Lying and Confessing

Christopher Slobogin

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by Christopher Slobogin[*]

Deception is usually considered a bad thing. We teach our children not to lie, we don't like it when our politicians dissemble, and we root against the television character who misleads people. But we also officially permit deception in all sorts of situations, including sports (Boise State's statue of liberty play in the 2007 Fiesta Bowl), negotiations between lawyers (puffing about the client's case), and scientific research (from whence the term "placebo").

This Essay tries to figure out where in this spectrum deception by the police, and more specifically police deception during interrogation, fits. I have previously argued that police should not be able to practice deceit in their official capacity, during interrogation or otherwise, unless (1) there is probable cause to believe the person to whom they are lying is a criminal; (2) the lying is necessary to obtain incriminating information; and (3) the lying does not have an illegitimately coercive effect.[1] The first (probable cause) limitation would curtail a significant amount of undercover work, pretextual seizures and searches, and lies aimed at witnesses and mere suspects.[2] But it would also permit trickery during interrogation that follows an arrest, limited by the second and third requirements.[3]

Part I of this Essay revisits my earlier argument that probable cause should be the threshold for authorizing deceptive practices and responds to some criticisms of that position. The rest of this Essay fleshes out the second and third limitations, something I neglected to do in my earlier work. Part II directly addresses the necessity issue. It suggests, but admittedly does not prove, that without police fraud a sizeable number of criminals would not confess, and their cases would thus be much more difficult to solve. On that assumption, Part III describes a typology of deception that might be useful during interrogation. It then identifies those situations within the typology

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* Stephen C. O'Connell Professor of Law, University of Florida Fredric G. Levin College of Law; Edwin A. Heafey Visiting Professor of Law, Stanford Law School.

1. Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 778-88 (1997).

2. *Id.* at 801-12.

3. *Id.* at 812-15.

where trickery becomes coercive, which addresses the third limitation. I conclude that only two types of interrogation lying are clearly illegitimately coercive: (1) lies aimed at convincing suspects that they do not have a right to remain silent or a right to counsel and (2) lies that would be considered illegitimately coercive if true, a principle that I call "the equivalency rule." Part IV explains why concerns about false confessions do not change this analysis. Finally, the concluding section of the Essay briefly considers whether moral considerations require any other limitations on the use of deception during interrogation, including whether we should make a distinction between affirmative misrepresentations and failure to correct misimpressions.

I. PROBABLE CAUSE AS THE JUSTIFICATION FOR DECEPTION

In an article entitled *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, I relied on the work of noted moral philosopher Sissela Bok in constructing a framework for analyzing police deception.[4] Bok argued that lying is generally to be avoided because it coarsens the liar, denigrates the dupe, and diminishes the level of trust in society as a whole.[5] Bok was willing, however, to recognize at least two narrow exceptions to this prohibition.[6] The first exception occurs when lying is necessary to avert a serious crisis, such as in a hostage situation.[7] The second arises when lying is necessary to protect society from an enemy, a category in which Bok included criminals.[8] Even in these two situations, however, Bok demanded that, if at all possible, the public —defined as a group representing diverse viewpoints, including potential dupes—be involved in sanctioning the deception, given the ease with which crises and enemies can be manufactured.[9]

In *Deceit, Pretext, and Trickery* I focused on the application of Bok's enemy-criminal exception to police investigation and argued that, given the difficulty of having a public debate about whether particular individuals fit that exception, a judicial determination of criminality, either before or shortly after arrest, should suffice.[10] In the interrogation context, this rule would prohibit deception aimed at witnesses and others not in custody but would permit necessary, non-coercive deception of persons who have been arrested, because at that point a judicial determination of probable cause either has already been

4. *Id.*, at 788-801 (discussing SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (Pantheon Books 1978)).

5. BOK, *supra* note 4, at 21-28.

6. *Id.* at 166.

7. *Id.* at 140.

8. *Id.* at 135.

9. *Id.* at 152-53. Bok ultimately expresses doubt that the public can put itself in the enemy's shoes and thus ends up being equivocal about the "lying to enemies" exception. *Id.*

10. *See* Slobogin, *supra* note 1, at 802-05.

made or is imminently pending.[11] I also argued that, once a person has been formally charged, which usually occurs several days or weeks after arrest, interrogation deception is no longer permissible because it should no longer be deemed necessary, given the government's pronouncement, through the formal charge, that the government has a prima facie case against the defendant.[12]

Professors Robert Mosteller and Margaret Paris, in separate articles, have both criticized this proposal to the extent it permits deception during interrogation.[13] Both contend that, under Bok's framework and as an independent normative matter, mere probable cause is an insufficient justification for practicing deception, because arrestees are not necessarily criminals.[14] Both also register concern that lying during interrogation is particularly pernicious and unacceptable when directed at someone charged with a minor crime.[15] Although these criticisms might argue for an adjustment of my earlier position, they do not require its abandonment.

Mosteller and Paris are correct in asserting that Bok was particularly concerned about the tendency of those who are contemplating deception to reach self-serving conclusions about their dupes.[16] And, consistent with that insight, research on the interrogation process verifies that the police are quite capable of rationalizing their use of deceptive techniques by convincing themselves that their interview subjects are guilty.[17] But ultimately Bok did not stake out a clear position on when a person can be labeled an enemy.[18] In a passage referring specifically to criminals, she stated: "[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

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11. *Id.* at 815-16.

