Extending Miranda: Prohibition on Police Lies Regarding the Incriminating Evidence

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I. INTRODUCTION

This Article addresses the question of whether lying to suspects during interrogations regarding the incriminating evidence against them is a legitimate deceit. The search for truth goes hand-in-hand with the human yearning for knowledge.[1] Generally, lying is perceived as reprehensible. Certain types of lies, such as those concerning medical treatment or the sale of a house, may even result in civil or criminal liability.[2] Despite the condemnation of lying, lying to suspects during interrogations is a common phenomenon, and has even been dubbed an "art."[3]

Part II of the article presents how police use deceit and lies during interrogations in general, as well as lies relating to the existence and strength of incriminating evidence, and describes their alleged justifications. Part III seeks to refute these justifications, and it turns to normative arguments for imposing a prohibition on lies concerning the incriminating evidence against suspects. The article argues in this third part that lies of this type are illegitimate because they create an increased risk of false confessions and because they force suspects in general, and innocent suspects in particular, to shape their defense in view of false evidence. Consequently, lies infringe upon fundamental principles of constitutional criminal law, such as the right to remain silent, the presumption of innocence, and the imposition of the obligation to prove the accusations on the prosecution. Alongside normative arguments, the article addresses empirical laboratory studies, which show the success of lies to induce false confessions and demonstrate that every type of lie concerning incriminating evidence carries a risk of such confession. All the arguments against using lies ultimately revolve around the linkage between lies and the requirement imposed on the state to shoulder the obligation of proving guilt. Finally, Part IV concludes.

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1. Eugene R. Milhizer, Rethinking Police Interrogation: Encouraging Reliable Confessions While Respecting Suspects' Dignity, 41 Val. U. L. Rev. 1, 59–63 (2006).

2. Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 469 (1996).

3. Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 784 (1997) [hereinafter Slobogin, *Deceit, Pretext, and Trickery*]; Young, *supra* note 2, at 459.

II. USING DECEIT AND LIES DURING INTERROGATION AND ITS JUSTIFICATIONS

A. Using Deceit and Lies

Deceit is a standard method of police interrogations.[4] It replaced, in practice, the use of violence as a means of extracting confessions.[5]

Courts consider the use of deceit in interrogations legitimate.[6] As Justice Lamer in Canada put it:

> The investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work.[7]

Scholars rest their claim that investigative deceit is justified on its effectiveness in discovering the truth and enforcing the law.[8] Proponents of deceit stress that guilty suspects normally do not act contrary to their own interest by

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4. *See* Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 221 (2006); Brian R. Gallini, *Police "Science" in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions*, 61 HASTINGS L.J. 529, 530, 546, 548–53 (2010); Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 792 (2006); Laurie Magid, *Deceptive* Police Interrogation Practices: How Far is Too Far?, 99 MICH. L. REV. 1168, 1168 (2001) [hereinafter Magid, *Deceptive Police*]; Meghan Morris, *The Decision Zone: The New Stage of Interrogation Created by* Berghuis v. Thompkins, 39 AM. J. CRIM. L. 271, 277 (2012); Jerome H. Skolnick & Richard A. Leo, *The Ethics of Deceptive Interrogation*, CRIM. JUST. ETHICS, Winter/Spring 1992, at 3; Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 581–82 (1979) [hereinafter White, *Police Trickery*]; Irina Khasin, Note, *Honesty Is the Best Policy: A Case for the Limitation of Deceptive Police Interrogation Practices in the United States*, 42 VAND. J. TRANSNAT'L L. 1029, 1030 (2009); Lisa Patrice Taylor, Note, Illinois v. Perkins*: Balancing the Need for Effective Law Enforcement Against a Suspect's Constitutional Rights*, 1991 WIS. L. REV. 989, 1025 (1991).

5. Khasin, *supra* note 4, at 1036; *see also* Alberto B. Lopez, *$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 682 (2002) (noting that the high value of confession creates an incentive for the police to use deceit).

6. Elizabeth N. Jones, *The Good and (Breaking) Bad of Deceptive Police Practices*, 45 N.M. L. REV. 523, 523 (2015); Paul Marcus, *It's Not Just About* Miranda*: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 612 (2006); Tracy Lamar Wright, Comment, *Let's Take Another Look at That: False Confession, Interrogation, and the Case for Electronic Recording*, 44 IDAHO L. REV. 251, 261–62 (2007).

7. R. v. Oickle, [2000] 2 S.C.R. 3, para. 66 (Can.).

8. Magid, *Deceptive Police*, *supra* note 4, at 1197–98.

confessing.[9] Society is not indifferent to the outcome of the investigation, and it is interested in obtaining a true account of events from the suspect.[10] The main role of the police is to solve crimes. The public's expectation of the police is to fulfill this role successfully. To this end, society must equip interrogators with effective tools to discover the truth, including the use of deceit.[11]

Scholars argue that absolute honesty is not practical even in the course of routine business negotiations because every negotiator naturally wishes that the other side think as highly of the negotiator's goods as he does.[12] *A fortiori*, absolute honesty is not warranted in an interrogation, in the course of which the interrogator is trying to obtain the necessary information "on the cheap," that is, without investing excessive resources and without significant compromise on the content of the accusations. Interrogators have the character of a "war of minds" between the interrogator and the suspect, with each side trying to prevail upon the other in ingenuity and creativity, while deceit helps overcome the resistance of suspects.

Roughly speaking, lies are a type of deceit.[13] Some lies during interrogation may take the form of a different category of misconduct, such as an interrogator threatening "if you don't confess your guilt, you will remain in custody for a long time and your children will be taken away from you"; or threatening to arrest a loved one without a basis of probable cause for such a detention; or tempting a suspect by offering "if you confess, you will be released immediately."

Other lies are distinct and cannot be included with other forms of misconduct. During interrogation, interrogators use many types of lies. They fake sympathy for the suspect and persuade him that they are interested in his welfare in order to buy his friendship and establish rapport.[14] They may use the tactic of minimization, which conveys a message to the suspect

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9. *See* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 31–33 (1993); HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 81 (1996).

10. Magid, *Deceptive Police*, *supra* note 4, at 1180.

11. *Id.* at 1172.

12. David Geronemus, *Lies, Damn Lies and Unethical Lies: How to Negotiate Ethically and Effectively*, BUS. L. TODAY, May/June 1997, at 11, 11–12 (1997).

13. However, deceit and lies are different in some respects. *See* SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 13–15 (2014) (explaining that lies do not necessarily require the recipient to be deceived and offering the pathological liar as an example of when lying decouples from deception).

14. *See* GRANO, *supra* note 9, at 112; Fred E. Inbau, *Police Interrogation—A Practical Necessity*, *in* POLICE POWER AND INDIVIDUAL FREEDOM 147, 151 (Claude R. Sowle ed., 1962); Laurie Magid, *The* Miranda *Debate: Questions Past, Present, and Future*, 36 HOUS. L. REV. 1251, 1259–60 (1999) [hereinafter Magid, *Questions Past*]; Morris, *supra* note 4, at 290; Margaret L. Paris, *Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3, 21–23 (1995) [hereinafter Paris, *Trust, Lies, and Interrogation*]; Skolnick & Leo, *supra* note 4, at 6; Khasin, *supra* note 4, at 1038.

that downplays his fault, and implicitly, the severity of the consequences of the confession and the guilt associated with the offense.[15] For instance, the interrogator may assert that the victim bears the brunt of the blame for the offense—by seducing the suspect into having sexual intercourse or attacking him and causing him to respond; may blame the suspect's accomplice, who is more experienced than he; or point to conditions of life in general as responsible for the offense.[16] The suspect is relieved upon believing that many people would have acted the way he did under similar circumstances.[17] The minimization tactic, which suggests to the suspect that his act is less serious than it is deemed, can be perceived as an implied promise of leniency.[18]

Lies relating to misrepresentation of the incriminating evidence against the suspect are part of a maximization tactic, designed to create a false impression for the suspect and to use the severity of the consequences to intimidate her if she does not confess guilt.[19] Other tactics of maximization, in addition to lies about the existence and strength of incriminating evidence, are interrogating the suspect using a more serious offense, or exaggerating the severity of her offense, by for example accusing the suspect of stealing a larger amount than the amount actually taken, or exaggerating the harm caused to the victim of the offense.[20]

Even without pointing to a certain type of lie, some argue that using lies is an integral part of interrogations, because often interrogators try to

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15. *See* Feld, *supra* note 4, at 277–78; Gohara, *supra* note 4, at 821; Peter Kageleiry, Jr., *Psychological Police Interrogation Methods: Pseudoscience in the Interrogation Room Obscures Justice in the Courtroom*, 193 MIL. L. REV. 1, 41 (2007) (quoting Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 LAW & HUM. BEHAV. 233, 247 (1991)); Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 125 (1996); Paris, *Trust, Lies, and Interrogation*, *supra* note 14, at 20–21; David L. Sterling, *Police Interrogation and the Psychology of Confession*, 14 J. PUB. L. 25, 40 (1965).

16. *See* JIM DWYER ET AL., ACTUAL INNOCENCE 89 (2000); Gallini, *supra* note 4, at 539–40; Kageleiry, Jr., *supra* note 15, at 13; Skolnick & Leo, *supra* note 4, at 6; Sterling, *supra* note 15, at 39–40; Young, *supra* note 2, at 430–31; Khasin, *supra* note 4, at 1039.

17. *See* Young, *supra* note 2, at 430–31; Khasin, *supra* note 4, at 1039.

18. *See* Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOLOGIST 215, 222 (2005) [hereinafter Kassin, *Psychology of Confessions*]; Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 18 (2010) [hereinafter Kassin et al., *Police-Induced Confessions*]; Kassin & Kiechel, *supra* note 15, at 125.

