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An Exclusionary Rule for Police Lies

Melanie D. Wilson
Washington and Lee University School of Law, mwilson@wlu.edu

ARTICLES

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INTRODUCTION

In July 2008, two officers of the Los Angeles Police Department took an oath in a criminal jury trial and testified that the defendant, who was charged with possessing cocaine, had run from them before throwing a "black box" that concealed both powder and crack cocaine.[1] Normally, the officers' testimony would have been sufficient to convict the defendant. However, this time the officers' testimony fell short. Unknown to the police, the whole incident had been captured on a grainy video from a surveillance camera mounted on a nearby apartment building.[2] The video, which the defendant's lawyer produced for the first time at trial, "sharply contradicted the testimony of [the] two police officers."[3] As a result of the tape, the prosecutor moved to dismiss the case, and the judge agreed.[4]

Relying on the video evidence, the defense attorney declared that the cocaine was not the defendant's and that the case had been "completely trumped up."[5] In other words, the defense claimed that the defendant "didn't do it." The prosecution stopped short of conceding the defendant's innocence but admitted: "There do appear to be sufficient inconsistencies to render a verdict beyond a reasonable doubt unlikely in this case."[6] In the prosecutor's view, the video evidence did not establish substantive innocence, but it revealed that police violated constitutionally required procedures. In short, everyone (prosecutor, defense lawyer, and judge)

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1. Jack Leonard, *Surprise Video Puts an End to Drug Trial*, L.A. TIMES, July 1, 2008, http://articles.latimes.com/2008/jul/01/local/me-video1.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

agreed that the video proved that the two officers had lied.[7] After all, everyone could see (and hear) the lies for themselves. Unfortunately, this scenario—police telling lies—is all too common.[8]

Although the Supreme Court has often said that truth is an imperative to justice,[9] we now know that police officers,[10] the *key* investigative component in our criminal justice system, lie, even under oath.[11] How often do the police lie? No one knows for sure, but credible reports of police lies are common. In addition to police lies captured on video and audio recordings, trial judges have become increasingly skeptical about police testimony in suppression matters.[12] Juries have found police lies using a beyond-a-reasonable-doubt standard.[13] Some judges, prosecutors, and criminal defense lawyers believe that the police often lie successfully at pretrial hearings to avoid application of the exclusionary rule.[14] Commissions have convened, studied, and documented police lies.[15] And there is circumstantial evidence of police lies, along with other police misconduct, from

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7. In this Article, "lie" means an intentional misstatement of a factual occurrence. Lie is meant to cover intentional dishonesty, not mistakes or a reasonable characterization of facts that with the benefit of hindsight seems less reasonable.

8. After a study of Chicago's criminal justice system, Myron W. Orfield, Jr. said: "The idea of police officers lying under oath is difficult for many people to accept, yet it unquestionably occurs in Chicago." Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 96 (1992). Although Orfield's statement was limited to the Chicago system, this Article will show widespread evidence of police lies, including perjury.

9. For instance, in *Giglio v. United States*, 405 U.S. 150, 153 (1972), the Court reiterated: "[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *See also* Kansas v. Ventris, 129 S. Ct. 1841, 1846 (2009) (noting the "'need to prevent perjury'" as a means "'to assure the integrity of the trial process'") (quoting Stone v. Powell, 428 U.S. 465, 488 (1976)); James v. Illinois, 493 U.S. 307, 311 (1990) ("'There is no gainsaying that arriving at the truth is a fundamental goal of our legal system.'") (quoting United States v. Havens, 446 U.S. 620, 626 (1980)); Oregon v. Hass, 420 U.S. 714, 722 (1975) ("We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution.").

10. In this Article, a reference to "police" is meant to include all law enforcement officers, whether state, federal, or local, unless otherwise indicated.

11. The wide-ranging evidence of police lies, even police perjury, is discussed in detail in Section I.A, *infra*. Of that varied evidence, there are two older, empirical studies that provide particularly persuasive evidence of police dishonesty during suppression matters. *See* Comment, *Effect of* Mapp v. Ohio *on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J. L. & SOC. PROBS. 87, 92, 95 (1968) (comparing narcotics cases in New York City, before and after the *Mapp v. Ohio* decision, which imposed the exclusionary rule on state prosecutions, and reporting a "sharp decline" in allegations that "contraband was found on the defendant's body or hidden in the premises" and an accompanying "suspicious rise in cases in which uniform and plainclothes officers alleged that the defendant dropped the contraband to the ground" or had it "'in hand'" or "'openly exposed in the premises'"); Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1050–51 (1987) (reporting the results of interviews of twenty-six narcotics officers in the Chicago Police Department in which "[v]irtually all of the officers admit[ted] that the police commit perjury, if infrequently, at suppression hearings"). More recent examples of police lies are usually captured by video recordings, as in the example given in the introduction to this Article.

12. *See infra* Section I.A.(2).

13. *See infra* Section I.A.(3).

14. *See infra* Section I.A.(5).

15. *See infra* Section I.A.(4).

the work of the Innocence Project and a recent empirical study conducted by Brandon Garrett.[16]

Our legal system treats the police as if they are impartial fact gatherers, trained and motivated to gather facts both for and against guilt, rather than biased advocates attempting to disprove innocence, which is the reality. Because of its partiality in favor of officers, the criminal justice system lacks the appropriate structure to expose and effectively deter police lies, which distort the truth about criminal or unconstitutional conduct.

This Article, presented in three parts, argues that the current system should be changed to provide the structure necessary to promote honest police work. Specifically, it urges a modification to the exclusionary rule that will encourage police to tell the truth about the lies they tell and the potentially unconstitutional conduct they commit. In other words, it advocates for an exclusionary rule tailored especially for police lies.

Part I catalogs the evidence that police lie. It illustrates that police lies are a prevalent part of many American criminal prosecutions. It also demonstrates that some of these lies interfere with accurate substantive outcomes, meaning that some innocent people have been wrongly convicted because of the lies. Part I further demonstrates that truth-distorting lies are decaying the public's confidence in the integrity of our criminal justice system and reducing the protections supposedly guaranteed by the federal Constitution, jeopardizing, in the long-term, the likelihood that juries and judges will continue to believe the government's evidence in criminal cases.

Part II considers what the Supreme Court has said, expressly or implicitly, about police lies, the exclusionary rule, and other procedural rules that advance or inhibit police dishonesty, and it examines other components of our criminal justice process that promote police lies. It explains that the Supreme Court's precedent reveals that the Court is ambivalent about police lies. Some of the Court's precedent discourages such lies and other decisions show indifference toward them.

The third Part differentiates between two distinct types of police lies: (1) those that expose the truth; and (2) those that distort it. It urges the adoption of a modified exclusionary rule for criminal cases that hinge on police credibility. It argues for maintenance of the status quo for cases involving police lies that expose the truth regarding a defendant's criminal behaviors but contends that harsher, more certain, and immediate consequences must follow when a judge or jury finds significant evidence that an officer lied to distort the truth about a defendant's actions, statements, or culpability, or about the officer's own conduct. Finally, in cases in which the police "come clean" about lies they tell suspects or potentially unconstitutional conduct they commit when trying to "catch the bad guy," the

16. *See infra* Section I.A.(6).

modified exclusionary rule proposed here provides for significantly more judicial and citizen oversight to assess whether the ends of justice necessitated those police lies, given the facts and competing interests in the case.

I. CATALOGING THE EVIDENCE AND EFFECTS OF POLICE LIES

Although few would debate that truth is crucial to an effective and reliable criminal justice system, we know from anecdotal evidence that witnesses occasionally lie and that some of these sworn witnesses are law enforcement officers.[17] We also know that police officers regularly lie during investigations (sometimes with the imprimatur of the Supreme Court) to gain the trust of a suspect or to convince a suspect to admit criminal behavior.[18] On occasion, the evidence suggests, officers lie to cover up wrongdoing, either their own or that of fellow officers.[19] And, it seems, police often justify their lies by convincing themselves that lying will ensure that a guilty and dangerous defendant is not released or acquitted.[20] This section examines the proof that police lie (both in and out of court) and considers some of the implications of those lies.

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17. *See supra* note 1 and related discussion; *see also infra* note 20.

18. *See generally* Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425 (1996) (discussing, in depth, the police's use of lies to effectively elicit confessions from the accused).

19. For example, in February 2009, after a traffic accident in which an officer was to blame, several members of the Hollywood (Florida) Police Department were caught on a dashboard camera rehearsing a story to blame the incident on a twenty-three-year-old woman. On the audio, an officer can be heard saying, "We're going to bend this a little." He goes on to say, "I don't lie and make things up, ever, because it's wrong, but if I need to bend it a little to protect a cop, I'll do it." Several other officers can be heard agreeing to "bend" the narrative of what happened. One can be heard agreeing to take photos of the scene so that it appears that the young woman caused the incident. Todd Wright, *Charges Dropped Against Woman Framed by Cops*, NBC MIAMI (July 29, 2009), *available at* http://www.nbcmiami.com/news/local-beat/Cops-Set-Up-Woman-After-Crash.html; *see also* Cynthia Williams, *Officer Cleared of Planting Evidence*, NASHVILLE NEWS (Feb. 21, 2008), *available at* http://www.wsmv.com/news/15370841/ detail.html (showing video of Cookeville, Tennessee police appearing to plant drugs on a defendant after searching him several times without finding drugs, but officer was later exonerated by a Tennessee Bureau of Investigation inquiry).

20. This conclusion has been reached by legal scholars. *See, e.g.*, ALAN M. DERSHOWITZ, REASONABLE DOUBTS 60, 68 (Simon & Schuster 1996); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, [hereinafter *"Testilying"*], 67 U. COLO. L. REV. 1037, 1044 (1996). In addition, the conclusion is consistent with the findings from several empirical studies. *See, e.g.*, J. SKOLNICK, JUSTICE WITHOUT TRIAL 215 (John Wiley & Sons 1967) (exploring findings of an extensive observation study of police in a 400,000-person city, Skolnick concluded that police attempt to construct a story of compliance with the Constitution to ensure apprehension of criminals); Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960–62*, 4 CRIM. L. BULL. 549 (1968) (studying thousands of arrests in New York suggesting that police altered their testimony following the decision in *Mapp v. Ohio* to avoid suppression of evidence found on guilty defendants); Comment, *Effect of* Mapp v. Ohio *on Police Search-and-Seizure Practices in Narcotics Cases*, *supra* note 11 (studying criminal cases in New York City before and after *Mapp* suggesting that police began lying to avoid suppression of contraband); Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence*, *supra* note 11 at 1051 (finding that the police in Chicago "shade the facts" to establish probable cause when they think the defendant is guilty).

A. The Evidence of Police Lies

For several decades, evidence of police lies has been mounting. The evidence can be found on video and audio recordings, in findings by judges, in jury verdicts, and even in empirical studies.

1. Evidence Captured on Video and Audio Recordings

The growing pervasiveness of technology in the United States has exposed police lies that would have otherwise gone unnoticed or proven. Such technology has the potential to reveal much more police dishonesty. Consider this recent example.

In the summer of 2008, a New York tourist videoed a police officer pushing a bicyclist off of his bike during an organized ride.[21] Although the video shows Officer Patrick Pogan going out of his way to physically assault the cyclist, Pogan arrested the biker and charged him with attempted assault, disorderly conduct, and resisting arrest.[22] In the official criminal complaint lodged by Pogan, he claimed that the biker "rode straight into him."[23] In direct contrast to the officer's assertion, the video shows the cyclist swerving to avoid Pogan. Thus, the video establishes that Officer Pogan lied about his conduct and that of the biker. After the tourist posted the video on YouTube,[24] a grand jury indicted Pogan for two felonies: filing a false instrument and falsifying business records.[25]

Police lies have been caught on video in other cases too. There is the incident fortuitously captured by a nearby recording device, which is referenced at the start of this Article.[26] And in a separate incident, in Atlanta, Officer Terrance Alexander was videotaped pulling a middle-aged woman, Diana Dictrich-Barnes, from her car, throwing her to the ground, and handcuffing her. Although the officer claimed Dictrich-Barnes struck him with her car door, video revealed that, at most, the mirror of her car may have barely bumped the officer when he ordered her to move her car from the front of the Atlanta airport.[27]

Video from the 2004 Republican National Convention revealed that police lied when they claimed that they arrested protesters for unrest and resisting arrest.

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21. John Eligon and Colin Moynihan, *Officer Is Indicted in Toppling of Cyclist*, N.Y. TIMES, Dec. 15, 2008, *available at* http://cityroom.blogs.nytimes.com/2008/12/15/officer-to-be-indicted-in-toppling-of-cyclist/.

22. *Id.*

23. *Id.*

24. *Id.*

25. Associated Press, *New York City Cop Indicted in YouTube Bike Knockdown*, Dec. 16, 2008, *available at* http://www.wcbs880.com/Cop-Indicted-in-YouTube-Bike-Knockdown/3504837. In addition to the two felony charges, Pogan was charged with three misdemeanors, including third-degree assault and making a punishable false written statement. *Id.*

26. *See supra* p. 1.

27. *See* Associated Press, *Woman Manhandled by Police Officer Gets $350,000 Settlement*, USA TODAY, Nov. 16, 2005, *available at* http://www.usatoday.com/travel/news/2005-11-16-airport-scuffle_x.htm.

Video of the arrests refuted the officers' claims.[28] In May of 2009, five police officers in Birmingham, Alabama were fired after video surfaced revealing that they punched, kicked, and struck an unconscious suspect with a nightstick.[29] And in February, 2009, after a traffic accident in which an officer was to blame, several members of the Hollywood, Florida, Police Department were caught on a dashboard camera rehearsing a story to blame the incident on a twenty-three-year-old woman, the driver of the car the officer struck.[30] In the audio portion of the recording, an officer can be heard saying, "We're going to bend this a little." And he says, "I don't lie and make things up, ever, because it's wrong, but if I need to bend it a little to protect a cop, I'll do it." Several other officers can be heard agreeing to "bend" the narrative of what happened. One officer can be heard agreeing to take photos of the scene so that it appears that the young woman caused the incident.[31] In fact, the internet is filled with videos in which the police appear to be caught telling lies.[32]

Technology and its widespread public availability provide increasing opportunities to accurately capture police-citizen encounters and to expose police lies.

2. Evidence from Judges' In-court Observations

Federal judges in New York have become increasingly suspicious of officers' testimony in pretrial suppression hearings. As reported in *The New York Times* in May, 2008, several of these New York judges expressly rejected the sworn testimony of police officers after concluding that the officers lied to avoid the suppression of evidence.[33]

According to *The New York Times*, in September, 2003, United States District Court Judge John S. Martin, Jr., found that police lied about the consent a suspect purportedly gave for a search of his apartment in which officers found a gun and

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28. *See* Jim Dwyer, *Videos Challenge Accounts of Convention Unrest*, N.Y. TIMES, Apr. 12, 2005, *available at* http://www.nytimes.com/2005/04/12/nyregion/12video.html?ex=1270958400&en=46f3604d 0befb92f&ei=5090&partner=rssuserland.

29. Robbie Brown, *Tape of Beating Leads to Firing of 5 Officers*, N.Y. TIMES, May 21, 2009, at A14.

30. Wright, *supra* note 19.

31. *Id.*

32. *See, e.g.*, Thomas MacMillan, *Priest's Video Contradicts Police Report*, NEW HAVEN INDEPENDENT, March 12, 2009, *available at* http://newhavenindependent.org/archives/2009/03/priests_video_c.php (showing video of police officer confronting priest about using camera to video the officer, but police report claims officer was afraid for his safety because priest had unknown, shiny object cupped in his hand); Tonya Alanez, *Sunrise Man Cleared After Elevator Video Shows He Did Not Batter Fort Lauderdale Officers*, S. FLA. SUN SENTINEL, Mar. 5, 2009, *available at* http://www.sun-sentinel.com/news/broward/fort-lauderdale/sfl-bn-0304video,0,6043429.story (noting that the video appeared to contradict officers' report that defendant assaulted officers); Jeffrey Wolf, *Videotape Shows Man Beaten by Denver Police*, 9NEWS, April 4, 2008, *available at* http://www.9news.com/news/article.aspx?storyid=97466&catid=188 (showing video revealing that although Denver police testified under oath that man assaulted them and resisted arrest and that they had no idea how man's teeth were broken, that man did not resist and that police slammed his teeth into pavement).

33. *See* Benjamin Weiser, *Police in Gun Searches Face Disbelief in Court*, N.Y. TIMES, May 12, 2008, at A20.

marijuana.[34] Similarly, United States District Court Judge John E. Sprizzo concluded that the police lied about why they searched a man on whom they found a .22 pistol.[35] In March, 2005, U.S. District Court Judge Barbara S. Jones rejected the testimony of two officers based on "contradictions in the police accounts" regarding why they searched a man's pocket, revealing a handgun.[36] In March 2006, U.S. District Court Judge Laura Taylor Swain decided to test officers' testimony herself and used a flashlight in deciding that police lied about the reason for conducting a search.[37] An officer had testified that the arrest of a suspect was sparked by the officer's discovery of a gun when he looked into a sports utility vehicle.[38] When the defendant's lawyer contended that the officer could not have seen the gun because of extensive tinting on the SUV's windows, Judge Taylor Swift "shined a flashlight" and attempted to peer into the SUV.[39] When the judge could not see inside, she concluded that it was "impossible" for Officer Lynch to have observed the gun through the window of the vehicle.[40]

The New York Times article also reported that in December, 2005, Judge Kimba M. Wood found that a suspect's father was more credible than police officer witnesses who offered conflicting stories about their arrest of the defendant for possessing two loaded guns.[41] The officers had testified that they obtained access to guns when the defendant's father allowed them into his apartment and agreed to a search of his son's room.[42] The father denied giving consent.[43] After hearing all of the testimony, Judge Wood resolved: "I find incredible the testimony of the police officer witnesses that Pedro Rosa consented to their entry into the apartment and their entry into Jason Rosa's bedroom."[44] In this one article, *The New York Times* documented "more than 20 cases in which trial judges found police officers' testimony to be unreliable [and] inconsistent . . . ."[45]

Judges beyond New York have also expressed similar doubts about police testimony. In April 2009, after an evidentiary hearing on the defendant's motion to suppress, a federal district court judge in Kansas found that officers' testimony about the reason for a traffic stop was not credible.[46] In 2007, a district court judge in Massachusetts suppressed evidence after finding that a Boston police officer lied

34. *Id.*
35. Judge Sprizzo sits in Manhattan. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. Weiser, *Police in Gun Searches Face Disbelief in Court*, *supra* note 33.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. United States v. Maldonado, 614 F. Supp. 2d 1179, 1183 (D. Kan. 2009).

on the witness stand in a "contrived" story."[47] In 2003, a federal district court judge in Illinois made an express finding that a police officer had lied under oath.[48] And in Boston, the Chief Judge of the United States District Court for the District of Massachusetts, "kicked off a legal brouhaha . . . by ruling that an arresting officer in a Boston gun case had testified falsely."[49] In fact, it appears to be fairly common for trial court judges to believe that the police have made false statements in their sworn affidavits.[50]

Juries, too, have made findings of police dishonesty.

