Should the Police Use Trickery and Deceit in Investigations and Interrogations?

Some Police Deceit and Trickery Is Legitimate

Advocate: Christopher Slobogin, Professor of Law and Alumni Research Scholar, University of Florida College of Law.

Source: "Deceit, Pretext, and Trickery: Investigative Lies by the Police," *Oregon Law Review*, Volume 76 (Winter 1997).

Lying by Police Should Be Generally Prohibited

Advocate: Margaret L. Paris, Associate Professor, University of Oregon School of Law.

Source: "Lying to Ourselves," *Oregon Law Review*, Volume 76 (Winter 1997).

There are some clear boundaries that police investigations are not supposed to cross. For example, police cannot "entrap" suspects into committing a crime: police can set up a sting operation, in which they pose as drug dealers or prostitutes and arrest those who seek them out; but they cannot seek out citizens and entice them into illegal acts. An undercover officer cannot offer a citizen a thousand dollars to make a drug delivery, and then arrest the citizen for drug dealing: in that case, the idea for the criminal act comes from the police, and there is no reason to suppose that the entrapped citizen was eager to become a drug dealer. And of course there are other restrictions: the police cannot legitimately beat a confession out of you, or obtain a confession by threats, or refuse to allow a suspect access to his/her lawyer, or subject the suspect to such severe and prolonged questioning that the suspect becomes psychologically disoriented and physically exhausted. But beyond such obviously coercive measures, the lines governing legitimate police interrogation techniques become rather blurred, and *almost* anything goes. As Jerome H. Skolnick and Richard A. Leo note:

> Contemporary police interrogation is routinely deceptive. As it is taught and practiced today, interrogation is shot through with deception. Police are instructed to, are authorized to—and do—trick, lie, and cajole to elicit so-called "voluntary" confessions.

Among the routine deceptive techniques practiced during interrogation are misrepresentation of the seriousness of an offense (a suspect might be told he is being charged with murder, when in fact the crime victim's injuries were not lethal), making false promises to the defendant (such as promises of leniency), and pretending to have evidence (such as fingerprints or the confessions of other members of the group). Are such deceptive techniques legitimate methods of police investigation? Should there be tighter restrictions on police methods of interrogation?

Christopher Slobogin agrees with a general prohibition against lying, but he believes that deception by police—though it causes some serious harms—can be justified as a special exception: lies to publicly identified enemies are legitimate, and criminals are enemies of society. But this requires, Slobogin insists, that the process be public, and that those suspected of criminal behavior recognize that the police view them as enemies. Margaret L. Paris welcomes Slobogin's concern over the proper limits of deceptive police interrogation, but believes that he does not go far enough. Because of the destructive consequences of police deception, Paris would allow deceptive interrogations only in the most extreme and extraordinary circumstances: when such deception is the only possible means of saving lives.

Points to Ponder

- One recommendation for dealing with the problem of deceptive interrogation techniques is to videotape all interrogation sessions, so that the jury could judge whether confessions were genuine, and a judge could decide whether a confession was obtained under coercive circumstances (and so should not be admitted as evidence). Should videotaping be required? Would that solve the problem?
- In one of the most common forms of deception employed by police interrogators, the interrogator pretends to be deeply concerned for the welfare of the suspect, and tries to convince the suspect—under the guise of concerned friendship—that confession would be of great benefit to the suspect ("the District Attorney would think more kindly of you if you could explain why you were justified in committing the crime and make people understand your situation," etc.). Under Slobogin's model of what counts as acceptable deceptive interrogation, would that sort of deceptive practice be prohibited?

- A common concern about the practice of police deception in interrogatio is that it is difficult to prevent the further spread of such deception: If we become accustomed to lying and faking evidence in interrogations, would that make it too easy to take the next step and actually fabricate evidence (if we're "certain" that this suspect is guilty); or perhaps go from lying to t suspect to lying to a jury during the trial? Is that a realistic concern?
- Paris asserts that "It harms a society when the officers who enforce its law behave like the worst used car salesmen." Paris does not note any specific harms that are caused to society from such police behavior; would it be possible to list such specific harms?

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

Christopher Slobogin

A lie is a statement meant to deceive. Many police, like many other people, lie occasionally, and some police, like some other people, lie routinely and pervasively. Police lie to protect innocent victims, as in hostage situations, and they tell "placebo lies" to assure or placate worried citizens. They tell lies to project nonexistent authority, and they lie to suspects in the hopes of gathering evidence of crime. They also lie under oath, to convict the guilty, protect the guilty, or frame the innocent.

Some of these lies are justifiable. Some are reprehensible. Lying under oath is perjury and thus rarely permissible. On the other hand, lying that is necessary to save a life may not only be acceptable but is generally applaud (even if it constitutes perjury). Mo types of police lies are of murk morality, however. In particular, co siderable disagreement exists over t permissibility of lying to suspects a means of gathering evidence. If t police want to uncover a conspira search a house, or obtain a confessio may they lie in an effort to do so? . .

The Nature of Investigative Lies and Why They Occur

Of the many varieties of lies police te the most prevalent type is probably t lie told to catch a criminal, if o because apprehending perpetrators crime is a primary job of the police.

