

2009

Honesty Is the Best Policy: A Case for the Limitation of Deceptive Police Interrogation Practices in the United States

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Irina Khasin, *Honesty Is the Best Policy: A Case for the Limitation of Deceptive Police Interrogation Practices in the United States*, 42 *Vanderbilt Law Review* 1029 (2021)
Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol42/iss3/7>

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Honesty Is the Best Policy: A Case for the Limitation of Deceptive Police Interrogation Practices in the United States

ABSTRACT

In the United States, police officers regularly employ deceptive interrogation tactics to extract confession evidence from suspects. Despite widespread recognition of the harm caused by police deception, courts in the United States have consistently condoned the practice, refusing to exclude confessions obtained through manipulative and deceitful means. The British Parliament has recognized that deceptive police practices yield false confessions and, thus, wrongful convictions. The Police and Criminal Evidence Act of 1984 addresses this concern by establishing clear rules for the police to follow and by empowering courts to enforce those rules. In evaluating the need for reform in American police interrogation policy, English law provides a valuable model for comparison. Taking a cue from the English, this Note proposes the creation of a new legislative framework focused on the reliability of confession evidence. The Note will argue that the new law should include guidelines for the police to follow in conducting interrogations and that those guidelines should prohibit the types of deceptive practices that lead to unreliable results.

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I. INTRODUCTION

Touted as the public's civic guardians, law enforcement officers seek to protect and preserve the values of a just society. But, acting under the guise of this duty to protect, the police may assume guilt first and ask questions later,¹ disregarding the American justice system's guiding principle of "innocent until proven guilty." Once identified as a suspect, a person becomes the enemy and the effort to extract a confession begins.² Police will tell lies to uncover the truth; they will deceive, fabricate, and manipulate until the suspect surrenders—methods that are all perfectly legal.³ The deceptive tactics employed by the police potentially cloud the value of confession evidence and raise serious concerns about reliability.⁴

1. FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 67–68, 599 (4th ed. 2001); *see also* *People v. Fitzgerald*, 152 N.E. 542, 544 (Ill. 1926) ("A confession is not rendered inadmissible by the mere fact that it was elicited by questions put by police officers . . . , even though the questions assumed the prisoner's guilt.").

2. *See, e.g., Fitzgerald*, 152 N.E. at 543–44 (police are able to ask questions that assume the defendant's guilt).

3. *See generally* INBAU ET AL., *supra* note 1, at 484–87, 607 (describing interrogation procedures that may involve trickery or deceit); Laurie Magid, *Deceptive Police Interrogation Practices: How Far is too Far?*, 99 MICH. L. REV. 1168, 1168 (2001) (describing a variety of deceptive techniques used by interrogators including "good cop, bad cop" techniques, pretending a photocopier is a "truth machine," and creating false evidence).

4. *See infra* Part II.

Still, judges support these practices by admitting the resulting confessions as evidence,⁵ because in America honesty is not police policy.

In Europe, police officers pursue confessions with equal zeal but employ different means to achieve the desired end.⁶ The modern framework for police interrogations in England, established by the Police and Criminal Evidence Act of 1984 (PACE), focuses on the search for truth by seeking reliable confessions through the use of fair police practices.⁷ Rather than leaving the courts to delve into the emotional state of every defendant who challenges a confession, English law establishes a uniform standard for the police to follow when conducting interrogations.⁸ To determine the admissibility of confession evidence, the English courts consider whether police officers have complied with PACE guidelines.⁹

While some trickery by the police may be permissible under the provisions of PACE, English courts have held that the intentional misrepresentation of evidence is unfair and violates the law.¹⁰ Because this type of police deception compromises the veracity of a suspect's statements, English judges routinely exclude any confessions gained through deception as unreliable.¹¹ Although research suggests that the use of fabricated evidence is rare in English interrogations,¹² PACE enforces the prohibition by requiring

5. Deborah A. Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 426 (1996); see, e.g., *Illinois v. Perkins*, 496 U.S. 292, 298–99 (1990) (admitting confession after police posed as a cellmate); *Colorado v. Spring*, 479 U.S. 564, 575–77 (1987) (upholding the confession of a suspect who was misinformed about the subject matter of the investigation); *Oregon v. Mathiason*, 429 U.S. 492, 495–96 (1977) (holding admissible a confession from a suspect after police lied about finding suspect's fingerprints at the scene); *Frazier v. Cupp*, 394 U.S. 731, 737–39 (1969) (upholding confession after police falsely told the suspect that his colleague had confessed); Christopher Slobogin, *An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation*, in *ADVERSARIAL VERSUS INQUISITORIAL JUSTICE: PSYCHOLOGICAL PERSPECTIVES ON CRIMINAL JUSTICE SYSTEMS* 42 (Peter J. van Koppen & Steven D. Penrod eds., 2003).

6. Aldert Vrij, "We Will Protect Your Wife and Child, But Only If You Confess": *Police Interrogations in England and the Netherlands*, in *ADVERSARIAL VERSUS INQUISITORIAL JUSTICE: PSYCHOLOGICAL PERSPECTIVES ON CRIMINAL JUSTICE SYSTEMS*, *supra* note 5, at 55, 56.

7. See JOHN SPRACK, *EMMINS ON CRIMINAL PROCEDURE* 4–5 (9th ed. 2002).

8. *Id.*

9. *Id.* at 7.

10. See Vrij, *supra* note 6, at 56 (stating that it is implied that evidence obtained by deceit and trickery cannot be admitted into evidence in courts in England).

11. See generally *id.* at 55–79 (discussing interrogation procedures in England).

12. PETER MIRFIELD, *SILENCE, CONFESSIONS AND IMPROPERLY OBTAINED EVIDENCE* 11 (1997) (explaining that evidence indicates that the use of manipulative techniques has declined since the enactment of the Police and Criminal Evidence Act); Slobogin, *supra* note 5, at 43.

the police to record every interview.¹³ Even a violation of the recording requirement itself can result in the exclusion of a confession from trial.¹⁴

Although commentators have criticized deceptive police practices for decades,¹⁵ American jurisprudence continues to overlook what English courts have long recognized: deceptive police practices yield false confessions and, thus, wrongful convictions.¹⁶ Confessions gained through police deception are often factually inaccurate and untrustworthy.¹⁷ English law limits the use of these deceptive practices by establishing clear rules for the police to follow and empowering courts to enforce those rules.¹⁸ PACE artfully balances police and prosecutorial interests with the fair and reliable administration of justice.¹⁹ In evaluating the need for reform in American police interrogation policy, English law provides a valuable model for comparison.

This Note advocates for the reform of American interrogation law and proposes the creation of a new legislative framework focused on the reliability of confession evidence. The Note argues that the new law should include guidelines for the police to follow in conducting interrogations and identify the types of deceptive practices that will lead to unreliable results. Part II addresses the wide-ranging problems associated with the current use of deceptive interrogation techniques in the United States. Part III defines and discusses the different types of deceptive police practices, which range from expressions of sympathy to the presentation of false evidence. Part IV provides a brief history of the common law on police interrogation and compares the current status of the law in the United States with the law in England. Lastly, Part V proposes a solution that borrows from the English legal system without compromising the strength of American law enforcement.

13. Code of Practice on Audio Recording Interviews with Suspects (Code E), ¶ 3.1 (promulgated under the Police and Criminal Evidence Act 1984, c. 60, § 67, pt. VI (Eng.)) [hereinafter Code E].

14. See Slobogin, *supra* note 5, at 43.

15. See, e.g., Magid, *supra* note 3, at 1169–70 (describing the criticism of commentators and the popular press of the false confessions that arise from the use of deceptive interrogation techniques); Margaret Paris, *Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3, 9 (1996) (advocating the prohibition of any lies during questioning); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 111, 148 (1997) (advocating substantial limits on deception by proposing that police be prohibited from presenting false forensic evidence).

16. White, *supra* note 15, at 111.

17. *Id.*

18. See SPRACK, *supra* note 7, at 4–7 (describing how PACE develops a framework for the exercise of police powers and how it is enforced).

19. See *id.* (noting that PACE sets out the framework for the exercise of police powers, accounts for the public interest and provides enforcement methods for courts).

II. THE COSTS OF DECEPTION

Without a doubt, investigators routinely secure powerful confession evidence through the use of trickery, deceit, manipulation, and false evidence.²⁰ However, in a society that generally views lying as immoral and wrong, deliberate dishonesty displayed by police officers raises serious concerns. The use of deception hurts not only the innocent suspect but also the lying police officer, the prosecuting attorney, and the criminal justice system as a whole. To address the need for the reform of American interrogation law, it is necessary to first consider the dangers associated with the use of deceptive techniques, including: (1) false confession, (2) evidentiary harm, (3) detrimental reliance, and (4) institutional harm.