3. Jury Findings of Police Perjury

In May of 2008, an Atlanta jury convicted Officer Arthur Tesler of lying about his participation in a drug raid during which police shot and killed an innocent, 92-year-old African-American woman.[51] The conviction of Tesler followed after three officers lied about their raid on the elderly woman's home and then told more lies to conceal a botched investigation.[52] According to prosecutors, "[a]fter searching the home and finding no drugs, officers tried to cover up the mistake . . . ."[53] During the criminal trial of Officer Tesler, a police witness cooperating in the investigation testified that "narcotics officers routinely lie[] under oath when seeking search warrants."[54]

The Atlanta prosecution of the dishonest officer is far from an isolated event. In significant numbers across the United States, juries, using a beyond-a-reasonable-

47. United States v. Dessesaure, 527 F. Supp. 2d 193, 194 (D. Mass. 2007).

48. Rankins v. Winzeler, No. 02 C 50507, 2003 WL 21058536, at *4 n.3 (N.D. Ill. May 9, 2003) (judge on remand found that police officer had lied).

49. Dick Lehr, Op-Ed., *A New "Bright Line Rule" Against Lying*, BOSTON GLOBE, Jul. 31, 2009, at 15. The judge is also considering sanctions against the prosecutor who failed to immediately disclose that the officer's testimony contradicted what he had previously told prosecutors about the case. Amir Efrati, *Legal System Struggles With How to React When Police Officers Lie*, WALL ST. J., Jan. 29, 2009, at A12.

50. *See, e.g.*, United States v. Garcia-Zambrano, 530 F.3d 1249, 1252 (10th Cir. 2008) (finding that officer made false statement in affidavit and excising the false statement to determine if warrant still valid); United States v. Tate, 524 F.3d 449, 457 (4th Cir. 2008) (finding that the defendant deserved a *Franks* hearing because of false statements in an affidavit); United States v. Torres-Ramos, No. CR 06-656(A) SVW, 2008 WL 4667119, at *21 (C.D. Cal. Oct. 17, 2008) (finding that officer "made false statements in the affidavit" warranting a *Franks* hearing); Joyce v. City of Sea Isle City, Civil No. 04-5345 (RBK), 2008 WL 906266, at *11 (D. N.J. Mar. 31, 2008) (slip op.) (holding that plaintiffs made substantial showing that two officers deliberately or recklessly included falsehoods in affidavit).

51. Associated Press, *Jury Convicts Officer of Lying in Fatal Raid*, N.Y. TIMES, May 21, 2008, at A17.

52. *Id.*; *see also* Steve Visser, *Witness Ties Infamous Raid to Lie*, ATLANTA J. CONST., May 9, 2008, at 1E.

53. Associated Press, *supra* note 51. The *Atlanta Journal Constitution* reported that officers Jason R. Smith and Gregg Junnier pressured an informant to report falsely that he had bought cocaine at the elderly woman's home. Visser, *supra* note 52. After the shooting, the officers planted drugs in the woman's basement to cover up their gaff. The third officer, Tesler, went along with the cover up, reportedly because "he feared [the other two] would frame him if he did not go along." Associated Press, *supra* note 51.

54. Visser, *supra* note 52 (reporting that former police detective Gregg Junnier, who pled guilty to voluntary manslaughter for his part in the death of the elderly woman, claims that narcotics officers routinely swear in affidavits for search warrants that they have verified information from their informants, when, in reality, they have not).

doubt standard, have found officers guilty of perjury and other crimes involving dishonesty.[55] Police have also pled guilty before trial to avoid such jury determinations.[56]

Perhaps the most notorious modern example is the guilty plea of Mark Fuhrman following the trial and acquittal of O.J. Simpson. During Simpson's trial, Detective Fuhrman lied under oath about his previous use of a racial epithet.[57] Following Fuhrman's testimony, tape recordings were played for the Simpson jury. From those recordings, the jury could hear Fuhrman using racially-charged words that he had previously denied ever uttering.[58]

Not uncommonly, groups of officers collude and commit perjury to conceal their collective wrongdoing. For instance, in 1994 and 1995, several officers were convicted of perjury after extensive corruption was uncovered in New York City.[59] One officer was an "integrity officer" in Harlem who was supposed to monitor "the honesty of the precinct's force."[60] In 2001, numerous criminal convictions resulted from extensive police corruption, including lies and coverups, within the "Rampart Division" of the Los Angeles Police Department.[61] In 2002, former New York Police Department police officer Charles Schwartz pled guilty to perjury stemming from officers' cover up of the torture of suspect Abner Louima.[62] And, currently,

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55. *See, e.g.*, Associated Press, Laurie Asseo, *Appeal from Boston Policeman Convicted of Perjury Rejected*, BOSTON GLOBE, Mar. 20, 2000, *available at* http://www.boston.com/news/daily/20/scotus_perjury.htm (reporting that officer Kenneth Conley was convicted of perjury by a Boston jury for lying about his knowledge of a suspect's beating by several officers); William Glaberson, *Guilty Verdict In Perjury Count in Louima Case*, N.Y. TIMES, Jul. 17, 2002, at A1 (reporting that on July 16, 2002, former police officer Charles Schwartz was convicted of perjury by a jury for lying when he denied leading a suspect to a police bathroom, where the suspect was physically abused and sexually assaulted by another officer); Posting of A.G. Sulzberger and Mathew R. Warren to N.Y. Times CityRoom, *Four-Month Sentence for Detective Convicted of Perjury*, http://cityroom.blogs.nytimes.com/2009/09/22/four-month-sentence-for-detective-convicted-of-perjury/ (Sept. 22, 2009, 2:10 PM) (reporting on the sentencing of a New York City Police detective convicted of lying on the witness stand during an attempted murder trial).

56. *See, e.g.*, David Abel, *Officer Admits Steroids Charge*, BOSTON GLOBE, Nov. 20, 2007, at B3 (reporting that Eduardo Rodriguez, a suspended Boston police officer, pled guilty in federal court to distributing steroids, committing perjury, and obstructing justice); CNN, *Ex-L.A. Cop Sentenced to 5 Years*, Aug. 13, 2002, *available at* http://archives.cnn.com/2002/LAW/08/07/rampart.sentencing/index.html (reporting that former Los Angeles police officer Nino Durden pled guilty to perjury, filing false police reports, and conspiracy to obstruct justice).

57. *See* MARK FUHRMAN'S 10/02/96 PLEA AGREEMENT TO FELONY PERJURY AT OJ SIMPSON'S CRIMINAL TRIAL, http://www.lectlaw.com/files/case63.htm (last visited Jan. 17, 2009) (providing the details of the plea entered in October, 2 1996).

58. *Id. See also* Steve Barnes, *Ex-Narcotics Agent Gets 10 Years' Probation*, N.Y. TIMES, Jan. 19, 2005, *available at* http://www.nytimes.com/2005/01/15/national/1stulia.html (reporting former Texas narcotics agent convicted of perjury for role in dozens of bogus drug arrests, mostly of black defendants).

59. *See* Joe Sexton, *Jurors Question Honesty of Police*, N.Y. TIMES, Sept. 25, 1995, *available at* www.nytimes.com/1995/09/25/nyregion/jurors-question-honesty-of-police.html.

60. *Id.*

61. *See* Charles Rappleye, *Rampart Watch: New, Harder Look Produces More Charges Against Cops*, LA WEEKLY, Apr. 12, 2001, *available at* http://www.laweekly.com/2001-04-12/news/rampart-watch (describing some of the police corruption that police covered up, including shootings).

62. *See* Associated Press, *Ex-Officer in Louima Case Is Freed*, N.Y. TIMES, May 5, 2007, *available at* http://www.nytimes.com/2007/05/05/nyregion/05louima.html.

retired Chicago police Commander Jon Burge faces two federal charges of obstruction of justice and one count of perjury for allegedly lying about whether he and other officers in Chicago physically abused suspects to obtain confessions. A jury is expected to hear that case this year.[63]

4. Evidence From Commissions Dedicated to Studying Police Corruption

The willingness of police to lie is not a new development. The Mollen Commission, formed to study police corruption in New York City, found police perjury rampant between 1992 and 1994.[64] The Commission reported extensive police corruption, including that officers "falsified official reports and perjured themselves to conceal their misdeeds."[65] The Mollen Commission report reiterated similar findings from two decades before in which a different commission reported on extensive lies and corresponding corruption in the New York Police Department.[66] And New York is not alone in its history of police corruption and lies. There is similar evidence of police misconduct from Boston, Atlanta, Los Angeles, and other cities.[67]

5. Evidence From an Empirical Study of Chicago's State Criminal Justice System

A study published in 1992 by Myron Orfield, Jr., revealed that police, judges, prosecutors, and criminal defense lawyers in Chicago perceived "a pattern of pervasive police perjury."[68] These participants in Chicago's criminal justice system reported "systematic fabrications in case reports and affidavits for search

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63. *See* Associated Press, *Jon Burge Indictment*, THE HUFFINGTON POST, Oct. 21, 2008, *available at* http://www.huffingtonpost.com/2008/10/21/jon-burge-indictment_n_136559.html.

64. N.Y. COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE MISCONDUCT AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, REPORT 2 (1994) ("the Mollen Report").

65. *Id.*

66. *See* THE KNAPP COMM'N REP. ON POLICE CORRUPTION (Dec. 1972).

67. *See, e.g.*, Laura Dannen, Katie Liesener, and Rachel Lux, *System to Stem Police Perjury Not Implemented*, THE BOSTON GLOBE, Oct. 24, 2005 (reporting that despite a 1997 pronouncement of "a sweeping crackdown" on police perjury, eight years later, little had changed); Scott Turow, *Lying to Get the Bad Guys*, N.Y. TIMES, Feb. 20, 2000 (commenting on the Los Angeles County district attorney's office's acknowledgment of "the city's metastasizing police scandal" in which "a number of officers" planted evidence and "perjured themselves to help get convictions"); REP. OF THE INDEP. COMM'N ON L.A. POLICE DEP'T (1991) ("the Christopher Commission") (formed in 1991 after the Rodney King beating to investigate police brutality).

68. Myron W. Orfield, Jr., *Deterrence, Pejury, and the Heater Factor*, *supra* note 8, at 82 (1992) (Orfield interviewed police, judges, prosecutors and criminal defense lawyers). Admittedly, the sample size of Orfield's study was small, making its findings less significant. *Id. See also* Steve Visser, *Witness Ties Infamous Raid to Lie*, http://www.policeone.com/patrol-issues/articles/1693754-Witness-ties-raid-to-lie/ (last visited Feb. 5, 2010) (reporting systematic police lies in obtaining warrants in drug cases); I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 836 (2008) [hereinafter "*Crime & Legitimacy*"] (detailing numerous incidents of police dishonesty and "testilying"); Slobogin, *Testilying*, *supra* note 20, at, 1037 (recounting perjured testimony by Detective Marc Fuhrman in the trial of O.J. Simpson and Judge Lance Ito's finding that Detective Philip Vannatter recklessly disregarded the truth in a warrant application for Simpson's home).

warrants, creating artificial probable cause, which forms the basis of later testimony."[69] In fact, of the judges, prosecutors, and public defenders who were interviewed, all but one "believe[d] that police lie in court to evade the exclusionary rule."[70]

Strikingly, two prosecutors admitted that some prosecutors advance police perjury on suppression matters. One detailed: "One of the techniques commonly used was inducing police perjury. You'd say to the witness, after you'd looked at his [case report] 'If this happens, we win. If this happens, we lose.' Guess what he'd say?"[71] A second prosecutor admitted that he had personally encouraged police perjury in suppression matters by telling officers to "toughen up certain aspects" of their story,[72] but he defended his practice, adding: "Never on the issue of guilt or innocence."[73]

Perhaps even more interesting than the fact that virtually every judge, prosecutor, defense lawyer, and narcotics officer interviewed agreed that police lie was the participants' interpretation of the word lie or perjury. In Orfield's interviews, two out of ten judges, six out of fourteen public defenders, and three out of fourteen state prosecutors did not equate police lies to committing perjury, as long as the lies were told during a suppression hearing.[74] In other words, almost one-third of the judges and lawyers surveyed in the Chicago system did not think that an officer commits the crime of perjury when he or she lies under oath about how evidence was obtained. One attorney explained his perception this way: "Lying is a strong word. Fudge it is what they do."[75] The same lawyer followed up: "[P]erjury is where the officer lied about guilt or innocence. They don't lie about that."[76] One of the judges interviewed was adamant that in the suppression context, police lies were not perjury. "Of course it is not perjury. Who would ever think it was perjury?" The judge added, "Perjury is when you contradict a prior sworn statement while you are under oath."[77]

Orfield's study appears to reveal not only that police tell a significant number of lies, but also that the Chicago judicial system tolerates such lies in some contexts, like suppression hearings. There has been no significant structural or procedural change to our system of justice since 1992 that would make such police lies more costly or less likely.

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69. Orfield, *Deterrence, Perjury, and the Heater Factor*, *supra* note 8, at 83.

70. *Id.* at 96. Orfield interviewed twenty-six of about one hundred narcotics officers in the Chicago Police Department, *id.* at 79, and randomly selected the lawyers and judges associated with fourteen of fourty-one felony trial courtrooms for additional interviews. *Id.* at 81.

71. *Id.* at 110 (brackets in original).

72. *Id.* at 111.

73. *Id.*

74. Orfield, *Deterrence, Perjury, and the Heater Factor*, *supra* note 8, at 112 n.172.

75. *Id.* at 113.

76. *Id.*

77. *Id.* at 114.

6. Circumstantial Evidence of Police Lies

One of the obvious impediments to the justice system's ability to deal effectively with police lies is its inability to distinguish between intentional deception and police mistakes. While sections I.A.(1)–(5) detail the growing evidence of flagrant police lies—those that seemed sufficiently obvious to juries, judges, commissions, researchers, and ordinary citizens—this section highlights additional, circumstantial evidence of the pervasiveness of police lies. The Innocence Project has uncovered such circumstantial evidence that police often lie during investigations.[78] In addition, Brandon L. Garrett conducted a follow-up study of the first two hundred convicted persons, later exonerated through DNA evidence, and that study buttresses the findings of the Innocence Project.[79]

According to the Project, half of the first seventy-four wrongly convicted defendants were found guilty as a result of "police misconduct."[80] It is unclear precisely how much of that misconduct is attributable to outright lies. It seems fair to characterize eleven percent of the exoneration cases in the purposeful-police-lie category because in eleven percent of cases, the Innocence Project found that police "fabricat[ed]" evidence.[81] It is difficult to imagine that police could fabricate evidence and obtain a conviction without accompanying the false evidence with lies.

More ambiguous examples include the case of Johnnie Earl Lindsey who, in September 2008, was cleared after serving time in prison for a twenty-five-year-old rape conviction. The evidence now shows that police included Lindsey's picture in a six-photo array and sent it to the victim about a year after her attack.[82] The victim had reported that her attacker was "shirtless." Of the six photos shown to the victim, only Lindsey's and one other photo depicted a shirtless man.[83] The victim chose Lindsey's photo, even though Lindsey had produced time cards from his job indicating that he was working at the time of the rape.[84] Years after the fact, it is unclear whether the police in Lindsey's case intended to mislead the witness or simply became myopic in their focus on him.

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78. Of course, DNA is not likely to reveal wrongful convictions in cases other than violent crimes, such as rapes and murders, so this data necessarily understates the impact of police lies and misconduct on all criminal convictions.

79. *See infra* note 85 and related discussion.

80. *See* Innocence Project, http://www.innocenceproject.org/understand/Government-Misconduct.php. According to the Innocence Project, 34% of police misconduct involved the suppression of exculpatory evidence; 33% was attributable to unduly-suggestive pretrial practices; 11% was caused by evidence fabrication; 9% was due to coercing witnesses; 8% was related to coerced confessions; and 5% was caused by other police misconduct. *Id.*

81. *Id.*

82. Innocence Project Profile of Johnnie Lindsey, http://www.innocenceproject.org/Content/1976.php. *See also* Tiara M. Ellis, *Wrongly Convicted Rape Defendant Freed After 26 Years*, The Dallas Morning News (Sept. 19, 2008) (detailing Lindsey's release and some information about his wrongful conviction).