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course, lies to catch criminals can be directed at nonsuspects whom the police believe have useful information. Most, however, are aimed at the suspects themselves and occur in one of three contexts: undercover work, searches and seizures, or interrogation. In each of these three contexts, the following discussion borrows from the sociological literature in exploring the nature and causes of police lies and then briefly reviews the law's (usually accommodating) response to them.

Undercover Work

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

Law enforcement's justification for this type of deception is twofold. First, certain types of crime—for instance, so-called "victimless crime," fraud, narcotics sales, organized crime, and terrorism—are considered difficult to detect or prevent through other means. Second, independently from solving a particular crime, undercover agents and informants gather general information about criminal activity and the key figures in it that is thought to be otherwise inaccessible. These objectives have led every major police department to devote significant resources to undercover work by police officers and by "snitches" recruited to work for the police.

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

The message to the police is that, as far as the law is concerned, they have virtual carte blanche to engage in deceptive undercover work.

Searches and Seizures

Lying meant to effectuate a search or a seizure is routine practice for many police officers. Such lies come in at least two varieties. The first involves lying about police authority to conduct the search or seizure. For instance, police may state that they do not need a warrant when they know the law requires they have one, assert they have a warrant when they do not, or state they can get a warrant when in fact they know they cannot. This last ruse, designed to encourage acquiescence from an otherwise unwilling person, is one among many deceitful ways of obtaining consent; police have also been known, for instance, to get motorists to sign a consent form for a car search by misrepresenting the form as a ticket. Finally, the police may simply make up a reason for conducting a search and seizure, such as when they fabricate a traffic violation as a ground for stopping a car.

The second type of lie misrepresents the police's purpose, not the police's authority. These so-called "pretextual" actions arise in a number of contexts. For instance, the police might ask for permission to enter a house for some innocuous purpose (such as investigation of a nonexistent burglary), when their actual intent is to conduct a search of its interior once inside. A similar, extremely common ruse is an effort to get a better look at a car's occupants and contents by stopping the car for a traffic violation, one which is not made up (as described in the preceding paragraph) but which is never or rarely enforced except in pretextual situations. In the same pretextual vein is a lie to get a suspect to "come quietly" rather than risk a violent arrest or a police "suggestion" that a person have a "short chat" with officers, whose real intentions are to seize the individual for a much longer period of time. In all of these situations, the police have the technical legal authority to engage in the act based on consent or some minor violation of the law but are dissembling their purpose.

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

This assertion is borne out by th observations of sociologists Thom Barker and David Carter, who al conclude that many police endorse "end justifies the means" approach deception. One statement they rep seems particularly illuminative on t score. Told that his description police methods for obtaining cons sounded like "a lot of lies," one offi responded: "It is not police lying; i an art. After all the criminal has c stitutional protection. He can through his teeth. Why not us? Wha fair is fair."

The sentiment that "it takes a to catch a liar" apparently reson with many police officers. Particul interesting is the officer's referenc police lying as an "art," which d tails with Skolnick's observation police see fabrication as part of craft. It suggests that, in this inves tive context, police do not think are "lying" at all; they are merely ing a role.

In short, police view dec searches and seizures as a profess investigative tool—the moral eq lent to undercover investig While courts presumably dis with this stance when the lie about police authority (because claimed authority did not exist the Fourth Amendment is viol most have put their imprimatur much larger category of pret searches and seizures. After inti it would do so on more than one occasion, the Supreme Court itself recently affirmed that the typical pretextual police action does not violate the U.S. Constitution. In Whren v. United States, which explicitly upheld a concededly pretextual traffic stop, the Court stressed that the subjective mental state of the police is irrelevant to Fourth Amendment analysis in most situations. As a result of decisions like these, the police know that as long as they have a legal explanation for their action, any duly limited entry, stop or seizure will usually be considered constitutional regardless of the hidden agenda.

Interrogation

As with undercover work, fabrication in the interrogation context is openly acknowledged by the police today. Indeed, the leading interrogation manual, authored by Inbau, Reid, and Buckley, continues to preach vigorously the merits of deceptive interrogation techniques, despite the Supreme Court's implicit criticism of one of its earlier incarnations in Miranda v. Arizona. The techniques they espouse include: (1) showing fake sympathy for the suspect by becoming his "friend" (e.g., by falsely telling a person suspected of rape that the interrogator himself had "roughed it up" with a girl in an attempt to have intercourse with her); (2) reducing feelings of guilt through lies (e.g., by telling a person suspected of killing his wife that he was not as "lucky" as the interrogator, who had recently been on the verge of seriously harming his nagging wife when the doorbell rang); (3) exaggerating the crime in an effort to prod the suspect into negotiating or in hopes of obtaining a denial which will indirectly inculpate the suspect (e.g., accusing the suspect of stealing $40,000 when only $20,000 was involved); (4) lying that suggests the futility of denying the truth (e.g., statements that sufficient evidence already exists to convict when it does not); and (5) playing one codefendant against another (e.g., leading one to believe the other has confessed when no confession has occurred).

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

As with the other investigative lies discussed, the police believe these techniques are necessary to catch criminals, in this situation because of the suspect's natural reluctance to respond to direct questions and the general prohibition on physically coercive interrogation practices. . . .