12. *Id.* at 810-15. At the symposium at which this Essay was presented, I received several comments to the effect that formal charging is an artificial dividing line, because the charging decision is often based on little more than the information that justified the arrest and is pro forma in many jurisdictions. That may be so, but the fact remains that a formal charge should represent a prosecutorial decision that a prima facie case exists against the defendant and that, therefore, no further evidence is needed, as opposed to desired. *Cf.* ABA CRIMINAL JUSTICE STANDARDS, Prosecution Function, Standard 3-3.9(a) ("A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction."); State v. Clark, 20 P.3d 300, 305 (Utah 2001) (holding that to prevail at a preliminary hearing, evidence must be sufficient "to survive a motion for directed verdict [but] need not be capable of supporting a finding of guilty beyond a reasonable doubt"). In any event, a prophylactic rule to this effect is warranted in this context.

13. Robert P. Mosteller, *Moderating Investigative Lies by Disclosure and Documentation*, 76 OR. L. REV. 833 (1997); Margaret L. Paris, *Lying to Ourselves*, 76 OR. L. REV. 817 (1997).

14. Mosteller, *supra* note 13, at 834; Paris, *supra* note 13, at 823.

15. Mosteller, *supra* note 13, at 844 n.45; Paris, *supra* note 13, at 831.

16. *See* BOK, *supra* note 4, at 146-53.

17. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 323-26.

18. For instance, in one passage Bok contemplated the use of unmarked police cars, which would obviously deceive the innocent and the guilty alike even though police would not know which was which. *See* BOK, *supra* note 4, at 99.

excusable will it be to lie to them if honesty is of no avail."[19] This language suggests that Bok would permit some uncertainty as to the enemyhood of an individual, provided the case for that status is made "openly and clearly," in a manner that gives the dupe, as well as the public, notice of the dupe's status.

An arrest is an open and a clear statement that the state considers the individual arrested to be a criminal suspect. While that declaration in any given case is not the result of a public debate, it usually cannot be, for obvious reasons. Of course, the public and the courts could debate in the abstract whether and when police deception should be permitted. But, as I pointed out in *Deceit, Pretext, and Trickery*, any conclusions about the propriety of particular deceitful techniques will vary widely depending on the perceived guilt of the hypothetical dupe. For instance, I asked:

> 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.[20]

Given this relationship between acceptable use of deceit and the degree of suspicion, the probable cause determination is not an unreasonable threshold for permitting interrogation deception.

Professor Mosteller is also bothered, however, by the fact that a *judicial* determination of probable cause rarely precedes an interrogation and that an ex post judicial determination is likely to be infected by the results of the interrogation.[21] I anticipated this complaint in *Deceit, Pretext, and Trickery*, where I noted:

> [T]he police know that within forty-eight hours of arrest, [the arrest] will be subject to a judicial check. 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.[22]

Nonetheless, Mosteller is right that police can manipulate facts based on what they learn during the interrogation and, given their ability and willingness to do so, might be encouraged by the rule I propose to arrest individuals illegally in the hope that deception will subsequently help them make their case in front of the judge. Thus, it might make sense—consistent with proposals designed

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19. *Id.* at 144.
20. Slobogin, *supra* note 1, at 803.
21. Mosteller, *supra* note 13, at 849-50.
22. Slobogin, *supra* note 1, at 811 (citation omitted).

to regulate *all* interrogation, deceptive or not—to require interrogation warrants, issued by judges on probable cause, before questioning that might involve trickery takes place.[23] To alleviate concerns about the effects of trickery on those charged with very minor crimes, where the benefit may not outweigh the harm visited by numerous betrayals of relatively law-abiding citizens, issuance of such warrants might be restricted to investigations of felonies. In those cases in which a warrant was not issued prior to arrest and speed is of the essence, one could be sought relatively efficiently using the telephonic warrant procedure now available in many jurisdictions.

This solution might mollify Professor Mosteller.[24] But it would not allay the concerns of Professor Paris who, following Bok, is particularly worried about the harms produced by deception even in cases where the evidence of guilt is great. For her, police deception is so likely to cause significant damage to police-citizen relations that it should virtually never occur.[25]

In *Deceit, Pretext, and Trickery*, I explored in detail how police lying can have a negative impact on dupes, police who lie, and police credibility more generally.[26] But if those harms are considered trump cards, as Professor Paris appears to believe, then undercover work and electronic surveillance, among many other deceptive investigative techniques, would have to be banned. In any event, any damage that the use of interrogation trickery visits on the police or on society should be minimal if lying is strictly confined to the post-arrest, pre-formal charge interrogation context. And while suspects who are fooled during such interrogations may well feel humiliated, the "harm" thereby caused is far less palpable than other harms to suspects we routinely permit upon a probable cause showing (I leave aside for now the harm of false confessions that might be caused by deception). Solely on their own determination of probable cause, law enforcement officials may detain individuals for up to forty-eight hours.[27] In emergency situations they may also ransack homes looking for evidence.[28] And if a warrant is obtained,

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23. *See* Russell D. Covery, *Interrogation Warrants*, 26 CARDOZO L. REV. 1867,1879-91 (2005) (arguing that interrogations are akin to Fourth Amendment searches); Timothy P. O'Neill, *Rethinking Miranda: Custodial Interrogation as a Fourth Amendment Search and Seizure*, 37 U.C. DAVIS L. REV. 1109, 1123-24 (2004) (arguing that, when seeking to conduct interrogations, police need either consent, via a *Miranda* waiver, or "proper authority" under the Fourth Amendment; if deception were seen as vitiating consent, a warrant would be needed under this analysis).

24. It is not clear what Mosteller's ultimate position is on the use of interrogation deception. At one point he suggests that deception be restricted to cases involving serious crime in which the suspect turns out to be guilty, based on what he calls a "just deserts" rationale. *See* Mosteller, *supra* note 13, at 842-44. But of course, guilt cannot be known at the time of interrogation. The probable cause requirement, bolstered by the warrant requirement, is the only practical way of implementing this "just deserts" approach.