A. *False Confession*

Modern psychological studies have indicated that the use of coercive interrogation techniques may result in one of two types of false confessions.²¹ “Coerced-compliant” confessions are those in which a suspect knowingly offers a false confession in order to obtain some goal or to escape from a stressful situation.²² For example, the suspect begins to feel hopeless and produces a false confession in an attempt to secure a lighter penalty when a police officer confronts him with false forensic evidence. On the other hand, “coerced-internalized” false confessions occur when deceptive tactics alter a suspect’s mental condition so severely that the innocent suspect actually believes in his own guilt.²³ In a distressed and vulnerable state, the suspect begins to confuse reality with the story that the police officer presents.²⁴ Both types of false confessions occur as a result of deceptive police practices and can lead to devastating consequences for innocent suspects. Even a guilty person may confess falsely in response to deceptive police practices, changing the details of his story to fit the suggestion of his interrogator.²⁵ Although the admission of guilt itself may be true, a suspect’s statements will prove unreliable if coercive police tactics influenced the suspect’s description of the facts.²⁶

20. See Magid, *supra* note 3, at 1169 (“Commentators have sought to show that deception causes many false confessions.”); White, *supra* note 15, at 108–09 & n.26 (describing how suspects have claimed that interrogation techniques have led them to falsely confess).

21. White, *supra* note 15, at 109.

22. *Id.*

23. *Id.*

24. Richard P. Conti, *The Psychology of False Confessions*, 2 J. CREDIBILITY ASSESSMENT & WITNESS PSYCHOL. 14, 22–23 (1999).

25. White, *supra* note 15, at 109.

26. *Id.*

In recent years, the phenomenon of the false confession has gained increasing attention as a serious problem for the American criminal justice system.²⁷ "Over the past two decades, a significant number of suspects have claimed that police interrogation techniques have led them to give false confessions."²⁸ Between 1973 and 1996, Professors Leo and Ofshe collected several dozen case histories of wrongful convictions due to false confessions.²⁹ Although the frequency of psychologically induced false confession remains uncertain,³⁰ scholars have discovered that they occur often enough to warrant major concern.³¹ Empirical data indicates that confessions induced by standard police interrogation tactics are frequently untrustworthy and that these tactics cause a significant number of false confessions.³² Leo and Ofshe argue that "when police interrogate suspects whose guilt is a mere possibility rather than a reasonable likelihood, they run a significant risk of eliciting a false confession."³³

The harm that results from false confessions is plain. Police-induced false confessions lead to the wrongful arrest, prosecution, conviction, and incarceration of the innocent.³⁴ Additionally, "false confessions are likely to lead to unjust deprivations of liberty . . . because jurors treat confession evidence with such deference that the confession usually outweighs strong evidence of a defendant's innocence."³⁵ With an admission in hand, a prosecutor is better able

27. See Magid, *supra* note 3, at 1169–70 (showing that deception causes false confessions and has captured the attention of the academic community and the press).

28. White, *supra* note 15, at 108.

29. See 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, 435–38 (1998) (explaining the methodology of the study) [hereinafter Leo & Ofshe, *Consequences of False Confessions*]; Magid, *supra* note 3, at 1191 n.109.

30. Leo & Ofshe, *Consequences of False Confessions*, *supra* note 29, at 431–32. Professors Leo and Ofshe attribute this uncertainty to several factors: there is no organization to collect data about the number of interrogations that take place annually or evaluate the reliability of those confession; most interrogations that lead to disputed confessions are not recorded; and the truth about what happened in an interrogation may remain in dispute after a defendant has plead guilty or been convicted. *Id.*

31. Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557, 561 (1998) [hereinafter Leo & Ofshe, *Using the Innocent*]; see Leo & Ofshe, *Consequences of False Confessions*, *supra* note 29, at 430 (1998) (arguing that the problems caused by police-induced confession are significant and recurrent).

32. White, *supra* note 15, at 131.

33. Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 986 (1997).

34. Richard A. Leo & Richard J. Ofshe, *Missing the Forest for the Trees: A Response to Paul Cassell's "Balanced Approach" to the False Confession Problem*, 74 DENV. U. L. REV. 1135, 1139 (1997) [hereinafter Leo & Ofshe, *Missing the Forest*].

35. Leo & Ofshe, *Consequences of False Confessions*, *supra* note 29, at 494.

to secure a conviction in a case that may otherwise be based on tenuous evidence.³⁶ A confession is also a powerful chip in the plea bargaining process.³⁷ Fearing a near certain conviction, an innocent person will often accept punishment in hopes of facing a lighter sentence.

B. Evidentiary Harm

The use of deceptive tactics by the police creates a risk that any resulting confession, regardless of its basis in truth, will be excluded from trial. Although a low likelihood exists of innocent people confessing to a crime, regardless of the police tactics used against them, the practice of deceptive interrogation techniques compromises the validity of any admission.³⁸ Because courts may exclude coerced confessions from trial, confessions resulting from deceptive interrogations are less valuable than those obtained without deception.³⁹ By using deceptive interrogation techniques, a police officer risks losing valuable confession evidence against the defendant.

Aside from the exclusion of confession evidence at trial, deceptive police tactics may also result in the loss of other important evidence, by discouraging cooperation from suspects who feel betrayed by police dishonesty. As officers question possible suspects, they may use deception under the assumption that lying to a suspect early in the investigation bears little cost.⁴⁰ If the suspect is innocent or unresponsive to the interrogation techniques, the only significant cost endured by the officer is time wasted. However, lying to innocent people potentially destroys the trust that is essential to encouraging future cooperation.⁴¹ When innocent people feel betrayed by the police, they become reticent to help in the investigation and are more likely to fail to disclose critical evidence.⁴² Because the police often rely on these initial suspects to testify as witnesses, the appearance of impropriety and dishonesty at the outset could be fatal to the development of an effective case against the defendant.⁴³

36. See *id.* (stating that confessions can outweigh strong evidence of innocence).

37. See *id.*

38. See Young, *supra* note 5, at 462–63.

39. *Id.* at 461.

40. *Id.* at 457.

41. *Id.* at 458.

42. *Id.*

43. *Id.*

C. Detrimental Reliance

"Sociological studies confirm that law enforcement officers rely heavily on the deceptive practices taught in interrogation manuals," to the exclusion of other investigative strategies.⁴⁴ In fact, lies and trickery essentially have replaced physical brutality as the favored technique to secure confessions.⁴⁵ Justice Felix Frankfurter remarked, "Under our system, society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation."⁴⁶ Permitting the use of false evidence creates the danger that skillful investigation becomes secondary.

Allowing the police to lie during interrogation may also cause the unintended effect of promoting lying in other circumstances.⁴⁷ Dishonest interrogators rationalize lying based on the notion that the deception is necessary to further the interests of society.⁴⁸ Their justification for such conduct is derived from a pursuit of the public good.⁴⁹ However, such reasoning could excuse any lie made for the public good, including lies told outside of the interrogation room.⁵⁰ For example, an officer may extend the same justification to lying on an affidavit for a search warrant or in testimony before a grand jury.⁵¹ The fact that courts condone lying in some police activities but staunchly prohibit any deception in other activities sends an inconsistent message about the values of the criminal justice system and the expectations of its officers.⁵²

44. Paris, *supra* note 15, at 61.

45. *Id.*; see also Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME, L. & SOC. CHANGE 35, 37 (1992) [hereinafter Leo, *From Coercion to Deception*] (noting that the use of deception has, in effect, become a functional alternative to the use of coercion).

46. *Watts v. Indiana*, 338 U.S. 49, 54 (1949).

47. See Young, *supra* note 5, at 463.

48. *Id.*

49. *Id.*

50. *Id.*

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

52. See generally Young, *supra* note 5, at 451 (describing how courts can elect to allow police lying at their discretion).

D. Institutional Harm

The practice of police deception runs contrary not only to widely held beliefs about right and wrong, but also to the ideals of the American criminal justice system. The promise of the presumption of innocence leads American citizens to believe that officers of the law and the court will treat suspects as innocent until proven guilty. But the prevalence of deceptive police practices suggests the opposite conclusion. The police usually assume guilt right from the start; they seek quick confessions and certain convictions.⁵³ In the view of the police, the primary goal of the criminal justice system may be to convict the guilty. But, the pursuit of such convictions through deceptive tactics threatens the integrity of the criminal justice system.⁵⁴ The dissenting justices in *People v. Martin* aptly stated that the admission into evidence of an interrogator's lie would "serve to denigrate and demean the judicial process."⁵⁵

Deliberate misrepresentations compromise the integrity of the police system as a whole, but these misrepresentations also hurt the individuals involved in the deception. When a police officer lies to achieve a certain result, he may experience a loss of self-respect and feelings of regret.⁵⁶ "Novice police [officers] have admitted their dismay at being expected to lie as part of their jobs."⁵⁷ Although, with time, individual police officers may accept even the most outrageous of police practices as routine, initial feelings of dismay signal that deceptive practices are contrary to societal norms of right and wrong.

III. THE PALLET OF POLICE DECEPTION: FROM FALSE SYMPATHY TO FALSE EVIDENCE

In the course of an interrogation, a police officer may use a wide variety of deceptive techniques to obtain a confession from the suspect.⁵⁸ Since *Miranda v. Arizona* places an affirmative obligation on police officers to inform suspects of their right to remain silent and to consult with counsel,⁵⁹ police officers generally avoid deception regarding the rights of a suspect. Instead, police officers may opt to

53. INBAU ET AL., *supra* note 1, at 67–68.

54. Young, *supra* note 5, at 457 (arguing that a simultaneous goal to that of convicting the guilty is to uphold a fair and ethical criminal justice system).