Which Police Lies Are O.K.?

. . . In recent times, probably the best known treatment of lying and its justification is the work by the moral philosopher Sissela Bok. Because her framework for evaluating deception throws considerable light on the nature and moral viability of police lying, this Article will rely primarily on her work. . . .

Bok's Framework

Bok begins by asserting that lies require a reason. They require a reason because, more so than truth, they have routine deleterious effects on the hearer of the statement, the maker of the statement, and society at large. The duped, she notes, often "feel wronged . . . [and] are wary of new overtures." Their autonomy is also denigrated by the lying, because they have been deprived of the ability "to make choices for themselves according to the most adequate information available." As to the negative effects of lying on those who perpetrate the lie, Bok points out how lying can become an intrinsic part of one's personality: "psychological barriers wear down; lies seem more necessary, less reprehensible; the ability to make moral distinctions can coarsen; the liar's perception of his chances of being caught may warp." Further, others will trust the liar less. Also, "paradoxically, once his word is no longer trusted, he will be left with greatly decreased power—even though a lie often does bring at least a short-term gain in power over those deceived." Finally, lying harms society:

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

. . . Bok next postulates an apparatu for assessing the reasons that migl be given for lying. Her principal asse tion here is that lies that cannot be ju tified publicly are not justifiabl Furthermore, she asserts, the "publi which assesses the lie must be cor posed of "reasonable persons" take from all walks of life, including "tho representing the deceived or othe affected by the lie"; this public asses ment is particularly important whe lying by the government is involve Finally, she develops three steps the reasonable persons should pursue assessing the worth of the lie.

First, those who evaluate the must "look carefully for any alter tives of a non-deceptive nature ava able to the liar." They should or begin to consider excuses for a lie af determining that no truthful stateme would do.

If no such alternatives prese themselves, the second step invol "weighing . . . the moral reasons and against the lie." Bok identi four conceivable justifications lying: (1) preventing harm; (2) prod ing benefit; (3) fairness, which inclu giving people what they deserve, c recting injustice, and simple rever and (4) veracity itself, in the sense t telling a lie may protect the tr However, Bok is very leary of any these justifications, given the ease w which a liar can manipulate these c cepts to justify any lie. Thus, emphasizes that reasonable pers evaluating a lie should "share the spective of the deceived and t affected by lies." They should much more cautious than those with the optimistic perspective of the liar [and] value veracity and accountability more highly than would individual liars or their apologists."

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

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

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

Bok's Lying Scenarios

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

Put in terms of Bok's four possible excuses for lies, lying in a crisis is best seen as a way of preventing harm and to a lesser extent as a means of producing benefit. In contrast, Bok says that the claim that lying to liars is permissible derives primarily from a fairness or "just deserts" excuse. As Bok says, to justify lying simply because the recipient is a liar "would be to make oneself entirely dependent on the character deficiencies in others, and to stoop always to the lowest common denominator in reciprocating lies for lies." Further, of course, we may be wrong about when someone is lying. For this reason, lying to people we think are liars is "likely to invite vast increases in actual deception and to escalate the seriousness of lies told in retaliation. . . . a notion [that] would not stand up well under the test of publicity."

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

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

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

Lying to enemies to prevent ha raises the same types of concerns. the liar, enemies are too readily p ceived. Furthermore, even when e mies are clearly identified, lies to th may be heard by and can dec friends as well, with a consequent s ous loss of trust when the deceptio unveiled. In particular, Bok points that "when a government is know practice deception, the results are s defeating and erosive." Here quotes Hannah Arendt, the as observer of totalitarian states, argues that government deceit the long run results in "the abso refusal to believe in the truth of thing, no matter how well it ma established." Eventually, it des "the sense by which we take our ings in the real world."

Bok does concede, consistent the discussion on lies in a crisis, "whenever it is right to resis assault or a threat by force, it then be allowable to do so by g Thus, says Bok, deceiving a kidn may be justifiable when deceivin mies in business is not.

Moreover, in a passage tha direct implications for police Bok is willing to countenance ly an enemy in one nonemergency tion: when a public declaration o tilities against the alleged ene made. She reasons that:

> Such open declarations le the probability of error an purely personal spite, so lo they are open to questioning

> requests for accountability . . . The more openly and clearly the adversaries, such as criminals, can be pinpointed, and the more justifiable, therefore, the criteria for regarding them as hostile, the more excusable will it be to lie to them if honesty is of no avail.

She goes on to say:

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

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

Bok and the Police

Overall, Bok makes a provocative case against lying in most instances. Except for lying in imminent crises and lying to publicly declared enemies, most lying is to be avoided. Unfortunately, Bok only fleetingly reflects on the applicability of these conclusions to lying by the police. . . . Nonetheless, her analysis is rich in implications for police deceit, and in particular investigative lying. . . .

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

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

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

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

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

A member of the same church condemned the federal government with the words "they're about as underhanded as anybody."