19. Feld, *supra* note 4, at 261; Kageleiry, Jr., *supra* note 15, at 41.

20. Skolnick & Leo, *supra* note 4, at 7.

convince suspects that it is beneficial for them to admit guilt, although confessing may lead to conviction and punishment.[21] Interrogators must deceive suspects in some way into taking an action that is devastating or irrational, like confessing guilt.[22] Complete honesty would require the interrogator to advise the suspect to avoid confessing and to consult with an attorney before making a statement.[23] Such an honest interrogator is unlikely to obtain confessions.[24] According to this line of thought, a ban on lying to reduce a suspect's ability to understand the consequences of the confession is tantamount to a prohibition on police interrogation, because every interrogator tries to achieve that exact objective.[25] The need to establish the suspect's rapport inevitably involves lies in the interrogation room.[26]

Furthermore, lies and deception are not unique to interrogations. Some claim that all people lie and mislead daily.[27] Lies and deception are part of the routine of life.[28] Many smile kindly to people they loathe, creating a false impression of friendship.[29] If we tell the truth to everyone, it is likely that our popularity would not soar very high. Given existing conventions, it is difficult to prohibit a lie that is reflected in a smile and gestures of friendship toward the suspect, such as offering a cup of coffee or a cigarette, even though such gestures do not reflect the true feelings of the interrogator toward the suspect, and are aimed solely at reducing his awareness of the adversarial relationship with the interrogator.[30] Polite gestures are not

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21. Morris, *supra* note 4, at 287; Paris, *Trust, Lies, and Interrogation*, *supra* note 14, at 18; William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1921 (1993) [hereinafter Stuntz, *Lawyers, Deception, and Evidence Gathering*].

22. *See* Gordon Van Kessel, *Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Silence*, 35 IND. L. REV. 925, 981 (2002) (calling modern interrogations a "confidence game"). Indeed, suspects can confess for rational reasons and for the purpose of clearing their consciences. William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975, 987 (2001). However, one may wonder how the scruples disappear at the trial itself, when the defendant—who confessed during interrogation—denies guilt. At any rate, confessions that are motivated by the will to clear the conscience are rare. *See* Scott W. Howe, *Moving Beyond* Miranda*: Concessions for Confessions*, 110 NW. U. L. REV. 905, 924 (2016).

23. Magid, *Deceptive Police*, *supra* note 4, at 1198–99.

24. *Id.* at 1199.

25. *Id.* at 1205.

26. Khasin, *supra* note 4, at 1056.

27. Magid, *Deceptive Police*, *supra* note 4, at 1184.

28. Deborah Bradford & Jane Goodman-Delahunty, *Detecting Deception in Police Investigations: Implications for False Confessions*, 15 PSYCHIATRY, PSYCHOL. & L. 105, 105 (2008); Stuntz, *Lawyers, Deception, and Evidence Gathering*, *supra* note 21, at 1910.

29. *See also* Paul Butler, *An Ethos of Lying*, 8 UDC/DCSL L. REV. 269, 269 (2004) (stating in a different context: "To be polite, I laughed, although actually I thought the jokes were tired. My laugh was a lie.").

30. This is the case even though when the suspect has a strong need for social recognition, sympathy on the part of the interrogator might cause the suspect to make a

necessarily lies.[31] Treating a friendly smile directed at an opponent as a lie ascribes too broad a meaning to lies and thereby weakens the immorality inherent in lying.[32] Even if such gestures are treated as lies, they are not necessarily ethically unacceptable. Creating a safe and friendly atmosphere does not cause normal, innocent suspect to confess and certainly does not create a sense of helplessness or hopelessness.[33]

But even if we accept the assumption that an interrogation inherently involves some lies, it does not justify every type of lie.[34] Although some scholars like Kant consider telling the truth to be an absolute moral principle,[35] the prevailing view holds that lies are justifiable in certain circumstances,[36] and that prohibition on lying may conflict with other moral values.[37] It appears that a reasonable person would find it difficult to condemn a lie told by a hostage in a situation of self-defense that he is armed with a gun. Although the general issue of lying is beyond the scope of this Article, general justifications for lying may also be partly valid during interrogations. Some allege that lying to suspects in interrogations may be justified for utilitarian reasons.[38] In situations of crisis, such as kidnapping, it is customary to justify lies aimed at preventing harm to others and saving innocent lives.[39] It is possible to think of other situations of crisis,

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false confession. Gary Hamblet, Note, *Deceptive Interrogation Techniques and the Relinquishment of Constitutional Rights*, 10 RUTGERS-CAMDEN L.J. 109, 143 (1978).

31. *See generally* THOMAS L. CARSON, LYING AND DECEPTION: THEORY AND PRACTICE 259 (2010).

32. At the same time, a situation in which a person who speaks ill of another behind his back but praises him to his face is perceived as a lie. *Id.* at 261.

33. Khasin, *supra* note 4, at 1039.

34. James G. Thomas, Note, *Police Use of Trickery as an Interrogation Technique*, 32 VAND. L. REV. 1167, 1190 (1979).

35. *See* Immanuel Kant, *On a Supposed Right to Lie from Altruistic Motives* (1797), *reprinted in* ABSOLUTISM AND ITS CONSEQUENTIALIST CRITICS 15, 15–19 (Joram Graf Haber ed., 1994); *see also* SAINT AUGUSTINE, *Against Lying*, *reprinted in* TREATISES ON VARIOUS SUBJECTS 125, 125–29, 171–74 (Roy J. Deferrari ed., Harold B. Jaffee trans., 1952).

36. *See* SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 39–42 (1978); Butler, *supra* note 29, at 269; Mark C. Murphy, *Natural Law and the Moral Absolute Against Lying*, 41 AM. J. JURIS. 81, 81 (1996); Skolnick & Leo, *supra* note 4, at 7; Ariel Porat & Omri Yadlin, *Valuable Lies* 5 (Univ. of Chi. Law Sch. Pub. Law & Legal Theory, Working Paper No. 491, 2014), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1949&context=public_law_and_legal_theory.

37. *See* CARSON, *supra* note 31, at 74 (explaining that lying may be moral when, for example, one lies to save someone's life).

38. *See* Skolnick & Leo, *supra* note 4, at 7.

39. *See* Margaret L. Paris, *Lying to Ourselves*, 76 OR. L. REV. 817, 819 (1997) [hereinafter Paris, *Lying to Ourselves*]; Slobogin, *Deceit, Pretext, and Trickery*, *supra* note

such as when there are reasonable grounds to be concerned about concrete and immediate danger to society on the part of the suspect.

Normally, however, lies are used during interrogations to elicit confessions from suspects for the purpose of prosecution and conviction.[40] As such, police perceive lies as a professional tool for managing interrogations,[41] and as a "necessary evil," stemming from the principle of necessity, as there is no dispute over the importance of bringing offenders to justice.[42] A common adage for warranting the use of lies states that "it takes a liar to catch a liar."[43] Some argue that, given the necessity of lying for law enforcement, lying should not be banned and should not be assessed through the lenses of normative social behavior.[44]

The argument further elaborates that lying to suspects is tantamount to lying to an enemy. Mendacity used to defeat enemies is considered justified.[45] The enemy is not bound by customary social practices and cannot expect their usual protections.[46] There is no expectation of trust between enemies.[47] Under this line of thought, interrogators believe that it is permissible to lie to liars and enemies.[48] The suspect harmed the social order. Perpetrators of serious crimes have failed to show a minimum of humanity toward others.[49] Interrogations are designed to identify criminals, not to serve as "a civics lesson," and suspects do not expect truthfulness from interrogators.[50] The purpose of lies is indeed to "harm" the suspects: to make them confess, and thereby to facilitate conviction of the alleged offense.[51] But this harm

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3, at 800–01. On the justification of lies to save lives, see BOK, *supra* note 36, at 109, 113, and CARSON, *supra* note 31, at 162–63.

40. *See* Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—And from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 533 (1998); Feld, *supra* note 4, at 220; Magid, *supra* note 4, at 1174, 1197–98; Miller W. Shealy, Jr., *The Hunting of Man: Lies, Damn Lies, and Police Interrogations*, 4 U. MIAMI RACE & SOC. JUST. L. REV. 21, 26 (2014); Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH L. REV. 1275, 1275 (2007) [hereinafter Slobogin, *Lying and Confessing*]; Young, *supra* note 2, at 425–26.

41. Slobogin, *Deceit, Pretext, and Trickery*, *supra* note 3, at 784.

42. Young, *supra* note 2, at 426 ("Courts admit these confessions uneasily, accepting lying only as a "necessary evil" of the criminal justice system."); *see* Skolnick & Leo, *supra* note 4, at 9.

43. Slobogin, *Deceit, Pretext, and Trickery*, *supra* note 3, at 784.

44. *See* Inbau, *supra* note 14, at 147; Magid, *Deceptive Police*, *supra* note 4, at 1186.

45. *See* BOK, *supra* note 36, at 135–40.

46. *Id.* at 138.

47. *See* WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 107–08 (Liberty Fund, Inc. 2002) (1785).

48. Young, *supra* note 2, at 459.

49. *See* Inbau, *supra* note 14, at 151.

50. Magid, *Deceptive Police*, *supra* note 4, at 1182.

51. *See id.* at 1168.

is the offenders' just desert. The immorality of deceit is not therefore self-evident.[52]

Nevertheless, certain types of lies are prohibited. Thus, lies to suspects that mislead them regarding their legal rights, such as their Fifth Amendment rights to remain silent and to consult with an attorney before and during interrogation, are illegitimate.[53] Interrogators are not only banned from lying about a suspect's rights, but obligated to inform a suspect explicitly about those rights.[54] Additionally, according to the holdings of the Supreme Courts in Florida and New Jersey, a lie that involves the fabrication of false evidence in writing is an illegitimate subterfuge.[55]

B. Lies Concerning the Incriminating Evidence

Lying to suspects concerning the existence and strength of the incriminating evidence against them is a widespread interrogation tactic,[56] and is recommended in police training manuals.[57] Interrogators lie to

52. *See* George C. Thomas III, *Regulating Police Deception During Interrogation*, 39 TEX. TECH L. REV. 1293, 1296 (2007).

53. Skolnick & Leo, *supra* note 4, at 5; Slobogin, *supra* note 40, at 1286 (citing William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 818 (1989)); White, *Police Trickery*, *supra* note 4, at 587.

54. Young, *supra* note 2, at 428.

55. State v. Cayward, 552 So. 2d 971, 973 (Fla. Dist. Ct. App. 1989); State v. Chirokovskcic, 860 A.2d 986, 991–92 (N.J. Super. Ct. App. Div. 2004). By contrast, the Supreme Court of Nevada did not exclude a confession obtained after the suspect of rape was presented with a document according to which his sperm was found on the couch where he allegedly carried out the rape. Sheriff v. Bessey, 914 P.2d 618, 622 (Nev. 1996).