25. Paris, *supra* note 13, at 829-32 (concluding, after a description of the harms caused by police lying in the interrogation context, that lying during interrogation is "unjustifiable").

26. Slobogin, *supra* note 1, at 796-801.

27. United States v. Watson, 423 U.S. 411, 417 (1976).

28. Minnesota v. Olson, 495 U.S. 91, 100 (1990) ("[A] warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, or the need to prevent a suspect's escape,

police are even permitted to use the ultimate deception technique—electronic eavesdropping.[29] If probable cause is sufficient to justify these types of government actions, it should be enough to justify non-coercive deception during interrogation.

Of course, even if the harms from post-arrest interrogation deception are not as significant as Professors Mosteller and Paris seem to think, they might still outweigh the benefits derived from the deception. In other words, lying during interrogation may not be necessary, or only necessary in a few, unusual cases. If that assumption is correct, then we need not bother debating about interrogation deception.

II. THE NEED FOR DECEPTION DURING INTERROGATION

There is some dispute over whether any type of interrogation, deceptive or not, is a necessary police tool. Paul Cassell, an avid supporter of the interrogation process, conceded that confessions are essential in only some 22% of cases, and other analyses have produced even lower estimates.[30] But most would probably agree that even if merely 5% of all prosecutions for serious criminal acts require a confession, that proportion is sufficiently high to warrant a continuation of the practice.

The more relevant statistic for present purposes is the extent to which trickery is necessary to obtain confessions that are important to successful prosecutions. Unfortunately, studies of the interrogation process produce equivocal findings on this score. But the combined results of observational studies, simulation research, and the conduct of the police themselves suggest that a non-trivial number of guilty people would not confess in the absence of investigative techniques that go beyond non-deceptive questioning.

Admittedly, most successful interrogations do not require specialized techniques. Several studies conducted in the United Kingdom indicate that the vast majority of confessions occur during the initial interview within a short period of time. For instance, Baldwin found that in 600 run-of-the-mill cases involving theft, burglary, and assault, confessions or admissions were obtained during interviews that typically lasted fewer than thirty minutes.[31] Moreover,

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or the risk of danger to the police or to other persons inside or outside the dwelling.").

29. Berger v. New York, 388 U.S. 41, 54-55 (1967).

30. Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 906 (1996). *See also* Michael Wald et al., *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1585-86, 1593-96 (1967) (finding that confessions are important or essential in 13% of cases, although they are also occasionally crucial in clearing other crimes and in discovering patterns of criminal activity); Richard H. Seeburger & R. Stanton Wettick, Miranda *in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 23 (1967) (finding that confessions are essential in less than 10% of cases).

31. John Baldwin, *Police Interviewing Techniques: Establishing Truth or Proof?*, 33 BRIT. J. CRIMINOLOGY 325, 327 n.28 (1993).

Baldwin concluded that of those twenty suspects who confessed after at first denying the charge, only nine did so because of the persuasive skills of the examiner.[32] Similarly, Pearse and Gudjonsson, in a second U.K. study, found that only 3 out of 93 individuals who confessed did so after the initial interview, with the rest providing incriminating statements during their first meeting with the police in sessions that averaged twenty-two minutes.[33] They further concluded that "psychological manipulation" was used in only 8% of the 173 cases studied.[34] Studies of American interrogations have found initial denials to be more frequent, perhaps for cultural reasons or because of *Miranda v. Arizona*, but nonetheless also indicate that many confessions are obtained relatively quickly.[35] These kinds of findings suggest that, in the typical case, deception plays little or no role in obtaining confessions because suspects confess quickly (undoubtedly due, in many cases, to the overwhelming evidence police already have against them).

When suspects insist on denying the charge beyond the first thirty minutes, however, deceptive techniques may become crucial. For instance, in the studies reported above, something beyond straightforward questioning was necessary in 1.5% to 8% of the cases. Another U.K. study, conducted by Gudjonsson, described twenty interrogations in cases involving rape, arson, armed robbery, and murder, during which police used an array of deceptive and other specialized techniques because the suspects were initially resistant to making admissions.[36] Unfortunately, the extent to which these observation studies demonstrate the efficacy of deception is unclear, because the special tactics may not *really* have been necessary. Furthermore, these studies do not differentiate between various interrogation techniques, making an assessment of deceitful practices difficult. For instance, in most of the cases involved in Gudjonsson's 20-case study, the police, in addition to dissembling, browbeat the suspect over long periods of time; indeed, in eight of the twenty cases the confession was excluded on the ground that the questioning had been "oppressive."[37] Nonetheless, "non-oppressive" techniques were clearly important in over half of these cases.

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32. *Id.* at 329 n..35.

33. John J. Pearse & Gisli H. Gudjonsson, *Police Interviewing Techniques at Two South London Police Stations*, 3 PSYCHOL., CRIME & L. 63 (1996), reported in GUDJONSSON, *infra* note 36, at 77.

34. *Id.* at 112.

35. Barry Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 316 (2006) ("Police in this study concluded three-quarters of interrogations in thirty minutes or less, and none exceeded one and one-half hours. These findings are consistent with every other study of routine interrogation."); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 279 (1996) (finding that 35% of interrogations lasted less than thirty minutes, and 71% lasted less than one hour).

36. GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 86-87 (2003).

37. *Id.* at 112.