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

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

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

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

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

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

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

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

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

The crisis exception might apply, for instance, when police believe they need information to avert harm to themselves or someone else (e.g., a kidnapping situation). Indeed, given the general maxim about the relationship of force and deception subscribed to by Bok, lying would be permissible in any situation in which the police are authorized to use physical coercion (e.g., lying to get a suspect to "come in quietly"). At the same time, the crisis exception should not be stretched to cover every effort to apprehend criminals who might harm another. Bok, at least, would require some showing of imminent danger to another person's interests before recognizing a crisis. In many cases in which lying to catch a criminal is practiced, police are not even sure their prey is a criminal, much less that harm is imminent.

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

Implementing the Public Identification Predicate

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

The difficulty arises in operat izing the public identification id the investigative context. Of co the legislature, presumably thr public debate, has already iden the conduct that is criminal (a therefore "enemy") conduct. How as suggested in Part II, a public authorizing police to use decept "apprehend criminals" is insuff because it begs the all-important tions of who (as opposed to wh criminal. At the same time, debate about the criminality of p lar individuals would not only be bersome but counterproducti would alert the targets to the fa are under suspicion. The best co mise between these two positio requirement of ex ante review judge, analogous to what occurs warrant process. After explaini conclusion, the rest of this applies it to deception used in cover operations, searches and se and interrogation.

The Case for Judicial Review as a Proxy

One way to avoid the inefficie counterproductiveness of a debate about particular suspe focus the discussion on pa police "practices." This is, in f approach Bok suggests with re use of unmarked police ca

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erts that the propriety of this inves-ative technique should be publicly ated and that it should be permit-d only if a consensus develops in its or. If the technique is eventually pted, not only does the public ate enhance its acceptability, but it ures that "those who still choose to ak the speed laws will be aware of deceptive practice and can decide ther to take their chances or not."

However, in contrast to use of arked police cars, many deceptive ce practices cannot be discussed out reference to what the police w about the target of the practice. public's response to decoy stings, textual stops, or trickery during rrogation is likely to vary greatly ending upon whether these prac-es are used randomly or aimed at ple thought to be guilty. Should the ce be able to pose as door-to-door yclopedia salespeople? The answer ht be yes if they use the ruse to n entry into the house of a person pected of kidnapping children but if they simply go door-to-door to what they can find. Should the ce be able to stop a car for viola-of a minor traffic law that is usu-not enforced to get a peak into the seat or consent to a full search? nswer might be yes if the police ect the car driver of being a drug rier but no if the police stop any ators they "feel like" stopping. uld police be able to lie to some-about finding his fingerprints at scene of the crime to scare him confessing? The answer might be if he's arrested but no if investiga-s with few or no leads come to the rson's house and make the state-nt simply to see how he'll respond.

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

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

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

Furthermore, the involvement of a judge should assure the public that deceit by the executive branch is cabined. The fact that a judge, presumptively divorced from law enforcement, has signed off on a particular use of investigative lying should extinguish or at least significantly diminish any feelings of betrayal. Indeed, its effect might be analogous to the way in which a warrant guarantees the propriety of overt police actions. . . .

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

Distinguishing Passive and Active Undercover Work

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

Passive undercover operations a
those which merely provide peop
with the opportunity to commit tl
crime, without importuning any parti
ular person. Posing on a street corn
as a prostitute waiting for a john is :
example of a passive operation, as
putting out the word that cocaine c
be bought in a particular alley or tl
stolen property can be sold at
specified location. These types of pa
sive-undercover operations can
meaningfully debated in the abstra
should citizens be tempted by pol
posing as prostitutes, drug dealers,
fences? If it were determined, af
such debate, that a certain kind of ba
ing operation is or may be efficacio
any particular operation of that ki
need not be preceded by judic
authorization, since people who ta
the bait are likely to be criminals. L
the use of an unmarked police ca
catch speeders, the only people agai
whom the police intervene are th
they know to be committing cri
Abuse of discretion and the poten
for betraying innocent people :
damaging citizen trust in governm
are minimized.

These potential harms are m
greater, however, when the unc
cover operation takes on an ac
mode by going after a specific ta
or targets thought to be crim
rather than seeking to lure crimi
out of the general population.
propriety of infiltrating a partic
organization or establishing an i
mate relationship with a partic
individual cannot be the subject c
abstract public debate. Moreo
there is no guarantee that the di
impact of such covert deception
be visited only on those who

clearly criminals, making the potential for the discrimination that Bok fears much greater. Thus, where active undercover operations are contemplated, judicial authorization should be obtained. The police should not be able to use such techniques unless the public, in the form of the judge, decides that good reason to do so exists and that more straightforward methods are not likely to work. . . .

Curtailing Pretextual Actions

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

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

Trickery during Interrogation: Pre- and Post-Arrest

. . . In contrast to the typical undercover operation or search and seizure, most interrogation in which deceit is practiced takes place after a person has been taken into custody. It thus follows either an indictment, a judicially issued arrest warrant, or a formal assertion by the police that they believe the interrogated person is a criminal, an assertion they know will be tested in front of a judge within a short timespan. As a result, the public declaration that is the cornerstone of Bok's enemy exception either precedes or hangs over the typical interrogation process, at least if one accepts the notion of the judge acting as the public's proxy. Furthermore, the official identification here is overt. Thus, as Bok would prefer, the person subjected to interrogation is on notice that the police view him or her as an enemy. . . .