56. *See* GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 8–9 (2003); Richard A. Leo, *Why Interrogation Contamination Occurs*, 11 OHIO ST. J. CRIM. L. 193, 199 (2013) [hereinafter Leo, *Interrogation Contamination*] (citing RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 139–48 (2008) [hereinafter LEO, POLICE INTERROGATION]); Morris, *supra* note 4, at 284–85; Ariel Porat & Omri Yadlin, *A Welfarist Perspective on Lies*, IND. L.J. 617, 650 (2016); Christopher Slobogin, *Comparative Empiricism and Police Investigative Practices*, 37 N.C. J. INT'L L. & COM. REG. 321, 339 (2011) [hereinafter Slobogin, *Comparative Empiricism*] (citing Kassin et al., *Police-Induced Confessions*, *supra* note 18, at 11–12, 27–28); Raymond J. Toney, *Disclosure of Evidence and Legal Assistance at Custodial Interrogation: What Does the European Convention on Human Rights Require?*, 5 INT'L J. EVIDENCE & PROOF 39, 42 (2001); Daniel W. Sasaki, Note, *Guarding the Guardians: Police Trickery and Confessions*, 40 STAN. L. REV. 1593, 1593 (1988).

57. CHARLES E. O'HARA & GREGORY L. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 177 (7th ed. 2003) (pointing out that earlier versions of these same training manuals were amongst those the Supreme Court critiqued in *Miranda v. Arizona*); Morris,

suspects about the existence of incriminating evidence against them or exaggerate its strength.[58] Specifically, interrogators may lie to suspects that their accomplice incriminated them,[59] that the victim or another eyewitness identified them,[60] or that forensic evidence, such as fingerprints[61] or DNA samples,[62] was found at the scene of the crime linking them to the event. Police interrogators may lie to suspects that the polygraph examination found their version of events false,[63] exaggerating the weight of the polygraph evidence and creating a sense that the polygraph is infallible.[64] Through these lies, interrogators pretend that all the evidence is known to them and that it proves the guilt of the suspect beyond a reasonable doubt. They claim that they wish to hear only the explanations of the suspect concerning the

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supra note 4, at 285 (citing FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 270–71 (Jones & Bartlett Pubs. 5th ed. 2013) (1962)).

58. Toney, *supra* note 56, at 42.

59. Kevin Corr, *A Law Enforcement Primer on Custodial Interrogation*, 15 WHITTIER L. REV. 723, 741 (1994) (citing People v. Jackson, 532 N.Y.S.2d 808, 810 (App. Div. 1988)); Marcus, *supra* note 6, at 612 (citing United States v. Ceballos, 302 F.3d 679, 694–95 (7th Cir. 2002); State v. Simons, 944 S.W.2d 165, 176 (Mo. 1997)); Morris, *supra* note 4, at 285 (citing Frazier v. Cupp, 394 U.S. 731, 737–38 (1969)); Young, *supra* note 2, at 426.

60. Corr, *supra* note 59, at 741 (citing State v. Amaya-Ruiz, 800 P.2d 1260, 1277 (Ariz. 1990); People v. Holland, 520 N.E.2d 270, 273 (Ill. 1988), *aff'd* Holland v. Illinois, 493 U.S. 474 (1990); Nebraska v. Erks, 333 N.W.2d 776, 779 (Neb. 1983)); Marcus, *supra* note 6, at 612 (citing United States v. Orso, 266 F.3d 1030, 1032 (9th Cir. 2001); Conner v. State, 982 S.W.2d 655, 661 (Ark. 1998)); Thomas, *supra* note 34, at 1183.

61. Corr, *supra* note 59, at 741 (citing Green v. Scully, 850 F.2d 894, 903 (2d Cir. 1988); Arizona v. Winters, 556 P.2d 809, 812 (Ariz. Ct. App. 1976); People v. Kashney, 490 N.E.2d 688, 693 (Ill. 1986); People v. Boerckel, 385 N.E.2d 815, 822 (Ill. App. Ct. 1979)); Marcus, *supra* note 6, at 613 (citing Lucero v. Kerby, 133 F.3d 1299, 1311 (10th Cir. 1998); State v. Davila, 908 P.2d 581, 585 (Idaho Ct. App. 1995)); Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 LAW & PSYCHOL. REV. 53, 69 (2007) (citing Skolnick & Leo, *supra* note 4, *reprinted in* ISSUES IN POLICING: NEW PERSPECTIVES 78, 82–83 (1993) [hereinafter Skolnick & Leo, *Ethics of Deceptive Interrogation*, *reprinted in* ISSUES IN POLICING]); Thomas, *supra* note 34, at 1183.

62. Marcus, *supra* note 6, at 613 (citing Conde v. State, 860 So. 2d 930, 952 (Fla. 2003)).

63. Morris, *supra* note 4, at 285; Scott-Hayward, *supra* note 61, at 69 (citing Skolnick & Leo, *Ethics of Deceptive Interrogation*, *reprinted in* ISSUES IN POLICING, *supra* note 61, at 82–83); Thomas III, *supra* note 52, at 1313 (citing DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 204 (1991)); Young, *supra* note 2, at 432 (citing United States *ex rel.* Lathan v. Deegan, 450 F.2d 181, 185 (2d Cir. 1971)).

64. Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. L. REV. 979, 1036 (1997).

reasons that motivated him to commit the offense.[65] The aim of these lies is to destroy the suspect's self-confidence.[66]

Courts worldwide have recognized the legitimacy of police lying to suspects about the existence and strength of the incriminating evidence against them.[67] In general, such lies are not perceived as undermining the voluntary nature of the confession or as causing an innocent suspect to confess guilt.[68] In the United States, the *Miranda* Court did not restrict lying and deceit during interrogations after the suspect waives his *Miranda* rights.[69] The Supreme Court ruled that the interrogators' lie about the suspect's accomplice implicating the suspect in the commission of the offense did not render the suspect's confession involuntary under the circumstances of that case.[70] In another case, the Court addressed whether it is possible to infer that an interrogation was custodial from the police interrogators' lying to the suspect regarding the presence of his fingerprints at the scene of the incident.[71] The Court answered no, without condemning the interrogation ruse used by the police.[72] As previously noted, the Canadian Supreme Court has also endorsed certain types of lies regarding the incriminating evidence during interrogation.[73]

In contrast, in England, lying during interrogations is rare.[74] The Court of Appeal in England excluded the confession of a defendant involved in arson, obtained after the police lied to the suspect and his solicitor regarding the presence of his fingerprints at the scene, and severely criticized the

65. *See* Leo, *Interrogation Contamination*, *supra* note 56, at 199–200; Ofshe & Leo, *supra* note 64, at 1008.

66. *See* Leo, *supra* note 56, at 200.

67. *See* R. v. Oickle, [2000] 2 S.C.R. 3, para. 3, 100 (Can.); Feld, *supra* note 4, at 309; Gohara, *supra* note 4, at 792–94; Wright, *supra* note 6, at 261; Young, *supra* note 2, at 426; Khasin, *supra* note 4, at 1047; Sasaki, *supra* note 56, at 1595.

68. Young, *supra* note 2, at 442 (citing Commonwealth v. Cressinger, 44 A. 433, 433 (Pa. 1899)).

69. *See* Howe, *supra* note 22, at 930–31; George C. Thomas III & Richard A. Leo, *The Effects of* Miranda v. Arizona*: "Embedded" in Our National Culture?*, *in* 29 CRIME AND JUSTICE: A REVIEW OF RESEARCH 203, 256 (Michael Tonry ed., 2002).

70. Frazier v. Cupp, 394 U.S. 731, 739 (1969). Many see the *Frazier* ruling as giving a green light to lying to a suspect in the course of his interrogation. *See* Kassin et al., *Police-Induced Confessions*, *supra* note 18, at 13. The issue of presenting false evidence in that case, however, was an incidental matter, and most likely this ruse was not the reason for the suspect's confession. *See* Thomas, *supra* note 34, at 1184–85.

71. Oregon v. Mathiason, 429 U.S. 492, 494–96 (1977).

72. *Id.* at 495–96.

73. *See* R. v. Oickle, [2000] 2 S.C.R. 3, para. 66 (Can.).

74. *See* Kassin et al., *Police-Induced Confessions*, *supra* note 18, at 13–14.

lying.[75] In another case, the Court of Appeal ruled that, although there is no obligation to disclose the full extent of evidence against a suspect to him, the law prohibits actively misleading him with regard to the incriminating evidence.[76] German law also prohibits the police from lying to suspects during interrogation.[77] In these legal systems, therefore, there is no assumption that lies are essential for law enforcement. [78]

III. ARGUMENTS AGAINST USING LIES

After having considered the justifications for lying during interrogations, this article turns now to critique. There are many moral arguments against the use of lies by interrogators to extract confessions in general and against the use of lies concerning the incriminating evidence against the suspect, in particular.

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75. R. v. Mason [1988] 1 WLR 139 at 144 (Eng.).

76. R. v. Imran Hussain [1997] EWCA (Crim.) 1401 (Eng.); *see also* Slobogin, *supra* note 56, at 327 (noting that "England requires taping of all questioning in the stationhouse," and that "affirmative misrepresentations about the evidence are barred" (citing David J. Feldman, *England and Wales*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 167, 169 (Craig M. Bradley ed., 2d ed. 2007))).

77. Jacqueline Ross, *Do Rules of Evidence Apply (Only) in the Courtroom?: Deceptive Interrogation in the United States and Germany*, 28 OXFORD J. LEGAL STUD. 443, 453 (2008) (citing STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE] § 136a (Ger.)); Slobogin, *supra* note 56, at 327 (citing Thomas Weigend, *Germany*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 77, at 243, 258); Stephen C. Thaman, Miranda *in Comparative Law*, 45 ST. LOUIS U. L.J. 581, 598 (2001) (citing Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 27, 1992, 38 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 214 (218) (Ger.)).