The most comprehensive research on interrogations in the United States arrived at similar results. Richard Leo observed 182 interrogations (60 by videotape, the rest directly) conducted by three different American police departments.[38] A little over 64% of these interrogations produced either a full confession or a partial admission.[39] Leo found that the two factors most likely to produce a confession were the number of interrogation tactics the police used and the length of the interrogation.[40] Leo also attempted to identify those tactics that were the most and least successful. Among deceptive techniques, the use of praise or flattery and offering moral justifications or psychological excuses for the suspect's offense fell in the former category, whereas confronting the suspect with false evidence of guilt and minimizing the moral seriousness of the offense ended up in the latter grouping (although the latter two tactics were still somewhat helpful in obtaining confessions).[41] Ultimately Leo's regression analysis could not definitively separate out the efficacy of deceitful tactics from the efficacy of other techniques (such as pointing out contradictions in the suspect's story or confronting him or her with evidence) used during the same interrogation.[42] But Leo's data, like Gudjonsson's, appear to show that in many cases some type of deception is important to interrogative success.

Comparative analysis is another potential way of assessing the usefulness of interrogation deception. The conclusions that can be drawn from this mode of analysis, however, are highly ambiguous, given our current state of knowledge. Gudjonsson asserts that the confession rate is higher in the United Kingdom than in the United States, and that fewer deceptive and oppressive tactics are used in the former country; based on these two assertions, he suggests that such tactics may not be necessary.[43] Yet both of Gudjonsson's assumptions—that the confession rate is higher in the U.K. and that U.K. police use fewer questionable practices—are suspect.[44] Furthermore, in contrast to legal practice in the U.S., U.K. law permits police to continue

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38. Leo, *supra* note 35, at 272.
39. *Id.* at 280.
40. *Id.* at 292.
41. *Id.* at 293, Table 14.
42. *Id.* at 300-01.
43. GUDJONNSON, *supra* note 36, at 620-23 (stating that, based on the English experience, fears among American police and courts that abandoning pressure and trickery would result in a significant reduction in confessions "may be overstated").
44. The confession rate in the United Kingdom appears to be around 50% to 60%, *see id.* at 139, which is similar to the rate found in American jurisdictions. *See, e.g.*, Leo, *supra* note 35, at 300-01 (stating the confession rate in America is 64%); George C. Thomas III, *Plain Talk About the* Miranda *Debate: A "Steady State" Theory of Confessions*, 43 UCLA L. REV. 933, 958 (1996) (finding a 52% to 55% confession rate in the United States). As to the tactics used by English police, Gudjonnson's own work indicates that in cases involving serious crimes, English police often resort to "American-style" tactics. GUDJONSSON, *supra* note 36, at 114. *See also* IAN BRYAN, INTERROGATION AND CONFESSION: A STUDY OF PROGRESS, PROCESS AND PRACTICE 4 (1997) (finding that reforms of the interrogation process in the United Kingdom may have had limited impact on police behavior).

questioning suspects even after they have indicated a desire to remain silent, and police are allowed to tell suspects that their silence may be used against them.[45] If a confession rate differential between the two countries does exist, these legal differences may explain all or most of it. Indeed, these differences may provide U.K. police with such an advantage that American police need deceptive practices merely to keep up.

The most direct support for the proposition that deception during interrogation can be important comes not from studies of actual interrogations, but rather from an innovative analogue study that attempted to simulate the interrogation environment. Roussano and her colleagues solicited individuals to participate in their experiment by telling them that they would be involved in research comparing individual and group decision-making processes.[46] The participants were informed that they would be solving logic problems, some alone and some with another individual who would be in the same small room with them.[47] Unbeknownst to the subjects, the person with whom they were paired was a member of the experiment team. With some of the subjects, the experiment team member asked for, and often received, help in solving one of the logic problems that was supposed to be solved individually, while with other subjects no attempt at rule violation occurred, thus creating a "guilty" group and an "innocent" group.[48]

After the testing was complete, all of the subjects, guilty and innocent, were accused of improperly solving an individual logic problem as a pair. The accused were then subjected to one of three interviewing conditions: (1) pressure tactics (e.g., being told that a confession would settle the matter quickly but that a denial would mean the professor would become involved and things would get worse); (2) minimization tactics (e.g., empathizing with the subject and minimizing the seriousness of the cheating); or (3) straightforward questioning.[49] Both of the specialized tactics, which could as easily be based on lies as on an accurate statement of the subject's situation, vastly increased the proportion of "confessions" from guilty subjects, from 46% in the no-tactic condition, to 76% in the pressure condition, and to 81% in the

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45. ROYAL COMMISSION ON CRIMINAL JUSTICE: REPORT 56-57 (1993) (permitting continued questioning after assertion of right to silence); Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, 1991, 10.4 (Eng.) (permitting the adverse use of silence caution). After English police were required to give cautions, but before they could tell the interviewee that silence could be used against them, the confession rate in the United Kingdom may have been 40-50%. GUDJONSSON, *supra* note 36, at 324; Baldwin, *supra* note 31, at 335.

46. Melissa B. Roussano et al., *Investigating True and False Confessions with a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481 (2006).

47. *Id.* at 483.

48. *Id.*

49. *Id.*

minimization condition.[50] As dramatic as these results are, however, they need to be interpreted with caution, given the simulated nature of the research.[51]

A final type of data to consider in assessing whether deception is crucial to the interrogation enterprise is the view of the police. If they show nothing else about the use of deception during interrogation, the observational studies reported above at least document that many police interrogators believe trickery is a necessary tool if a confession is not quickly forthcoming. Indeed, Leo claimed, based on his study of the interrogation process, that "modern American interrogation is steeped in artifice, deception and fraud" because, police interrogators believe, deception is the only way they can be effective against those who do not want to talk.[52] Leo's conclusion is not surprising given the fact that police training manuals openly subscribe to this point of view.[53]

That police believe interrogation deception is necessary does not make it so, of course. But the police do have the most experience at interrogation; thus, the fact that they believe trickery is an essential mechanism for obtaining confessions should count for something. Barred from using physically intimidating tactics (as they should be), police may well be correct in their surmise that many criminals who want to deny their involvement would not confess without some degree of deception.

