations are the only conclusive proof of false confessions).

untary. This rule recognizes the fact that a power imbalance exists in the interrogation room, with suspects being more vulnerable and dependent on the police. Police lies are an abuse of this superior power, as they disregard the autonomy of the suspect, enhance distrust in government, and violate the presumption of innocence.

Exceptions to the ban on lying are warranted in the rare situations where there is a crisis and/or a suspect is attempting to exert an improper influence over the police through knowledge of criminal activity. This narrow carve-out of the ban on police deception allows police to lie when suspects are using criminal activity to gain an advantage over police.

The current voluntariness standard almost always allows police to lie in interrogations. This impermissibly places the power to determine when to lie with the police, even though liars can be counted upon to justify lying by exaggerating "the threat, its immediacy, or its need."[155] Furthermore, the current standard relies primarily on the *Miranda* rights to protect suspects, even though most suspects waive these rights. *People v. Thomas* recognized that certain forms of deceptive police tactics can be coercive. Now it is time to take the next step. As with the ban on the use of force in interrogations, it is time to reconsider a ban on police deception because "[i]t is not sufficient to do justice by obtaining a proper result by irregular or improper means."[156]

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155 BOK, *supra* note 66, at 119–22.

156 Miranda v. Arizona, 384 U.S. 436, 447 (1966) (quoting the IV NAT'L COMM'N ON LAW OBSERVANCE AND ENF'T, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 5 (1931)).