In short, under Bok's framework as interpreted in this Article, a good case can be made for the proposition that postarrest trickery is permissible. Because the arrest threshold both limits police deception to openly identified "enemies" and alerts the potential dupe to the adversarial relationship, such trickery is not inherently immoral, at least when, as will often be the case, a colorable claim can be made that direct questions will not obtain the desired information. . . .

Recall, however, that Bok would permit deceit only when a truthful alternative is not available. By the time of formal charging (in contrast to the time between arrest and charging) the state presumably has developed a prima facie case against the defendant

At this point, then, interrogation of any type, with or without trickery, should not be necessary to fulfill the state's objective. If this is so, similar to the outcome under Sixth Amendment law, formal charging should mark a cut-off beyond which investigative lies of any sort are not allowed.

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

A final consideration in det mining what types of deception any, might be permitted during int rogation is the degree of coerci created by the deceptive practi The Supreme Court itself has rec nized that certain types of deceit c render a confession involuntary. E also notes that deception can cre coercive circumstances, particula when it limits knowledge of on alternatives. . . .

Conclusion

A central lesson of Sissela Bo analysis is that, once lying become practice, it is rarely justifiable. Rou deceit coarsens the liar, increases likelihood of exposure, and w exposed, maximizes the loss of tr When the deceptive practice is car out by an agent of the governmen is even more reprehensible, b because the liar wields tremend power and because governm requires trust to be effective. Thus, itations on police lying are justifi and perhaps necessary. . . .

The extrapolation of Bok's an sis developed in this Article sugg that once an individual has b identified as a suspect through public proxy of a judge, noncoer deception in the investigative set is often permissible. On the o hand, in the absence of such identification, or when decep leads the dupe to believe he ha choice but to provide the sou after evidence, investigative lyi wrong and should be prohibited this premise, warrantless "act undercover operations and pretextual police actions are improper, unless necessary to save a life or useful as a substitute for legitimate use of force. On the other hand, deception associated with passive, bait-type stings is proper, so long as the general propriety of the sting has been subject to public debate. Trickery in connection with postarrest, precharge interrogation is also proper, so long as it does not coerce the dupe. . . .

Lying to Ourselves

Margaret L. Paris

Christopher Slobogin's article contributes to the emerging dialogue regarding police lying in two important ways. First, the article challenges us to categorize and morally evaluate the lies in which police engage during investigations. The article's focus on moral questions is a welcome change from the "ends-justifies-the-means" approach of some current criminal procedure scholarship that advocates the lifting of restrictions on police conduct on the basis of a questionable belief that fewer restrictions mean more convictions. Second, the article appears to invite legislatures and rulemaking bodies to debate the morality of police lying. Historically, legislatures and rulemaking bodies have left it to the courts to regulate police lying and other forms of police misconduct. Slobogin points out, however, that courts applying constitutional law have "acquiesced in, if not affirmatively sanctioned," police lying. Because constitutional law permits courts little room to impose meaningful restrictions on police lying, those of us desiring to address that social ill must not only oppose any further erosion of current doctrine in the courts, but also must affirmatively address the problem of police lying in legislative and administrative forums. I hope that Slobogin's article and the accompanying responses are read broadly by police, legislators, administrators, and other rulemakers, to whom the responsibility of tackling the issue falls.

I am also enthusiastic about Slobogin's project because I agree with his tentative conclusion that police lies are often unjustifiable. I would, however, go farther than Slobogin . . . and prohibit all police lying except when necessary to save lives. Slobogin employs Bok's evaluative method to suggest that police may justifiably lie to suspects who have been publicly identified as criminals even in noncrisis situations—that is, even in situations in which lives are

Margaret L. Paris, "Lying to Ourselves," *Oregon Law Review*, Volume 76 (Winter 1997). Reprinted with permission from the publisher and author.

not at stake. According to Slobogin, Bok acknowledges that an otherwise unjustified lie might be justifiable if it is told to an enemy to avert a crisis, and criminal suspects can be considered "enemies," as that term is used by Bok. Slobogin advances this rationale to justify police lies to suspects undergoing custodial interrogation as well as deceptive undercover techniques used against people "likely to be criminals" or those about whom judicial authorization to lie has been obtained. I will focus specifically on Slobogin's discussion of lies during interrogation because I tend to think lying during interrogation is more damaging than other types of deception.

Working within Bok's framework, I disagree with Slobogin's proposal to permit lies during interrogation on two grounds. Bok disapproves of all lies except those that can be publicly justified. According to Bok, lies can be publicly justified when: (1) there are no alternatives to lying (the necessity principle); and (2) lying would produce a surfeit of benefits versus harms (the utility principle). While Bok suggests that lies to enemies sometimes pass these tests, Slobogin's equation of arrested suspects with "enemies" does not meet these tests. Slobogin's proposal to permit lies during interrogation condones unnecessary lying because truthful alternatives exist. Slobogin's proposal also creates negative consequences that will likely outweigh the benefits, although costs and benefits are difficult to quantify in this context.

Before I address these issues, however, I will explore whether Slobogin's proposal to permit lying during interrogation is capable of public justification, an important predicate to Bok's "l
to enemies" exception.