83. *Id.*

84. *Id.* Lindsey's boss also corroborated his presence at work. *Id.*

Brandon L. Garrett has analyzed the cases correlated to the first two hundred criminally convicted people eventually cleared by DNA evidence.[85] His study reveals that faulty forensic evidence combined with dubious or false testimony interpreting that science contributed to a substantial number of the wrongful convictions.[86] In multiple cases, the government's forensic expert offered "misleading testimony and mischaracterized their own laboratory reports."[87] For example, according to Garrett's research, "[i]n one case, that of Gilbert Alejandro, the criminalist claimed a DNA match even though neither he nor anyone else had even conducted the DNA testing."[88] In another case study, that of Paul D. Kordonowy, who had been convicted of rape, Garrett found that bogus hair-match evidence contributed to the conviction:

> Montana Forensic Science Laboratory specialist Arnold Melnikoff did not correctly explain the lack of probative power of hair comparison. Instead, he testified that he could distinguish head hairs in 99 of 100 cases, telling the jury that Kordonowy's hair and blood type matched those found at the scene. In fact, an enzyme in the blood sample did not match Kordonowy, nor did the hairs, and yet Melnikoff's testimony contributed to Kordonowy's wrongful imprisonment for thirteen years. Melnikoff was later fired, but not before he falsified testimony in at least one other case.[89]

Of course, laboratory specialists and scientists, like Melnikoff, are distinguishable from "the police," who control multiple aspects of a criminal investigation designed to identify, arrest, and convict guilty defendants. Police are permitted extensive discretion in how to conduct these investigations. Also, the motives of government scientists could be different than those of the police. Their training is probably significantly different too. The government recently made these same types of arguments before the Supreme Court in *Melendez-Diaz v. Massachusetts*,[90] in the context of trying to convince the Court that the Sixth Amendment right to confrontation does not apply to laboratory professionals who produce results reflecting "neutral, scientific testing."[91] The government in *Melendez-Diaz* contended that scientific testimony is different than "testimony recounting historical events, which is 'prone to distortion or manipulation.'"[92] But Garrett's findings of scientific wrongdoing illustrate the widespread nature of governmental misconduct (much of which is necessarily concealed by lies) that impacts outcomes in criminal cases, and they impliedly suggest that government actors as a whole, not

85. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 58–59 (2008).
86. *Id.* at 81–84.
87. *Id.* at 84.
88. *Id.*
89. *Id.* (footnotes omitted).
90. 129 S. Ct. 2527 (2009).
91. *Id.* at 2536 (quoting Government's Brief at 29).
92. *Id.*

just police, feel some pressure to convict those charged with crimes. In other words, the lies and other misconduct of government-sponsored scientists provide circumstantial evidence of the culture and prevalence of lies that impact the American criminal justice system generally.

A majority of the Supreme Court appears to agree that even laboratory scientists sometimes feel pressure to conform their findings to the prosecution's case. In ruling that the Sixth Amendment Confrontation Clause applies to reports of such scientists, the Court recognized that a majority of laboratories producing forensic evidence "are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency."[93] The Court also appeared to accept that forensic scientists "responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution."[94] The recognition that "neutral scientists" who work for law enforcement agencies sometimes feel pressure (and submit to that pressure) to alter their findings to benefit prosecution and conviction is strong circumstantial evidence that law enforcement officers, who are more directly associated with such prosecutions, feel pressure to stretch the evidence to favor conviction.

In any event, Garrett's findings were not confined to flaws in the scientists' evidence. In addition to evidence of misleading testimony from forensic scientists, Garrett found evidence that in thirty-one cases (16%), defendants had falsely confessed.[95] The inferential evidence suggests that these confessions were prompted by overzealous police officers. Garrett describes the evidence this way:

> In retrospect, DNA evidence tells us that these confessions were false. Courts often highlighted in their opinions the corroborated nonpublic details that made these confessions appear to be particularly credible at the time. For example, in the case of Earl Washington, the Fourth Circuit emphasized that: Washington had supplied without prompting details of the crime that were corroborated by evidence taken from the scene and by the observations of those investigating the [victim's] apartment. He had confessed to the crime not in a general manner, but as one who was familiar with the minutiae of its execution.
>
> Now that we know that convicts like Washington were actually innocent, we may also know that they could not have, "without prompting," offered accurate and nonpublic details in their confessions. Unless the person was an accomplice, if those details were truly nonpublic, they could have come only from law enforcement. Thus, in some cases DNA proves not only that the defendant was innocent, but also that police fed facts, asked leading questions, supplied

93. *Id.* (quoting NAT'L RESEARCH COUNCIL OF THE NAT'L ACAD., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 6-1 (Prepublication Copy Feb. 2009)).

94. *Id.*

95. Garrett, *supra* note 85, at 88.

> details, and in cases such as Earl Washington's, lied later about what happened and claimed that the suspect offered the details "without prompting."[96]

In addition to evidence suggesting that officers unduly influenced some innocent defendants to confess, Garrett found evidence that the police made certain confessions appear more believable by "suppl[ying] false facts to bolster false confessions" at trial.[97]

The implication of Garrett's findings is that the current criminal justice system sometimes produces substantively inaccurate results, even in serious felony cases, because of flawed scientific evidence and false confessions and that some of the flawed science and false confessions can be attributed to intentionally-misleading testimony and police dishonesty about the manner in which a confession was secured.

Section I.A. has cataloged the extensive direct and circumstantial evidence that some police officers lie, at least occasionally, and that many of these lies are told despite the officer's oath to tell nothing but the truth. Section I.B. discusses some of the most detrimental effects of police lies.

B. The Effects of Police Lies

As Justice Blackmun once declared: "[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'"[98] Justice Blackmun's sentiment is especially true when the witness is a police officer.

As the evidence in Section I.A. shows, police lie to "get the bad guy," to further their careers, to cover up mistakes, to support fellow officers, to prevent the suppression of evidence, and for many other reasons.[99] Whether the lie an officer tells is simple or compound, whether told with malice or a pure motive, police lies are necessarily significant. They affect case outcomes because officers are the *key* investigative component in our criminal justice system. Police gather, handle, and test physical evidence. They testify in grand jury proceedings, at bail hearings, preliminary hearings, suppression hearings, and trials, identifying and explaining the evidence of guilt and how it was gathered. The police decide who to interview,

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96. *Id.* at 89–90 (footnote with internal citation omitted).

97. *Id.* at 89.

98. Arizona v. Youngblood, 488 U.S. 51, 72 n.8 (Blackmun, J., dissenting) (citing E. LOFTUS, EYEWITNESS TESTIMONY 19 (1979)).

99. Christopher Slobogin has argued that "the most common venue for testilying is the suppression hearing and the most frequent type of suppression hearing perjury is post hoc fabrication of probable cause." Slobogin, *Testilying*, *supra* note 20, at 1043. Slobogin also asserts that "[t]he most obvious explanation for all of this [police] lying is a desire to see the guilty brought to 'justice.'" *Id.* at 1044. And he acknowledges that a "related reason" for police lies is "the institutional pressure to produce 'results'." *Id. See also* Gabriel J. Chin and Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT L. REV. 233, 246 (1998) (asserting that police probably commit perjury most often "with respect to defendants whom the police believe to be guilty and who may in fact be guilty").

where to look, what documents to collect, what people and places to leave uninvestigated, what questions to ask, and with what tone to ask them. Police flavor and shape every case from beginning to end. Without their evidence gathering, evidence testing, and testimony, few criminals could be convicted. This section briefly considers a few of the significant costs of police lies.[100]

1. Police Lies Thwart Constitutional Rights

When police lie and get away with it, they exercise a unique power that unilaterally reduces the protections of the Constitution. When they lie, police, rather than judges, legislators, jurors, or voters, empower themselves to decide who the Constitution protects and how much protection it gives. They also make these decisions without legislative or judicial oversight. Each police lie that manufactures a reason to support an otherwise "unreasonable" search or seizure deprives all citizens of their confidence in the Fourth Amendment's protections against government intrusions into privacy, liberty, and dignity.[101] The Fifth Amendment, which protects against compelled self incrimination and guarantees due process of law,[102] is divested of its potency with every police lie that conceal coercive police tactics resulting in a statement against a suspect's interests. Lies can frustrate the protections the Supreme Court provided in *Miranda v. Arizona*,[103] and they can prevent a defendant from enjoying his Constitutionally-guaranteed right to receive effective assistance from counsel.[104] When police undermine these important rights, wrongful convictions can, and sometimes do, follow.[105]

When the police single-handedly thwart constitutional rights by lying, they undermine the entire system of justice, which, at a minimum, is set up to allow well-educated and trained lawyers to present competing and compelling arguments about the propriety of these guarantees and the effects of the government's breach of these constitutional protections. Likewise, lies impair the citizens' voting power because, normally, citizens vote for their local prosecutors and judges who, in turn, exercise discretion over whom to charge with a crime, what charges to assert, and what sentence is appropriate and proportional for the individual defendant's

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100. Obviously, there are also costs associated with police mistakes. Those costs are beyond the scope of this paper. In addition, the costs resulting from police mistakes are compounded when police lie and may be ameliorated when police are honest about their actions, mistakes or not.

101. *See* U.S. CONST. amend. IV (guaranteeing the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures").

102. In pertinent part, the Fifth Amendment provides: "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

103. *See* Miranda v. Arizona, 384 U.S. 436 (1966) (holding that the prosecution may not use statements stemming from custodial interrogation unless a suspect is warned of the consequences of such statements, and other rights, including the right to remain silent and to have an attorney present during interrogation).

104. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.").

105. *See* Garrett, *supra* notes 85–97 and accompanying text.

prohibited conduct. When the police lie about a defendant's behavior, they interfere with this structure and frustrate the citizens' power to elect its officials and to provide a buffer between citizens and the government. Similarly, police lies of this kind interfere with the responsibilities of judges, who are trained in the law and politically-accountable to the people, to review the arguments of lawyers and make well-grounded and impartial judgments about which competing interests should prevail in a given case.

Beyond the constitutional and judicial protections that are lost when police lie effectively and infringe rights, unilateral police decisions weaken the potency of juries comprised of thoughtful and diverse citizens, who otherwise protect individuals from overreaching by judges and other governmental actors.[106] Police lies also hinder the role of appellate courts, which are tasked with declaring rules that will ensure that the Constitution is enforced in a manner that is consistent with the intent of the Framers and the will of the People. The power and responsibilities assigned to prosecutors, defense lawyers, trial judges, appellate judges, citizens, and citizen juries are diluted,. if not nullified, when police lie and decide for themselves who is and is not protected by the Constitution. As Justice Brennan emphasized in his dissenting opinion in *Illinois v. Gates*,[107] our system of justice expects officers to remain "under the law"; this is not a "police-state where they are the law."[108]

2. Police Lies Can Leave Criminals Undetected and Unprosecuted

Odds are, most of us will neither suffer a wrongful conviction nor know someone who does. Nevertheless, apathy toward the rights of criminal defendants and the unfortunate few who are wrongly convicted would be a mistake because prosecuting the wrong person leaves the real culprit undetected and unprosecuted. If the police honestly, but incorrectly, believe that X committed the crime, they will not look for Y, the real culprit. In addition, they will become myopic in analyzing evidence and interviewing witnesses,[109] viewing every detail they uncover from the perspective of an officer who believes that he knows "who did it." And if the officer "fudges" his reports or his testimony to ensure conviction of the person he thinks is guilty, he will guarantee not only the conviction of an innocent person, but also the freedom of someone who is culpable and should be convicted, incapaci-

106. "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." Duncan v. Louisiana, 391 U.S. 145, 155 (1968). Government oppression includes "judges too responsive to the voice of higher authority." *Id.* at 156.

107. 462 U.S. 213 (1983).

108. *Id.* at 291 (quoting Johnson v. United States, 333 U.S. 10, 17 (1948)).

109. Of the first two-hundred people shown by DNA to have been wrongly convicted, about eighteen percent claimed on appeal that police had unduly suggested the defendant as the perpetrator. *See* Garrett, *supra* note 85, at 76, 80 ("Twenty-nine of the exonerees raised suggestive eyewitness identification claims during their appeals or postconviction proceedings.").

tated, and punished. Thus, in Dallas County, Texas, where Johnnie Earl Lindsey was released after DNA established that he did not, in 1981, rape the woman who later identified him from a skewed photo array, we now know that the real rapist has gone unpunished for more than twenty-seven years.[110] Given statutes of limitation, the real rapist is probably beyond prosecution because it took too long for society to uncover the truth.

Adding to the likelihood of unjust outcomes (in which the guilty remain unprosecuted) is the persuasive impact police lies have on prosecutors. Professor Alafair Burke has persuasively argued that, as humans, prosecutors fall victim to the usual human tendencies, including forming strong beliefs about a defendant's guilt and resisting any change in that belief.[111] She says, "[d]ecades of empirical research demonstrate that people's beliefs are both imperfect and resistant to change. Once people form theories, they fail to adjust the strength of their beliefs when confronted with evidence that challenges the accuracy of those theories."[112] Prosecutors are accustomed to receiving evidence from the police and can and do form strong beliefs about the guilt of a particular defendant based on the police narratives about the evidence and the strengths and weaknesses of witnesses and claimed defenses.

If police lie about the evidence and the validity of the case—especially if they tell the lies because of their own convictions in the defendant's guilt—then prosecutors may become entrenched in the police's beliefs that the defendant did it. This myopic view also will cause prosecutors to discount exculpatory evidence and other strong indicators that they are pursuing the wrong person.

3. Police Lies Undermine Public Trust

Most police lies are "wrong because once [] discovered, [they] diminish[] one of our most crucial 'social goods'—trust in government."[113] Police lies can undermine public trust in ways that other witnesses' lies do not. "What distinguishes police officers is their unique power—to use force, to summarily deprive a citizen of freedom, to even use deadly force, if necessary—and their commensurately unique responsibilities—to be the living embodiment of the 'law' in our communi-

110. *See supra* note 82.

111. Burke gives a particularly compelling example from the case of Earl Washington, Jr. Washington was convicted for the rape and murder of a woman, but DNA later linked another man to the crime. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1588 (2006). Even after Washington was pardoned, "prosecutors insisted that he remained a viable suspect." *Id.*

112. *Id.* at 1593.

113. Christopher Slobogin, *Testilying*, *supra* note 20 at 1039. *See also* Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1311 (1994) (arguing that police lies are "uniquely corrupt" because they are "offered by government officials who are sworn to enforce and uphold the law."); *see also* Gabriel J. Chin & Scott C. Wells, *supra* note 99, at 245 (arguing that police testimony, even when perjurious, "is more persuasive to juries than testimony by civilian witnesses" because officers have "special credibility" and are experts at testifying).

ties, as applied fairly to every member."[114] Because of the expansive power of the police, the "revelation that some police routinely and casually lie [especially under oath,] makes members of the public, including those who serve on juries, less willing to believe all police, truthful or not."[115] For instance, after extensive police corruption was exposed in New York City in 1994, *The New York Times* reported that potential jurors of varied backgrounds were highly skeptical of police.[116] The newspaper conducted numerous interviews in jury rooms in Brooklyn, Queens, and Manhattan over a two-day period.[117]

A 68-year-old, white woman from an upscale New York neighborhood and a 19-year-old, black man from a housing project each told *The Times* that they distrusted New York City's police officers.[118]According to the young man, "'I live in the projects, and so I know the reality of having seen the police in action day after day' . . . 'I know that, depending on what's at stake, the police will lie.'"[119] According to the older woman, "'I have lived long enough to have seen corruption problems come and go several times over. They clean it up and it gets dirty again. It looks like it's dirty again.'"[120]

Police lies also "diminish[] law enforcement's effectiveness in the streets."[121] Few are willing to cooperate with police, worried that police will misuse their information. And to the extent that other members of the judicial system—like prosecutors and judges—appear to condone police lies, by doing nothing to report, punish or deter them, "the loss of public trust may extend beyond law enforcement to the criminal justice system generally."[122]

If police sometimes lie about evidence and how it was collected, why should citizens, including petit and grand juries, trust in the correctness of a conviction that also rests on the integrity of the police who investigated the case? And why would juries (or judges) think that the police revealed weaknesses in the evidence to the prosecutor? Should juries and citizens believe the charges, or even the witnesses who are interviewed and prepared by officers willing to lie to obtain a conviction? An accurate and fair system cannot thrive if the police, who are integral to the system, will say whatever it takes to make the charges stick.

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114. David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L 455, 462 (1999).

115. Slobogin, *Testilying*, *supra* note 20, at 1039.

116. Sexton, *Jurors Question Honesty of Police*, *supra* note 59.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Slobogin, *Testilying*, *supra* note 20, at 1039. *See also* Capers, *Crime & Legitimacy*, *supra* note 68, at 843 (reporting that former Attorney General Janet Reno has expressed that too many Americans, especially in minority communities, believe that police are too aggressive, use excessive force, are biased, and behave disrespectfully and unfairly).

122. Slobogin, *Testilying*, *supra* note 20, at 1039.

4. Police Lies Sometimes Inflict a Double Negative—Allowing Both Guilty Defendants and Corrupt Officers to Avoid Prosecution

Bennett Capers has convincingly argued that when police lie about Fourth Amendment issues, their lies can create a problem of over-enforcement in addition to the more obvious one of under-enforcement of the criminal laws.[123] Laws may be over-enforced because police target suspects for illegal reasons—Capers points to race. Under this scenario, officers lie and claim that a Fourth Amendment search or seizure was conducted for legitimate, non-racist reasons.[124] At the same time, under-enforcement may occur. When officers lie, sometimes their lies are eventually uncovered, and neither a culpable defendant nor the officers are successfully prosecuted.[125] The guilty defendant escapes prosecution because the evidence against him is suppressed.[126] The lying officer skirts prosecution because perjury cases against such officers are too rarely pursued.[127]

5. Police Lies Can Lead to Conviction of the Innocent

Police lies sometimes result in innocent people pleading guilty to crimes they did not commit. Trials are costly to defendants. At a minimum, if a defendant insists on the protections of a trial to show his innocence, he typically loses the sentencing benefits of a plea. Prosecutors are less willing to agree to a lenient sentence because the defendant has forced the prosecution to spend money, exert effort, and use resources to prove the case.[128] Furthermore, after a jury (or in a bench trial, a judge) finds the defendant guilty beyond a reasonable doubt, there is no reduction of the defendant's sentence for his or her "acceptance of responsibility" of wrongdoing. Because a defendant is faced with more extreme sanctions following a trial than he faces following a plea of guilty, defendants sometimes plead guilty to avoid the harsher penalties that accompany a trial.[129] When police

123. *See* Capers, *Crime & Legitimacy*, *supra* note 68, at 836.