In sum, the empirical evidence suggests, although it does not prove, that deception is a necessary component of a successful interrogation in a subset of cases where the suspect initially denies involvement in crime. Assuming that is true, deception might generally be permissible if the police are stymied using straightforward questioning, and if, as proposed in the previous section, they limit its use to the post-arrest, pre-charge context.

That conclusion comes with two significant caveats, however. First, for constitutional reasons, coercive deception and other deception that tends to produce false confessions must be off-limits, even if it is considered necessary. Second, even when necessary and non-coercive, some forms of deception might be considered impermissible on moral grounds. I briefly address the latter situation in the conclusion to this Essay. Below I discuss the issue of coercion and false confessions.

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50. *Id.* at 484, Table 1.

51. The specialized tactics also increased the number of confessions by innocent subjects, *id.*, although, as discussed in the next section, that result is probably even more suspect from an external validity standpoint.

52. RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 42 (forthcoming 2008).

53. *See* CRIMINAL INTERROGATION AND CONFESSIONS xii (Fred E. Inbau et al. eds., 4th ed. 2004) ("We do approve, however, of psychological tactics and techniques that may involve trickery and deceit; they are not only helpful but frequently indispensable in order to secure incriminating information from the guilty or to obtain investigative leads from otherwise uncooperative witnesses or informants."). *See also id.* at 236, 291, 323, 427-29 (defending trickery); 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, 808-18 (2006) (discussing leading interrogation manuals, all of which endorse trickery to some extent).

III. WHEN TRICKERY IS COERCIVE

As just noted, one reason police think trickery is necessary during interrogation is because, as a legal matter, they may no longer resort to physical coercion. But coercion can be psychological as well as physical. Thus, regardless of its effectiveness, some types of trickery may be barred by the Constitution. Identification of these psychologically coercive techniques is a difficult but crucial aspect of regulating interrogation. Rather than attempt a comprehensive review of this issue, I will summarize the views of two thoughtful scholars who have addressed it and then offer my own perspective.

Probably the best known analysis of the involuntariness concept in the interrogation context comes from the late Welsh White, who addressed the topic in several different works.[54] Although Professor White acknowledged that per se rules defining when a confession is voluntarily obtained are very likely to be over- and under-inclusive, he believed the police and the courts needed meaningful guidance on the topic, given the failure of the pre-*Miranda* totality of the circumstances approach to confessions.[55] He thus endeavored to produce concrete prohibitions on "police conduct that is *likely to render* a resulting confession involuntary or to undermine the effect of required *Miranda* warnings or a suspect's independent right to an attorney."[56]

Operating from this baseline, White argued that the following techniques (reorganized and augmented here for analytical convenience) should be impermissible: (1) deception about whether interrogation is taking place (including the use of "jail plants" and electronic eavesdropping of conversations between co-suspects); (2) use of the "pretended friend" technique (e.g., showing fake sympathy for the suspect or promising help outside the legal system); (3) deception that minimizes the seriousness of the charge or the crime (e.g., by suggesting that the crime was justified or accidental); (4) lying about the strength of the case against the suspect (e.g., false statements that a co-defendant has inculpated the suspect, that the suspect's fingerprints were found at the scene of the crime, or that the suspect's polygraph examination indicates he is lying); (5) false promises of lenient treatment by the legal system if the suspect confesses (i.e., what might be called "pre-plea bargaining"[57]); (6) false threats of physical or other serious harm to the suspect or significant others; and (7) deception that suggests the *Miranda* warnings are meaningless (e.g., suggestions that silence in the face

54. *See, e.g.*, Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979) (hereinafter *Trickery*); Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001 (1998).

55. *Id.* at 586.

56. *Id.* at 599-60 (emphasis in original).

57. LEO, *supra* note 52, at 29.

of an accusation by a co-suspect can be used against the suspect).[58] To White, the first ploy undermines the right to an attorney; the second and third ploys imply that incriminating statements will not be used against the suspect (contrary to the second *Miranda* warning); and the final four ploys place an impermissible amount of pressure on the suspect to confess.[59]

William Stuntz offers a contrasting view on the use of interrogation trickery, focusing on whether the technique in question would confront the guilty suspect with what he calls the "confession-or-perjury dilemma."[60] It was this dilemma, Professor Stuntz suggests, that *Miranda*'s right to silence warning was designed to avoid, by providing guilty individuals with a third option beyond making an incriminating statement or lying.[61] To Stuntz, only those interrogation techniques that lead suspects to believe they do not have the option of remaining silent are coercive.[62] Threats of physical harm or lies about the right to silence (i.e., scenarios (6) and (7) above) are clearly coercive under this approach. In contrast, however, deception usually "avoids the confession-or-perjury dilemma either by convincing the suspect that truthful statements will not have incriminating consequences, or by making him forget temporarily that they will."[63] Thus, to Stuntz, the first three ploys listed above are clearly not coercive because they lead suspects to believe no ill consequences will befall them if they talk.[64] The fourth and fifth ploys might also be permissible under Stuntz's approach, so long as the warnings make clear that remaining silent and requesting an attorney are options; if so, the guilty suspect presented with overwhelming evidence or promised leniency does not have to choose between confessing and lying.[65]

My tentative take on this issue differs from both scholars, although I am closer to Stuntz than to White. I agree with White and Stuntz that a police technique designed to convince a suspect that there is no right to remain silent is coercive. That conclusion follows from *Miranda*'s holding that, without that right, custodial interrogation is inherently a violation of the Fifth Amendment.[66] Thus, leading a suspect to think that a failure to deny an accusation can be used as evidence, as in ploy 7 above, is impermissible, as would be any other statement by the police to the effect that silence can be used against the suspect.