Public Justification

Bok generally finds lies justifi
only if they are told to avert a cr
However, Bok does seem to ackn
edge, in principle, a "narrow justi
tion" for deception in nonc
situations involving self-def
against enemies, and Bok indic
several times that "criminals"
among those to whom the l
"enemy" would apply. Bok stre
that one of the more critical feat
of this justification is public identi
tion of the enemy.

Slobogin uses Bok's pass
referring to criminals as enemi
construct a rule permitting poli
lie to persons who have been id
fied as criminals. He proposes se
limitations on this license. I
Slobogin would not permit poli
lie to suspects who are interrog
before arrest because the poli
that stage might not have prob
cause to believe those suspects
guilty of criminal behavior. Slob
would not consider those suspe
be "enemies" until police have d
oped probable cause to suppo
arrest. For the same reason, Slob
would not permit lying to nonsus
and witnesses. Second, Slobogin
poses that we permit police to lie
before formal charges have
lodged against suspects. Slob
imposes this limit because cri
charges usually are initiated
when the prosecution has suffi
evidence to proceed. After that
it would be unnecessary to ext
confession by lying or, presum

any other means. Third, Slobogin would prohibit "coercive" lying, which he considers immoral because it limits suspects' knowledge of alternatives.

Despite these limitations, Slobogin's proposal would permit lying in the vast majority of custodial interrogations. I believe that Bok would reject Slobogin's proposal because the generous permission to lie would soon overwhelm the limits that Slobogin advocates. Bok's language is susceptible to more than one interpretation, but nowhere does Bok state that lying to enemies is justifiable on a broad scale. To the contrary, she argues that deception is analogous to violence and that, while both are justifiable in principle when used in preemptive strikes against enemies, they are, in practice, unrestrainable in such a context. Because the practical application of justificatory schemes is of great importance to Bok, she ultimately suggests that we should resort to deception and violence only in crisis situations.

It is worthwhile to explore why Bok predicts that, as a practical matter, if deception (and violence) against enemies are condoned they are likely to proliferate. Those reasons are especially pertinent in the context of Slobogin's proposal to permit lying during interrogation. Bok believes that all significant lies (including lies told by those, like police, who occupy positions of trust) must stand up to the scrutiny of unbiased, reasonable people. Bok argues that public justification avoids the malleability of the liar's own conscience, which would all too easily assess the balance in favor of the lie. Public justification brings objectivity and wisdom, eliminates bias, challenges assumptions, and exposes fallacious reasoning. Bok asserts that a necessary part of public justification is the ability of the public to "adopt the perspective not only of liars but of those lied to; and not only of particular persons but of all those affected by lies—the collective perspective of reasonable persons seen as potentially deceived." The importance of the public's objectivity cannot be overstated: Bok rejects lies in situations in which the public justification test cannot function in an unbiased manner.

According to Bok, in situations involving enemies, the public justification test will inevitably break down as the public's reasonableness and objectivity disappears. When the public perceives an enemy, it will react with hostility, precluding the kind of balanced, perspective-shifting analysis that the public justification test requires. Bok states that if the public has been "whipped into a frenzy of hostility, one cannot speak of 'publicity' in the sense in which it has been used up to now in this book." Because the public cannot put itself in the enemy's shoes, Bok ultimately concludes that deceptive schemes based on the "lying to enemies" justification should not be sanctioned. Even deceptive practices that are carefully circumscribed at the outset will eventually expand beyond reasonable limits because the public's hostility will prevent it from objectively maintaining limits on lying. Bok explains that, in practice, neither deception nor violence can "be contained within . . . narrow boundaries; they end up growing, perpetuating themselves, multiplying, and feeding on one another, to produce the very opposite of increased safety."

If Bok were asked to comment on Slobogin's use of the "lying to enemies" justification to support police lying during interrogations, I believe she would point out that her public-justification test cannot function well in the atmosphere of public hostility that surrounds crime, and that public sympathies will inevitably allow deceptive police practices to expand beyond the limits proposed by Slobogin. For this practical reason, I believe Bok would not agree that lying during interrogation can be justified by reference to her narrow "lying to enemies" exception.

The problem of maintaining public objectivity in the "enemies" context might be alleviated if the parameters on police lying that Slobogin proposes were defined in legislation or administrative rules. It is not clear, however, that legislative or administrative bodies are capable of maintaining greater objectivity than the general public when it comes to crime and police lying or that those politically accountable bodies can avoid endless tinkering with Slobogin's parameters if the public demands change. There have been few intelligent public discussions of issues related to crime or law enforcement since the presidential election of 1968, when national politicians began inciting a public panic about crime. The political dangers inherent in advocating limits on police lying may mean that the issues cannot be fully aired. On the other hand, a few productive national conversations about law enforcement have occurred recently in connection with situations such as Waco and Ruby Ridge, in which relatively large numbers of the public were able to empathize with the suspects. These dialogues provi[de at] least a glimmer of hope that the p[ublic] may be capable of critically exam[ining] law enforcement practices and m[ain]taining reasonable limits on de[cep]tion. The malleability of p[ublic] opinion of law enforcement sug[gests] to me (as I believe it would to B[ok]) that the wisest course would b[e to] enact a nearly absolute prohibitio[n on] police lying. An absolute rule w[ould] have a better chance of long-term [sur]vival than a nuanced one.