124. *Id.*

125. *Id.* at 837.

126. *Id.*

127. *Id. C.f.* Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L. J. 1311, 1313 (1994) (contending that police are rarely punished for perjury, let alone prosecuted for it); Andrew Blankstein, *Police Are Rarely Prosecuted Unless Case Is Bulletproof*, L.A. TIMES, Dec. 9, 2005 (citing string of controversial law enforcement cases in which prosecutor declined to prosecute police for alleged misconduct, including a number of excessive force incidents).

128. *See* Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1415 (1997) (explaining how federal prosecutors use "acceptance of responsibility" and a recommendation for a low-end of the Guidelines sentence to manage plea bargains to save resources).

129. *See, e.g.*, Brandon J. Lester, *System Failure: The Case for Supplanting With Mediation in Plea Bargaining*, 20 OHIO ST. J. ON DISP. RESOL. 563, 563 (2005) (recounting case in which mother who maintained her innocence to criminal charges agreed to plead guilty out of fear that she would lose custody of her children to her estranged husband if she did not get out of jail to fight for custody); Morris B. Hoffman, *The Myth of Factual Innocence*, 82 CHI.-KENT L. REV. 663, 672–73 n.44 (2007) (asserting that charging an innocent defendant makes the system look "incapable of distinguishing the guilty from the innocent").

lie to increase the strength of the evidence against a defendant, they increase the pressure on the defendant to plead guilty, regardless of the defendant's actual, factual guilt.

DNA testing has proven that innocent defendants do plead guilty and that some innocent suspects confess to crimes they did not commit.[130] In about twenty-five percent of the first 200 cases in which DNA later exonerated a defendant, "the wrongfully convicted person either pleaded guilty, confessed to the crime, or made self-incriminating statements."[131] On first reflection, a false guilty plea or confession might seem counter-intuitive or surprising. But it makes sense that a defendant would lose confidence that the system would exonerate him, if police are willing to lie to make the evidence look as though he is guilty. If the police are telling lies about the defendant's criminal involvement and the amount or strength of the evidence, it is not irrational to think that they will continue to lie and lie convincingly to a jury, resulting in conviction and a severe sentence. If police, who have access to, and control over, all of the trial evidence, are willing to lie to convict a defendant, there is little incentive to fight the lies, even if the defendant is innocent. If the result—a conviction—is inevitable, then the logical action to take is to seek the most lenient sentencing solution available.

Even when they do not admit guilt, innocent people can be convicted at trial if police tell lies about the investigation and the evidence. On September 23, 2008, the Supreme Court temporarily stayed the scheduled execution of Troy A. Davis, who sits on Georgia's death row.[132] The Court granted the stay to consider whether Davis's case deserved additional review given that seven of nine witnesses from Davis's murder trial have recanted their stories.[133] According to Davis's petition for a writ of certiorari, he is innocent. In support of his substantive claim of innocence, he points, in part, to the fact that the recanting witnesses now say that police coercion and "questionable interrogation tactics" led them to misidentify Davis as the murderer.[134] Assuming that the claims in Davis's petition are true, police lies and accompanying misconduct have tarnished the entire process, denying procedural protections to Davis, as well as impairing his substantive rights by effecting a wrongful conviction.[135]

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130. *See supra* notes 80 and 85. Usually, DNA testing reveals nothing about non-violent cases, such as the run-of-the-mill drug distribution case or the many fraud and public corruption cases. Therefore, DNA testing reveals nothing about the likelihood that police may have lied in those cases.

131. *See* Mark Godsey, *Editorial: DNA Testing Beyond a Shadow of a Doubt*, CRIM PROF BLOG, Nov. 17, 2008, http://lawprofessors.typepad.com/crimprof_blog/2008/11/editorial-dna. *See also* Garrett, *Judging Innocence*, *supra* note 85.

132. Rhonda Cook et al., *Supreme Court Issues Stay of Execution for Davis*, ATL. JOURNAL-CONST., Sept. 23, 2008, *available at* http://www.ajc.com/metro/content/metro/stories/2008/09/23/davis_stay_execution.html.

133. Order of Stay, Davis v. Georgia, 554 U.S. __ (Sept. 24, 2008), *available at* http://www.scotusblog.com/wp-content/uploads/2008/09/davis-stay-order-9-23-08.pdf (last visited Feb. 6, 2010).

134. Davis v. Georgia, 129 S. Ct. 397, petition for cert. filed, 2008 WL 4366181 (July 14, 2008) (No. 08-66).

135. Timothy Masters, who was recently released from prison after serving nine years for a murder that he did not commit, makes similar assertions. Masters blames "overzealous investigators" for concealing evidence that

On Tuesday, October 14, 2008, the Supreme Court denied review in Davis's case, and the stay expired automatically.[136]

Part I has shown that police lies are an unfortunate part of the American system of criminal justice and that they can be detrimental to both substantive and procedural fairness. Part II will consider how the United States Supreme Court handles police lies.

II. THE SUPREME COURT'S TREATMENT OF POLICE LIES

Whether a defendant is correctly labeled guilty depends on the accuracy of the tangible evidence collected and introduced against him at hearings and trial and, correspondingly, the credibility and accuracy of the witnesses who testify about that evidence. Despite the uncontested importance of credibility to a proper finding of guilt, the Supreme Court openly permits some police lies during criminal investigations, tolerates some false testimony by officers who are investigating crimes, and the Supreme Court's precedent is occasionally openly hostile to the suppression of evidence, even when police gather that evidence with lies or through unconstitutional behaviors. This Part examines the Supreme Court's treatment of police lies and its recent application of the exclusionary rule, which the Court employs to deter police misconduct, and it looks at other procedural rules that impact the value of police lies to the current system of justice.

A. The Court's Precedent is Generally Hostile to the Exclusionary Rule

At least in theory, the exclusionary rule bars the use of evidence at a defendant's criminal trial if the police gathered evidence in violation of the Constitution.[137] The basic idea—police will be deterred from violating the Constitution if they know evidence gathered in violation of its mandates cannot be used to prove a defendant's guilt.[138] But if the exclusionary rule was ever preferred,[139] the Supreme Court no longer favors it. By 1979, Justice Burger criticized the exclusionary rule for leading to "practical poverty," arguing that "[t]he suppression of truth is a grievous necessity at best . . . ."[140] More recently, the Court said in

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"might have cleared him." *See* Kirk Johnson, *Colorado: Wrongly Convicted Man Sues*, N.Y. TIMES, Oct. 22, 2008, at A15. According to the star prosecution witness, the witness "would never have testified as he did if he had been shown the entire police file." *Id.*

136. Davis v. Georgia, 129 S. Ct. 397 (2008).

137. *See* Mapp v. Ohio, 367 U.S. 643, 648 (1961) (applying the exclusionary rule to state prosecutions to prevent the government from introducing evidence at the criminal trial of an aggrieved defendant, if the evidence is obtained in violation of the Fourth Amendment).

138. *See* James v. Illinois, 493 U.S. 307, 311 (1990) ("The occasional suppression of illegally obtained yet probative evidence has long been considered a necessary cost of preserving overriding constitutional values . . . .").

139. *See* Mapp, 367 U.S. at 659 (indicating that "the imperative of judicial integrity" required imposition of the exclusionary rule).

140. Ybarra v. Illinois, 444 U.S. 85, 97 (1979) (Burger, Chief J., dissenting).

Hudson v. Michigan: "Suppression of evidence . . . [is the Court's] last resort, not our first impulse."[141] And last year, the Court in *Herring v. United States* declared:

> The fact that a Fourth Amendment violation occurred . . . does not necessarily mean that the exclusionary rule applies . . . . [O]ur precedents establish important principles that constrain application of the exclusionary rule. First, the exclusionary rule . . . applies only where it "result[s] in appreciable deterrence." We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation. Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future. In addition, the benefits of deterrence must outweigh the costs. "We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence."[142]

Because a majority of the current Court disfavors the exclusionary rule, the Court limits the contexts in which it applies the rule. The Court now refuses to apply the rule whenever it deems that the costs of application (including the always-present cost of allowing a potentially-guilty defendant to go free) outweigh the deterrence benefits.[143] In 2009, the Court suggested that the costs of application will always be too great if the challenged police conduct is the result of simple and isolated negligence.[144] In *Herring*, an officer relied on a faulty computer record maintained by a law enforcement organization to conclude that there was an outstanding arrest warrant for defendant Herring.[145] Acting in accordance with the computer record, the officer subjected Herring and his car to a traffic stop and arrested him. The officer then searched Herring and his car incident to the arrest and found amphetamine in Herring's pocket and a pistol (which Herring could not legally possess, because he was a convicted felon) in his car.[146] Later, officers learned that there had been a mistake. There was no outstanding warrant for Herring's arrest because the preexisting warrant was recalled five months earlier.[147]

Writing for the majority, Chief Justice Roberts began the opinion with a general rebuke of the exclusionary rule:

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141. Hudson v. Michigan, 547 U.S. 586, 591 (2006).

142. Herring v. United States, 129 S. Ct. 695, 700 (2009) (explaining that the exclusionary rule does not apply automatically upon a Fourth Amendment violation); *see also* Montejo v. Louisiana, 129 S. Ct. 2079, 2090 (2009) (noting that "[t]he principal cost of applying any exclusionary rule 'is, of course, letting guilty and possibly dangerous criminals go free . . . '").

143. Hudson, 547 U.S. at 591 (*quoting* United States v. Calandra, 414 U.S. 338, 348 (1974); Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998)).

144. *See* Herring, 129 S. Ct. at 698 (holding that in cases of isolated police negligence, the jury should not be prevented from considering all evidence).

145. *Id.*

146. *Id.*

147. *Id.*

> Our cases establish that . . . suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence.[148]

In fact, in rejecting Herring's argument that the exclusionary rule should have barred introduction of the drugs and gun at his criminal trial, Justice Roberts explained:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.[149]

Later, the majority concluded:

> In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system . . . we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not "pay its way."[150]

In short, the Supreme Court has grown increasingly unreceptive to the exclusionary rule and has enumerated several contexts in which the rule will not apply, even if the police gather evidence by violating the Constitution. In addition to the newly announced exception for "simple" negligence, the exclusionary rule does not apply when police obtain a warrant unsupported by probable cause but, nevertheless, search in good faith reliance on the warrant.[151] The rule does not preclude the government from using illegally-obtained evidence in grand jury proceedings,[152] and it does not prevent the government from introducing evidence obtained in violation of the knock-and-announce requirement of the Fourth Amendment,[153] or from using evidence obtained in violation of the Fifth or Sixth Amendments, if the evidence is used to impeach a defendant's trial testimony.[154] The Court has

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148. *Id.*

149. *Id.* at 702 (footnote omitted).

150. Herring, 129 S. Ct. at 704 (citing United States v. Leon, 468 U.S. 897 (1984)).

151. *See* United States v. Leon, 468 U.S. 897, 922–23 (1984).

152. *See* United States v. Calandra, 414 U.S. 338, 354–55 (1974).

153. *See* Hudson v. Michigan, 547 U.S. 586, 593 (2006).

154. *See* Harris v. New York, 401 U.S. 222, 225–26 (1971) (holding that exclusionary rule does not bar the use of statements taken in violation of Fifth Amendment right against self incrimination and *Miranda v. Arizona* when such statements are used to impeach defendant who takes the stand and provides inconsistent testimony); Kansas

additionally held that evidence uncovered by the police pursuant to a search warrant obtained with an affidavit in which police have lied to mislead the issuing magistrate judge does not necessarily require application of the exclusionary rule.[155]

Even when the exclusionary rule would otherwise apply to preclude the use of evidence seized in violation of the Constitution, the Court-made doctrines of "inevitable discovery" and "attenuation" may save the evidence from suppression. As the Court held in *Nix v. Williams*, evidence linked to illegality is admissible in a criminal trial provided the evidence would inevitably have been discovered through lawful means.[156] Moreover, if the Court finds that the "taint" of the illegality is so removed that it has been "purged" by the passage of time or the circumstances following the illegality, evidence will not be excluded.[157] As these examples illustrate, even when the police have flagrantly violated a criminal defendant's constitutional rights and thereby intruded on her liberty, privacy, and freedom, the Supreme Court disfavors excluding evidence of the defendant's guilt as a remedy for the police's wrongful conduct.

B. The Supreme Court Implicitly Condones Some False Statements and Allows Police to Lie about their Reasons for Searching and Seizing

The Supreme Court's decision in *Franks v. Delaware* illustrates that the Court tolerates police lies in affidavits[158] offered as justification for searches and seizures of private spaces and people.[159]

In that case, Franks, who had been convicted of rape, kidnapping, and burglary, challenged the veracity of statements in an affidavit used to obtain a warrant authorizing a search of his home.[160] For the first time, the Supreme Court ruled that there is a limited right to challenge the veracity of a police affidavit, *if* the challenger's allegations are accompanied by an offer of proof (such as reliable

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v. Ventris, 129 S. Ct. 1841, 1847 (2009) (holding that exclusionary rule and Sixth Amendment right to counsel do not prevent the use of defendant's statements to informant in absence of counsel when such statements are used to impeach defendant who elects to take the stand).

155. *See* Franks v. Delaware, 438 U.S. 154, 171–72 (1978) (holding that a search warrant obtained with an affidavit containing false statements, which are knowingly or intentionally made, must be evaluated further before evidence is excluded; only if the warrant lacks probable cause after the false information is excluded should the warrant be voided and the evidence excluded).

156. *See* 467 U.S. 431, 448 (1984).

157. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 491 (1963) (finding that despite unlawful arrest made without probable cause, confession that followed was so disconnected that taint of illegal arrest had been dissipated); Oregon v. Elstad, 470 U.S. 298, 306–07 (1985) (noting that "intervening events" can break the causal connection between illegal arrest and confession and noting differences between Fourth Amendment and *Miranda* violations).

158. Affidavits, of course, are statements made under oath, including statements made under penalty of perjury.

159. *See Franks*, 438 U.S. at 171–72.

160. *See id.* at 156–58.

statements of witnesses), pinpointing specific portions of the affidavit that are knowingly or intentionally false, or made with a reckless disregard for their truth.[161]

Franks is best known for permitting a challenge to the veracity of an officer's sworn statements in a warrant application. But the *Franks* decision is also remarkable for its insight into the Court's lack of concern with police lies. *Franks* suggests that the Court views police lies in the suppression context as less significant than comparable lies told by police in the trial context. In fact, in the suppression setting, the Court has directed trial courts to presume that police are telling the truth. "There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant."[162] In other words, the Court requires trial judges to presume that officers are truth telling when they swear that there are sufficient grounds to intrude on a person's Fourth Amendment rights. Only if a defendant later establishes, with specific evidence, that the affidavit contained deliberately-false information, or that information was included in the affidavit with a reckless disregard for its truth, is the defendant entitled to a hearing to further probe the officer's untruths.[163] This presumption that all police tell the truth is also seen in the Court's precedent exploring the type and amount of evidence that suffices for a showing of probable cause to support the issuance of a warrant. Although the government must make a showing that non-police informants are worthy of belief and that their information is likely to be reliable, the Court simply requires an assessment of the sufficiency of the facts, not veracity, when an officer seeks a warrant based on his own observations.[164]

Not only has the Supreme Court emphasized that police are presumed to tell the truth when they provide sworn affidavits in support of a warrant, it has also explained that even flagrant falsehoods in an affidavit do not require a judge to strike the affidavit or suppress evidence obtained with it. Relying on a concession of the challenger in *Franks*, the Court said, "if what is left [in the affidavit after excising the false parts] is sufficient to sustain probable cause, the inaccuracies are irrelevant."[165] Thus, in *Franks*, the Court concluded that even when an officer lies about the factual basis for a warrant, if, with the dishonest statements removed from the affidavit, the affidavit still supports a finding of probable cause, then the evidence obtained with the warrant remains viable for use at trial.[166]

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161. *See id.* at 171; State v. Mell, 182 P.3d 1, 12 (Kan. Ct. App. 2008) (interpreting *Franks* to mean that a defendant challenging an affidavit must make a "'substantial preliminary showing' that 'a false statement is included in the affidavit'").

162. *Franks*, 438 U.S. at 171.

163. *See id.*

164. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 230–31 (1983) ("This totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific tests be satisfied by every informant's tip.")

165. *Franks*, 438 U.S. at 172 n.8.

166. *See id.* at 171–72.

The *Franks* decision provides officers with negligible incentives to include only truthful statements in an affidavit. Every affidavit is presumed to be truthful, regardless of how far-fetched its content. Only if a challenger to the warrant can find and introduce specific and concrete evidence of the affiant's dishonesty is the challenger entitled to additional process (a hearing) to show that the warrant is invalid.[167] The evidentiary burden on such a challenger is significant, especially given the small likelihood that a challenger will have access to evidence sufficient to demonstrate deceit by the police. And even if the challenger could meet his burden, as long as it is adequate without the false portions, the affidavit is still sufficient support for a warrant.