55. *People v. Martin*, 466 N.E.2d. 228, 236 (Ill. 1984) (Goldernhersh, J., dissenting).

56. Young, *supra* note 5, at 468.

57. *Id.*

58. *Id.* at 429.

59. *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966).

lie during the interrogation itself.⁶⁰ The police may trick the suspect by (1) showing false sympathy, (2) manipulating the suspect's perception of culpability, (3) deceiving the suspect regarding the circumstances, (4) lying about the strength of the case, or (5) even fabricating forensic evidence.⁶¹ The type of deception employed by interrogators largely depends on the objective of the questioning.⁶²

A. False Sympathy or Flattery

One of the most common interrogation strategies that police routinely employ is the process of building a rapport with the suspect.⁶³ Although building rapport is not inherently deceptive, the investigator typically uses the practice as a vehicle for securing a confession.⁶⁴ By making gestures and offering statements to signal his honesty and sincerity, an interrogator creates an atmosphere of trust and openness.⁶⁵ An officer may imply or even state directly that he sympathizes with the suspect, regardless of his personal feelings, in an effort to gain a suspect's trust.⁶⁶ Often, this rapport-building technique is paired with other types of deception to secure a confession.⁶⁷ In order to foster a suspect's trust, interrogators frequently use an interrogation technique known as the "Mutt and Jeff" or "good cop/bad cop" routine.⁶⁸ In this scenario, two police officers question one suspect.⁶⁹ One interrogator pretends to be highly adversarial, while the other plays the role of the friendly police officer. The empathetic interrogator essentially promises to save the suspect from the nasty interrogator, which leads the reluctant suspect to trust that the good cop will protect him.⁷⁰

Some interrogation manuals even suggest flattering the suspect in an attempt to elicit a confession.⁷¹ Compliments directed toward the suspect by the interrogator work to "defuse the natural

60. Young, *supra* note 5, at 429.

61. Leo, *From Coercion to Deception*, *supra* note 45, at 43–47; Young, *supra* note 5, at 429–33.

62. Young, *supra* note 5, at 429.

63. See INBAU ET AL., *supra* note 1, at 93–94 (describing how to establish rapport).

64. See *id.* at 93 (describing the importance of establishing rapport with a suspect).

65. *Id.*

66. Leo, *From Coercion to Deception*, *supra* note 45, at 45.

67. See *id.* (describing the use of a variety of interrogation techniques to build and exploit the trust of the suspect).

68. *Id.*

69. Susan E. Brodt & Marla Tuchinsky, *Working Together But in Opposition: An Examination of the "Good-Cop/Bad-Cop" Negotiating Team Tactic*, 81 ORG. BEHAV. & HUM. DECISION PROCESSES 155, 156 (2000).

70. *Id.*

71. See INBAU ET AL., *supra* note 1, at 268–69.

adversarial relationship that exists between the two.”⁷² In the absence of a friendly relationship, people often find it much easier to justify lying—particularly lying to people whom they resent.⁷³ As a result, complimenting the suspect and feigning admiration encourages the suspect to return the sentiment and effectively establish a rapport. Once such a relationship is established, the positive emotional attachment discourages lying.⁷⁴

Although showing sympathy for an accused murderer or feigning camaraderie with a rapist does involve deception, the result of the deception merely creates an environment where the suspect feels safe. While such an environment may lead a guilty suspect ultimately to confess, that feeling of safety probably will not create the type of desperation, fear, or hopelessness that would lead to a false or unreliable confession.

B. Misrepresentations About Culpability

To induce a confession, interrogation manuals suggest lying about the appropriateness of a suspect’s conduct in order to persuade the suspect that the criminal conduct was less blameworthy than he might fear.⁷⁵ Step Two of the widely followed *Reid Nine Steps of Interrogation* instructs an interrogator to “Sympathize with the Suspect by Saying that Anyone Else Under Similar Conditions or Circumstances Might Have Done the Same Thing.”⁷⁶ For example, an interrogator may tell a rape suspect that he had “roughed it up with a girl” himself in order to have sex with her.⁷⁷ A person derives “mental relief and comfort” from an investigator’s assurance that others would behave similarly.⁷⁸ The investigator’s assurance allows the suspect to justify or excuse the behavior in his own mind.⁷⁹ The comfort that the suspect feels as a result of the investigator’s assurances “offers an added incentive to obtain even greater relief” through a confession.⁸⁰

The police may also lie about the victim’s conduct by suggesting that the victim initiated or consented to the suspect’s actions. For example, a 50-year-old man, accused of having taken indecent liberties with a 10-year-old girl, was told during his interrogation: “This girl is well advanced for her age. She probably learned a lot

72. *Id.* at 269.

73. *Id.* at 269.

74. *See id.* (stating that flattering remarks can be helpful in obtaining a confession of guilt).

75. *Id.* at 213, 232–33, 241–42, 244.

76. *Id.* at 241.

77. *See id.* at 251, ex. 13–1.

78. *Id.* at 241–42.

79. *Id.* at 242.

80. *Id.*

about sex from the boys in the neighborhood and from the movies and TV; and knowing what she did about sex, she may have deliberately tried to excite you to see what you would do."⁸¹ The offender then confessed and blamed the victim for inciting his behavior.⁸²

Similar to expressions of sympathy and flattery, police deception about the suspect's culpability creates an environment where a guilty person feels more comfortable confessing to a crime. However, sympathy and flattery likely fail in creating the type of environment that induces an innocent person to confess. Because this type of deception likely would not result in an unreliable confession, the harm under this practice is limited.

C. *Misleading Circumstances*

The police may also lie about the circumstances of an interrogation, such as the identity of the interrogator or the privacy of the setting. In one case, a police officer impersonated an Army officer to obtain a confession from a suspect who was on leave from the Army.⁸³ Such an impersonation is most often utilized when a suspect will not speak with the police.⁸⁴ Knowing that the suspect would be more comfortable with an Army officer, and thus more likely to confess to the crime, the police officer lied about his identity to gain the suspect's trust.⁸⁵ In another case, the police granted a suspect ten minutes to converse with a co-suspect regarding a possible joint statement by the two.⁸⁶ The police officers assured both suspects that they could speak together in a soundproof room.⁸⁷ Thinking that their conversation would remain private, they made damaging statements during the meeting.⁸⁸ Meanwhile, the police had placed a recording device in the room.⁸⁹ At trial, the court allowed a police officer to testify regarding the contents of the conversation.⁹⁰

Lying to a suspect about an interrogator's identity or the privacy of the location will do little more than alter the suspect's perceived environment, usually creating impressions of increased comfort. Of course, a guilty suspect may more readily confess to a person with whom he feels more at ease. Such a relaxed interaction, however, should not exert enough pressure on an innocent suspect such that the suspect would feel compelled to confess. An officer's role-playing

81. *Id.* at 256.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

simply creates an opportunity for the suspect to let down his guard and make admissions he might not otherwise make. If faced with the question regarding the reliability of a confession, a judge likely would not find the police officer's role-playing sufficient to exclude the confession.

D. Lies About the Strength of the Case

Police officers may suggest the existence of some unidentified independent evidence establishing guilt in an effort to mislead the suspect about the strength of their case against him. This suggestion is misleading if the officer lacks any independent source of information. However, the lie does not necessitate the fabrication of any actual evidence. Some interrogation manuals suggest that "the investigator should state, or intimate, that there are independent means to detect any lies told."⁹¹ For instance, the interrogator may tell the suspect, "This morning, we will begin getting the results back from the crime lab on hair and fiber analysis found at the scene. At that point, we will have definitive information as to who committed the crime."⁹²

Lies about the strength of the case have the potential to cause significant distress for a suspect, but only if the suspect has reason to fear that incriminating facts may be uncovered. If a guilty suspect believes that the police are bound to discover the truth, he may choose to confess earlier in hopes of leniency. But, it seems unlikely that such misrepresentations would do more than create an opportunity for the defendant to question the wisdom of maintaining his innocence. When confronted with the possibility of imminent lab results, an innocent suspect has nothing to fear. In fact, an innocent suspect may even feel relieved that corroborating forensic evidence will confirm his innocence. As a result, the harm from this deceptive practice is also limited.

E. The Presentation of False Evidence

The presentation of false evidence takes two main forms: deceptive oral assertions and fabrication of physical evidence. The first form of false evidence relies on oral assertions by the police officer that are intended to induce a confession without requiring the production of physical evidence.⁹³ To convince the suspect that his confession is unnecessary to prove guilt, the police may lie about

91. *Id.* at 95.

92. *Id.*

93. *See generally id.* at 427-29 (discussing the purposes of introducing false evidence during interrogations and the credibility of any confessions obtained by such interrogation techniques).

other sources of testimonial evidence.⁹⁴ Often, the police officer tells the suspect that a co-defendant has confessed and implicated the suspect in the crime.⁹⁵ Police may also tell a suspect that someone witnessed the crime, the victim has identified the suspect, or the murder weapon has been found.⁹⁶ Each of these tactics presents false testimonial evidence against the suspect that, if true, would prove the suspect's guilt.