I would like to see Slob[ogin] address in more detail Bok's res[erva]tions about the practical problem[s of] implementing a limited "lying to [ene]mies" exception to the general [pre]sumption against lying. The pr[esent] article does not explain adequ[ately] how those problems could be o[ver]come. Even if Slobogin were ab[le to] convince me that the limitations o[n his] proposed "license to lie" would n[ot be] lifted quickly, however, I would [still] oppose his approach because he [does] not demonstrate that police lying [dur]ing interrogations is either nece[ssary] or beneficial, both of which [are] required before a lie can be just[ified] under Bok's method. The next se[ction] addresses those points in turn.

The Necessity and Utility of Lying

Bok acknowledges that lies to av[ert a] crisis with an enemy may somet[imes] be necessary, but she neverth[eless] requires an exacting search for t[ruth]ful alternatives, even when an e[nemy] is involved. Despite Bok's exhort[ation] that alternatives must be sc[rutinized] before lying can be justified, Slo[bogin] does not explore the alternativ[es] ying during interrogation. If Slobogin had examined the alternatives, he would have perceived an obvious one: police can interrogate truthfully. Of course, to be considered a viable alternative, truthfulness would have to advance the goals sought during interrogation. Slobogin does not clearly articulate the goals of interrogation, but he appears to assume that gathering information from suspects is the chief objective. I would add another objective: interrogations provide important opportunities for police to distribute information to suspects (and more indirectly, the public) about such things as integrity, honest dialogue, and trustworthiness. The dissemination of this kind of information is essential to a successfully functioning criminal justice system. Because this information is transmitted in large part by exemplification, it cannot be conveyed through deceit.

Even if we focus exclusively on the information-gathering objective of interrogations, we must recognize the possibility that truthful interrogations can produce confessions or useful information. It is far from clear that the amount of information derived from interrogations would be significantly reduced if police were required to tell the truth. Certainly, interrogators, who place great stock in the tools of manipulation and deception, would argue that their effectiveness would be jeopardized. However, the fact that professional interrogators believe deceit to be essential is not persuasive. There is no evidence that those in the law enforcement business have seriously considered, much less tried, the alternative.

Even if lying increases confession rates, it is not certain whether confession rates affect conviction rates. Professor Paul Cassell has attempted to establish a relationship between confessions and convictions in his efforts to compute the cost of Miranda, estimating that Miranda has resulted in lost convictions in 3.8% of all serious criminal cases and concluding that such a loss amounts to a significant social cost. Other scholars disagree with both his estimate and his conclusion, however. For example, Professor Stephen Schulhofer argues that Miranda affected fewer than one percent of all cases in the period shortly after the Court issued that decision, its "net damage to law enforcement is zero," and even if Cassell's 3.8% figure is accurate, that figure represents a small cost.

In addition, both Slobogin and Cassell overestimate the utility of confessions. Both assume that deception is successful if it produces confessions. Confessions are of limited use, however, if they are ruled inadmissible. Slobogin admits that lies can sometimes cause a court to rule a confession inadmissible on voluntariness grounds. Lies might also produce statements that run afoul of the corpus delicti rule, which excludes confessions unless they are supported by independent evidence of guilt. The corpus delicti rule represents a judicial determination that confessions are of questionable reliability—a determination that casts doubt on the utility of obtaining a confession through any means. In fact, wrongful convictions based on erroneous deception-induced confessions must be considered a cost of, not a benefit from, those confessions. It is not mere speculation that lies might induce untruthful statements. Psychological and sociological studies indicate that suspects are susceptible to police pressure and sometimes confess even when they are innocent. The vulnerability of suspects and the possibility that they might confess even when innocent are magnified in the hands of an interrogator well-versed in deceit and other interrogation techniques. Even "experienced" suspects are vulnerable to sophisticated interrogation techniques. Thus, although a broad rule permitting lies during postarrest, precharge interrogations might facilitate confessions, some of those confessions would be inadmissible and some would undermine the accuracy of the criminal justice system.

Slobogin acknowledges that there is conflicting research on whether confession rates affect conviction rates, and he acknowledges that a relationship between the two is necessary to his analysis. He nevertheless assumes that postarrest, precharge deceit is necessary to obtain convictions. Slobogin's failure to seriously consider the alternative of being truthful in interrogations and to demonstrate any conclusive link between confessions and convictions undercuts his conclusion that lying in interrogations is necessary and useful.

If we take Bok's test seriously, then, we would have to reject Slobogin's conclusion that lying in postarrest, precharge settings is justifiable. There are alternatives to lying, and the benefits of lying are not clear. Slobogin might fine tune his proposal by limiting lying to situations in which a judicial officer has found no viable alternative to lying and has concluded that lying is likely to produce useful information or admissible evidence. Moreover, t
judicial officer would have to determi
that the benefits from lying outwei
the harms caused by lying. The time a
effort involved in that kind of judic
oversight, however, would make lyi
too expensive in all but the most pre
ing circumstances.

In my discussion of the benel
and costs of lying, I have saved for l
the special harm that police ly
causes. As I explain in the next secti
those harms, while difficult to quant
are substantial.