Isn't the message of *Franks* that officers can lie, as long as they are careful not to leave a trail and that even then, as long as the information in the affidavit supports a search or seizure, a few extraneous lies won't hurt the process? If that is not the intended message of *Franks*, it is the consequence of its holding. And that consequence is exacerbated by the fact that judges, who are tasked with deciding whether an affidavit established probable cause minus the false portions, will be evaluating probable cause with the hindsight that the search did, in fact, uncover evidence of illegality. Although a judge may have been willing and able to assess the affidavit fairly and impartially before the search, after a successful search, the judge will be biased (consciously or subconsciously) toward finding probable cause. Moreover, in the cases in which the officers do not uncover evidence of illegality, the exclusionary rule provides no relief from their unconstitutional search.

Presumably, an officer's lies would not meet with such indifference in a criminal trial. At least at trial, the jury (or fact-finding judge) would not be asked to accept portions of an officer's testimony as presumptively correct, even after other portions had been established as deliberately false. The jury would be told that it could disbelieve all or any part of a lying officer's testimony.[168] And it is human nature to doubt a witness's entire testimony if the witness has shown a willingness to lie, under oath, about some things. If an advocate can establish that a witness has lied despite taking an oath to tell the truth, a jury may conclude that the witness is lying about other aspects of her testimony, even if there is no direct contradiction of those parts. Typical jury instructions remind juries of this common-sense point. For instance, in the Eleventh Circuit, a jury would be told: "You should also ask yourself whether there was evidence tending to prove that a witness testified

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167. *See id.* at 171.

168. *See* TENTH CIR. CRIM. PATTERN JURY INSTRUCTIONS § 1.08 (2005) ("You are the sole judges of the credibility or 'believability' of each witness and the weight to be given to the witness's testimony . . . . You should think about the testimony of each witness . . . and decide whether you believe all or any part of what each witness had to say . . . ."); ELEVENTH CIR. PATTERN JURY INSTRUCTIONS (CRIM. CASES) § 5 (2003) ("You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part.").

falsely concerning some important fact."[169]

In addition to the Court's decisions that reveal its tolerance for police lies in affidavits supporting warrants, the Court's precedent shows its indifference to police lies about officers' motives for searching and seizing. In *Whren v. United States*,[170] the Supreme Court documented this indifference. The Court declared: "[Our] cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."[171]

In other words, if there is probable cause for an officer to search or seize, the search or seizure is constitutionally reasonable, even if the officer who conducted the search lies about officers' reason he searched or seized in the first place.[172] An officer may have selected his searchee based on race, gender, size, number of tattoos, or any other arbitrary bias, as long as probable cause also existed for the selection. As in the *Franks* setting, even if a judge might have decided before a search or seizure that probable cause was lacking to support it, the judge's post-hoc review of such intrusions, which uncover evidence of illegality, will be swayed in favor of a finding of reasonable cause for the search or seizure.

C. The Court Allows Police to Gather Evidence Under False Pretenses and to Lie to Obtain Confessions

As indicated by Christopher Slobogin: "Undercover work is by definition deceptive. It normally involves outright lies."[173] Although such police work is synonymous with widespread deception, the Supreme Court permits police to engage in it.[174] The Court allows police to use deception and trickery in gathering evidence and in urging confessions. Provided the police comply with their obligations to provide a suspect with "*Miranda*" warnings before undertaking custodial interrogation, and as long as they avoid intrusion on a defendant's Sixth

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169. ELEVENTH CIR. PATTERN JURY INSTRUCTIONS (CRIM. CASES) § 6.1 (2003).

170. 517 U.S. 806 (1996).

171. *Id.* at 813.

172. *See* Bernard v. Ray, 246 F. App'x 553, 556 (10th Cir. 2007) ("[E]ven if the FBI invented the informant from whole cloth, seatbelt violation furnished the . . . police with independent reasonable suspicion . . . .") (citing Whren v. United States, 517 U.S. 806, 811–14 (1996))

173. Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies By the Police*, [hereinafter *Deceit, Pretext, and Trickery*], 76 OR. L. REV. 775, 778 (1997). An example of the effectiveness of such deception was reported in *The New York Times* on October 22, 2008: "Dozens of members of the Mongol motorcycle gang were arrested by federal agents in six states after a three-year undercover investigation in which four agents infiltrated the group. More than 60 members of the gang, based in Southern California, were arrested under a federal racketeering indictment that included charges of murder, attempted murder, assault, and gun and drug violations . . . . " Associated Press, *Motorcycle Gang Members Arrested*, N.Y. TIMES, Oct. 22, 2008, at A17.

174. *See* Slobogin, *Deceit, Pretext, and Trickery*, *supra* note 173, at 779. (citing Lewis v. United States, 385 U.S. 206 (1966); Hoffa v. United States, 385 U.S. 293 (1966)); *see also* William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1919–20 (1993) (noting that criminal law "is generally hospitable to deceptive tactics . . . in criminal investigation" "even when the defendant is represented by counsel" and even when the police tell "outright lies" in the course of questioning a suspect).

Amendment right to counsel,[175] officers can tell at least a moderate number of material lies without jeopardizing the admissibility of the resulting evidence or confession.[176]

D. The Court Allows a Prosecutor to Withhold Exculpatory Evidence until Trial; Therefore, Evidence Casting Doubt on Police Credibility May Never be Revealed, and Police Lies are Encouraged by Other Trappings of Pretrial Proceedings

The Supreme Court has said that "the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence."[177] Because guilt or innocence is a pivotal question, in *Giglio v. United States*,[178] the Court expressly acknowledged the importance of evidence indicating the reliability or unreliability of a witness who contributes to the jury's ultimate declaration of guilt. The Court recognized that a trial witness's credibility "may well be determinative of guilt or innocence," and, therefore, impeachment evidence, which is material[179] and suppressed by the prosecution, requires a new trial.[180] A new trial is required whether or not the prosecutor withholds material impeachment evidence in good or bad faith.[181] And evidence, which has a reasonable probability of changing the result in a criminal case, must be disclosed to a defendant whether or not the defendant asks for the information.[182]

The Court's *Brady/Giglio* precedent underscores how central lies can be to the accurate outcome of a criminal trial.[183] Nevertheless, this important protection

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175. *See, e.g.*, Massiah v. United States, 377 U.S. 201, 205–06 (1964) (finding defendant's Sixth Amendment rights violated when post-indictment statements elicited from him in the absence of his lawyer were admitted as evidence against him at trial).

176. *See, e.g.*, Frazier v. Cupp, 394 U.S. 731, 739 (1969) (indicating that misrepresentations by police during an interrogation, "while relevant," did not make confession involuntary); *see also* Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 583 (1979) ("Use of trickery or deceit in the questioning of criminal suspects is a staple of current police interrogation practices . . . . [And] the Court has neither held nor even indicated that any particular type of police trickery would, in and of itself, render a resulting confession inadmissible.").

177. Rose v. Clark, 478 U.S. 570, 577 (1986) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)).

178. 405 U.S. 150 (1972).

179. The Court assessed materiality by asking whether the evidence "'could . . . in any reasonable likelihood have affected the judgment of the jury . . . .'" *Id.* at 154. (ellipses original) (quoting Napue v. Illinois, 360 U.S. 264, 271 (1959)).

180. *Id.* at 154.

181. *Id.* at 153.

182. *See* Kyles v. Whitley, 514 U.S. 419, 434 (1995).

183. The ability to receive information and evidence of certain lies, for example lies that frame an innocent defendant for possessing contraband, is crucial to fairness at any stage of a criminal case. If such information were available pretrial, it could lead a magistrate judge to release a defendant from detention while awaiting trial and could avoid other consequences of criminal prosecution, such as job loss and community condemnation. But arguably evidence of some police lies, for instance those that provide a constitutional basis for a search that, in fact, violated the Constitution, do not necessarily deprive a defendant of a fair determination of his guilt or innocence. If the criminal process is designed only to accurately determine the factual guilt or innocence of a

against lies, even police lies, does not apply pre-trial.[184] As a result, a defendant may plead guilty and relinquish all the rights that accompany a trial, including the right to produce evidence in her defense, the right to have a jury decide her case, the right to insist that the government establish her guilt beyond a reasonable doubt, and other protections against wrongful convictions, without having received any information from the government about the impeachability of the government's witnesses or other evidence contained in the government's files that casts doubt on her guilt.[185]

Because many of the procedural rules for pre-trial hearings are more relaxed than the procedural rules that apply during trial, the hearing context is a safer place for the police to tell lies. Unlike full trials, pre-trial hearings are unaccompanied by jury scrutiny and a beyond-a-reasonable-doubt burden of proof. Suppression hearings are also conducted with relaxed rules of evidence; yet, defense lawyers have to jump through burdensome hoops to call certain law enforcement officers as witnesses.[186]

The Sixth Amendment's guarantee of "a speedy and public trial by an impartial jury"[187] was enacted to protect defendants from the whims and overreaching of the government, including judges.[188] But there is no jury protection at the pre-trial stage of a criminal case. Similarly, the protection afforded defendants at trial from the beyond-a-reasonable-doubt burden of proof is lacking at the pre-trial stage. "[E]ven if a question of credibility is raised during a pre-trial suppression hearing, the prosecution must show only that its version of the facts is more likely than not, a standard that invites, at most, mild judicial scrutiny."[189] As long as the prosecution presents a modicum of evidence that its witnesses are telling the truth and a modest amount of evidence of guilt, the government will meet its preponderance burden, and the defendant will face a trial or a plea. If the prosecution had "to prove the credibility of its witnesses beyond a reasonable doubt in order to prove probable cause to search, no doubt the judge-as-factfinder would feel constrained

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defendant charged with a crime, *see* Rose v. Clark, 478 U.S. 570, 577 (1986), then failure to provide the defendant with information about lies irrelevant to his guilt or innocence does not undermine the process.

184. *See* Weatherford v. Bursey, 429 U.S. 545, 559–60 (1977) (finding *Brady* does not require the government to provide the defense with the names of all adverse witnesses prior to trial); United States v. Ruiz, 536 U.S. 622, 629 (2002) (holding that the Constitution does not require the pre-guilty plea disclosure of impeachment information); *see* also 18 U.S.C. § 3500(a) ("In any criminal prosecution brought by the United States, no statement or report in the possession of the United States, which was made by a Government witness . . . shall be the subject of . . . inspection until said witness has testified on direct examination in the trial of the case.")

185. *See* Ruiz, 536 U.S. at 630 (noting that it is "difficult" to characterize impeachment information as critical information that a defendant must have before pleading guilty, and that the Constitution does not require "complete knowledge of the relevant circumstances" before a plea).

186. *See infra* note 192.

187. U.S. CONST. amend. VI.

188. *See* Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.").

189. Dorfman, *supra* note 114, at 468.

to scrutinize the witness' [sic] reliability more carefully."[190]

In addition to the lenient standard of proof that applies pre-trial, the rules of evidence are significantly relaxed. Hearsay and other uncorroborated testimony is normally more than adequate to convince the magistrate judge that there is a fair probability that a crime was committed and that the defendant was involved. Because the evidentiary standards are relaxed, a police officer with outstanding credibility can appear and testify to all the evidence she heard second-hand from other officers, some of whom may be notorious for "fudging" the truth.[191] Officers who might be easily impeached or exposed for lying are protected from testifying, at least in the federal system, because a defendant's lawyer must get permission to call officer witnesses.[192]

Moreover, unlike jurors, who probably give no thought to the matter at all, judges know that credibility assessments "are reviewed on appeal only for an abuse of discretion."[193] Because their credibility judgments are given significant deference on appeal, reversed only when the judge has committed an obvious mistake, "judges do not experience the same fear of committing reversible error when weighing the accuracy and believability of testimony, as opposed to when making the correct ruling on a matter of law."[194] In addition, in the pre-trial setting, judges have weak incentives to find that the police have lied. When judges evaluate credibility pre-trial, they know that the vast majority of their rulings will not be reviewed at all, even under the deferential standard. Most criminal cases are resolved through pre-trial pleas. These cases never reach trial, let alone appellate review. In fact, in many cases, the judges are weighing the credibility of the police while simultaneously hearing about the extensive evidence of the defendant's wrongdoing and illegality, which was exposed during the case. These factors, taken together, make the likelihood of reversal on credibility rulings exceedingly small.

Although statistics are currently unavailable to show how many trial-level judges tend to favor the testimony of officers over the testimony of defendants or the witnesses offered by defendants, when credibility is in doubt, there are additional incentives for these judges to make credibility findings in favor of the government. Many judges face difficult elections. If their opponents can fairly

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190. *Id.*

191. *See* FED. R. EVID. 1101(d) (3) (making the Rules of Evidence inapplicable in "preliminary examinations in criminal cases," thus allowing officers to testify from hearsay accounts of other officers). In my experience as a federal prosecutor, it was not uncommon for "Giglio-impaired" officers to continue to assist in investigations, the execution of warrants, and the apprehension of suspects. But those officers, whose credibility was subject to effective impeachment, did not appear as affiants or as witnesses at hearings or trials.

192. *See, e.g.*, Young v. United States, 181 F.R.D. 344, 347–48 (W.D. Tex. 1997) (recognizing that federal employees may be required to obtain the permission of their employing agencies before testifying as experts against the United States in federal court).

193. Dorfman, *supra* note 114, at 467.

194. *Id.* at 467–68.

characterize them as "soft on crime" for allowing "guilty" defendants to go free because their rulings excluded otherwise relevant evidence, judges may be defeated in such elections. Even if a judge does not face such contested elections, there may be other public pressures against the suppression of evidence.

The pressure applied to Harold Baer, a federal district judge with a long and distinguished record, illustrates this point. Judge Baer was nearly impeached in the 1990s after he refused to admit eighty pounds of drugs in a New York City case against Carol Bayless.[195] Reportedly, prominent politicians, including President Bill Clinton and Senator Bob Dole, "beat up on" Baer in an effort to "burnish their law-and-order credentials."[196] Furthermore, unless the evidence of police dishonesty is overwhelming, judges do not want to tarnish or ruin the careers of police officers, who may be "good people," "hard working," and frequent witnesses in the judge's courtroom.[197]

E. The Court's Desire for Truth is One-sided, Favoring the Government

In its opinions, the Supreme Court has regularly declared the importance of truth-seeking in criminal cases and its disdain for perjury.[198] But in practice, the imperative of truth appears to be a one-sided coin. Heads, the government wins. Tails, the defendant loses.

Recently, in *Kansas v. Ventris*, the Court held that the government could use evidence gathered in violation of a defendant's Sixth Amendment "*Massiah*" rights to impeach the defendant's inconsistent trial testimony.[199] On its way to reaching this result, the Court offered its customary, truth-based rationale:

> Our precedents make clear that the game of excluding tainted evidence for impeachment purposes is not worth the candle. The interests safeguarded by such exclusion are "outweighed by the need to prevent perjury and to assure the integrity of the trial process." Stone v. Powell, 428 U.S. 465, 488 (1976). "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can . . . provide himself with a shield against contradiction of his untruths." Walder [v. United States, 347 U.S. 62, 65 (1954)]. Once the defendant testifies

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195. *See Bayless*, 913 F. Supp. at 243 (granting defendant's motion to suppress based on finding that officers lacked reasonable suspicion to conduct investigatory stop), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996).

196. Op-Ed., *Judge Baer's Exit*, N.Y. TIMES, May 18, 1996; Julian E. Barnes, *Prison Term for Woman in Disputed Drug Case*, N.Y. TIMES, Oct. 2, 1998 at B (indicating that the Clinton Administration suggested that Baer might be asked to resign if he did not change his ruling on suppression). Eventually, Judge Baer capitulated. *See Bayless*, 921 F. Supp. at 212 (vacating prior decision).

197. This observation is my own and that of other friends and colleagues who have been prosecutors in the federal system. Others have come to similar conclusions. *See* Morgan Cloud, *The Dirty Little Secret*, 43 Emory L. J. 1311, 1322–23 (1994) (noting several reasons that judges may accept police perjury, including that judges "do not like to call other government officials liars").

198. *See supra*, note 9.

199. *See* Kansas v. Ventris, 129 S. Ct. 1841, 1847 (2009).

> in a way that contradicts prior statements, denying the prosecution use of "the traditional truth-testing devices of the adversary process," . . . is a high price to pay for vindication of the right to counsel at the prior stage.[200]

Many of the Court's cases incorporate these lofty, truth-focused phrases. In *Herring v. United States*,[201] the Court noted the "costly toll upon truth-seeking and law enforcement objectives" created by the exclusionary rule.[202] In *Oregon v. Hass*,[203] the Court allowed the government to impeach a defendant with statements he made after the police violated his *Miranda* rights, reasoning:

> [T]he impeaching material would provide valuable aid to the jury in assessing the defendant's credibility . . . . [T]he shield provided by *Miranda* is not to be perverted to a license to testify inconsistently, or even perjuriously, free from the risk of confrontation with prior inconsistent utterances. We are, after all, always engaged in a search for truth in a criminal case . . . .[204]

In practice, however, the Court's demand for truth in the criminal process is slanted in a way that especially targets criminal defendants. The Court's precedent and the procedural rules that support that precedent are more indifferent, if not accepting, of police lies, even those that distort the truth about a suspect's allegedly criminal conduct and an officer's seemingly unconstitutional or wrongful behavior.[205] Why the double standard? Probably because a majority of the Court worries that application of the exclusionary rule will result in the release of guilty and dangerous defendants. As the Court said in *United States v. Payner*,[206] "[o]ur cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury . . . . After all, it is the defendant, and not the constable, who stands trial."[207] In other words, a majority of the Court believes that when a defendant lies, he distorts the truth about his guilt, but when a police officer lies, he may be doing so to ensure that the truth is told about the same defendant's guilt.

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200. *Id.* at 1846 (internal citation omitted). *See also* Michigan v. Harvey, 494 U.S. 344, 351 (1990) ("[The Supreme Court has] consistently rejected arguments that would allow a defendant to 'turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.'").

201. 129 S. Ct. 695 (2009).

202. *Id.* at 701.

203. 420 U.S. 714 (1975).

204. *Id.* at 722.