When police are unsure that their words alone will induce a confession, they sometimes present false physical evidence to bolster their lies regarding the strength of the case.⁹⁷ False or fabricated evidence may consist of fingerprint matches,⁹⁸ blood samples, hair analysis, and the like. Interrogators read fabricated test results to suspects as if the tests were definitive proof of the suspect's guilt.⁹⁹ The popular interrogation manual written by Inbau, Reid, Buckley, and Jayne suggests that using "visual props" like a report file containing blank pages, a plastic bag holding carpet fibers, or a generic finger print card are permissible.¹⁰⁰ The investigator may "verbally tell the suspect that the file folder contains incriminating evidence, that the carpet fibers match those in his home, or that the fingerprints lifted from a vehicle were those of the suspect."¹⁰¹

In one elaborate scheme, a police officer obtained a knife similar to one that he believed to be the murder weapon.¹⁰² The officer smeared blood on the stand-in weapon and made a fingerprint in the blood.¹⁰³ He then had photographs of the fingerprint made and

94. *Id.* at 429.

95. *Id.* at 484.

96. *See* United States ex rel. Galloway v. Fogg, 403 F. Supp. 248, 251 (S.D.N.Y. 1975) (noting that the defendant was falsely told by a police interrogator that there was an outside witness); Moore v. Hooper, 389 F. Supp. 931, 935 (M.D. Ga. 1974) (holding that misrepresentation that the gun was found did not render the confession inadmissible); People v. Payton, 462 N.E.2d 543, 546 (Ill. App. Ct. 1984) (noting the police interrogator falsely told the suspect that he had been identified by the victim).

97. *See id.* at 427-28 ("In some cases an investigator may falsely imply, or outright state, that evidence exists that links the suspect to the crime.").

98. For cases in which police claimed that defendant's incriminating fingerprints were found on the murder weapon or at the scene of the crime, see, for example, Oregon v. Mathiason, 429 U.S. 492, 493 (1977) (police officer falsely informed defendant that his fingerprints were found at the scene of a burglary, eliciting a confession from defendant moments later) and Morgan v. Zant, 743 F.2d 775, 779 (11th Cir. 1984) (evidence of police deceiving defendant by informing him that his fingerprints were on the murder weapon and his footprint was found at the crime scene allegedly excluded from hearing on voluntariness of defendant's confession to police), *rev'd on other grounds*, Peek v. Kemp, 784 F.2d 1479 (11th Cir. 1986).

99. *See* INBAU ET AL., *supra* note 1, at 428 (discussing the consequences of implying to a rape suspect that the suspect had failed a DNA test).

100. INBAU ET AL., *supra* note 1, at 610.

101. *Id.*

102. State v. Jackson, 304 S.E.2d. 134, 143-44 (N.C. 1983).

103. *Id.* at 144.

marked them as if fingerprint identification had been performed.¹⁰⁴ Police used the bloody weapon and photographs to interrogate the suspect, falsely stating that the fingerprints had been identified as the suspect's.¹⁰⁵ Despite these and other fraudulent representations, the Supreme Court of North Carolina upheld the confession, finding that the fraudulent representations were not likely to make an innocent person confess.¹⁰⁶

The presentation of false evidence poses a more severe threat than other types of deceptive police practices. When a police officer tells a suspect that physical evidence proves his guilt, accomplices have already confessed, or the victim has identified him as the assailant, even an innocent suspect may suffer an emotional breakdown. Faced with seemingly definitive proof of guilt, an innocent suspect may begin to doubt his own sanity. In a desperate situation, a person may weigh the prudence of maintaining innocence when it seems that everything is stacked against him. This type of deception seems most likely to induce a false confession—where a defeated and distraught suspect decides to surrender to escape an impossible situation. The deceptive technique of presenting false evidence thus jeopardizes the reliability of the resulting confession.

IV. FROM TORTURE TO TRICKERY: THE HISTORY OF POLICE INTERROGATION PRACTICE

Although common law originally placed no limitations on suspicious interrogation tactics, the 18th and 19th centuries saw increased judicial concern regarding the reliability of confessions obtained by abusive means.¹⁰⁷ English courts led the way in 1783, issuing the first decision to exclude a confession obtained "by the flattery of hope or by the torture of fear."¹⁰⁸ In determining the reliability of confessions, English courts used an evidentiary standard, asking whether (1) the defendant had been induced to confess by a promise of benefit or threat of harm; (2) the defendant had spoken under circumstances that impaired the reliability of statements; or (3) the confession had been made voluntarily.¹⁰⁹ In the early 19th century, American courts followed suit, evaluating

104. *Id.*

105. *Id.*

106. *Id.* at 148.

107. Magid, *supra* note 3, at 1172.

108. *The King v. Warickshall*, (1783) 168 Eng. Rep. 234, 235 (K.B.); *see also* Young, *supra* note 5, at 435 (noting the English decision as the first "formal pronouncement" excluding a confession obtained in such a manner).

109. Young, *supra* note 5, at 435 (quoting *Developments in the Law: Confessions*, 79 HARV. L. REV. 954, 954-55 (1966)).

confessions on the basis of the evidentiary standard pronounced by the English courts.¹¹⁰

In the mid-1800s, however, the American criminal justice system began to veer from the course established by the English courts, bringing in commissioned police to take over the traditionally private role of apprehending and detaining criminals.¹¹¹ Although the magistrates of the court, consistent with the English system, had originally served the function of suspect interrogation, the new American police force replaced the magistrates in the investigation process.¹¹² With the advent of police interrogation came a stark change in the nature of interrogation tactics in the United States. Unlike their judicial predecessors, police interrogators began to use physical coercion and lying to induce confessions.¹¹³ In the 1884 case of *Hopt v. Utah*, the Supreme Court recognized that physically abusive interrogation tactics might deprive the accused of "that freedom of will or self-control essential to make his confession voluntary within the meaning of the law."¹¹⁴

Still, law enforcement officials continued to abuse and torture the accused in their efforts to extract confessions. In 1936, the landmark case of *Brown v. Mississippi* finally announced a definitive prohibition of the "rack and torture chamber" in police interrogation.¹¹⁵ Holding that police use of violence was "revolting to the sense of justice," the Court announced that Due Process required interrogation procedures that would yield voluntary and thus reliable statements.¹¹⁶

A few years after *Brown*, the Court extended the rule in *Chambers v. Florida*, holding that, even when there was no physical violence, persistent questioning and "other ingenious forms of entrapment" could constitute compulsion.¹¹⁷ In cases after *Brown*, the "courts used a 'totality of the circumstances' analysis to determine whether 'the interrogation was . . . unreasonable or shocking, or if the accused clearly did not have an opportunity to make a rational or intelligent choice.'"¹¹⁸ "The totality of the circumstances test [for voluntariness] required courts to consider: the conduct and actions of the officers; the physical surroundings of the interrogation; and the

110. Young, *supra* note 5, at 435-36.

111. *Id.* at 437.

112. *Id.* at 437-38.

113. *See id.* at 438 ("With the shift from magistrates to police as interrogators, techniques of interrogation also began to change. Physical coercion and lying by police interrogators became part of the process.")

114. *Hopt v. Utah*, 110 U.S. 574, 585 (1884).

115. *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936).

116. *Id.* at 286.

117. *Chambers v. Florida*, 309 U.S. 227, 237 (1940).

118. Magid, *supra* note 3, at 1173 (quoting *New York v. Quarles*, 467 U.S. 649, 661 (1984) (O'Connor, J., concurring in part, dissenting in part)).

characteristics and status of the defendant, including both physical and mental condition.”¹¹⁹

In the mid 1900s, the Court shifted its concern from a pure focus on the voluntariness of confessions to a view that condemned police practices likely to coerce confessions.¹²⁰ In *Ashcraft v. Tennessee*, the Court found coercion where police questioned a defendant for thirty-six hours without allowing the defendant to rest or sleep.¹²¹ The important change underlying the Court’s reasoning in *Ashcraft* rested in the fact that the Court did not explicitly find that the confession was obtained by manipulating the defendant’s will.¹²² Instead, the Court condemned the police conduct itself, finding it so “inherently coercive” as to render the confession compelled and, as a result, inadmissible.¹²³ In *Ashcraft*, the Court focused not on the individual characteristics of the defendant, as it had it in the past, but on the reprehensible nature of the police questioning.¹²⁴

The Supreme Court first addressed police deception in the 1959 case of *Spano v. New York*.¹²⁵ In *Spano*, the defendant first confessed to murder over the phone to a friend, Bruno—a student in the police academy.¹²⁶ During the course of Spano’s subsequent custodial interrogations, the police used Bruno to deceive Spano into believing that his story was causing problems for Bruno and his family.¹²⁷ After eight hours of questioning, which included pleas from Bruno, Spano confessed and was convicted.¹²⁸ The Court applied a totality of the circumstances test in evaluating the admissibility of the confession, and held that official pressure, fatigue, and falsely aroused sympathy rendered the confession involuntary.¹²⁹ The Court’s opinion emphasized the abhorrence of the police tactics employed.¹³⁰ Similarly, in *Rogers v. Richmond*, the Court held that a confession obtained by psychological coercion could not stand when

119. *Id.* (citing 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.2(c), at 448 (2d ed. 1999)).

120. *See generally* Young, *supra* note 5, at 443–47 (discussing the Supreme Court’s increasing use of the Due Process clause to scrutinize police misbehavior as it related to tending to coerce confessions).