Most interrogation techniques, however, operate on the assumption that the suspect has a right to remain silent and instead are aimed at convincing him

58. White, *Trickery*, *supra* note 54, at 602-28.
59. *See id.* at 603, 611, 614, 625, 633, 627, 609 (discussing each of the seven techniques).
60. William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 803 (1989).
61. *Id.* at 818.
62. *Id.* at 803.
63. *Id.* at 823.
64. *Id.* at 808-13, 817 (discussing the first three ploys).
65. *Id.* at 818.
66. Miranda v. Arizona, 384 U.S. 436, 467 (1966).

or her that asserting the right is a bad idea. Many of these techniques clearly exert pressure on suspects. But the legal question is whether that pressure is a violation of the Fifth Amendment or the Due Process Clause's prohibition on involuntary statements.

My inclination, similar to Stuntz's, is to say that the only other types of deceptive practices that should be considered unconstitutionally coercive are those that would be unconstitutionally coercive if the statements made by the police were true (a mode of analysis that might be called "the equivalency rule"). A threat to beat a suspect who is not talking (i.e., scenario 6) is impermissibly coercive, whether the threat is real or not. The same is true of threats to prolong confinement until a confession is forthcoming, or insinuations that a relative or close friend will be harmed if denials continue; whether serious or fraudulent, these threats should be banned.[67] In contrast, the equivalency rule suggests that none of the first four ploys described above is illegitimate. A conversation with a cellmate who is *not* a plant or with an officer who is *actually* sympathetic (scenarios 1 and 2) is not coercive, and deception about the motivation of the interrogator does not change that fact. And while description of possible defenses or of the evidence against the suspect (scenarios 3 and 4) does exert pressure on the suspect to provide information, neither technique, when based on an honest assessment by the officer, is impermissible on Fifth Amendment grounds, and thus neither should be impermissible when the officer is lying about these matters. Deception about the possible charges or the evidence does not accentuate the inherently coercive nature of these techniques; indeed, these tactics probably exert more pressure on the person who is told the truth than on the person who is deceived.

More difficult to analyze under the equivalency rule are false promises of leniency (scenario 5). Consider the practice described by David Simon in his book *Homicide: A Year on the Killing Streets*.[68] According to Simon, Baltimore detectives routinely tell the suspect that an invocation of rights will only "make matters worse for him, for it would prevent his friend, the detective, from writing up the case as manslaughter or perhaps even self-defense, rather than first degree murder."[69] Simon averred that detectives also said: "Once you up and call for that lawyer, son, we can't do a damn thing for you. . . . Now's the time to speak up . . . because once I walk out of this room any chance you have of telling your side of the story is gone."[70]

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67. Paul Marcus, *It's Not Just About* Miranda*: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 619-21 (2006). Several cases hold that a threat to arrest a relative is permissible if police may lawfully do so, but a majority of courts have held to the contrary. *Id.*

68. DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS (Ballantine Books 1991).

69. *Id.* at 195.

70. *Id.* at 194-95.

Under the equivalency rule, qualms about this type of practice arise not because of the possible deception involved; rather, they exist because even the propriety of an honest promise of leniency is unclear. In *Bram v. United States*, the Supreme Court held that a detective's suggestion to a suspect that he would get a break if he confessed violated the Fifth Amendment.[71] The Court explained in a subsequent opinion that in *Bram*, "even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times ['alone and unrepresented by counsel'] are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess."[72] The Court has since repudiated *Bram*,[73] but lower courts continue to send mixed signals about interrogation promises, whether sincere or sham, with many still adhering to the principle that promises of any type are prohibited during interrogation.[74] For instance, after noting that "[t]he California Supreme Court has never distinguished between promises of leniency based on whether the promises were kept," the court in *People v. Vasila* explained:

> The issue is not whether a commitment was honored, but rather whether governmental agents have coerced a citizen to give testimony against himself. When the government does so, it deprives that citizen of a right assured to him by the Fifth Amendment. Whether the coercion is based on a promise kept or repudiated can only truly be tested in hindsight, but it constitutes coercion under either scenario.[75]

Vasila is correct that *all* promises of leniency should be viewed as impermissibly coercive. Professor White tried to distinguish between kept and unkept promises by arguing that lying about the prospects for leniency during interrogation could be equated with a prosecutor's failure to abide by a plea agreement,[76] which the Supreme Court held to be a violation of due process in *Santobello v. New York*.[77] But *Santobello* is probably best explained by the Court's desire to ensure that plea bargaining works. Defense attorneys, as repeat players, will be unwilling to negotiate if prosecutors can renege with impunity on any agreement reached. The same type of reasoning does not apply to most suspects subjected to interrogation.

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71. Bram v. United States, 168 U.S. 532, 542-43 (1897) ("But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.") (quoting 3 H. SMITH & A. KEEP, RUSSELL ON CRIMES AND MISDEMEANORS 478 (6th ed. 1896)).
72. Brady v. United States, 397 U.S. 742, 754 (1970).
73. Arizona v. Fulminante, 499 U.S. 279, 286 (1991).
74. *See* Marcus, *supra* note 67, at 621-22.
75. People v. Vasila, 45 Cal. Rptr. 2d 355, 360-61 (Cal. Ct. App. 1995).
76. Welsh S. White, *Confessions Induced by Broken Government Promises*, 43 DUKE L.J. 947, 964-74 (1994).
77. Santobello v. New York, 404 U.S. 257, 262 (1971).