78. Slobogin notes that, in England and Germany, the police are allowed to continue questioning in the face of explicit request of the suspect to remain silent, and this rule may compensate for the prohibition to lie. *See* Slobogin, *Lying and Confessing*, *supra* note 40, at 1282–83 (citing THE ROYAL COMM'N ON CRIMINAL JUSTICE, REPORT 56–57 (1993)); see also Slobogin, *Comparative Empiricism*, *supra* note 56, at 326 (noting that suspects in the United Kingdom and Germany have long been informed of their rights to remain silent (citing Feldman, *supra* note 76, at 167)). However, in the United States too, the police may resume questioning a suspect who invoked his right to silence after they scrupulously honor this invocation by cutting off questioning, waiting a reasonable amount of time, and informing the suspect of his *Miranda* rights once again. *See* Michigan v. Mosley, 423 U.S. 96, 104–07 (1975). Additionally, the police are allowed to interrogate a suspect as long as he does not explicitly invoke his *Miranda* rights to silence and counsel, even in the face of his silence. *See* Berghuis v. Thompkins, 560 U.S. 370, 381–82 (2010) (quoting Davis v. United States, 512 U.S. 452, 458–59, 461–62 (1994)). Moreover, interrogators are not obliged to cease questioning after invocation as long as the suspect's statements are not introduced during the prosecution's case-in-chief. Russell D. Covey, *Interrogation Warrants*, 26 CARDOZO L. REV. 1867, 1899 (2005).

A. The Slippery Slope Argument and Legitimizing Lies

Lies harm the integrity of the police and of the criminal justice system.[79] They undermine the general norm that condemns lies.[80] A priori permission granted to interrogators to lie to suspects with the approval of the legal system makes mendacity a method and creates a culture of lies.[81] Such a culture can have devastating effects on the moral strength of the police.[82]

The prohibition on fabricating written documents rests, inter alia, on the concern that the fabricated evidence will end up being incorporated into the file presented as evidence at trial,[83] and on the concern that the police might be tempted to forge other documents as well, such as search warrants, and harm the fairness of the judicial system and the public trust in it.[84]

But the fear of breaching boundaries and of not observing the separation between lying in the interrogation room and in the court room persists, even when the lie is spoken. One lie may lead to another, because the first lie has already violated the internal and external prohibition on lying.[85] Interrogators who routinely lie to suspects may lie to prosecutors and judges as well.[86] After all, the rationale for the legitimacy of the lie, ostensibly in the name of the public interest, which demands law enforcement and protection of public safety, is present throughout the criminal process.[87] Contrary to other improper means, such as threats, temptations, and sleep deprivation, which can naturally be directed only toward suspects, lies can be used also against prosecutors and fact finders. Interrogators may lie to prosecutors and judges, though they are not publicly identified enemies, because of

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79. Young, *supra* note 2, at 456.

80. Skolnick & Leo, *supra* note 4, at 10.

81. Jerome H. Skolnick, *Deception by Police*, CRIM. JUST. ETHICS, Summer/Fall 1982, at 40, 45.

82. *See* Boaz Sangero, *Using Tricks and Cover Agents for Extracting Confessions*, 9 ALEI MISHPAT 399, 412 (2011) (Isr.); Slobogin, *Deceit, Pretext, and Trickery*, *supra* note 3, at 800 ("Barker and Carter assert that 'police lying contributes to police misconduct and corruption and undermines the organization's discipline system.'" (quoting Tom Barker & David Carter, *"Fluffing Up the Evidence and Covering Your Ass:" Some Conceptual Notes on Police Lying*, 11 DEVIANT BEHAV. 61, 71 (1990))).

83. Skolnick & Leo, *supra* note 4, at 9 (citing State v. Cayward, 552 So. 2d 971, 974 (Fla. Dist. Ct. App. 1989)); Thomas III, *supra* note 52, at 1308.

84. Skolnick & Leo, *supra* note 4, at 9.

85. Robert F. Nagel, *Lies and Law*, 22 HARV. J.L. & PUB. POL'Y 605, 616 (1998).

86. Jones, *supra* note 6, at 530; Skolnick & Leo, *supra* note 4, at 9; *see* Gohara, *supra* note 4, at 832–33. On the phenomenon of police officers lying in court, see generally Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1 (2010).

87. *See* Sangero, *supra* note 82, at 415–16; Young, *supra* note 2, at 463–64.

their disagreement on the concept of public safety and their insistence on due process.[88]

Furthermore, allowing interrogators to lie creates an anomalous situation and a "double standard," under which police officers are allowed to lie but suspects are not.[89] Whereas a lie by interrogators to suspects has no cost associated with it for the interrogators, if suspects lie to interrogators they commit a criminal offense.[90] Though lying in an effort to fight crime may be viewed as less culpable than lying about a crime one has committed, it is difficult to think of a solid moral justification for such an anomalous situation that allows interrogators to lie to suspects but prohibits suspects from lying to the interrogators. Suspects who know that the interrogators are lying to them may feel that their lies to the interrogators are justified as well.[91] If the police treat suspects as enemies, there is a good chance that suspects will view police interrogators as enemies.[92] In general, lying by police interrogators to citizens legitimizes lying by citizens to the police.[93]

B. Harm to the Relationship of Trust Between Citizens and Police and to Due Values

Trust is a fundamental principle of any social order, and lies generally harm trust.[94] Systematic lies by the police "undermine[] public confidence" in the integrity of the police as an institution.[95] Harm to the public's confidence in police may harm public cooperation.[96] Law enforcement personnel should serve as paragons and set an example for correct values through appropriate behavior.[97] Tolerating lies sends a problematic and

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88. *See* Carl B. Klockars, *Blue Lies and Police Placebos: The Moralities of Police Lying*, 27 AM. BEHAV. SCI. 529, 540 (1984); Sangero, *supra* note 82, at 416; Young, *supra* note 2, at 464.

89. Dorothy Heyl, *The Limits of Deception: An End to the Use of Lies and Trickery in Custodial Interrogations to Elicit the "Truth"?*, 77 ALBANY L. REV. 931, 941 (2014). This is contrary to the situation in Germany where suspects are allowed to lie but the police are not. Ross, *supra* note 77, at 473.

90. *See* Howe, *supra* note 22, at 962.

91. *See* Ross, *supra* note 77, at 473.

92. *See id.* at 460–61.

93. Young, *supra* note 2, at 460.

94. Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259, 264 (1996); *see* BOK, *supra* note 36, at 28–29.

95. Skolnick & Leo, *supra* note 4, at 9; *see* Young, *supra* note 2, at 457.

96. Laura Hoffman Roppé, Comment, *True Blue? Whether Police Should Be Allowed to Use Trickery and Deception to Extract Confessions*, 31 SAN DIEGO L. REV. 729, 763 (1994); *see* Young, *supra* note 2, at 458–59.

97. *See* SHIFFRIN, *supra* note 13, at 198–99; Paris, *Trust, Lies, and Interrogation*, *supra* note 14, at 31–32.

inconsistent message regarding the appropriate values that should underlie the criminal justice system.[98] It is easier to accept moral condemnation from people who are deemed moral.[99] The quandary of Bishop Myriel in Victor Hugo's novel *Les Misérables* about the relationship between the moral flaw inherent in the commission of an offense and the moral flaw of lying to suspects, illustrates this point:

> One day he heard a criminal case, which was in preparation and on the point of trial, discussed in a drawing-room. A wretched man, being at the end of his resources, had coined counterfeit money, out of love for a woman, and for the child which he had had by her. Counterfeiting was still punishable with death at that epoch. The woman had been arrested in the act of passing the first false piece made by the man. She was held, but there were no proofs except against her. She alone could accuse her lover, and destroy him by her confession. She denied; they insisted. She persisted in her denial. Thereupon an idea occurred to the attorney for the crown. He invented an infidelity on the part of the lover, and succeeded, by means of fragments of letters cunningly presented, in persuading the unfortunate woman that she had a rival, and that the man was deceiving her. Thereupon, exasperated by jealousy, she denounced her lover, confessed all, proved all.
>
> The man was ruined. He was shortly to be tried at Aix with his accomplice. They were relating the matter, and each one was expressing enthusiasm over the cleverness of the magistrate. By bringing jealousy into play, he had caused the truth to burst forth in wrath, he had educed the justice of revenge. The Bishop listened to all this in silence. When they had finished, he inquired,—
>
> "Where are this man and woman to be tried?"
> "At the Court of Assizes."
> He went on, "And where will the advocate of the crown be tried?"[100]

Indeed, as good intent is by and large no justification for violating the law, there is no justification in the normal case for lies—including ugly lies that cause people to lose trust in loved ones—told ostensibly for a good purpose.[101] Specifically, lies told during interrogations could harm the suspect's confidence in both the interrogators and the police as a whole.[102] Breach of trust on the part of the interrogators, and the knowledge that interrogators are lying to suspects, can affect the ability of suspects to trust representatives of law enforcement agencies in the later stages of the criminal process and

98. *See* Khasin, *supra* note 4, at 1036.
99. Paris, *Trust, Lies, and Interrogation*, *supra* note 14, at 32.
100. VICTOR HUGO, LES MISÉRABLES 13 (Isabel F. Hapgood trans., Thomas Y. Crowell & Co. 1887) (1862).
101. Sangero, *supra* note 82, at 415.
102. *See* SHIFFRIN, *supra* note 13, at 198–99.

lead to failure to trust legitimate proposals on the part of the interrogators.[103] Such distrust could harm the ability of law enforcement agencies to search for the truth.

C. Harm to Human Dignity and to the Presumption of Innocence

Lies harm "the dignity of suspects."[104] The harm to dignity follows not only from the false statement but also from the underlying assumption of guilt expressed. Suspects, who assumedly interrogators must presume innocent, are perceived as guilty from the outset of the interrogation.[105] Interrogators allow themselves to lie under the assumption that suspects are guilty and that they lie when denying guilt.[106] Innocent suspects, then, do not fit the scenario under which interrogators may lie to catch a liar.[107] There is a relation between the interrogator's tendency to assume guilt and the use of manipulative techniques on his part during interrogations.[108] An interrogator whose working assumption includes the possibility of the suspect's innocence does not make eliciting the suspect's confession the goal of the interrogation.

It may be argued, however, that lies do not necessarily assume the guilt of the suspect. The aim of the lie is to test the reaction of the suspect and to distinguish in this way between guilty and innocent suspects. Additionally, the lie can cause a suspect to provide other evidence apart from the confession. But it is highly doubtful whether interrogators are able to glean guilt or innocence from reaction.[109] Feelings of stress, fear, and anger, as well as the desire of an innocent suspect to prove his innocence, could create a perception that he is a criminal.[110] It is difficult to maintain that there is

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103. *See* Sangero, *supra* note 82, at 415; Slobogin, *Deceit, Pretext, and Trickery*, *supra* note 3, at 799.