121. *Ashcraft v. Tennessee*, 322 U.S. 143, 153–54 (1944).

122. *Id.* at 154.

123. *Id.* at 153–54.

124. *Id.* at 153–55.

125. *See Spano v. New York*, 360 U.S. 315, 320–21 (1959).

126. *Id.* at 317.

127. *Id.* at 318–19.

128. *Id.* at 318–19, 322–23.

129. *Id.* at 323; *see also* Magid, *supra* note 3, at 1175 (describing how the Court in *Spano* applied the totality of the circumstances test).

130. *See id.* at 320, 323–24 (“[T]he police were not therefore merely trying to solve a crime, or even to absolve a suspect, [but] . . . were rather concerned primarily with securing a statement from defendant on which they could convict him.”).

police falsely threatened to arrest Rogers's wife if he did not confess.¹³¹

In the 1960s, the Court's treatment of confessions moved dramatically in the direction of protecting defendants' rights against self-incrimination. In 1966, the Court decided *Miranda v. Arizona*,¹³² continuing to focus on the appropriateness of police practices. The Court's conclusion that the Fifth Amendment's protection from compulsory self-incrimination is "fully applicable during a period of custodial interrogation" was unprecedented in constitutional law.¹³³ The Court's development of the *Miranda* warnings reflected the recognition that all custodial interrogation is inherently coercive.¹³⁴ Explaining that modern police interrogation used psychological rather than physical coercion,¹³⁵ the Court enumerated the standard deceptive techniques espoused in at least five different popular interrogation manuals.¹³⁶ The Court denigrated these deceptive practices for contributing to impermissible coercion and laid the foundation for further court-imposed limitations on police conduct.¹³⁷

In *People v. Smith*, a state court interpreted *Miranda* as prohibiting lying by police in custodial interrogations.¹³⁸ In *Smith*, the police had questioned the defendant about an injured child, deliberately choosing not to disclose that the child had died.¹³⁹ The court stated, "Clearly, the State has no right to extort confessions by deliberate fraud or trickery."¹⁴⁰ Just three years later, however, the Supreme Court rejected the interpretation of *Miranda* as an absolute prohibition of lying by police.¹⁴¹

131. *Rogers v. Richmond*, 365 U.S. 534, 535–36, 545 (1961).

132. *Miranda v. Arizona*, 384 U.S. 436, 436 (1966).

133. JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* 120 (1993) (citing *Miranda*, 384 U.S. at 460).

134. *See Miranda*, 384 U.S. at 467 ("We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.").

135. *Id.* at 448.

136. *Id.* at 449.

137. *Id.* at 449–54; *see also* Young, *supra* note 5, at 450 (noting that *Miranda*'s "resounding criticism of police lying could have been the foundation for further court-imposed limitations on police conduct").

138. *See People v. Smith*, 246 N.E.2d 689, 692–93 (Ill. App. Ct. 1969) ("At the outset, we find that the 'trickery' contemplated in [*Miranda*] and other decisions cited by the defendant, involve affirmative acts of fraud or deceit such as a misrepresentation that a friend's job would be jeopardized if the defendant did not confess . . .").

139. *Id.* at 692.

140. *Id.* at 693.

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

In the watershed case of *Frazier v. Cupp*, Frazier had been indicted jointly with another defendant, Rawls, for murder.¹⁴² After both were arrested, police falsely told Frazier that Rawls had confessed.¹⁴³ When Frazier asked for an attorney, the police stated, “[Y]ou can’t be in any more trouble than you are in now.”¹⁴⁴ Frazier gave a signed confession and the Court held that although the lies were relevant, they did not make an otherwise voluntary confession inadmissible.¹⁴⁵ Using a totality of the circumstances test, the court found that the lies were not material for the purpose of assessing the admissibility of the confession.¹⁴⁶

Following *Frazier v. Cupp*, both state and federal courts have upheld the validity of trickery and deceit in suspect interrogations.¹⁴⁷ Courts have sustained the practice with respect to presenting false fingerprint evidence, “playing one accomplice against another, placing blame upon and condemning the victim, and lying to a murder suspect that the victim is still alive.”¹⁴⁸ In *Holland v. McGinnis*, a police officer exaggerated the strength of the case against the defendant during an interrogation.¹⁴⁹ The court found that, even if the misrepresentation caused the defendant to confess, it was not inherently coercive and “insufficient by itself to render an otherwise voluntary confession inadmissible.”¹⁵⁰ The misrepresentation was just one factor that the court considered in the totality of the circumstances.¹⁵¹ The Tenth Circuit, in *Lucero v. Kerby*, held that without additional evidence, a detective’s false statement about fingerprint evidence would not render an otherwise voluntary confession inadmissible.¹⁵²

Although courts have generally rejected the application of a per se rule of inadmissibility due to deception,¹⁵³ a few courts have taken a stand against the use of certain deceptive practices. In 1984, an Illinois appellate court in *People v. Payton*¹⁵⁴ delivered a holding criticized by some as an aberration exhibiting “a gross misconception

142. *Id.* at 733.

143. *Id.* at 737.

144. *Id.* at 738.

145. *Id.* at 738–39.

146. *Id.* at 739.

147. See INBAU ET AL., *supra* note 1, at 608 (noting that both state and federal courts have upheld the validity of a wide variety of practices that could be considered trickery or deceit in a large number of instances).

148. *Id.* at 608–09.

149. *Holland v. McGinnis*, 963 F.2d 1044, 1051 (7th Cir. 1992).

150. *Id.* at 1051–52 (quoting *Frazier*, 394 U.S. at 739).

151. *Id.* at 1051.

152. *Lucero v. Kerby*, 133 F.3d 1299, 1311 (10th Cir. 1998).

153. INBAU ET AL., *supra* note 1, at 610.

154. *People v. Payton*, 462 N.E.2d 543, 545–46 (Ill. App. Ct. 1984).

of judicial precedent.”¹⁵⁵ In *Payton*, the police interrogator had falsely told the suspect that his fingerprints had been found at the scene of a residential burglary and that the victim had positively identified him.¹⁵⁶ In reversing the conviction, the court stated that “a suspect grossly and intentionally misled as to the amount and strength of the evidence against him may well be induced to confess as a direct result of those misrepresentations.”¹⁵⁷ Condemning the interrogator’s use of flagrant deceptive tactics, the court in *Payton* held that the defendant’s confession was properly excluded from evidence.¹⁵⁸ Critics of the decision pointed to the appellate court’s erroneous citations to *Miranda* for the proposition that the Supreme Court has disallowed the use of trickery.¹⁵⁹

Shortly after the Illinois appellate court’s decision in *Payton*, the Supreme Court of Illinois decided another case that sparked debate about the detrimental effects of the use of deceit in inducing confessions.¹⁶⁰ *People v. Martin* involved a defendant who had confessed after being told by the interrogator that his accomplice named him as “the trigger man.”¹⁶¹ Although four of the Illinois Supreme Court justices opined that the interrogator’s lie was not enough to render the resulting conviction inadmissible, three justices dissented, stating, “there is no difference in principle between the withholding of evidence favorable to a defendant and the wilful, knowing falsehood which tricked defendant into making the statement.”¹⁶²

A. State of American Confession Law

Today, with no absolute prohibition of police deception during interrogation, courts may admit confessions despite the use of trickery, misrepresentation, lies, and false evidence.¹⁶³ American courts have abandoned the original common law approach to

155. See, e.g., INBAU ET AL., *supra* note 1, at 610 (describing *Payton* as an “outstanding aberration” and noting that it also grossly misconceived “the judicial rationale for the allowance of trickery and deceit”).

156. *Payton*, 462 N.E.2d. at 544.

157. *Id.* at 546.

158. *Id.*

159. See INBAU ET AL., *supra* note 1, at 610–11 (noting that in *Miranda* the Supreme Court did not rule that trickery by police officers was categorically prohibited in eliciting confessions from criminal suspects).

160. See *People v. Martin*, 466 N.E.2d. 228, 236 (Ill. 1984) (Goldenhersh, J., dissenting) (noting that a knowing, voluntary waiver of a defendant’s right to silence could not have been made in a situation in which deceit on the part of police was present); see also INBAU ET AL., *supra* note 1, at 612 (criticizing the decision in *Martin*).

161. *Martin*, 466 N.E.2d. at 229.

162. *Id.* at 236 (Goldenhersh, J., dissenting).

163. See Young, *supra* note 5, at 451 (“With no absolute prohibition of police lying during interrogation, courts today are free to condone such lying.”).

interrogation law, refusing to consider the reliability of confession evidence.¹⁶⁴ Instead, judges look to the voluntariness of the defendant's statements, and apply an ill-defined totality of the circumstances test to determine the admissibility of a confession.¹⁶⁵ This test determines "whether an examination of the totality of the circumstances indicates that the conduct of the law enforcement officials was such as to overbear petitioner's will to resist and to bring about a confession that was not the product of a rational intellect and a free will."¹⁶⁶ Police lying is necessarily only one of numerous factors considered in determining voluntariness.¹⁶⁷ Because the test is so flexible, courts can simply permit or reject confessions without clear reasons.¹⁶⁸

In applying the totality of the circumstances test, courts have taken different approaches. Some judges review police deception by simply citing *Frazier v. Cupp* for the proposition that "false statements by the police are insufficient to invalidate an otherwise voluntary confession."¹⁶⁹ Such a review draws a bright line that permits police lying.¹⁷⁰ Other courts engage in extensive balancing tests, weighing the size or seriousness of the particular deception along with other circumstances surrounding the interrogation.¹⁷¹ Ultimately, courts have great latitude in determining the importance of each factor within the totality of the circumstances.¹⁷² Because the current constitutional doctrine has acquiesced in, if not affirmatively sanctioned, police deception during the investigative phase, federal and state courts have interpreted the Supreme Court's decisions to find that almost no type of deception renders a confession per se involuntary.¹⁷³

164. See *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (holding that a confession's lack of reliability is "a matter to be governed by the evidentiary laws of the forum").