As *Vasila* recognized, the crucial question should not be whether a promise is broken but whether any promise, true or false, is coercive under the Fifth Amendment. The argument that it is rests on the two leading Fifth Amendment interrogation cases. As *Bram* recognized, forcing a suspect to weigh the advantages and disadvantages of what is, in essence, a plea offer, by implying or explicitly stating that calling in an attorney to help with the decision will shut the door on any possibility of a deal, trenches not only on the right to remain silent, but also on the right to counsel, which *Miranda* held was an essential element of implementing the Fifth Amendment in interrogation cases.[78] For that reason, this particular coercive practice probably should be prohibited, whether the offer is legitimate or not.

IV. DECEPTION AND FALSE CONFESSIONS

Some might believe that this discussion of coercion misses the point. Many commentators, for example, have argued that any discussion of which interrogation practices are permissible should be influenced, if not driven, by their potential for producing false confessions. Thus, Professor White called for prohibitions on (1) lengthy interrogations, (2) interrogations of vulnerable suspects such as minors or people with disabilities, and (3) interrogations involving threats, promises, and certain types of deception, because these techniques have figured prominently in confession cases where the defendant was eventually exonerated.[79] Others have promoted outright bans on all types of deception out of fear it will induce innocent people to confess.[80]

As White himself admitted, however, the false confession rationale for barring prolonged questioning or questioning of particularly vulnerable individuals is much stronger than it is for prohibiting deception.[81] The only plausible evidence that deception, by itself, causes false confessions comes from the previously mentioned study conducted by Roussano and colleagues, which found that 14% of the innocent participants who were offered a deal and 18% of the innocent participants who were subjected to minimization tactics ended up confessing.[82] As explained earlier, however, findings from such simulation research need to be taken with a grain of salt. The consequences

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78. "Without the protections flowing from adequate warnings and the rights of counsel, 'all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.'" *Miranda*, 384 U.S. at 466 (quoting Mapp v. Ohio, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)).

79. WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON 190-95, 201-14 (2001) [hereinafter WANING PROTECTIONS]; *see also* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 110, 142-55 (1997).

80. *See, e.g.*, Paris, *supra* note 13, at 826; Gohara, *supra* note 53, at 795.

81. *See* WANING PROTECTIONS, *supra* note 79, at 190-95, 201-14.

82. *See* Roussano, *supra* note 46, at 484.

of confessing in the Roussano study were minimal (a possible charge of cheating on a non-graded experiment); indeed, 6% of the innocent subjects confessed even though they were not subject to *any* specialized interrogation technique, suggesting that many of the participants were not particularly concerned about incriminating themselves.[83] Studies of actual interrogations are much more equivocal about the impact of deceptive techniques. After looking at the available research on why and how often innocent people confess, Professor Laurie Magid, for one, concluded that "the studies on false confessions fail to prove, or even strongly to suggest, that a significant number of persons have been wrongly convicted because of false confessions obtained by police using deceptive interrogation techniques."[84]

Professors Ofshe and Leo have stated that there are "numerous documented cases" in which custodial suspects confessed to crimes they did not commit in response to psychological interrogation techniques.[85] But the absolute number of such false confessions is small.[86] Furthermore, Ofshe and Leo's own research, as well as the research of others, confirms that deception, by itself, is rarely the cause of false confessions; usually, deception must be combined with a lengthy interrogation during which the police convince the suspect that a confession is the only way to escape an intolerably stressful situation.[87] This research suggests that long, drawn-out interrogation should be

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83. *Id.* at 483-484. *Cf.* Robert Horselenberg et al., *False Confessions in the Lab: Do Plausibility and Consequences Matter?*, 12 PSYCHOL., CRIME, & L. 61 (2006) (finding that increasing the potential consequences of a confession in simulation research dramatically reduced the rate of false confessions).

84. Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1194 (2001).

85. Richard A. Leo & Richard J. Ofshe, *Using* Miranda *to Scapegoat the Innocent: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557, 567 (1998).

86. Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 473 (1998). Leo and Ofshe claimed to have discovered sixty such cases, resulting from a wide range of interrogation techniques, although in thirty-one of the cases the inaccuracy of the confession was discovered before trial. *Id.* Other studies have reported additional false confession cases, perhaps amounting to a total of 200 over several decades. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in a Post-DNA World*, 85 N.C. L. REV. 891 (2004).

87. 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. & SOC. 189, 212 (1997) ("[E]liciting a false confession takes strong incentives, intense pressure and prolonged questioning."); Saul M. Kassin & Gisli Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 60 (2004) (referring to a 2004 study that found that the average length of interrogation leading to false confession was 16.3 hours); Welsh S. White, *Confessions in Capital Cases*, 4 U. ILL. L. REV. 979, 1021 (2003) ("[I]n fifteen of the sixteen proven or probable false confession cases in which Leo and Ofshe specify the length of the interrogation, the police interrogated the suspect for more than six hours"); Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Tactics*, 99 MICH. L. REV. 1211, 1235, 1243 (2001) (admitting that minimal promises of benefit and exaggerating strength of the evidence are unlikely to lead to false confessions). *See also* WANING PROTECTIONS, *supra* note 79, at 213 (telling a suspect that he or she failed a polygraph is unlikely to cause a false confession because the suspect is likely to believe the test is wrong).

prohibited as impermissibly coercive, but it says little about the impact of deception during shorter interrogation sessions.