104. Milhizer, *supra* note 1, at 88.

105. Although the Supreme Court held in *Bell v. Wolfish* that the presumption of innocence does not apply prior to trial, the presumption of innocence bears a broader meaning. 441 U.S. 520, 532–33 (1979); *see* Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 259 (2002).

106. *See* Young, *supra* note 2, at 459, 461–62.

107. *See id.* at 459.

108. Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381, 395 (2007); *see also* Jerome Hall, Objectives of Federal Criminal Procedural Revision, 51 YALE L.J. 723, 730 (1942) (explaining the rationale that "social defense" assumes guilt).

109. *See* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 226 (2008); Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809, 810–12, 815 (2002) [hereinafter Kassin, *Human Judges of Truth*].

110. *See* GUDJONSSON, *supra* note 56, at 25–28; Danny Ciraco, *Reverse Engineering*, 11 WINDSOR REV. LEGAL & SOC. ISSUES 41, 51–52 (2001) (citing SIMON, *supra* note 63, at 206) (Can.); Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y. L. SCH. L. REV. 911, 926 (2011–2012) (quoting Dan Simon, *The Limited*

a specific pattern of response to false incriminating evidence that credibly draws the line between guilty and innocent suspects.[111]

The harm to dignity also results from the severe injury to the feelings of the innocent suspect, who is confronted with overwhelming incriminating evidence. An innocent person, who believes there is such incriminating evidence against him, may feel anxiety and severe mental distress in response to the expected false conviction, and perhaps even at the thought that he is being set up.[112] In the already difficult situation of an interrogation, the innocent suspect's "only hope lies in the knowledge of his innocence."[113] His confrontation with the alleged incriminating evidence against him dismantles his remaining hope of extricating himself from his predicament and of not becoming another victim of a false conviction.[114] Leo and Ofshe compare the situation of an innocent suspect confronted with both the interrogator's allegations and his refusal to admit the possibility that he may be wrong, to the experience of a person who wakes up in the morning and finds, in the spirit of the Kafka's story *The Metamorphosis*, that he has become a cockroach, unable to change his situation.[115] Hence, presenting false incriminating evidence to a suspect, in a way that the suspect believes that his conviction is inevitable, borders on emotional abuse.

Slobogin argues that it is possible to justify lying to suspects if the evidence against them is strong.[116] In his opinion, arresting a person based on probable cause is an appropriate point in time for the police to lie regarding the incriminating evidence because a judge will shortly review the evidence required for arrest, and he is not part of the investigating

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Diagnosticity of Criminal Trials, 64 VAND. L. REV. 143, 175, 179 (2011)); Kassin, *Human Judges of Truth*, *supra* note 109, at 812.

111. *See* Gallini, *supra* note 4, at 577 (stating that "there exists no physiological or psychological response unique to lying"); Kassin, *Psychology of Confessions*, *supra* note 18, at 219–20; Mann et al., *Suspects, Lies, and Videotape: An Analysis of Authentic High-Stake Liars*, 26 LAW & HUM. BEHAV. 365, 365 (2002); Julianne M. Read et al., *Investigative Interviewing of Suspected Sex Offenders: A Review of What Constitutes Best Practice*, 11 INT'L J. POLICE SCI. & MGMT. 442, 448 (2009) (citing Lucy Akehurst & Aldert Vrij, *Creating Suspects in Police Interviews*, 29 J. APPLIED SOC. PSYCHOL. 192, 192–93 (1999)); Vrij et al., *Cues to Deception and Ability to Detect Lies as a Function of Police Interview Styles*, 31 LAW & HUM. BEHAV. 499, 514 (2007)).

112. *See* Young, *supra* note 2, at 468–69; Thomas, *supra* note 34, at 1195, 1197.

113. Thomas, *supra* note 34, at 1201.

114. *See id.*

115. *See* Ofshe & Leo, *supra* note 64, at 1043.

116. Slobogin, *Deceit, Pretext, and Trickery*, *supra* note 3, at 777.

authority.[117] Furthermore, by the very arrest, the suspect is warned of the adversarial relation between her and the interrogator, and to the fact that the interrogator perceives her as an enemy.[118]

But suspects are not enemies, who are outside of standard social connections.[119] This metaphor is not suitable for most suspects and defendants.[120] The definition of crime may be disputable and politically-skewed.[121] Besides, there are offenders whose violation of the law—for which they will have to answer—is dwarfed by their overall contribution to society. Other offenders made a single mistake or may rehabilitate. Many other offenders have not committed a particularly serious offense that undermines the foundations of the social order.[122]

Furthermore, perceiving suspects as enemies is inconsistent with the obligation imposed on police officers to inform suspects of their Fifth Amendment rights to remain silent and to consult with an attorney before and during interrogation, and to enable them to exercise these rights.[123] As a matter of policy, individuals who are considered innocent in relation to the offense of which they are accused cannot be considered enemies.[124] An evidentiary standard of probable cause is insufficient to make a person into an enemy.[125] Although incriminating evidence against an individual weakens the factual presumption of innocence before the verdict,[126] the existence of such evidence against a person does not weaken the presumption of innocence at the normative level.[127] Treating a person as guilty before his guilt is established and before he is given the opportunity to address the incriminating evidence against him violates his dignity.[128] It is, therefore, inappropriate to lie to suspects based on their status as ostensible "enemies."

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117. *See id.* at 803, 810–11.

118. *See id.* at 811.

119. *See* Paris, *Lying to Ourselves*, *supra* note 39, at 830.

120. *See* Robert P. Mosteller, *Moderating Investigative Lies by Disclosure and Documentation*, 76 OR. L. REV. 833, 834 (1997).

121. *See* Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743, 764–65 (1995).

122. Slobogin states that the use of trickery during interrogation "might be restricted to investigations of felonies." Slobogin, *Lying and Confessing*, *supra* note 40, at 1279. Not every felony, however, shocks society to render a felon enemy.

123. *See* Klockars, *supra* note 88, at 533.

124. *See* Mosteller, *supra* note 120, at 834–35.

125. *See id.*

126. *See* Mark Heerema, *Uncovering the Presumption of Factual Innocence in Canadian Law: A Theoretical Model for the "Pre-Charge Presumption of Innocence,"* 28 DALHOUSIE L.J. 443, 451 (2005) (Can.);

127. *See* Bruce A. Antkowiak, *Saving Probable Cause*, 40 SUFFOLK U. L. REV. 569, 594 (2007); Kitai, *supra* note 105, at 292–93.

128. *See* Kitai, *supra* note 105, at 284.

D. Incriminating the Innocent

1. Entanglement in Lies

One risk that suspects face when dealing with false evidence is becoming entangled in lies to distance themselves from the incriminating evidence presented against them.[129] This is, indeed, one of the risks against which the right against self-incrimination seeks to protect. A key deontological argument justifying the right against self-incrimination concerns the trilemma facing accused persons who must respond to accusations against them by choosing one of three unfavorable options: (a) self-incrimination—if they choose to tell the truth; (b) entanglement in false testimony—if they choose to lie; and (c) risking contempt of court—if they choose to breach the law by remaining silent.[130] The right against self-incrimination was intended to rescue accused persons from the trilemma they face by giving them the possibility to choose a path that does not lead directly to their downfall.[131] Some believe silence is morally preferable to lying and that the right against self-incrimination is important because it removes the incentive to lie.[132]

But when the interrogator lies to an innocent suspect that his fingerprints were found at the scene of the crime, she encourages the suspect to lie. An innocent suspect might lie by providing an innocent explanation to his presence at the scene of the crime, based on his belief that his presence there—which did not occur—has been proven, and that the only option available to him to escape an indictment and conviction is to lie.[133] When the explanation of the innocent suspect is disproved, he becomes enmeshed in his lies, which are liable to strengthen the incriminating evidence against him.[134]

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129. *See* Thomas III, *supra* note 52, at 1299–1300.

130. This is referred to as the "cruel trilemma" of the English Judicial System, and public outcry against it was a direct precursor to the Fifth Amendment. JOE RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 33–34 (2005).

131. *See* Erwin N. Griswold, *The Right to Be Let Alone*, 55 NW. U. L. REV. 216, 222 (1960).

132. *See* Stuntz, *Lawyers, Deception, and Evidence Gathering*, *supra* note 21, at 1942.

133. Sangero, *supra* note 82, at 415. For analysis of such cases, see Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1097–99 (2010).

134. For more on the ability of a suspect's lies to strengthen the incriminating evidence against him, see Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 864 (1996);

2. The Risk of False Confessions

Lies about the existence and strength of the incriminating evidence might lead to false confessions.[135] Why would an innocent suspect confess in response to misleading incriminating evidence? First, when the interrogators claim that they have evidence which in fact does not exist, they create a risk that the suspect becomes persuaded that all claims to innocence are solely a fruitless endeavor.[136] "Cost-benefit" considerations may lead a suspect, who is certain of his conviction, to make a false confession, which from his point of view appears to be rational.[137]

Second, innocent suspects might become persuaded that they committed the offense attributed to them.[138] Suspects who were under the influence of drugs or alcohol at the time of the incident and do not remember its details may be persuaded of the veracity of the police's version regarding the events.[139] Other innocent suspects, however, may be persuaded to believe both their own guilt and the fact that they do not remember the details of the painful event.[140] The belief of an innocent suspect in the interrogator's claim, and their disorientation during the interrogation, might lead them to doubt their own memory and believe they suppressed committing the offense.[141] Thus, as noted by Kassin, one of the leading scholars researching the phenomenon of false confessions:

Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 443 (2000).

135. *See* Young, *supra* note 2, at 454, 468; Khasin, *supra* note 4, at 1032 (citing Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 128 (1997) [hereinafter White, *False Confessions*]).

136. *See* R. v. Oickle, [2000] 2 S.C.R. 3, para. 43 (Can.).

137. Alan Hirsch, *Threats, Promises, and False Confessions: Lessons of Slavery*, 49 HOW. L.J. 31, 35 (2005); *see* Morris, *supra* note 4, at 284.

138. *See Oickle*, 2 S.C.R. 3, para. 43.