Special Harms

Bok's evaluative method for detern
ing when lying may be justified requ
a careful assessment of the harms t
lying causes and a rejection of
whose harms outweigh the benefit
be gained. Bok stresses that lying d
ages the liar, the dupe, and societ
general. Slobogin acknowledges
nature of some of those damages in
criminal investigation context. He a
differ, though, in the weight we assig
those harms. This kind of disagreem
may be intractable because the rela
weights of benefits and harms is a
subjective matter. Nevertheless, a
brief points might help to highlight
nature of our disagreement.

First, lies harm the liars. Slob
acknowledges that lying has an "i
ious impact" on police themse
and he is particularly aware of
danger that lying in the interroga
context may lead to police per
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spread harm that also damages
dupe and society in general. G
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ek to reduce the sheer number of es that police tell. Yet his rule per-itting lies during interrogation ould mean that police would con-nue to lie extensively and presum-ly would continue to incur the kinds damages that he describes so well. obogin explains his acceptance of ing during postarrest, precharge errogations in part by the fact that rested suspects are likely to be ilty. He may reason from this that lice would have difficulty comply-with a rule forbidding them from ng to guilty people and would refore lie twice as much as they do to cover up what happened dur-interrogations. I agree that this ld be a problem, but presumably iciently strict sanctions for lying ld correct the problem. I also ld expect cover-ups to diminish if g becomes generally unacceptable ong police.

Slobogin also underestimates the mage that lying does to subjects of errogation, although he acknowl-ges that some damage occurs. bogin's willingness to characterize ested suspects as "enemies" helps sk the damage caused by lying cause the word enemies implies tile outsiders—persons outside our l or national connections, whose lty and trust we do not seek. I t (but only might) agree that we d not worry as much about the age caused by lying when we deal true outsiders because we are not ncerned about maintaining social s with them. But when it comes to sons in this country who are sus-ted (or even convicted) of criminal avior, we ignore at our own peril damage caused by lying. As the commentators to whom Slobogin refers have argued, the loyalty and trust of "suspects" are of great concern to us because they will continue to live among us or will return to us after a period of incarceration, unless they are locked up for life without the possibility of parole. As a result, it is important that we behave honorably and truthfully with them to initiate, maintain, or renew their loyalty and trust and to exemplify appropriate behavior.

Slobogin suggests that those who are probably innocent should fare better in our calculations than those who are probably guilty, but this distinction conceals many troubling subtleties that make it unworkable in practice. For example, I am not certain how Slobogin would view the suspect whose behavior might ultimately be determined to have been lawful based on self-defense or some other excuse or justification and who might therefore be legally innocent although appearing guilty to police at the outset. In the same way, it would be useful to know how Slobogin would deal with the suspect whose crime was minor and nonviolent, the first-time offender, the suspect whose behavior might be decriminalized, or the offender whose behavior was previously acceptable but has been recently criminalized. Suspects in each of these categories would enjoy more sympathy than the violent criminal, and they probably make up a larger portion of criminal suspects than violent offenders. Add to these complexities the pervasive nature of racial, ethnic, and class bias in the criminal justice system, and an outright prohibition on all interrogation lying seems far preferable to a rule with a rationale that depends on a simplistic distinction between innocence and guilt.

Finally, there are the social costs of Slobogin's proposal. It harms a society when the officers who enforce its laws behave like the worst used car salesmen. That harm is compounded because deceptive tactics employed by police to obtain evidence reflect poorly on courts that supervise the admission of that evidence. The U.S. Supreme Court used these harms to justify the Fourth Amendment exclusionary rule, although more recently it has abandoned the "judicial integrity" rationale in favor of deterrence of police misconduct alone. These unquantifiable but very real harms deserve renewed attention and increased weight in the emerging dialogue about police
Unfortunately, Slobogin gives
short shrift when he evaluate
morality of lying during interroga

Conclusion

Professor Slobogin's article in
an important discussion abo
morality of police lying. Nevert
Slobogin's approach falls short v
evaluates police lying during in
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that context because it is unne
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The Continuing Debate

What Is New

Recent cases of false confessions to major crimes have raised hard questio
cerning the potentially coercive power of deceptive police interrogatio
niques. In 1989, five young men confessed to a brutal attack on a Centr
jogger—an attack that left the victim near death and very severely injur
made newspaper headlines for weeks. In 2002, the convicted men were
ated by DNA testing, and the obvious question was, Why had they confes
brutal crime they had not committed? And rather than being an isolat
false confessions are a common feature of wrongful conviction cases
deceptive interrogation techniques are used to convict the guilty, some
have qualms about their use, though for others the importance of correc
ing crimes may mitigate concern about methods; but when deceptive in
tion techniques convince innocent people to plead guilty to crimes they
commit, almost everyone would agree the techniques require closer scrut

Where to Find More

Sissela Bok, *Lying: Moral Choice in Public and Private Life* (1978), is ar
tant examination of lying and its effects; Christopher Slobogin refers t
book at several points in his article. For further insight on when deceptior
used in the interrogation process, see Christopher Slobogin, "Ly
Confessing," *39 Texas Tech Law Review* 1275 (2007).