205. *See* discussion of *Franks*, *supra* at notes 159–167 and *Payner*, *infra* at notes 206–07.

206. 447 U.S. 727 (1980).

207. *Payner*, 447 U.S. at 734. In *Payner*, the Court relied on notions of "standing" to reject application of the exclusionary rule, even for intentional violations of constitutional rights. *Id.* at 727–28.

III. THE PROPOSAL—AN EXCLUSIONARY RULE TAILORED TO REDUCE TRUTH-DISTORTING LIES

Innocent mistakes by the police can result in inaccurate case outcomes, but truth-distorting police lies are worse. Arguably, they are more likely than mere mistakes to result in wrongful convictions, and the truth-distorting police lies also lead to all of the negative collateral consequences described in Part I.B. Police lies are also different from police errors because some of them—truth-exposing lies—are "good lies" that promote the primary goal of our system—to foster the truth-seeking function of identifying the guilty and distinguishing them from the innocent. Other police lies, however, undermine that aim. These are "bad lies" that, in a perfect world, would be eliminated. Although the Supreme Court expressly permits some police lies and quietly tolerates others, it has made no attempt to explain its different treatment of the two groups. Part III distinguishes between "good" police lies and "bad" ones, and it urges a modification to the existing exclusionary rule to reduce the number of "bad" ones police tell.

A. Distinguishing Truth-Exposing Lies From Lies That Distort Truth

This section distinguishes between two kinds of police lies: (1) Those that expose the truth about criminal conduct; and (2) Those that distort the truth about criminal or unconstitutional behavior. Ultimately, this Article concludes that the Supreme Court treats the first type in a way that supports the core goals of a fair criminal justice system. The Article finds fault, however, with the Court's handling of the second type—those police lies that distort the truth about criminal acts. Because the Article argues for a different treatment of the second category, this section explains the difference between the two groups and provides specific examples of police misconduct that would fall within each category. Ultimately, this Section distinguishes between police lies that the Court should expressly permit and those that the Court should openly prohibit. The distinctions drawn in Sections 1 and 2 are offered to show that there are meaningful and identifiable differences in the two types of lies and that those differences require different applications of the exclusionary rule.

1. Police Lies That Expose the Truth About Criminal Conduct

"The end justifies the means." This adage probably best characterizes why most police lies are told. It also explains the Supreme Court's hostility to the exclusionary rule. After all, if the point of the American criminal justice system is to ensure that the guilty are promptly convicted and proportionally punished and that the not-guilty are quickly exonerated and freed from any intrusion on their liberty or smear on their reputations, then the system should tolerate any and all lies that ensure these laudable ends. There are two types of police lies that fit this description: (1) Lies told by officers that are necessary for undercover investigations; and (2) Lies told by officers urging the guilty to confess the truth about their

crimes. Because the end goal of justice validates these lies, they should be openly accepted by society, and thus protected by Supreme Court precedent.[208]

a. Lies Necessary for Undercover Operations

Sometimes police lie to expose the truth about clandestine criminal enterprises that operate over the Internet or from other increasingly secure distances and unknown locations away from officers and public places. Police could not penetrate some criminal organizations or solve some crimes without dishonesty. Crimes involving human trafficking and the solicitation of minors for sex are but two examples of the types of criminal activity that could not effectively be investigated and exposed without police lies. Of equal importance, these lies expose the truth about the guilt or innocence of those suspected of such criminal behaviors.

Human trafficking is growing in popularity in the United States,[209] and it is a highly clandestine crime, which by definition often goes unreported. Those who commit crimes of human trafficking often are associated with international criminal organizations. Because of these international ties, human traffickers are difficult to identify and harder still to find. In addition, victims are usually afraid to cooperate with authorities, or they are too young to assist. They fear for themselves and, more commonly, their family members, who often are in another country, home to the trafficker. One of the most effective ways to expose these deplorable crimes is for police to assume false personas and to lie about their willingness to participate in the crime. Once in the confidences of the traffickers, police learn the truth about the nature and breadth of the operation, and they can sometimes disrupt it, or reduce its effectiveness.

The same is true of police guises to catch adults who trawl the Internet for minors, soliciting them for sex acts.[210] To expose the truth about who is engaging in these solicitations and who intends to follow through and act on them, the police lie to gain access to communications initiated from intensely private spaces, such as a home. They enter public areas using the Internet and lie about their identities and ages, and when police are solicited in violation of federal law, they engage in

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208. Although not described in these terms, William Stuntz has also asserted that deceptive tactics used by the government in criminal investigations, including during undercover ruses and while interrogating suspects, "not only harm guilty defendants; they probably help innocent ones." William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1921 (1993).

209. Between 2001 and 2005, the U.S. Department of Justice identified 555 people suspected of committing human trafficking violations. *See* MARK MOTIVANS & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL PROSECUTION OF HUMAN TRAFFICKING, 2001–2005 1 (2006) http://bjs.ojp.usdoj.gov/content/pub/pdf/fpht05.pdf. Many human trafficking violations involve the sex trafficking of women and children. Congress viewed this crime to be so serious and common that in 2000, it passed the Victims of Trafficking and Violence Protection Act, which enhanced pre-existing penalties for those convicted and offers more rights to victims of these crimes. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

210. *See, e.g.*, 18 U.S.C. § 2422(b) (2006) (criminalizing solicitation of minors for sexual activity).

further deception to guarantee that the suspect not only thinks about criminal behavior, but also that he (or occasionally she) intends to act on those thoughts. These police lies are necessary to, and effective at, revealing the truth about a defendant's guilt or innocence.[211]

In addition, this type of police deception is tempered, and defendants further protected from wrongful conviction, by the defense of "entrapment." In essence, entrapment asserts that the government induced the defendant to commit a crime that he would not have otherwise committed.[212] "[A] finding of entrapment does more than result in the exclusion of evidence at trial—it bars the successful prosecution of the defendant."[213] Thus, police lies told to garner the confidence and acceptance of those suspected of criminal behavior, so that the suspect's behavior can be fully and fairly evaluated as indicative of guilt or innocence, are lies told to expose the truth. These truth-exposing lies are "acceptable" lies that the Supreme Court should and does permit.[214] They are acceptable because the ends of justice are served and factual guilt and innocence is exposed with them.

b. Lies Urging Guilty Suspects to Admit their Conduct

The second type of police lie that exposes truth is the lie that convinces a guilty suspect to admit his conduct. The Supreme Court has expressly sanctioned such lies,[215] and the Court's precedent is defensible because the ends of justice warrant this deception.

As Justice Scalia expressed in his dissent in *Minnick v. Mississippi*:

> [I]t is wrong, and subtly corrosive of our criminal justice system, to regard an honest confession as a "mistake." While every person is entitled to stand silent,

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211. *See* Stuntz, *supra* note 208, at 1930 (an advantage of undercover deception is it "gives the defendant who truthfully maintains his innocence some additional leverage. At the least, it makes his claims marginally more credible . . . .").

212. JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 571 (4th ed. 2006).

213. *Id.* Christopher Slobogin has argued that the entrapment defense, along with the Due Process Clause, and the Sixth Amendment (as interpreted in *Massiah*), provide some protection against unwarranted undercover operations, but he also finds these protections inadequate. *See* Slobogin, *Deceit, Pretext, and Trickery*, *supra* note 173, at 779–781.

214. *See* Illinois v. Perkins, 496 U.S. 292, 300 (1990) (affirming a conviction based on a confession resting on lies to a suspect by an undercover officer); United States v. Russell, 411 U.S. 423, 445 (1973) (noting that the government's use of undercover acts and deception is not necessarily unlawful); Jackson v. Denno, 378 U.S. 368, 425 n.2 (1964) (Clark, J., dissenting) (reiterating that "the fact that a confession was procured by the employment of some artifice or deception does not exclude the confession . . . if the artifice or deception was not calculated to procure an untrue statement); Rogers v. Richmond, 365 U.S. 534, 542 (1961) (same). *But see* Slobogin, Deceit, Pretext, and Trickery, *supra* note 175, at 808–09 (contending that these "active" police lies told during undercover ruses are not justifiable).

215. *See* Illinois v. Perkins, 496 U.S. 292 (1990) (reversing trial court's grant of motion to suppress where police used undercover officer and trickery to convince defendant to confess); Moran v. Burbine, 475 U.S. 412 (1986) (reversing court of appeals' grant of habeas relief where police lied to defendant's attorney about when the interrogation would take place and failed to tell the defendant of his attorney's attempt to reach and represent defendant during the interrogation).

> it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves. Not only for society, but for the wrongdoer himself, "admissio[n] of guilt . . . , if not coerced, [is] inherently desirable, . . . because it advances the goals of both "justice *and* rehabilitation" . . . .[216]

Because a voluntary confession can expose details of a crime, which would otherwise remain undetectable and unsolved, confessions are important evidence of guilt. And lies that urge suspects to speak honestly about their conduct should be encouraged.[217]

Of course, we now know that in this context police lies must be carefully regulated so that police do not unduly pressure a defendant to say that he committed a crime when he did not. Although, at first, it might seem unlikely that a suspect would lie and implicate himself, we know from the first 200 DNA exonerations that innocent people occasionally confess to crimes they did not commit.

There is a natural check on this category of police lies—the non-public details of the crime. Even if the police lie to a suspect, telling him that they know he committed the crime because his fingerprints are on the murder weapon, his shoeprint is at the scene, his accomplice "gave him up," and the victim picked him out of the line up, the police will know whether the confession is genuine or merely contrived in response to their lies. The specific, factual details of the crime will verify or refute the suspect's actual involvement. The key is that police must never "feed" a suspect the details of the crime.[218] This is the line between police lies that uncover truth and those that distort it. If an officer provides a suspect with factual details to flesh out a confession, the officer must never lie about what details he gave. Lying about these aspects of the interview would either require the officer to perjure himself later in court or to falsify the police report telling what happened inside the interrogation room. Courts must not sanction lies in a police report. Likewise, at any subsequent court proceedings, the system must demand that police forthrightly admit the specifics of any deception they used. To the extent that police lie or conceal the words uttered and actions taken to obtain a confession, the lies fall within the second category of police lies, discussed below, those that conceal and distort the truth.

Numerous legal scholars have argued that police should be required or encouraged to record their interviews of suspects.[219] Especially if the exclusionary rule is

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216. Minnick v. Mississippi, 498 U.S. 146, 166–67 (1990) (Scalia, J., dissenting) (internal citations omitted).

217. *But see* Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 476 (1996) (arguing that police lies during interrogations "can impede evidence gathering by generating distrust and suspicion which limit citizen cooperation and by obtaining or creating false evidence").

218. *See* findings of Brandon L. Garrett, *supra* Part I.A.(6).

219. *See, e.g.*, Richard A. Leo, et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-first Century*, 2006 WIS. L. REV. 479, 486, 522–25 (2006); Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1127–28 (2005); Gail

modified so that police lies amounting to simple trickery are openly and expressly permitted, there will be more reason for the police to willingly record these interviews and greater incentives for courts to impose legal obligations on the police to do so. If officers know that they will not be penalized for lying to suspects, as long as their lies do not taint the truth of the confession, they should be more receptive to record the police-suspect interactions and less concerned about allowing judges and the public to see and hear that the truth was told because of savvy police work, not undue pressure or unfair influence.

The line is clear and bright between police lies told to a suspect to encourage truth-telling and, in contrast, those that distort the circumstances under which the confession was acquired. Every officer should be expected to understand the obvious and significant difference and be held to account for her conduct and lies. If the law draws this distinction (expressly recognizing the difference between these two types of lies), officers will be reminded of the importance of catching the real criminal, not apprehending a suspect who did not have the fortitude to withstand police pressure. If a defendant is unable to provide specific details about where and how the crime was committed, police, juries, prosecutors, and judges should be wary of the accuracy of the confession. Especially if there is little or no corroborating evidence of the defendant's guilt, a judge should readily exclude those confessions as unreliable. In other words, in doubtful cases, the benefit of the doubt should go to the defendant whose life and liberty are in jeopardy.

Moreover, police should approach a suspect's confession with the same skepticism that they approach a cooperating witness's claims that she knows who committed a crime and can, therefore, assist in solving the crime in exchange for leniency on a criminal charge or for monetary compensation. The police rarely take a cooperator's claims at face value.[220] They search for corroborating evidence that either supports the claim or suggests that the cooperator's story is invented to point suspicion away from herself or for some other self-interested reason, such as financial gain.

In sum, police who lie to encourage guilty suspects to admit the truth about their criminal behavior are justified by the goal of identifying the guilty. On the other hand, police lies that conceal or distort the truth about a defendant's knowledge of the non-public details of a crime are unjustified because these lies distort truth about factual guilt. Because these two types of lies require different exclusionary treatment, the exclusionary rule must be modified to more effectively deter the

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Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recordings of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 741 (1997).

220. Some states require corroboration of the story of a cooperating witness. *See* State v. Johnson, 627 N. W.2d 753, 762 (Neb. 2001) (prohibiting the prosecution of controlled substance offenses without corroboration of a cooperating witness); *see also* Daniel Richman, *Expanding the Evidentiary Frame for Cooperating Witnesses*, 23 CARDOZO L. REV. 893, 894 (2002) (stating that the standard "cooperator trial" includes the prosecutor "pointing to all the corroboration of the cooperator's testimony").

unacceptable lies and expressly allow the acceptable ones. If at a pretrial hearing or during trial persuasive evidence is presented, that the police revealed publically-unavailable information to a suspect as a means to obtain a confession, the exclusionary rule should exclude the resulting confession from use at trial.[221]

Occasionally, the police may not lie to the suspect at all but may, instead, pressure the suspect into lying about his criminal activity and then provide the suspect with non-public information that makes his confession appear more plausible. This might happen, for instance, when an officer becomes convinced that the suspect "did it," and in an effort to prove that guilt, the officer "feeds" the suspect information to support the confession. Technically, in this instance, the police have not lied; they made a mistake. Importantly, though, the mistake pressured the suspect into lying. Because this resulting lie is just as disruptive to an effective criminal justice system as the police lie with scienter, both should result in exclusion of the resulting confession. Essentially, the police have lied through a surrogate. This police misconduct falls within category two, discussed immediately below.

2. *Police Lies That Distort a Suspect's Criminal Behavior or Conceal an Officer's Unconstitutional Conduct*

In contrast to lies that police tell as an undercover ruse or to convince a defendant to admit his guilt (those that expose the truth about criminal conduct), there are numerous police lies that distort the truth about a suspect's behavior and conceal the fact that the government violated someone's constitutional rights. This section discusses how such truth-distorting police lies are meaningfully different from the first category of police dishonesty. Ultimately, this Article contends that the Supreme Court should modify the exclusionary rule to deter these lies. The modification is necessary to reduce the incentives for police to tell such lies.

The most obvious type of a police lie that distorts the truth is a lie that frames an innocent person. An example can be found in Section I.A.3, *supra*. There, Atlanta's Officer Tesler lied to make it look like an elderly woman was keeping illegal drugs in her home and told more lies claiming that the woman was killed trying to defend the drugs.[222] In reality, Tesler was covering for two other officers who had obtained a search warrant with fictitious information.[223] All three officers lied to excuse the killing of the innocent woman and to conceal their other unconstitutional behavior. Reasonable grounds never existed to believe that drugs were in the woman's house or that she was involved in drug sales.[224] To cover the unconstitu-

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221. For reasons detailed later in the paper, this exclusion of the resulting confession should apply to the government's case-in-chief and for purposes of impeachment because the circumstances under which the confession is obtained calls into doubt the accuracy of the admission.

222. *See supra* note 51 and accompanying text.

223. *Id.*

224. *Id.*

tional entry, illegal search, and unjustified shooting, one of the officers planted drugs in the woman's home.[225]

A second type of police lie that distorts the truth is a lie told by police to create a post-hoc justification for their unlawful intrusion on someone's constitutional rights. For instance, police may search or seize a suspect or his belongings, knowing that they had insufficient grounds, making the search or seizure unlawful. As discussed in the introduction to this Article, Los Angeles police officers told truth-distorting lies at trial when they testified falsely that they found drug evidence abandoned by a suspect as he ran.[226] Similarly, the New York officer discussed in Section I.A.2., lied and distorted the truth about a Fourth Amendment search when he falsely testified that he could see drugs in a suspect's car and only after seeing them in plain view, did he decide to search the car and seize the drugs.[227]

Officers who falsely claim that a defendant has consented to a search also tell truth-distorting lies, as do police who convince a suspect to confess by divulging to the suspect intimate facts of a crime that only the perpetrator would know, wearing down an innocent person.

A third example of police lies that distort the truth can be found in cases like *Franks*, discussed in Section II.B. In these cases, officers believe that a suspect is committing a crime. They become intent on proving their belief, but they lack sufficient evidence to convince others that they are correct. As a result, they cut corners. They proffer evidence, which, if true, would convince a neutral and detached magistrate judge that there is probable cause to believe that evidence will be found in a specific place or that a certain person has committed a crime. With a fabricated version of events, they conceal their lack of real evidence and ask a judge to issue a search warrant or an arrest warrant.

These are just a few examples of police lies that tell a story different from the reality of what the officer actually did or saw, different from what a suspect said and did, or slants the reality in some other way. None of the lies exposes the truth about a suspect's criminal conduct. Each impairs constitutional rights, and each represents a post-hoc justification for conduct that an individual officer wants to validate or excuse.

Currently, the incentives for police officers to tell these types of truth-distorting lies are strong and the disincentives equally weak. For example, as long as an officer, in a semi-convincing way, "fudges" his testimony to provide a plausible explanation for his otherwise unconstitutional actions, he can avoid the exclusionary rule that would exclude the use of the evidence from the government's

225. *Id.*

226. *See supra* note 1.