165. *Id.*; see also Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 863 (1979) ("The Court's general unwillingness to articulate the policies underlying volitional terminology explains the ambiguity of voluntariness doctrine . . ."); Magid, *supra* note 3, at 1174 n.28 (indicating that the vulnerabilities of a defendant is just one factor of the totality of the circumstances test).

166. *Robinson v. Smith*, 451 F. Supp. 1278, 1284-85 (W.D.N.Y. 1978).

167. *Young*, *supra* note 5, at 451-52.

168. *Id.* at 452.

169. *Id.*

170. *Id.*

171. See *id.* at 452-53 (describing the different ways that courts apply the totality of the circumstances test).

172. *Id.* at 453.

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

B. State of English Confession Law

In England, police interrogation is now governed by PACE.¹⁷⁴ Seeking to strike an appropriate balance between the powers of the police and the rights and freedoms of the public, PACE provides the basic framework for the exercise of police authority.¹⁷⁵ The statute incorporates some common law principles long followed by the English courts but also includes new provisions dealing with searches, arrests, detention, investigation, identification, and interviewing.¹⁷⁶

Recognizing that the primary legislation could not possibly cover the multitude of problems encountered by the police in conducting investigations, the government also empowered the Home Secretary to issue Codes of Practice. These Codes provide detailed regulations and advice for certain aspects of police procedure.¹⁷⁷ The purpose for the creation of the Codes of Practice was to provide a guide to the proper conduct of criminal investigations so that the police and public would know their respective rights and duties.¹⁷⁸ There are five Codes presently in operation.¹⁷⁹ In the context of a custodial interrogation, Code C is the most relevant.¹⁸⁰ Code C is known as the Code of Practice for the Detention, Treatment, and Questioning of Persons by Police Officers.¹⁸¹

The Codes themselves are not statutory instruments and therefore have no legislative effect.¹⁸² Copies of the Codes, however, are "kept at all police stations and they are available to detained suspects upon request."¹⁸³ Although the breach of a provision of a Code is not in itself a criminal or civil wrong, courts are obliged to take into account any provision of a Code relevant to a question arising under the proceedings before them.¹⁸⁴ Further, any contravention of a Code of Practice may also be a disciplinary offense

174. See SPRACK, *supra* note 7, at 4 (noting that PACE governs police powers such as questioning a suspect before and after arrest).

175. Police and Criminal Evidence Act 1984 (PACE) and Accompanying Codes of Practice (U.K.), <http://police.homeoffice.gov.uk/operational-policing/powers-pace-codes/pace-code-intro/> (last visited Mar. 24, 2009) [hereinafter PACE Website]; see also SPRACK, *supra* note 7, at 4-5 (stating that PACE provides the framework for the exercise of police powers while taking into account the public's interest).

176. SPRACK, *supra* note 7, at 4-5.

177. *Id.*; see also Police and Criminal Evidence Act, 1984, c. 60, § 66 (U.K.). These Codes of Practice can be found on the police force's website. See PACE Website, *supra* note 175.

178. SPRACK, *supra* note 7, at 5.

179. PACE Website, *supra* note 175.

180. SPRACK, *supra* note 7, at 5.

181. *Id.*

182. *Id.* An order made by the Home Secretary brought the Codes into effect and each Code was approved by a resolution of each House of Parliament. *Id.*

183. *Id.*

184. *Id.*

covered by the police discipline regulations.¹⁸⁵ Most importantly, if police obtained evidence against the accused through a breach of the Code, the court will consider the breach in evaluating the admissibility of the evidence.¹⁸⁶ Depending upon the nature of the breach, the breach alone may make a confession inadmissible or, in the alternative, be a contributory factor which, taken with other circumstances, leads to the exclusion of the confession.¹⁸⁷ Since PACE was enacted, judges in courts of first impression as well as in the Court of Appeals have readily exercised their discretion in favor of the defense, choosing to exclude evidence obtained in violation of the Codes of Practice.¹⁸⁸

Courts considering the admissibility of confessions evidence evaluate police conduct for compliance with PACE section 76 and 78.¹⁸⁹ The cornerstones of the law governing police interrogation are reliability and fairness. PACE section 76 provides:

If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

Applying PACE section 76, courts consider the words or actions that induced such confession to determine whether the confession made by *the particular suspect* is likely to be unreliable.¹⁹⁰ Questioning that might be acceptable in the interrogation of an average suspect may still cast doubt as to the reliability of admissions made by a particularly vulnerable or inexperienced suspect, such as a child.¹⁹¹ Section 76 permits judges to exercise considerable discretion in excluding confessions on the basis of reliability.¹⁹² Section 78 further develops the courts' power to bar confessions by allowing judges to

185. *Id.* at 6.

186. *Id.* at 6–7.

187. *Id.* at 7.

188. *Id.*

189. *See id.* at 29 (describing the framework set out by Sections 76 and 78).

190. *Id.*

191. *Id.*; cf. MIRFIELD, *supra* note 12, at 283 (“[T]he mental handicap of the accused may properly be considered . . . for the purposes of section 76(2)(b).”). The leading case is *R v. Everett*. *See* Case Comment, *Reliability of Confession—Mental Condition of Suspect: R v. Everett*, 1988 CRIM. L. REV. 826 (Eng.).

192. Confession and Breaches of Police and Criminal Evidence Act (PACE) (U.K.), http://www.cps.gov.uk/legal/a_to_c/confession_and_breaches_of_police_and_criminal_evidence_act/ (last visited Mar. 24, 2009).

exercise discretion in excluding evidence that would otherwise be admissible on the basis that it would be unfair to offer the evidence as proof in a criminal trial.¹⁹³ In English courts, the function of the judge is to protect the fairness of the proceedings.¹⁹⁴ Because each case will turn on its relevant facts, the government has been reluctant to fetter individual judges' discretion by drawing bright line restrictions.¹⁹⁵

Courts in England routinely exclude confession evidence obtained unfairly by some deceit or trick played on the suspect.¹⁹⁶ Even before the enactment of PACE, English common law granted courts the discretion to exclude confession evidence if the police made misrepresentations to persuade a suspect to make the incriminating statements.¹⁹⁷ Since PACE was enacted, defendants usually challenge evidence obtained as a result of a trick as "unfair" under PACE section 78.¹⁹⁸ If the defendant can show that the police acted in bad faith by making a deliberately deceitful representation, the court likely will exclude the confession from evidence.¹⁹⁹ In *R v. Mason*, the Court of Appeal excluded a confession for such a bad faith misrepresentation by a police officer.²⁰⁰ With no direct evidence to connect the suspect to the crime, the police officer falsely told the defendant and his solicitor that they had found the suspect's fingerprints at the scene of the crime.²⁰¹ After being presented with this false evidence during his interrogation, the defendant confessed to the crime.²⁰² The Court of Appeal held that the deceit perpetrated on the defendant and his solicitor was reprehensible and impacted the fairness of the trial.²⁰³ As the confession was the only definitive evidence linking the defendant to the crime, the conviction was overturned.²⁰⁴

193. *Id.*

194. *Id.*

195. *Id.*

196. See Richard Stone, *Exclusion of Evidence Under Section 78 of the Police and Criminal Evidence Act: Practice and Principles*, 3 WEB J. CURRENT LEGAL ISSUES, § II.1 (1995), <http://webjcli.ncl.ac.uk/articles3/stone3.html>; cf. *R v. Houghton*, (1978) 68 Crim. App. 197, 206 (Eng.) ("Evidence would operate unfairly against an accused if it had been obtained in an oppressive manner by force or against the wishes of an accused person or by a trick or by conduct of which the Crown ought not to take advantage.") (citations omitted); MIRFIELD, *supra* note 12, at 12 (recognizing the "emerging consensus in official circles" that the kind of tactics "advocated by Inbau, Reid, and Buckley, as well as being arguably unethical, is also inimical to the gathering of reliable confession evidence").

197. MIRFIELD, *supra* note 12, at 199.

198. *Id.* at 205-09.

199. *Id.* at 206.

200. *R v. Mason*, (1988) 1 W.L.R. 139, 144 (Eng.).

201. *Id.* at 142.

202. *Id.*

203. *Id.* at 144.