139. Young, *supra* note 2, at 462 (citing JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW 61 (1993)).

140. *See* Kassin & Kiechel, *supra* note 15, at 125–26; Christopher Sherrin, *False Confessions and Admissions in Canadian Law*, 30 QUEEN'S L.J. 601, 621–22 (2005); Skolnick & Leo, *supra* note 4, at 8 (quoting Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, *in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 67, 78 (1985)); Khasin, *supra* note 4, at 1033 (quoting White, *False Confessions*, *supra* note 135, at 109).

141. *See* Hirsch, *supra* note 137, at 35–36; Kageleiry, Jr., *supra* note 15, at 40–41; Scott-Hayward, *supra* note 61, at 68 (quoting Michael Crowe, *It Happened to Me*, JANE MAG., Dec. 2002); White, *False Confessions*, *supra* note 135, at 128.

> Many classic experiments have shown that the presentation of false information (through confederates, witnesses, counterfeit test results, bogus norms, false physiological feedback, and the like) can substantially alter people's visual perceptions, beliefs, behaviors, emotions, memories, and even certain physiological outcomes, as seen in medical studies of the classic placebo effect.[142]

Unlike guilty suspects, who know incriminating evidence against them is credible, innocent suspects, who do not understand the very existence of incriminating evidence against them, experience the undermining of reality.[143]

Mark Kuznetsov, who was accused of murder and acquitted in the Tel Aviv District Court in Israel, may serve as an example for this phenomenon. Kuznetsov testified in court about the mental process he underwent during the interrogation, which had led him to make a false confession, stating that:

> During that period of my life logic betrayed me and the worst thing that happened was that the interrogations caused me, a day after the initial interrogations, at night, when I was going to sleep, not during sleep, but while awake, to interrogate myself, maybe I don't remember what I did. . . I had never lost my memory. . . This convinced me once again that I didn't do it. But the worst thing that happened to me was this shadow of a doubt. . . And it was even more difficult for me to choose some kind of stand in the interrogations, especially when I was cut off from everything, from my parents, an attorney.[144]

Indeed, it is possible to manipulate and contaminate memories. One experiment attempted to ask people about a strange childhood incident involving them bumping into a table when goofing around at a wedding and spilling punch on the parents of the bride; after several interviews, about twenty-percent of respondents provided false information.[145] In another experiment, participants in Elizabeth Loftus's study "recalled" the

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142. Saul M. Kassin, *Inside Interrogation: Why Innocent People Confess*, 32 AM. J. TRIAL ADVOC. 525, 535 (2009) [hereinafter Kassin, *Inside Interrogation*].

143. Therefore, I oppose Slobogin's approach, which states, "Even if the police go to the trouble of fabricating evidence that can be shown to the suspect, the pressure to talk is no greater than in cases where the evidence actually exists." Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After 50 Years of* Miranda *Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 B.U. L. REV. 1157 (2017). When the evidence is real, no undermining of reality exists.

144. File No. 1172/04 DC (TA), State of Israel v. Kuznetzov (Dec. 12, 2005), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

145. Steven B. Duke et al., *A Picture's Worth a Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, 44 AM. CRIM. L. REV. 1, 32 (2007) (citing Ira E. Hyman, Jr., *Creating False Autobiographical Memories: Why People Believe Their Memory Errors*, *in* ECOLOGICAL APPROACHES TO COGNITION: ESSAYS IN HONOR OF ULRIC NEISSER 229, 236 (Eugene Winograd et al. eds., 1999)).

experience implanted in their memory of getting lost in a shopping mall as children.[146] Hence, information that individuals learn about events after the fact can be stored in their minds and change their memory regarding the original incident.[147]

David Hume described the fragile boundary between imagination and memory:

> And as an idea of the memory, by losing its force and vivacity, may degenerate to such a degree, as to be taken for an idea of the imagination; so on the other hand an idea of the imagination may acquire such a force and vivacity, as to pass for an idea of the memory, and counterfeit its effects on the belief and judgment. This is noted in the case of liars; who by the frequent repetition of their lies, come at last to believe and remember them, as realities; having habit and custom in this case, as in many others, and Infixing the idea with equal force and Vigour.[148]

Memory can indeed mislead. In many cases, individuals overcome the frailties of the human memory by creating a false memory.[149] Naturally, lying may exacerbate this phenomenon. When an innocent suspect believes his own guilt and that he does not remember the details of the incident, he is liable to complete the missing details from his imagination and believe in their existence.

There is no disagreement on the principle that lies, which create a significant risk of false confessions, are illegitimate.[150] Nevertheless, some believe that lies concerning the incriminating evidence are not expected to lead to false confessions. Indeed, it is difficult to estimate to what degree lies cause suspects to confess, and how many suspects who confess are innocent.[151] A study conducted by Richard Leo found that confronting suspects with strong incriminating evidence is very useful in obtaining confessions: seventy-eight percent of suspects confronted with true evidence confessed, and eighty-three percent of suspects confronted with false evidence did so.[152] Likewise, other studies demonstrated that the strength of the real or perceived incriminating evidence is a central factor in the decision to confess.[153]

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146. Elizabeth F. Loftus, *The Reality of Repressed Memories*, 48 AM. PSYCHOLOGIST 518, 532 (1993).

147. Corey John Ayling, Comment, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121, 1175–76.

148. DAVID HUME, *Of the Impressions of the Senses and Memory*, *in* 1 A TREATISE OF HUMAN NATURE 86 (L.A. Selby-Bigge, ed. 1896) (1739).

149. *See* Loftus, *supra* note 146, at 532.

150. *See, e.g.*, Inbau, *supra* note 14, at 152; Morris, *supra* note 4, at 284 (regarding interrogations methods in general).

151. *See* Feld, *supra* note 4, at 311.

152. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 293–94 (1996).

153. *See* Michel St-Yves & Nadine Deslauriers-Varin, *The Psychology of Suspects' Decision-Making During Interrogation*, *in* HANDBOOK OF PSYCHOLOGY OF INVESTIGATIVE

While lies significantly increase confessions, it is unknowable how many of the suspects who confessed when confronted with false evidence were innocent.

Some believe that even in the face of false evidence that appears overwhelming, which causes anger and hopelessness, an innocent person would not admit guilt. An innocent person has no reason to do so. After all, confession may lead to a wrongful conviction.[154] According to this line of thought, a confession of guilt requires a component in addition to the lies, such as threats or temptations of a reduced punishment.[155] It is argued that most innocent suspects will try to confront the evidence presented to them and to prove its unreliability.[156]

But the presentation of false evidence constitutes both a threat and a concealed temptation. It conveys a message to the suspect that he will be convicted in any case, without gaining the benefit resulting from his collaboration.[157] The suspect's assessment that his conviction is inevitable so he has nothing to lose by confessing, and that his confession adds nothing to what is already known to the interrogators, can lead him to believe that confession may benefit him by casting him in a more favorable light in the eyes of the court, thereby lessening his punishment.[158]

In any case, there is no need to seek an explicit benefit in the form of a temptation gained from confession. Interrogation, in the course of which considerable pressure is exerted and the accusation is hurled at the suspect again and again, is a traumatic experience.[159] The mere ending of the interrogation after confession is an immediate benefit to an innocent suspect.[160] Every suspect understands this, even without a banner hanging in the interrogation room stating "better treatment for confessing and worse

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INTERVIEWING: CURRENT DEVELOPMENTS AND FUTURE DIRECTIONS 1, 6–7 (Ray Bull et al. eds., 2009); Divya Sukumar et al., *Strategic Disclosure of Evidence: Perspectives from Psychology and Law*, 22 PSYCH. PUB. POL. & L. 306, 306–07 (2016) [hereinafter Sukumar et al., *Strategic Disclosure*].

154. *See* Thomas III, *supra* note 52, at 1300; *see also* Frazier v. Cupp, 394 U.S. 731, 739 (1969).

155. *See* INBAU ET AL., *supra* note 57, at 421; Thomas III, *supra* note 52, at 1299–1300.

156. *See* Thomas III, *supra* note 52, at 1300.

157. *See* Gohara, *supra* note 4, at 825–26.

158. *See* Kageleiry, Jr., *supra* note 15, at 40; Paris, *Trust, Lies, and Interrogation*, *supra* note 14, at 24; White, *False Confessions*, *supra* note 135, at 130; Hamblet, *supra* note 30, at 130.

159. White, *False Confessions*, *supra* note 135, at 143.

160. Bradford & Goodman-Delahunty, *supra* note 28, at 113.

treatment for resisting."[161] This statement holds true also for an interrogation that does not involve lies. But lies, which cause the suspect to believe that, given the evidence against him, insisting on innocence seems futile, spurs the illusion that the suspect can only end the interrogation by confessing.[162]

Additionally, even without attempting to derive future benefit from confession, an innocent suspect who believes that, given the overwhelming incriminating evidence, he has no chance of proving his innocence and therefore there is no point in disavowing guilt,[163] may confess because of despair,[164] a mental breakdown,[165] the collapse of his will power,[166] doubts about his sanity,[167] or because of the ostensible knowledge of someone in a position of authority.[168] Contrary to true evidence, lies deliberately create those risks.

Ethical limitations on research make it difficult to conduct an experiment that simulates the true conditions of a lengthy and high-pressure interrogation to examine how lying about incriminating evidence affects an innocent suspect's willingness to confess.[169] Even if it were possible to make such a simulation, it would be difficult to isolate lies from other factors, such as the pressure of detention or fatigue.

Nevertheless, laboratory studies have shown that lies concerning the existence of incriminating evidence increase the risk of false confessions and internalization of imagined guilt.[170] Kassin and Kiechel conducted a well-known experiment, an aim of which was to investigate the effect of

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161. Yi Yanyou, *State Ideology Transition and Procedure Model Reformation: China's Criminal Procedure Law and Its Revisions*, 4 TSINGHUA CHINA L. REV. 155, 179 (2012) (noting that Chinese interrogators actually hang such a banner in the interrogation room).

162. Feld, *supra* note 4, at 313 (citing Kassin, *Psychology of Confessions*, *supra* note 18, at 224); Gohara, *supra* note 4, at 818; Wright, *supra* note 6, at 262 (citing Fred E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 419 (Aspen Publishers, Inc. 4th ed. 2004) (1962)).