227. *See supra* note 37–40 and accompanying text.

case-in-chief.[228] So, if an officer searched a suspect based on an unsupportable hunch, but that hunch paid off because the search revealed evidence of a crime, the officer has a strong incentive to lie and provide a legitimate justification, beyond the truthful hunch, that would have legally permitted the search. Unless the law changes these inducements, police will continue to lie in some cases to avoid application of the exclusionary rule. As discussed in Section I.B., such lies have both direct and indirect damaging effects on our criminal justice system, and more should be done to eliminate them.

The modification to the exclusionary rule proposed in Section III.C., below, seeks to tailor the current rule to encourage honest police work and to create stronger motivation for officers to honestly admit their misconduct, thereby promoting the core aims of a fair criminal justice system. The proposal urges a broader use of the exclusionary rule in cases in which a trial judge suspects the police of telling truth-distorting lies, and a narrower application of the rule in cases in which officers forthrightly admit that they may have violated a suspect's constitutional rights in an effort to "catch the bad guy."

B. As Is, the Exclusionary Rule Does not Discourage Truth-Distorting Police Lies

The Supreme Court properly tolerates police lies that seek to uncover the truth about a suspect's criminal behavior. For good reason, the Court neither punishes officers, nor suppresses evidence, when an officer works undercover using a false identity, even if the officer repeatedly tells lies, sometimes elaborate ones, about his own motives and conduct. These lies are justified because they uncover the truth about crimes a suspect has or has not committed. Moreover, when an officer takes the stand as a witness later in the course of the prosecution and testifies about his behavior and deception, he candidly admits his lies, under oath, before judge and jury.

The same is true when the police lie and tell a suspect that his co-conspirator is next door confessing and implicating him, or when the police say that they have tested the murder weapon and found the suspect's fingerprints. These lies also result in a suspect admitting the truth about whether or not he engaged in criminal conduct. Like the lies an officer tells while conducting undercover surveillance, officers who lie to trick a suspect into admitting criminal conduct later testify honestly, explaining what really happened. Because these officers testify truthfully, explaining their lies, both judge and jury can assess whether or not the officers' lies went too far and coerced a confession.

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228. This is true because the standard of proof in this stage of the case is a mere preponderance of the evidence. *See* United States v. Matlock, 415 U.S. 164, 178 n.14 (1974) (noting that suppression hearings require only proof by a preponderance of evidence), and because even a pretextual search or seizure can be saved by a lawful explanation); Whren v. United States, 517 U.S. 806, 813 (1996).

The Supreme Court has never sought to deter these types of police lies and rightfully so.[229] Whether the Court would justify them in this way, the lies are consistent with the core values of our criminal system of justice, which seeks to expose the truth about criminal behaviors and to separate the innocent from the guilty.

In contrast to its proper treatment of truth-revealing police lies, the Court has sent the wrong message and created the wrong incentives for police who lie to conceal the truth about criminal conduct and officers' breaches of constitutional rights. If the system were changed to alter officers' perceptions of the value of truth-concealing lies—to their careers, to reducing crime, to convicting the bad guys—logic suggests that many, if not most, of these lies would stop. Several legal scholars have offered suggestions about how to change the current system to stem incentives for the police to lie. Donald Dripps has argued for polygraphing police under some circumstances.[230] David Dorfman contends that prosecutors should have increasingly burdensome discovery obligations and that defense lawyers need greater opportunities for cross-examination.[231] Bennett Capers asserts that officers should be prosecuted more often for perjury.[232] Christopher Slobogin has offered multiple proposals to reduce the widespread problem.[233]

Each of these proposals holds allure, given that the current system has proven ineffective at significantly reducing unwanted police lies. This portion of the Article offers an alternative procedural solution to capture some of the benefits of the previous suggestions, while furthering two central goals of the Bill of Rights: (1) to protect "the people" against unreasonable searches and seizures by the government, as provided in the Fourth Amendment;[234] and (2) to ensure the protections of a citizen jury, whose job it is to make sure the government establishes each element of a charged crime by a beyond-a-reasonable-doubt standard, as mandated by the Sixth Amendment.[235]

Because the Supreme Court's current application of the exclusionary rule rests

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229. This is true as long as the deception does not render the resulting confession "involuntary." *See* Spano v. New York, 360 U.S. 315 (1959).

230. Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693, 693 (1996).

231. Dorfman, *supra* note 114, at 496 (1999).

232. Capers, *supra* note 68, at 837.

233. Slobogin, *Testilying, supra* note 20, at 1054–59.

234. *See* U.S. CONST. amend. IV (guaranteeing "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures").

235. In relevant part, the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI. The Supreme Court has consistently interpreted the Sixth Amendment to confer a constitutional right to: (1) a jury determination on each element of a crime, and (2) proof of guilt beyond a reasonable doubt. *See* United States v. Booker, 543 U.S. 220, 230 (2005) (noting that the Constitution "gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged"); *In re* Winship, 397 U.S. 358, 361 (1970) (indicating that the government must "convince the trier [of fact] of all the essential elements of guilt") (citations omitted).

on the tacit, but incorrect, premise that police officers are impartial, fact-gatherers who rarely lie and seldom mislead judges and juries about the actual happenings in a criminal case, the Court's criminal procedure jurisprudence is undermining core guarantees of our supposedly rational and constitutionally-based system of justice. In fact, we now know that the Court's current version of the exclusionary rule has failed to adequately prevent truth-distorting police lies and has led to substantive errors about defendants' guilt.

The exclusionary rule should be modified to provide additional oversight by trial judges and, more importantly, juries, who can critically evaluate whether evidence should be excluded as a sanction for suspected police lies and, correspondingly, misconduct concealed by those lies. Not only do citizen juries serve the Framers' desire for checks on the government's power, but also juries are better positioned to reflect the diverse citizenry in America, giving a voice to groups underrepresented in the judiciary. Furthermore, a jury is better positioned than judges or others to reject the police culture of lies. Juries serve on a one-time basis and are, therefore, not faced with the same pressure to overlook lies told by police or tolerated by prosecutors who often work together and who regularly appear in the same courtroom with the same judge. Encouraging more jury input would infuse more police accountability into the current system, especially if the change was implemented in combination with some of the other proposals already offered by scholars—for example, additional opportunities for discovery and cross examination,[236] and more frequent perjury prosecutions for officers who appear to lie under oath.[237]

The exclusionary rule should be tailored to strengthen those aspects that have proven ineffective at reducing truth-distorting police lies and simultaneously changed to loosen the grip on police lies that reveal actual criminal conduct. More probing oversight from well-educated and politically-responsive judges and citizen juries, who are well-positioned to determine when the Fourth Amendment reasonableness requirement has been violated and when police behaviors have unduly overcome the will of a citizen suspect, will give the current system more checks and balances and foster the aims of the Framers of the Bill of Rights, who sought to protect citizens' and suspects' liberty and privacy through oversight of a citizen jury.

Although occasionally still debated, the consensus appears to be that the exclusionary rule deters police (at least some of the time) from knowingly or intentionally violating a citizen's constitutional rights.[238] Because the police know that a judge might exclude illegally-obtained evidence from a defendant's trial as a

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236. *See* Dorfman, *supra* note 114, at 496.

237. *See* Capers, *supra* note 68, at 837.

238. Orfield, *Deterrence, Perjury, and the Heater Factor*, *supra* note 8. *But see* L. Timothy Perrin, et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 711–36 (1998) (reporting results of an empirical study and concluding that the exclusionary rule is not an effective deterrent).

remedy for a breach of the defendant's constitutional rights, many or most police officers tend to be more cautious about violating those rights. On the other hand, the exclusionary rule may often encourage police to lie to conceal such a violation of rights. Especially in cases charging serious crimes, an officer may know or learn that his conduct violated constitutional standards and that the remedy for that breach is exclusion of important (perhaps necessary) evidence of the defendant's guilt. To avoid application of the exclusionary rule, the officer calculatedly decides to lie. Usually, in the officer's view, the ends of justice—convicting the bad guy—warrant the dishonesty. Thus, while the exclusionary rule encourages compliance with the Constitution, it also advances, to some degree, an incentive to lie and cover up conduct that may be construed as illegal itself.

A major weakness of the exclusionary rule is that its use is too diluted to effectively reduce all unwanted police lies,[239] some of which relate directly to whether or not police violated someone's constitutional rights, others of which suggest that the defendant "did it" when, in fact, he did not. As explained in Sections II.A. and B., the Supreme Court does not apply the exclusionary rule strictly, even when police admittedly lie to secure a search or arrest warrant. And the Court has held that the exclusionary rule is inapposite even when police lie about why they conducted an otherwise reasonable search or seizure.[240] Decisions like *Franks* and *Whren* encourage truth-distorting police lies when coupled with the Court's current application of the exclusionary rule. At the same time that the exclusionary rule is too weak in dealing with lies like those in *Franks* and *Whren*, it is too inflexible in other instances, resulting in the exclusion of evidence necessary to convict the factually guilty.[241]

Perhaps because of the potentially harsh result of releasing such individuals, in some cases, police unilaterally decide that lying is justified to avoid application of the rule.[242] When police lie to avoid the exclusionary rule, they decide who is entitled to constitutional protection without judicial or legislative checks, undermining the aims of the Framers. Because there is no safeguard against the whims or unconscious biases of the police, they may single out the poor, black Americans, or other minorities for unconstitutional invasions. "Police in major U.S. cities stop

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239. Christopher Slobogin appears to agree. *See* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363.

240. Whren v. United States, 517 U.S. 806 (1996).

241. This is akin to the Supreme Court's conclusion in *Hudson v. Michigan*, 547 U.S. 586 (2006).

242. Dallin Oaks believed that illegal searches and seizures were "concentrated in a few types of crimes, notably weapons and narcotics offenses." Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 667, 681 (1969–1970) (citing court statistics showing that in Chicago and the District of Columbia in 1969–70, "search and seizure issues account for an overwhelming proportion" of motions to suppress and that most were gun and drug cases). *See also* Orfield, *Deterrence, Perjury, and the Heater Factor*, *supra* note 8, at 118 (1992) (reporting results of an empirical survey of members of Chicago's criminal justice system in which prosecutors, judges and defense lawyers indicated "that police testimony that would not pass muster in small cases suddenly becomes believable in a big case").

and question more than a million people each year[.]"[243] In 2008, police in New York City stopped 531,159 people.[244] Fifty-one percent of those stopped were black; thirty-two percent were Hispanic; eleven percent were white.[245] Police exercise individual discretion over whether and whom to stop, what questions to ask, and whether to search a bag, backpack, purse, or the person.[246]

Judges too have been known to strain facts or credibility determinations when they perceive that an unfair outcome will result if the exclusionary rule were applied. In such instances, judges sometimes give the benefit of the doubt to the government, even in the face of significant evidence of police lies or other government misconduct.[247] In short, the anecdotal evidence suggests that police lie and that courts look the other way when application of the rule would acquit suspects whom the police believe are guilty, at least when the charges are serious.[248]

Because the exclusionary rule is simultaneously too weak and too strong, the rule should be modified so that it continues to deter unconstitutional conduct but so that it also makes truth-distorting police lies very costly. It is time to modify the rule because the Court's current application is ineffective at deterring "bad" police lies. The current rule imposes both an inadequate sanction to deter truth-distorting lies and too harsh a sanction in cases in which the police candidly admit that they may have intruded on a suspect's constitutional rights to obtain evidence of the suspect's guilt.

C. How the Exclusionary Rule Should be Modified for Truth

Evidence obtained as a result of truth-distorting police lies should be systematically excluded from use at a defendant's trial. There should be no wavering and no balancing of interests. When a fact-finder (trial judge or jury) determines that substantial evidence[249] indicates that the police have lied to acquire evidence or to conceal the way they gathered it, whether the lies are told in an affidavit, in a police report, in informal communications with other officers or potential witnesses, at a hearing, or in any other court proceeding, all evidence proximately connected to that truth-distortion should be excluded. Customizing the current exclusionary rule

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243. Colleen Long, *Big-City Police Frisk 1 Million a Year; Results Are Disputed*, VIRGINIAN-PILOT (Norfolk, Va.), Oct. 8, 2009, at A9.

244. *Id.*

245. *Id.*

246. *Id.*

247. In Orfield's study of Chicago, interviewees asserted that in serious cases, especially those with victims, judges are more likely to find a way to avoid the suppression of evidence. Orfield, *Deterrence, Perjury, and the Heater Factor*, *supra* note 8, at 115. Those same respondents explained that while police are more *likely* to lie in "big," significant cases, judges are more likely to credit their testimony in the big cases. *Id.* at 118.

248. *See generally id.*

249. While difficult to quantify, in this Article, "substantial evidence" means more than a hunch or suspicion but *less* than a finding by a preponderance of the evidence.

to deal with cases in which fact finders strongly suspect that police are lying will give the exclusionary rule a potency to deter police from telling lies that distort factual innocence and that conceal violations of citizens' constitutional rights, a potency that the current rule lacks and a strength that more accurately reflects the corrosive nature of police dishonesty. The proposed modification will shift the benefit of the doubt to the innocent defendant, reducing the likelihood of wrongful convictions, and will provide all citizens with greater protection against rogue government actors. It will increase the penalties of the exclusionary rule when police knowingly distort the factual happenings in a case. This increase in sanction is justified because it will tend to reduce the number of truth-distorting lies, and that reduction should, in turn, reduce police misconduct, which routinely prompts lies. In addition to adding deterrence value, the proposed modification will return a respect for honesty and integrity to the criminal justice system.

A stronger, more reliable deterrent for truth-distorting police lies is necessary because police officers are such an integral part of every criminal prosecution. If police cannot be trusted to tell the truth, convictions resting on evidence gathered by them cannot be trusted either. If the Supreme Court is really committed to truth-seeking and intolerant of perjury, the proposed modification will better support these values. It will also balance the scales of justice so that the government, (not just defendants), experiences consequences when it distorts truth.[250]

At the same time this Article proposes a stronger exclusionary rule for cases in which police are suspected of telling truth-distorting lies, it argues that the exclusionary rule should be modified to lessen its impact on cases in which the police tell the truth about the lies they tell to a suspect (or others) in a good-faith effort to obtain evidence of the suspect's guilt and when they report honestly (whether in official or unofficial police reports, affidavits, or in court proceedings) about their questionable conduct. When the police "come clean" about their lies and misdeeds, the trial judge (and, if he or she does not rule for exclusion, a citizen jury) should use a balancing approach to decide whether the ends of justice in the particular case validated the police lies or the potentially unconstitutional police behaviors.

Thus, as long as police are honest about their behavior, their statements, and the suspect's behavior and statements, the modified exclusionary rule proposed here

250. In addition to the threat of a perjury prosecution that every witness faces if he or she lies under oath, criminal defendants (at least in federal court) are regularly sentenced to additional time in prison for "obstructing justice," when they are convicted and the sentencing judge finds, by a preponderance of evidence, that they lied during their trial testimony. *See* U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2009) (providing for a two-level increase in offense level when a defendant willfully obstructs justice during the course of the investigation, prosecution, or sentencing). In addition, defendants can be criminally prosecuted for lying to officers during the officers' investigation of the defendant's alleged crimes. *See* 18 U.S.C. § 1001 (2006) (criminalizing the knowing and willful falsification of a material fact "in any matter within the jurisdiction of the . . . Government of the United States").

will not require the exclusion of evidence. A judge will exclude evidence only if she weighs the interests of the government's questionable conduct, compares it with the defendant's interests in liberty, privacy, and fair trial, and concludes that, on balance, the breach of constitutional rights or the risk of wrongful conviction is too great to admit the evidence. Nevertheless, even if the judge balances the competing interests and decides that the interests weigh in favor of the government, she should expressly instruct a jury to re-weigh those same interests and decide whether the defendant should be acquitted on the basis of governmental dishonesty. If both judge and jury decide that fairness favors admitting the evidence, the trial will proceed. Should either judge or jury find that the police over-reached and unilaterally decided guilt, or went too far in trampling constitutional rights, all evidence causally connected to the police dishonesty will be excluded from the case. If the government lacks other evidence to prove its case, the case against the defendant will be summarily dismissed.

Because the available anecdotal evidence suggests that judges may already be secretly (or subconsciously) using such a balancing approach, and straining to admit evidence that the current exclusionary rule requires trial courts to exclude, the proposed modification is preferable because it makes the process more transparent, thereby adding integrity to the system. Given that the exclusionary rule is a Court-created remedy, applied only when the balance of interests weighs in favor of its application,[251] there is no mandate to exclude evidence, and when evidence is excluded, the message should be clear about why it was.[252]

The proposed rule favors the government. Even when the police have mistakenly violated a suspect's rights or, in the heat of the chase, gone too far in obtaining evidence of guilt, the evidence will still be admitted in deserving cases. At the same time, the proposed rule offers more protection to defendants and the public. It

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251. *See* Hudson v. Michigan, 547 U.S. 586, 594 (2006) (indicating that "the exclusionary rule has never been applied except where its deterrence benefits outweigh its substantial social costs") (internal quotation marks omitted).