204. *Id.*

Although express deception by the police during the interrogation of a suspect is generally prohibited in England, the courts have found that some types of police deception do not warrant the exclusion of confession evidence.²⁰⁵ For example, the English "courts have exhibited a considerable degree of tolerance of surreptitious tape-recording by . . . the police."²⁰⁶ In *Bailey*, the police had failed to obtain confessions from two suspects through ordinary questioning; as a result, the police placed the two suspects in a bugged cell in an effort to record incriminating statements.²⁰⁷ Before doing so, the officers acted out a deceptive charade to lull the suspects into a false sense of security.²⁰⁸ The police officers suggested to the suspects that they should have been placed in separate cells, but an uncooperative custody officer had placed them in the cell together.²⁰⁹ Assuming that their conversation would be private, the suspects made incriminating remarks.²¹⁰ The court found that the use of deception was "merely a detail," refusing to exclude the admissions from evidence at trial.²¹¹

To facilitate the practice of judicial discretion in excluding unfairly obtained evidence, Code C also requires that all custodial interviews be recorded.²¹² This requirement states that "[a]n accurate record must be made of each interview, whether or not the interview takes place at the police station."²¹³ If the interview is conducted at the station and the police officer chooses to record the interview by manual notation, the interview must be transcribed contemporaneously with the questioning on forms specially provided for that purpose.²¹⁴ At the conclusion of the interview, the suspect should be invited to read the entire record and asked to sign it to indicate that the record is accurate.²¹⁵

As a practical alternative to the time-consuming practice of manual notation, police routinely tape-record interviews.²¹⁶ PACE Practice Code E is entirely devoted to the procedures that police

205. MIRFIELD, *supra* note 12, at 207.

206. *Id.* at 208.

207. *R v. Bailey*, (1993) 3 All E.R. 513, 514 (Eng.).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. Code for the Detention, Treatment and Questioning of Persons by Police Officers (Code C), § 11.7(a) (promulgated under the Police and Criminal Evidence Act 1984, c.60, § 67, pt. VI (Eng.)) [hereinafter Code C]; see SPRACK, *supra* note 7, at 38–39 (discussion of the effect of the failure to record an interview on judicial discretion).

213. *Id.*

214. SPRACK, *supra* note 7, at 38.

215. *Id.*

216. *Cf.* Code E, *supra* note 13, § 3.3 (stipulating when the interviewer may not audio record and instead record in writing).

officers must follow in making audio recordings of custodial suspect interrogations.²¹⁷ If the suspect has an objection to being recorded by video or audio, the suspect may express the objection at the outset.²¹⁸ The interview will then commence without media recording, but a written record or transcript must still be produced.²¹⁹ If the interrogator terminates the use of recording equipment, he must instead comply with the written record requirement under Code C.²²⁰

Whether the interrogation is recorded in writing or on tape, the record may be introduced as an exhibit at trial.²²¹ The substance of the interrogation may be used by the prosecution to prove that the defendant made admissions of guilt or the defense to show consistencies between the defendant's responses to the interview and the defense's theory of the case.²²² To ensure that recording requirements are routinely followed by the police, the courts exclude confessions that are obtained in violation of the recording requirement as unreliable under section 76 of PACE.²²³

V. SOLUTION

For decades, scholars have observed that the permissibility of deceptive police practices leads to false confessions, compromises the admissibility of valuable evidence at trial, leads police officers to lie as a first resort, and harms the integrity of the justice system. In an effort to diminish these widespread effects in the United States, the legislature should consider reforming interrogation law. Taking a cue from the English confession law expressed in the Police and Criminal Evidence Act of 1984, the PACE Practice Codes, and the case law that has interpreted that sweeping legislation, the new law should incorporate three basic components. First, the new law should empower the courts to focus on the reliability of confession evidence in determining its admissibility. Second, the law should identify the deceptive police techniques that produce unreliable results and encourage courts to exclude unreliable evidence. Third, the new law should mandate the recording of police interrogations with the

217. *Id.*

218. *Id.* § 4.8.

219. *Id.*

220. *Id.*

221. SPRACK, *supra* note 7, at 38.

222. *Id.*

223. *Id.* at 38–39; *see also* R v. Delaney (1988) 88 Crim. App. 338, 340–41 (Eng.) (holding that a failure to compile a contemporaneous record of the bulk of a ninety minute interview with the defendant was a “flagrant breach of the Code”); *cf.* R v. Canale [1990] 2 All E.R. 187 (Eng.) (quashing a conviction because the trial judge should have acted under section 78 to exclude admissions which had not been contemporaneously recorded).

warning that confession evidence may be excluded from trial if those rules are not followed. By prohibiting the use of certain deceptive techniques and requiring more safeguards, the law may help to ensure that police interrogation practices lead to reliable confessions.

A. *A Framework with a Focus on Reliability*

Following the example of PACE section 76, the legislature should steer judicial discretion in the direction of reliability. Instead of analyzing the difficult question of individual voluntariness, the courts should focus on determining whether a given practice produces reliable results. Such a shift in focus reflects the understanding that while a suspect's final admission to an interrogator may be freely offered, that confession may also be the tainted product of unjust and unduly provocative means.

The Supreme Court's refusal to definitively address the issue of reliability should urge lawmakers to make the necessary changes to confession law, clarifying the circumstances under which a confession may be excluded. Rather than relying on judges to determine, on a case-by-case basis, whether certain misrepresentations are coercive enough to render a particular suspect's confession involuntary, the law should govern police conduct at the outset. To accomplish this focal shift from voluntariness to reliability, the law need not enumerate every possible circumstance in which police deception may be employed or even establish a per se rule against all types of police deception. Instead, the legislation should make clear that use of deceptive tactics that produce unreliable confessions compels the exclusion of a confession. The legislation should identify certain types of police practices that frequently jeopardize the reliability of a confession, while recognizing that the list of prohibited techniques is not exhaustive. In doing so, lawmakers can assist the courts in determining whether particular deceptive practices jeopardize reliability, while simultaneously empowering the courts to make the determination in those cases where the circumstances call for a fact-dependant inquiry.

B. *Prohibition Against Fabricated Physical Evidence and False Testimonial Evidence*

Though some have advocated for the creation of a per se rule against the use of any and all trickery and deceit in police interrogation,²²⁴ the United States seems far from adopting such a

224. See, e.g., Daniel W. Sasaki, Note, *Guarding the Guardians: Police Trickery and Confessions*, 40 STAN. L. REV. 1593, 1612-15 (1998) (advocating a per se prohibition on police of use trickery in investigations).

rule. Because police officers rely on the ability to build trust and rapport with suspects during interviews, some level of trickery will inevitably seep into the questioning.²²⁵ But the law should draw the line at the presentation of false evidence during an interrogation. The presentation of false evidence leads not only to a greater risk of false confession, but also to the increased likelihood of irreparable evidentiary harm. Although the PACE model stops short of making an explicit prohibition of false evidence, the case law interpreting PACE obviates the conclusion that false evidence leads to unreliability.²²⁶ Similarly, the proposed American legislation should make clear that the presentation of deliberately misleading physical or testimonial evidence during a police interrogation may render any resulting confession unreliable and cause the confession to be excluded from trial. A policy prohibiting the use of false evidence to obtain confessions would strike an appropriate balance between the goal of securing valuable evidence and the need to protect the innocent from coercive police tactics.²²⁷

Advocates of broad police and judicial discretion may reject such a policy outright for its limitation on a widely-relied-upon police practice. Some may argue that the effectiveness of false evidence techniques justifies their continued use. Although police regularly secure confessions through the use of deception, it does not follow that these practices are necessary to solicit confessions.²²⁸ In fact, one of the best reasons to prohibit the use of false evidence lies in the fact that police reliance on such a practice may reduce the effort put into legitimate investigation.²²⁹ Although an outright prohibition against the use of false evidence would limit a police officer's arsenal in interrogating the witness, the result will generate more good than harm. When a prosecutor can offer a confession obtained without psychological manipulation and fraudulent representations, the confession is more reliable.

225. See Leo, *From Coercion to Deception*, *supra* note 45, at 45.

226. See discussion *supra* Part IV.B.

227. Cf. White, *supra* note 15, at 149 (advocating limits on deception by proposing first, that police be prohibited from falsely leading a suspect into believing that forensic evidence establishes his guilt, and second that courts "closely scrutinize any tactic that misleads the suspect as to the strength of the evidence against him").

228. Cf. Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH L. REV. 1275, 1280-84 (2007) (discussing the dispute over the necessity of deceptive interrogation practices).

229. Cf. Fred E. Inbau, *Should We Abolish the Constitutional Privilege Against Self-Incrimination?*, 89 J. CRIM. L. & CRIMINOLOGY 1385, 1387 (1999) (arguing that without constitutional restrictions on coercive interrogation practices, there would be an incentive for police and prosecutors "to sit comfortably in the shade, rubbing red pepper into a poor devils eyes, rather than go about in the sun hunting up evidence") (quoting SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW IN ENGLAND 442 n.1 (1883)).

Some commentators have suggested that the elimination of deceptive police interrogation tactics would lead to the prohibition of police involvement in undercover work.²³⁰ On the contrary, undercover operations pose none of the dangers discussed above. When police officers use deception to hide their identity, they create an opportunity for suspects to act as they would normally. Whether these undercover strategies are employed before, after, or during custodial interrogation, the effect is essentially the same. Suspects feel more comfortable in making admissions that they would never make if they knew that a police officer was listening. But undercover strategies likely would not cause a suspect to feel the same amount of mental anguish or despair that one might suffer if faced with the presentation of false evidence. Without the presentation of evidence suggesting guilt, there exists no real compulsion on the suspect to make any admissions. For this reason, any confession secured through undercover work would not create the same reliability problems as a confession secured through the presentation of false evidence.