163. *See* Thomas, *supra* note 34, at 1192; White, *False Confessions*, *supra* note 135, at 146–47; White, *Police Trickery*, *supra* note 4, at 625 (citing FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION & CONFESSIONS 30 (2d ed. 1967)); Khasin, *supra* note 4, at 1043.

164. Feld, *supra* note 4, at 313 (citing Kassin, *Psychology of Confessions*, *supra* note 18, at 224); Khasin, *supra* note 4, at 1043.

165. Khasin, *supra* note 4, at 1043.

166. Thomas, *supra* note 34, at 1192.

167. Khasin, *supra* note 4, at 1043.

168. White, *supra* note 4, at 624 (citing INBAU & REID, *supra* note 163, at 13–17).

169. Slobogin, *supra* note 56, at 340 (citing Melissa B. Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 483–84 (2006)); *see also* Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 LAW & HUM. BEHAV. 141, 151 (2003).

170. *See* Kassin, *Inside Interrogation*, *supra* note 142, at 535.

false evidence on the willingness of innocent people to admit guilt.[171] Seventy-nine students were asked to type in a few letters that were read to them, after being told to be careful not to press the Alt key because it causes the program to crash and lose all data.[172] The letters were read at a fast speed to some of the students, and slowly to others.[173] In the course of typing, the computer stopped working, and the experimenter asked the student angrily whether he touched the Alt key.[174] The experimenter also asked the person reading the letter, who was part of the experiment team, whether he saw the student touch the Alt key.[175] In some cases, the reader answered in the affirmative, in others in the negative.[176] The students who typed the data were asked to sign a form stating "I hit the 'ALT' key and caused the program to crash. Data were lost," knowing they were likely to receive a call from the principal experimenter.[177] Although initially all the students denied the charge leveled at them, sixty-nine percent later admitted their imagined guilt and signed the confession form; twenty-eight percent internalized their guilt; and nine percent added imaginary details concerning the circumstances under which they touched the Alt key.[178] The rate of confessions among students whose letters were read at a rapid pace, as well as the rate of the confessors who believed in their guilt, was significantly higher than the rate of confessions among students for whom the letters were read slowly.[179] The rate of confessions and internalization of guilt among students whose reader falsely testified that he saw them press the Alt key was higher than among students whose reader testified that he had not noticed the Alt key having been pressed.[180] According to the authors, the experiment demonstrated that presenting false evidence increases the rate of confessions, makes people believe in their guilt, and causes people to change their memories of the events.[181]

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171. Kassin & Kiechel, *supra* note 15, at 126. For more about this experiment, see also Kassin, *Inside Interrogation*, *supra* note 142, at 535–36; Edward J. Sackman, *False Confessions: Rethinking a Contemporary Problem*, 16 KAN. J.L. & PUB. POL'Y 208, 225–26 (2006) (citing Kassin & Kiechel, *supra* note 15, at 125–26).
172. Kassin & Kiechel, *supra* note 15, at 126.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 127.
179. *Id.*
180. *Id.*; *see also* Kassin et al., *Police-Induced Confessions*, *supra* note 18, at 17.
181. Kassin & Kiechel, *supra* note 15, at 127.

This experiment, obviously, does not simulate the reality of an interrogation, which includes conditions of isolation and fear of expected punishment in the case of conviction. Given the qualitative difference between confession of having negligently pressed a key, which is expected to trigger only minimal harm, and confession of committing a serious offense, the ability of research of this type to shed light on the phenomenon of false confessions is limited.[182] As noted by the authors themselves, the participants were accused of negligent behavior, which does not involve disgrace, and not of deliberate behavior, and therefore the barrier before a false confession may be lower.[183] Furthermore, the very definition of the conduct as negligent indicates the perpetrator acted without awareness of the circumstances of the offense. Therefore, although the experiment sheds light on certain aspects of one's personality, such as adherence to authority and the ability to "remember" imaginary information, there may have been students who truly believed that they pressed the key inadvertently.[184] The fact that there were significant gaps between the rates of confessions among students who had the letters read to them at a rapid pace and those who had the letters read to them slowly reinforces this conclusion.[185] Additional experiments that were conducted in the spirit of the experiment of the imaginary pressing of the Alt key have yielded similar findings.[186]

In another study, conducted by Nash and Wade, participants in a computerized gambling experiment were asked to return counterfeit money to the bank after providing a wrong answer, and to take counterfeit money from the bank after providing a correct answer.[187] On the computer screen, a *V* checkmark appeared after a correct answer and an *X* sign after a wrong

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182. Redlich & Goodman, *supra* note 169, at 151.

183. Kassin & Kiechel, *supra* note 15, at 127.

184. *See* Russano, *supra* note 169, at 482.

185. Redlich & Goodman, *supra* note 169, at 143–44.

186. *See id.* at 147–151. The main purpose of this study was to examine the effect of age on the willingness to confess. *Id.* at 151. Ninety-six participants were warned against pressing the Alt key, and this time a computer printout provided imaginary proof that the forbidden key was pressed. *Id.* at 144, 146. Here also, some of the participants were presented with false evidence in the form of a computer printout, and to some participants no such evidence was presented. *Id.* at 146. In this experiment as well, sixty-nine percent of participants accepted responsibility for the imaginary pressing of the prohibited key. *Id.* at 154. Presentation of the false evidence did not increase the percentage of those who admitted pressing the key among college students and among participants between the ages of twelve and thirteen, but only among participants aged fifteen to sixteen. *Id.* at 148. Among those in the twelve to thirteen age group who admitted pressing the key, a significantly greater percentage believed that they were responsible for pressing the forbidden key upon exposure to the false evidence. *Id.* at 154.

187. Robert A. Nash & Kimberley A. Wade, *Innocent but Proven Guilty: Eliciting Internalized False Confessions Using Doctored-Video Evidence*, 23 APPLIED COGNITIVE PSYCHOL. 624, 625 (2009).

answer.[188] The experimenters used digital editing software to fabricate evidence according to which participants took money from the bank instead of returning money to it, despite the fact that ostensibly an *X* appeared on the computer screen.[189] All the participants admitted to taking money illegally if they were charged that they did so on one occasion, and sixty-three percent of the participants internalized imaginary guilt.[190] It seems that, when confronted with the fake video evidence, participants could easily believe to have made a one-time mistake concerning the rules of the game. But even when participants were accused of taking money from the bank three times rather than returning it, although it was unlikely that such a mistake could be made in good faith so often, ninety-three percent admitted their guilt.[191] One must still bear in mind that the results of a confession were rather limited: confession meant the subject would not receive the promised payment for participating, while refusing to confess meant having to participate in a subsequent experiment.[192] Because the game was played using counterfeit money, the confession did not involve an offense that disgraces the participant.

Turning to the real world and serious crimes, a seventeen-year-old youth confessed to murdering his mother after an interrogator confronted him with a series of false incriminating pieces of evidence.[193] Among other lies, the interrogator told the suspect that his father, who was severely hurt in the attack that killed his mother, regained consciousness and asserted that it was his son who had attacked him.[194] The youth confessed because he believed that the story told by his father, who was an object of his admiration and who had never lied, must be true.[195] The youth was convicted of murder and spent many years in jail before he was exonerated.[196] Even in high-stakes cases, then, when confronted with incriminating evidence innocent suspects might admit committing a serious offense and internalize their guilt.

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188. *Id.* at 627, 627 fig.2.
189. *Id.* at 627.
190. *Id.* at 629.
191. *Id.* at 631.
192. *Id.* at 628.
193. Kassin, *Inside Interrogation*, *supra* note 142, at 536.
194. *Id.*
195. *Id.* (quoting RICHARD FIRSTMAN & JAY SALPETER, A CRIMINAL INJUSTICE: A TRUE CRIME, A FALSE CONFESSION, AND THE FIGHT TO FREE MARTY TANKLEFF 278–79 (2008)); Gohara, *supra* note 4, at 793.
196. *Id.*

3. Distinction between Different Types of Lies with Respect to the Risk of False Confessions

Some distinguish between types of evidence regarding the risk of false confessions, claiming that in most cases the misleading evidence will not cause an innocent suspect to confess guilt.[197] But the situation is different when the suspect is presented with scientific evidence that substantiates his guilt unequivocally, because in this case even an innocent person can give up hope of proving his innocence and assent to the story being told by his interrogators.[198]

When interrogators lie to suspects, telling them that their fingerprints or DNA samples were found at the scene of the incident, guilty persons are likely to believe that their crime was discovered, unless they can think up a reasonable explanation for their presence at the scene. Whereas a guilty person who believes the lie knows that he cannot refute the evidence, an innocent person hopes that the error is revealed and corrected.[199] It may be, however, that an innocent suspect might feel he cannot cope with strong scientific evidence without the knowledge needed to uncover an error in testing. Some believe, therefore, that interrogators should be prohibited from lying about incriminating evidence that is perceived as infallible, and that can cause a reasonable innocent suspect, on some occasions, to think that conviction is inevitable.[200]

The prohibition on forging an official document relies, *inter alia*, on the concern that innocent suspects will believe they cannot prove their innocence and, as a result, will make false confessions. Whereas suspects are aware of their rivalry with their interrogators and treat their assertions with suspicion, a document that was ostensibly issued by a reputable neutral agent is viewed by the suspect as reliable.[201]

However, although backing up a lie with documentation can strengthen its reliability in the eyes of the suspect, a lie voiced orally can also win the suspect's trust.[202] In both cases, the interrogator asks the suspect to trust

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197. *See* George C. Thomas III, Miranda*'s Illusion: Telling Stories in the Police Interrogation Room* 81 TEX. L. REV. 1091, 1118 (2003) (reviewing WELSH S. WHITE, *MIRANDA*'S WARNING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER *DICKERSON* (2001)).

198. *See id.*

199. Thomas III, *supra* note 52, at 1295.

200. *See* Gohara, *supra* note 4, at 822; Christine D. Salmon, *DNA is Different: Implications of the Public Perception of DNA Evidence on Police Interrogation Methods*, 11 RICH. J.L. & PUB. INT. 51, 56–57 (2008) (proposing to prohibit interrogators from lying about the existence of DNA evidence); Thomas, *supra* note 34, at 1190.