Similarly, false confessions from youth and people with mental retardation appear to result from the inherent vulnerability of these people to suggestive techniques, not from deception per se. Research indicates that leading questions based on the *actual* evidence and *sincere* assertions about its strength are as likely as fraudulent tactics to cause a false confession from these types of people.[88] Indeed, one simulation study found that all of the variance in false confessions stemmed from individual traits, not deceptive techniques.[89] Perhaps for that reason, as White suggested, interrogation of particularly vulnerable groups should be banned or subject to particularly rigorous review. But a prohibition on deception in all interrogations would be an overreaction to the suggestiveness of a small subset of people subject to interrogation.[90]

V. CONCLUSION: MORAL AND IMMORAL LYING

I have argued that police deceit during interrogation is permissible when: (1) it takes place in the window between arrest and formal charging; (2) it is necessary (i.e., non-deceptive techniques have failed); (3) it is not coercive (i.e., avoids undermining the rights to silence and counsel and would not be considered impermissibly coercive if true); and (4) it does not take advantage of vulnerable populations (i.e., suspects who are young, have mental retardation, or have been subjected to prolonged interrogation). A prohibition of interrogation deception under these conditions would cause much more harm (in terms of lost true confessions) than benefit (in terms of preventing false confessions and any intangible harm to the dupe or society).

Even if one accepts these conclusions as a general matter, however, a Bokian debate may ultimately place further limitations on interrogation deceit. For instance, as I noted in *Deceit, Pretext, and Trickery*, debate about

88. *See* P.A. Register & John F. Kihstrom, *Hypnosis and Interrogative Suggestibility*, 9 PERSONALITY AND INDIVIDUAL DIFFERENCES 549 (1988) (finding that suggestible individuals alter their responses even when no negative or misleading feedback is given; the mere fact of leading or repeated questions causes them to give inconsistent answers); C.P. Linton & Peter W. Sheehan, *The Relationship Between Interrogative Suggestibility and Susceptibility to Hypnosis*, 22 AUSTRALIAN J. CLINICAL & EXPERIMENTAL HYPNOSIS 53 (1994) (same). *See also* BRYAN TULLY & DAVID CAHILL, POLICE INTERVIEWING OF MENTALLY HANDICAPPED PERSONS: AN EXPERIMENTAL STUDY 11 (1984) (finding that suggestible individuals produced inaccurate information even when interviewed by police who, because they knew they were being taped as part of an experiment, presumably did not try to lead or mislead the subjects). These three studies are reported in GUDJONSSON, *supra* note 36, at 362, 404.

89. J.P. Blair, *The Roles of Interrogation, Perception, and Individual Differences in Producing Compliant False Confessions*, 13 PYSCH., CRIME, & L. 173, 183-84 (2006) (finding, based on a study involving 143 students, that "individual differences were important in explaining false confessions" but that "[t]he false evidence induction did not . . . cause more false confessions to occur," and that "the min/max induction did not . . . increase the number of false confessions").

90. *See* WANING PROTECTIONS, *supra* note 79, at 110.

appropriate practices might well declare off-limits certain particularly dramatic ruses, such as a police officer posing as a court-appointed lawyer, clergy person or psychiatrist, regardless of whether such a technique is considered necessary or "coercive."[91] And even courts that have generally been tolerant of deception have prohibited officers from manufacturing physical evidence (a tactic that would not be coercive under the equivalency rule).[92] Perhaps consensus might develop around a even more general principle: A prohibition on all affirmative misrepresentations about evidence against the accused or about police motivation (which would still permit failures to correct misimpressions about these issues). This dividing line would justify all but one of the Supreme Court's cases[93] and has been adopted in some European countries.[94] It also informs the code of ethics governing lawyers, apparently on the theory that the adversarial nature of the legal process obligates the parties to discover relevant facts rather than have them handed to them (thus the authority to leave misimpressions uncorrected), but that adversariness should only be carried so far (thus the prohibition on lying).[95] Accordingly, even if affirmative misrepresentations are necessary to obtain confessions in some cases and are not coercive, we may decide that all such misrepresentations, or some subset of them, are too morally repugnant to permit their occurrence.

In the meantime, however, interrogation deception should be permitted under the conditions I have suggested.

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91. Slobogin, *supra* note 1, at 813.

92. *See, e.g.*, State v. Cayward, 552 So.2d 971, 974 (Fla. Dist. Ct. App. 1989) ("[T]he manufacturing of false documents by police officials offends our traditional notions of due process. . . .").

93. *See* North Carolina v. Butler, 441 U.S. 369 (1979) (admitting verbal admissions made by a suspect who believed that unwritten statements could not be used in evidence); Connecticut v. Barrett, 479 U.S. 523 (1987) (reaching the same conclusion); Colorado v. Spring, 479 U.S. 564 (1987) (admitting statements about a homicide by a suspect who believed the police were only going to ask questions about a firearms crime). *But see* Frazier v. Cupp, 394 U.S. 731, 739 (1969) (admitting statements made by suspect who was told, falsely, that his co-defendant had confessed). *See also* Mathiason v. Oregon, 429 U.S. 492 (1977). In *Mathiason* the Court noted that the officer had lied about finding the defendant's fingerprints at the scene of the crime and then stated "whatever relevance this fact may have to other issues in the case, it has nothing to do with whether respondent was in custody for purposes of the *Miranda* rule." *Id.* at 495.

94. Thomas Weigend, *Germany Rules of Criminal Procedure*, *in* CRAIG BRADLEY, CRIMINAL PROCEDURE: A WORLDWIDE STUDY 202-04 (1999) (recounting German rules that bar affirmative misrepresentations and failures to clear up misimpressions about the law, but not misimpressions about other matters).

95. Rule 4.1 of the Model Rules of Professional Conduct states that "a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person." MODEL RULES OF PROF'L CONDUCT R. 4.1 (2002). But the first comment to that rule states: "A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts." *Id.* R. 4.1 cmt. 1.