252. Although the Court does not expressly say that it conducts this same weighing analysis when deciding whether to exclude statements obtained by police in violation of *Miranda*, in fact, the Court uses a similar assessment in that context too. *See, e.g.*, James v. Illinois, 493 U.S. 307, 322 (1990) (Kennedy, J., dissenting) (arguing that a defendant's statement obtained in violation of *Miranda* should be available as impeachment evidence when a defense witness testifies in direct contradiction to the defendant's statement, noting that "the exclusionary rule does not apply where the interest in pursuing truth or other important values outweighs any deterrence of unlawful conduct"); Oregon v. Elstad, 470 U.S. 298, 318 (1985) (holding that when police violate *Miranda* and obtain a confession from a suspect, a later confession from the same suspect that follows a proper *Miranda* warning need not necessarily be excluded pursuant to the exclusionary rule and that a finder of fact must consider "the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of [the second set of] statements"). Only when the totality of the circumstances demonstrate that a defendant was coerced to give a statement does the Court apply a per se rule of exclusion. *See* New Jersey v. Portash, 440 U.S. 450, 459 (1979) (explaining that balancing of interests is impermissible when the testimony at issue is given in response to a grant of legislative immunity); Mincey v. Arizona, 437 U.S. 385, 401–02 (1978) (explaining that a defendant's involuntary statements cannot be used in any way against a defendant at trial).

increases incentives for the trial judge to label suspected lies as lies. When a judge rules that the police have lied and that the evidence must be excluded, no double jeopardy will attach. Thus, if a judge believes that a reasonable jury is likely to be offended by the apparent police dishonesty or extreme misconduct, he or she will have a greater incentive to exclude evidence *before* a trial jury is impaneled and jeopardy attaches. Following a judge's finding of potential police dishonesty, the government will be on notice that it cannot proceed unless it finds additional, untainted evidence of the defendant's illegal conduct. In close cases, where a jury is impaneled and sworn and then it finds lies or undue and unconstitutional conduct by the police, jeopardy will attach, risking the likelihood that the government will be prevented from re-trying the defendant, even if additional or overwhelming evidence of guilt is uncovered.

The proposed approach is consistent with the majority of Supreme Court Justices' views regarding the primary goal of the exclusionary rule—deterrence.[253] And it better serves the other, less popular, view of a minority of the Justices—that the exclusionary rule should also encourage government and judicial integrity.[254] The majority justifies its current balancing approach to the exclusionary rule and the categorical exceptions it has created to the rule by pointing to "the substantial costs" that application of the rule can cause.[255] "The exclusionary rule generates 'substantial social costs,' . . . which sometimes include setting the guilty free and the dangerous at large. We have . . . repeatedly emphasized that the rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application . . . ."[256]

In short, the Court has carved out an exception to the general rule of excluding evidence obtained in violation of the Constitution when: (1) the costs of exclusion are great because they undermine legitimate law enforcement objectives—i.e., convicting the guilty, (2) the costs are great because they undermine the imperative of our justice system—to uncover the truth, or (3) both objectives are undermined.

The second cost—distorting truth—has been cited repeatedly by the Court when it seeks to justify evidence of a defendant's lack of credibility. For instance, in *Harris v. New York*,[257] the Court held that a prosecutor can introduce statements obtained in violation of *Miranda* to impeach a testifying defendant because to prevent the prosecutor from using such statements would turn *Miranda* into a

253. *See* Herring v. United States, 129 S. Ct. 695, 698 (2009) (Chief Justice Roberts wrote the majority opinion in which Justices Scalia, Kennedy, Thomas and Alito joined and declared that application of the exclusionary rule is not automatic but "turns on the culpability of the police and the potential of exclusion to deter . . . .").

254. *See* Herring, 129 S. Ct. at 707 (Ginsburg, J., dissenting) (noting that the exclusionary rule not only deters but also "serves other important purposes" including allowing the judiciary "to avoid the taint of partnership in official lawlessness" and assures the people of the United States that "the government would not profit from its lawless behavior" (quotation marks omitted)).

255. Hudson v. Michigan, 547 U.S. 586, 591 (2006).

256. *Id.* (internal citations omitted; first brackets in original).

257. 401 U.S. 222 (1971).

"shield" providing "a license to use perjury by way of a defense[.]"[258] Similarly, the Court relied on a truth-finding rationale in *Oregon v. Hass*,[259] in holding that statements obtained in violation of a suspect's unequivocal request for counsel pursuant to *Miranda* were also permissible ammunition for impeachment, noting: "We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution."[260]

The proposed rule, which would apply only in cases of suspected police dishonesty, will do a better job than the current exclusionary rule of furthering the public policies underlying the rule—deterring police misconduct and promoting truth-telling in all criminal cases.[261] It offers quicker, stronger, and more definitive police deterrence benefits. When and if the police are found to have falsified evidence, which is causally connected to a criminal matter, the evidence would be excluded and the defendant released. There will be no second look to evaluate whether the lies were important ones or whether they might not have affected the outcome of the case. Through consistent application of this bright-line rule, which implements real and certain consequences, the police will come to understand that truth-distorting lies equal release of the accused and dismissal of the case. This dependable rule not only will teach police the importance of telling the truth, but also will encourage them, in close or doubtful cases, to corroborate evidence of guilt. Because in close cases, the judge and jury will give the benefit of the doubt to the defendant, officers will have strong incentives to demonstrate that there is significant evidence of guilt from numerous and varied sources and that wrongful police influence could not have played a role in tainting the evidence.

The proposed rule provides strong deterrence against police dishonesty. And it honors the Court's justifications for making exceptions to the general rule. The Court denies application of the exclusionary rule when it deems the costs of excluding evidence too great on the "truth-seeking" imperative of our criminal justice process, and when legitimate law enforcement goals would be thwarted.[262] The proposed rule maximizes introduction of evidence that furthers truth-finding

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258. *Id.* at 226.

259. 420 U.S. 714 (1975).

260. *Id.* at 722.

261. Although a majority of the Court appears to apply the exclusionary rule on the sole ground that it serves a necessary deterrence role, others on the Court adhere to other justifications attributed to the rule by the Court in years past, including protection of judicial integrity and discouraging law breaking by those who are tasked with upholding the laws. *See* Herring v. United States, 129 S. Ct. 695, 707 (2009) (Ginsburg, J., dissenting) ("[T]he rule also serves other important purposes: It 'enabl[es] the judiciary to avoid the taint of partnership in official lawlessness,' and it 'assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.'") (quoting United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting)); Mapp v. Ohio, 367 U.S. 643, 659 (1961) (recognizing "judicial integrity" as a consideration in applying the exclusionary rule to the states and noting that if the government "becomes a lawbreaker, it breeds contempt for law"). The proposed rule furthers all of these goals.

262. *Herring*, 129 S. Ct. at 701.

and conviction of the guilty and minimizes the introduction of evidence that undermines either ideal.

Application of the modified exclusionary rule will resemble application of the current exclusionary rule. In the first instance, a trial-level judge will be asked to evaluate the veracity of officers' and others' testimony and evidence to determine what happened and whether a defendant's rights were violated. But the new rule calls for a different standard of proof when the credibility of officers is called into question. It also provides for more transparency when a judge finds that the police have told lies in furtherance of identifying the guilty and proving his or her guilt.

If the judge concludes that there is significant evidence that the police have told truth-distorting lies, she should exclude the evidence and dismiss the case against the defendant. In contrast, if the judge finds that the police told truth-furthering lies, she should weigh the cost of those lies (to the integrity of the system of justice and the public's confidence in that system) and compare those costs with the benefits that resulted from telling them. Has a dangerous and culpable person been identified through truth-furthering lies? The judge will make a formal finding on whether the ends of justice (the apprehension and/or acquisition of evidence) justify the means (the lies), given the specific circumstances of the case. If she finds that the evidence is weak or that the danger to society did not warrant the lies the police told, she will order the evidence excluded. If she finds that justice was served by the lies, the defendant can reargue her case to the jury. The judge does not need to resort to the doctrine of "attenuation" or other exceptions or explanations for her decision on exclusion. She will simply weigh the pros and cons and explain forthrightly in the record why, on balance, she found as she did. But she will conduct this balancing process knowing that a citizen jury will re-evaluate her assessment and with the understanding that her assessment is not accompanied by double jeopardy consequences.

On appeal to the higher courts, the trial judge's factual findings will be reviewed for clear error,[263] and her conclusions regarding the balance of interests will be reviewed using a *de novo* standard.[264] Significantly, however, under the proposed modification to the exclusionary rule, the trial judge's findings (both factual and balancing) will first be subject to *de novo* review by a citizen jury. Before any trial on guilt is begun and before any appeal can be taken to a higher court, a jury will consider the exclusionary issue.

If a citizen jury finds that the police told truth-distorting lies, (even if the judge

263. Maine v. Taylor, 477 U.S. 131, 145 (1986) (holding that the clear error standard applies to district court's non-guilt factual findings).

264. United States v. Mayer, 560 F.3d 948, 956 (9th Cir. 2009) (indicating that *de novo* review applies to district court's denial of motion to dismiss).

did not find truth-distortion), the defendant will be acquitted.[265] If the jury finds that the police told lies in a good-faith effort to "get the bad guy," they will be asked to re-weigh the justifications for the lies and determine whether the ends of justice supported the lie-telling.

The jury might be instructed as follows on this point:

> The police are not altogether prohibited from using deception during their criminal investigations, including during interviews of persons suspected of criminal activity. However, some police deception is harmful to our system of justice in that it distorts the truth about events and circumstances, and that type of deception may result in errors about whether this defendant committed the crime with which he is charged. In other words, some lies are told by law enforcement officers to uncover the truth about a person's involvement in criminal wrongdoing. However, sometimes police deception impairs our confidence in the voluntariness of a suspect's statement or in a suspect's actual guilt.
>
> It is your job as jury to consider whether the police engaged in any deception in this case. You must make a specific finding on this issue, indicating: Yes, the police used deception; or No, the police did not use deception.
>
> If and only if you find that the police engaged in deception during the investigation of this case, you should answer a second question: Were the police justified in using the deception that they used, given the specific circumstances of this case? You must choose one of two answers: 1) Although the police used deception, the deception was justified in this case; or 2) The police's use of deception in this case was not justified.

If the jury concludes that the ends of justice were not furthered by the police's deception, the evidence obtained as a result of the police's lies will be excluded from the trial of the case. The government can proceed with its case only if it has sufficient other evidence to obtain a conviction.

The only exception to this new, transparent balancing process would be for cases in which it appears that evidence was obtained from a suspect through coercion. The Court's blanket prohibition for coerced and involuntary statements would apply if either judge or jury found that evidence was obtained from a defendant through compulsion.[266]

Unlike the present proposal, which argues for a significant change in how the exclusionary rule is applied, Christopher Slobogin has argued that the exclusionary

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265. It is beyond the scope of this paper to consider whether a panel of jurors will be impaneled to hear multiple cases involving alleged police misconduct or whether a jury can appropriately hear these issues and later hear evidence regarding the defendant's guilt.

266. Although it exceeds the scope of this paper, in promoting truth-finding, a notable and significant distinction could be drawn between coercive techniques that promise leniency versus those that threaten the opposite.

rule should be abolished[267] and that money damages should be substituted as the sanction for Fourth Amendment violations.[268] Slobogin's proposal is broader than the modification proposed here because it reaches all breaches of the Fourth Amendment, not just incidents in which police tell lies.[269] But his proposal would encompass such cases; therefore, the proposal deserves addressing.[270]

In short, it is unlikely that the damages actions that he proposes will more effectively deter police lies while simultaneously serving the other, core values of our system. In his article arguing that "[t]he exclusionary rule is significantly flawed as a deterrent device, especially when compared to more direct sanctions on the police and police departments[,]"[271] Professor Slobogin relies on behavioral theory in asserting that the exclusionary rule is flawed because it "is both a weak punishment and a weak reward."[272] He later adds, "[t]he rule *is* a punishment, but only minimally so from the behavioral perspective."[273]

Slobogin asserts that one key defect in the exclusionary rule is that it is not applied in "the vast majority of illegal searches and seizures"[274] and when it otherwise might be applied, "exclusion's punch is reduced considerably by police facility in lying about their actions, the hindsight biasing effect of judicial knowledge that criminal evidence was found, and judicial reticence in excluding dispositive evidence."[275] Finally, Slobogin prefers damages rather than the current exclusionary rule because "[e]ven when exclusion results, it is not a particularly strong punishment."[276] One of the main reasons, he says, is that "the primary goal of officers in the field . . . is to get a 'collar.'"[277] The police view the successful prosecution of the collar as the prosecutor's job.[278]

The modified exclusionary rule proposed here performs considerably better against Slobogin's criticisms than does the Court's current version of the rule. The proposal would provide a quick and powerful deterrent that would bar, without

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267. Slobogin makes an exception "when police flagrantly abridge Fourth Amendment rights or illegally seize private papers." Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, *supra* note 245, at 366. *But see* Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119 (2003) (defending the benefits of the rule while acknowledging its weaknesses).

268. Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, *supra* note 239, at 366.

269. His proposal is also narrower than the one proposed here in that it is directed to the Fourth Amendment, not violations of the Fifth and Sixth Amendments.

270. Although Professor Slobogin's proposal deserves recognition here, this Article in no way seeks to respond to every attribute or potential shortcoming of his proposal. It does hope to use the article as evidence that this proposal is a stronger candidate for balance and deterrence than is the Court's current version of the exclusionary rule.

271. Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, *supra* note 239, at 365.

272. *Id.* at 373.

273. *Id.*

274. *Id.* at 374.

275. *Id.* at 376 (citations omitted).

276. Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, *supra* note 239, at 376.

277. *Id.* at 377.

278. *Id.* at 378.

exception, police who tell truth-distorting lies in an effort to "get the bad guy." Unless police are satisfied with an arrest accompanied by no punitive consequences to the arrestee, the proposed rule would encourage them to think carefully before telling lies about what they did or said and the conduct and words of the defendant. If cross-examinations or conflicting evidence suggest that officers are lying, judge and jury would be required to acquit the defendant. This quick and serious consequence provides a much stronger deterrent against police lies than the current rule.

The second theory on which Slobogin relies in arguing for damages in lieu of the exclusionary rule is a "legitimacy-compliance" theory.[279] In Slobogin's recap of this theory, which was developed by Tom Tyler, he says that "deterrence is not the only, and may not be the primary, reason people follow legal mandates."[280] Instead, this theory suggests that "people comply with the law for a complex set of reasons that include cost-benefit analysis . . . the norms of peers, one's own norms, and the perceived legitimacy of the authorities."[281] On this point too, the modified exclusionary rule proposed here would seem to perform better than the Court's current rule (and probably better than abolition of the rule too).

The proposed rule would allow officers to conduct a cost-benefit analysis and decide whether the risk of exclusion was too great or whether, to "catch the bad guy," extreme measures, including possibly unconstitutional behaviors, were necessary. Importantly, officers then would have an opportunity to explain the justifications for their behavior to judge and jury, arguing why they thought the ends of justice warranted the extreme action they took. In Fourth Amendment parlance, judge and jury would decide whether the search or seizure was "reasonable" given the importance of pursuing the intrusion. If the judge and jury agree that the officer's deception was justified, the evidence survives. In this way, not only can officers conduct a cost-benefit analysis, but also "the people" are protected from police overreaching by judicial oversight and, further, by supervision of the citizenry, advancing core goals of the Bill of Rights.

Accordingly, this Article proposes a solution to reduce the flaws in the current exclusionary rule, which Professor Slobogin has identified, but it retains operation of *an* exclusionary rule, which appears to have at least some deterrent value as is. It also relies on judges and ultimately juries to ensure that individuals are protected from overzealous police and other government actors who may not adequately protect individual rights. This additional oversight from judges and juries furthers the Framers' goals of protecting "the people" from the unbridled discretion of police officers, who are restricted to searching and seizing only when it is "reasonable," and allows a direct and transparent jury check on government

279. *Id.* at 381–82.

280. *Id.* at 382.

281. Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, *supra* note 239, at 382.

overreaching during criminal investigations.

The most controversial circumstances for application of the proposed, modified exclusionary rule will probably occur when an officer knows he does not have probable cause to search for evidence; yet, he decides to search anyway, and his search uncovers damning evidence of a defendant's serious criminal conduct. This probably happened, for instance, during the investigation of the death of Nicole Brown Simpson when Los Angeles police officers jumped a fence and entered O.J. Simpson's estate without a warrant. The officers later testified that they entered only out of concern for the safety of people inside the estate.[282]

If the presiding judge in the O.J. case had strongly suspected the officers' testimony to be untruthful, the rule proposed here would require exclusion of the bloody glove found during the Fourth Amendment search. But if the police had honestly explained what they did and why they did it, the proposed rule would allow the judge, and ultimately a jury, to balance the competing interests and decide whether the interests of justice weighed in favor of allowing the prosecutor to use the evidence at trial. A similar result would follow in the "black box" case highlighted in the introduction to this Article.[283] If the police had testified honestly about how they uncovered the cocaine and why they suspected the defendant of the corresponding drug crimes, the judge and, if necessary, a jury, could have considered the facts of the case and determined whether the benefits of apprehending that particular defendant for that specific criminal violation justified the officers' actions, even if those actions violated the Fourth Amendment.

CONCLUSION

Although we may never know how many law enforcement officers lie to "get the bad guy" or to conceal their own misconduct or that of other government agents, we know that police lies have plagued our criminal justice system for years, casting doubt on the validity of convictions and undermining jurors' and others' faith in the system's integrity. Prosecutors, defense lawyers, and judges appear to agree that police sometimes lie, even under oath.

Although some police lies undermine the core aims of our system—to convict the guilty and exonerate the innocent—other police lies support these goals. In other words, there are some police lies that expose the truth about a defendant's factual guilt. Lies told by police as part of an undercover ruse, which expose otherwise undetectable criminal conduct, are an example. Police lies like these, which further the truth about factual guilt, should be openly and expressly permitted. But police lies that distort the truth about a suspect's conduct or innocence, and police lies that conceal wrongdoing and unconstitutional behavior by the police, must be more effectively discouraged.

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282. Kenneth B. Noble, *Ruling Aids Prosecution of Simpson*, N.Y. TIMES, Sept. 20, 1994, at A16.

283. *See supra* pp. 1–2.

Although still debated, most appear to agree that the exclusionary rule effectively discourages some unconstitutional police conduct. Nevertheless, as currently applied by the United States Supreme Court, the exclusionary rule remains too weak. In fact, there is evidence to suggest that in the suppression context, the current exclusionary rule encourage police to lie. Because truth-distorting police lies are destructive of the core aims of a fair and effective criminal justice system, the exclusionary rule should be modified for cases hinging on police credibility.