Another possible criticism of the proposed plan is that for some suspects, even rapport-building or sympathetic treatment may be deceptive enough to push the suspect toward a confession. Although such tactics may not be enough to make an innocent person confess, the deception may be sufficient to exercise coercive control over an especially vulnerable defendant. In these cases, a judge may engage in a subjective analysis as contemplated by section 76 of PACE. Under the proposed solution, this type of case-specific analysis is not necessarily problematic. Although some tactics may be unreliable in every situation, other tactics may only be unreliable under the circumstances applicable to a specific suspect. Tactics that the legislature finds to produce unreliable results, such as the use of false evidence, should be enumerated in the guidelines. However, even those tactics that do not prove dangerous enough for outright prohibition will be subject to judicial scrutiny. With the charge of determining reliability, judges will exercise discretion in assessing the appropriateness of specific tactics as employed in individual cases. When making these determinations, judges may rightfully consider special circumstances in deciding whether a particular practice is unreliable.

C. Mandatory Recording

Unless interrogation policies include safeguards for the suspect, it is unlikely that legislative changes will dramatically alter the

230. See, e.g., Magid, *supra* note 3, at 1182 (arguing that a proposal to limit deceptive interrogation techniques would require a ban on undercover investigation).

tactics employed by the police. A court's inquiry into the degree of coercion or trickery employed proves difficult without the ability to observe the tenor of the interview.²³¹ When questioned about the circumstances of an interview, the police officer may be tempted to "shade the facts to suggest a less coercive environment."²³² One safeguard, mandated in the PACE Code of Practice C to combat these problems of proof, involves the recording of every custodial interrogation.²³³ Although the Code does not yet require videotaping, the goal is clear: In an effort to deter police from employing prohibited practices and to assure the admissibility of properly obtained confessions, police officers must make a recording of interrogation procedures.²³⁴

In 1990, The National Institute of Justice in the United States commissioned a nationwide study of the use of videotape by law enforcement agencies.²³⁵ The study concluded that approximately "one-third of all U.S. police and sheriffs' departments serving 50,000 or more citizens videotap[ed] at least some interrogations, primarily in homicide, rape, battery, robbery, and drunk driving cases."²³⁶ Those departments that reported videotaping interrogations said that they initiated the practice to avoid defense challenges and to reduce doubts about the voluntariness of the confessions.²³⁷ "Most agencies experienced resistance from detectives when the practice was instituted," but disapproval fell to 26% several years later.²³⁸ The majority of agencies surveyed found that the videotaping practice led to improvement in the interrogation techniques used by their law enforcement officers.²³⁹ These agencies also reported that since the institution of the videotaping practice, defense attorneys had made fewer allegations of coercion or intimidation.²⁴⁰

With the exception of Alaska and Minnesota, most states do not currently mandate any form of police taping.²⁴¹ However, the fact

231. Young, *supra* note 5, at 462.

232. *Id.*

233. Code C, *supra* note 212, § 11.7(a); *see also* SPRACK, *supra* note 7, at 38–39 (discussing that the requirement of recording interviews is to ensure accurate records of suspects' statements).

234. *See* SPRACK, *supra* note 7, at 38–39 (discussing how failure to record may lead to suspect's answers being excluded from evidence); *cf.* R v. Delaney, (1988) 88 Crim. App. 338, 341–42 (Eng.) (finding that in failing to record the interrogation the police deprived the judge of the best evidence of what actually happened during the interrogation and what really made the defendant confess).

235. ROGER W. SHUY, *THE LANGUAGE OF CONFESSION, INTERROGATION, AND DECEPTION* 192 (1998).

236. *Id.*

237. *Id.*

238. *Id.* at 193.

239. *Id.*

240. *Id.*

241. *See* John E. Reid, *Electronic Recording of Interviews and Interrogations*, POLICE LINK, <http://www.policelink.com/training/articles/1879-electronic-recording-of->

that some police departments have voluntarily assumed and continued the practice of videotaping demonstrates that a videotaping requirement would not be prohibitively costly or bothersome. Even advocates of police lying do not dispute the ease of videotaping.²⁴² One popular interrogation manual begs the question: "In this day and age of digital cameras, and affordable camcorders, where criminal trials are nationally broadcast for public viewing and syndicated television shows allow the public to watch police officers chase suspects and make arrests, the obvious question arises: Why are criminal interrogations and confessions not routinely videotaped?"²⁴³

Still, objections to mandatory taping abound.²⁴⁴ Inbau suggests that police should choose when to tape and when to refrain from taping to allow privacy.²⁴⁵ They argue that "the thought of having one's statements permanently recorded on tape is inhibiting" and that guilty suspects would not be as likely to tell the truth.²⁴⁶ The PACE Practice Codes offer an agreeable compromise to resolve these concerns.²⁴⁷ If the suspect feels uncomfortable with the presence of the audio or video recording equipment, he is free to object to its use.²⁴⁸ The suspect will be free to speak without the intrusion of a media operator but will remain protected by the creation of a written record,²⁴⁹ which he has the opportunity to review and contest.²⁵⁰ For those suspects who desire the protection that recordings may provide, the requirement will facilitate a hassle-free process.²⁵¹ Regardless of whether the suspect chooses to record the interrogation on video or by the creation of a written transcript, the suspect will be able to use the resulting record to contest the appropriateness of police tactics in trial. Similarly, the prosecutor will be able to use that record to argue in favor of the permissibility of the officer's interrogation tactics, which saves a legitimate confession from exclusion.

interviews-and-interrogations (last visited Mar. 24, 2009) (discussing that most law enforcement agencies in the U.S. do not record interviews). In *Stephan v. State*, 711 P.2d 1156, 1164 (Alaska 1985), the Alaska Supreme Court ruled that an unexcused failure to electronically record a custodial interrogation should result in the exclusion of the statement. Similarly, the Minnesota Supreme Court held in *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994), that custodial questioning should be recorded where feasible and must be recorded at a place of detention.

242. See, e.g., IBAU ET AL., *supra* note 1, at 393.

243. *Id.*

244. *Id.* at 395–97.

245. See *id.* (discussing when recording may be beneficial to the interrogator and when it may not).

246. *Id.*

247. Code E, *supra* note 13, § 4.8.

248. *Id.*

249. *Id.*

250. Code C, *supra* note 212, § 11.11.

251. See Code E, *supra* note 13 (setting out the procedures for audio recording of interviews).

Certainly, videotaping may also be an unwelcome intrusion upon the police officer's freedom to work without fear of scrutiny. However, the unpopularity of videotaping among investigators is arguably all the more reason to require it. When officers know that the court can review their techniques, they will probably respond by avoiding misconduct. Videotaping not only ensures that any coerced confessions are excluded as unreliable but also serves as a valuable deterrent against misconduct. By preventing police misconduct in the interrogation room, the practice of videotaping will actually work to solidify the admissibility of those confessions obtained through appropriate means.

For decades, commentators have advocated administrative regulations on police recording, without result.²⁵² The legislature should take the example of the PACE Code and mandate recording as a required safeguard under its guidelines for police conduct. Such a mandate would help to ensure compliance with any legislative prohibitions against the presentation of false evidence in custodial interrogations.

VI. CONCLUSION

The harm that results from police use of deception is prevalent and far-reaching. In England, the courts have recognized the problems with dishonesty and Parliament has responded with the Police and Criminal Evidence Codes. English law has proscribed the coercive practice of the fabrication of false evidence. Although judges maintain discretion to assess the reliability and fairness of particular tactics in context, case law demonstrates that the English courts have routinely penalized flagrant police deception with the exclusion of confessions from trial. In the United States, however, the Supreme Court and legislatures have yet to take significant action in preventing deceptive police practices. Despite widespread recognition of the devastating individual and institutional effects of deception, courts routinely condone lying as sound police policy.

For a system of justice that seeks to presume innocence, the routine assumption of guilt and practice of dishonesty by police as a means to uncovering truth hardly seems fitting. Society demands honesty not just in personal and business dealings, but also in the practices of its guardians. In an effort to maintain the integrity and purpose of the criminal justice system, the legislatures must seek to drive the policies of law enforcement towards the direction of reliability. By obtaining reliable confessions from the guilty and

252. See, e.g., Young, *supra* note 5, at 476-77 (suggesting that requiring videotaping of police interrogation would help prevent police lying).

protecting the innocent from overreaching, the police will gain respect from the public and garner more convictions from solid, admissible evidence.

From the time that children learn the difference between truth and lies, they recite the old adage, "honesty is the best policy." Perhaps now is the time to make honesty police policy in the United States.

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* J.D. Candidate, Vanderbilt University Law School, May 2009; B.A., University of Southern California, 2006. The Author wishes to thank Professors Terry Maroney and Christopher Slobogin for inspiring an interest in interrogation law through dynamic teaching. She also wishes to acknowledge the support of her parents, Liliya and Arkady Khasin, and the multifaceted contributions of her colleague and best friend, Armon B. Shaddadi.