201. Morris, *supra* note 4, at 286–87 (citing Stave v. Cayward, 552 So. 2d 971, 974 (Fla. Dist. Ct. App. 1989)).

202. *See* Skolnick & Leo, *supra* note 4, at 8.

the truthfulness of a false assertion, and to respond to it. An oral lie can be even more dangerous, as it creates anxiety about conviction; whereas it is possible to peruse a lie presented in writing and assess its strength, an oral lie is more vague and subject to the deceptions of memory.[203] In any case, the assumption is that the suspect believes the interrogator about the existence of incriminating evidence.[204] If the suspect does not trust the interrogator, his decision on whether to confess is not affected by the incriminating evidence presented. Suspects who assume that the interrogator can lie to them are either sufficiently sophisticated or have prior experience with police interrogations and, in any case, would tend to avoid collaborating with the police.[205]

Some argue that a reasonable innocent suspect is likely to feel he can deal with false evidence that is not scientific; scientific evidence is perceived as more dangerous for the suspect than evidence based on a human source, such as a confession by an accomplice or identification in a lineup.[206] According to this line of thought, an innocent suspect would normally not confess after an interrogator claims the suspect's accomplice confessed to the crime and implicated the suspect, but will instead believe that he can maintain his innocence, as the case comes down to his word against that of another person.[207] Therefore, whereas lies concerning the existence of scientific evidence should be totally forsworn, other lies told concerning the incriminating evidence should be examined cautiously based on whether they can lead to false confessions.[208]

However, in practice, every lie about incriminating evidence can lead an innocent suspect to feel his conviction is inevitable. It is possible that, if an innocent suspect believes that another person allegedly deflected the blame onto him, or if an eyewitness mistakenly identified him, he is likely to fall victim to a false conviction.[209] A lie about eyewitnesses implicating suspects led to the suspects in the infamous Central Park Jogger case to

203. *Id.*
204. *Id.*
205. *Id.*
206. Gohara, *supra* note 4, at 822–23 (citing Ofshe & Leo, *supra* note 64, at 1023); Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1243 (2001)).
207. Thomas III, *supra* note 52, at 1302.
208. White, *supra* note 141, at 137.
209. Thomas, *supra* note 34, at 1197.

falsely confess about causing grievous bodily harm and committing rape.[210] A lie of this type can lead the suspect not only to make a false confession, but also provide the names of imagined accomplices and implicate them in a crime they have not committed.[211] This cause and effect is understandable. Such a lie may cause the suspect to lose faith in the people close to him, and can demolish his worldview and his faith in humanity. A suspect's "knowledge" that a person in whom he has faith betrayed his trust could bring a suspect to a state of emotional breakdown, and lead to a desire to take revenge by implicating that person who allegedly betrayed his trust, out of frustration and rage.[212] Besides, the suspect may want to do unto others as they did unto him. No wonder, then, that some recommend prohibiting interrogators entirely from lying about incriminating evidence because of the risk of false confessions.[213]

Compare a neutral lie about incriminating evidence that does not implicate the suspect. An interrogator could, for example, lie to a suspected burglar that a house's tenant is able to identify whoever robbed him. The suspect might answer "that is impossible—the house was empty," implicating his guilt without confessing. Alternatively, an interrogator might lie that fingerprints were found at the scene, without explicitly stating the fingerprints are the suspect's—the suspect might concede those are his fingerprints. Such lies on their face do not appear to produce false confessions or confessions prompted by emotional distress. Likewise, there is no reason for an innocent suspect who is presented by the interrogator with a blood-stained shirt that was allegedly found at the scene of the crime to confess guilt when asked if he knows anything about the shirt.[214]

Assume, then, that the interrogator lies to the suspect that the laboratory results regarding the DNA samples taken from the scene will soon become available, and advises the suspect to tell the truth before the test results arrive. A false statement that the interrogator is waiting for the laboratory results does not create any hidden representations regarding the discovery

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210. Garett, *supra* note 133, at 1098 (citing Sydney H. Schanberg, *A Journey Through the Tangled Case of the Central Park Jogger*, VILLAGE VOICE (Nov. 19, 2002), https://www.villagevoice.com/2002/11/19/a-journey-through-the-tangled-case-of-the-central-park-jogger/ [https://perma.cc/R6C3-NYBE]); Wright, *supra* note 6, at 263 (citing Elaine Cassel, *How to Stop False Confessions such as in the Central Park Jogger Case*, CNN (Dec. 17, 2002, 12:42 PM), http://www.cnn.com/2002/LAW/12/17/findlaw.analysis.centralpark.jogger/ [https://perma.cc/EF4Y-V7VZ]).

211. *See* GUDJONSSON, *supra* note 56, at 17.

212. *See also* Heyl, *supra* note 89, at 942.

213. *See* Gohara, *supra* note 4, at 835; Kassin, *Psychology of Confessions*, *supra* note 18, at 225.

214. Thomas, *supra* note 34, at 1189, 1196.

of incriminating evidence against the suspect.[215] An innocent suspect who believes the interrogator is likely to be reassured by this knowledge, because he is sure that there will be no match between his own DNA samples or fingerprints and those obtained at the scene.[216] He must even feel relieved at the prospect that scientific evidence will demonstrate his innocence.[217]

And yet the intuition that neutral lies do not propel false confessions does not match reality. Kassin gives an example of a suspect who confessed to murdering his wife after nineteen hours of interrogation, and after the interrogator told him that blood was found in his car, which was sent to the laboratory to obtain a DNA sample.[218] The suspect made a false confession, explaining later that he was exhausted by the interrogation and thought that the DNA test would in any case prove his innocence.[219] Another suspect also confessed to rape and murder after six hours of interrogation, after being told that a DNA sample had been taken from the scene, certain that the DNA test would prove his innocence.[220] A DNA sample was truly taken from the scene, and it did not match the suspect's DNA.[221] But despite the discrepancy, the suspect was prosecuted based on his confession, convicted, and exonerated sixteen years later, after investigators matched the DNA obtained at the scene of the crime and the DNA of another person.[222]

Studies that have examined how a statement about the existence of evidence that has not been reviewed affects the decision to confess found, surprisingly, that such statements increase the risk of false confessions.[223] In an experiment similar to the Alt key scenario, a group of participants

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215. Note that in Germany, the ban on lying extends also to truthful statements that are liable to create a misconception on the part of the suspect about the existence of incriminating evidence. Ross, *supra* note 77, at 457. This includes a statement by the interrogator to the suspect, when taking his fingerprints, that he now has the opportunity to confess, because such a statement could cause suspects to mistakenly conclude that a match has been found between his fingerprints and those taken at the scene of the crime. *Id.*

216. Thomas III, *supra* note 52, at 1301.

217. Khasin, *supra* note 4, at 1041.

218. Kassin, *Psychology of Confessions*, *supra* note 18, at 224.

219. *Id.*; Jennifer T. Perillo & Saul M. Kassin, *Inside Interrogation: The Lie, the Bluff, and False Confessions*, 35 LAW & HUM. BEHAV. 327, 328–29 (2011).

220. Perillo & Kassin, *supra* note 219, at 329 (quoting Fernanda Santos, *DNA Evidence Frees a Man Imprisoned for Half His Life*, N.Y. TIMES (Sept. 21, 2006), http://www.nytimes.com/2006/09/21/nyregion/21dna.html?mcubz=3).

221. *Id.*

222. *Id.*

223. *Id.* at 330–31.

was told that the computer was connected to a server that documented each keystroke, and that when the experimenter was able to get the password to the server from the experiment's organizer, she could actually check whether the Alt key was pressed.[224] Surprisingly, the rate of false confessions that occurred under this scenario was even higher than the one wherein the subject was confronted with an actual lie about someone watching them touch the Alt key with the tip of their finger.[225] The neutral lie, which did not cause people to modify their belief as to their guilt, was sufficiently strong to trigger false confessions.[226] Seventy-five percent of those who confessed cited the bluff as a reason for the confession,[227] probably out of belief that the confession would not prevent their exoneration.[228]

In a different study, each pair of students was asked to answer questions, some of them together, and some individually.[229] In the "guilty" group, one of the pair, who was a collaborator, sought help from his partner in answering an individual question.[230] In the "innocent" group none of the participants spoke with one another.[231] Afterwards, the participants were told that they and their confederate were suspected of violating the academic institution's honor code because of their answers' similarity to one of the individual questions.[232] The participants were then asked to sign a confession.[233]

In this case, the accused participants were necessarily aware of whether they assisted their partner in answering the question. The results showed a significant difference between the confession rates—approximately ninety percent of the students confessed when they were in the guilty group (where the confederate asked for help), whereas approximately twenty-seven percent of the students confessed when they were part of the innocent group (where the students did not talk to each other).[234] Some of the accused participants were told that a camera placed in the adjacent room had filmed the course of the examination, and that the video technician, who was expected to arrive in a few hours, would retrieve the data from the hard disk.[235] The lie significantly affected guilty participants into making confessions,

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224. *Id.* at 330.
225. *Id.* at 330, 330 tbl.1. Table one shows that false evidence provided a 78.57% false confession rate, whereas bluff provided an 86.67% false confession rate.
226. *Id.* at 330 tbl.1, 331.
227. *Id.* at 332. However, three participants who did not confess also explained their refusal to confess by the knowledge that their innocence would be revealed. *Id.* at 332.
228. *Id.*
229. *Id.* at 332–33.
230. *Id.* at 333.
231. *Id.*
232. *Id.*
233. *Id.* at 333–34.
234. *Id.* at 334.
235. *Id.* at 333.

as opposed to guilty participants who were not exposed to the lie, but it also significantly sparked confessions of guilt by innocent participants.[236] Fifty percent of innocent participants who were exposed to the lie confessed, as opposed to those who were not exposed to the lie, where none admitted their guilt.[237] Eighty-eight percent of innocent participants who confessed and seventy-five percent of innocent participants who declined to admit guilt explained that the existence of the camera was a pivotal factor in their decision; those who admitted assumed that their innocence would soon become apparent anyway, and those who declined to admit were strengthened in their knowledge that they would be cleared after the facts were checked.[238] The trust that the innocent confessors demonstrate in clearing their name after the evidence is tested is compatible with a more general phenomenon of innocent suspects who do not treat an out-of-court confession as significant, out of belief that the criminal justice system will expose the truth.[239]

These experiments showed that lies of any type regarding the existence of incriminating evidence can push false confessions, and that they are also sufficiently strong means to extract confessions from guilty persons. The lie's net catches many guilty suspects as well as a considerable number of innocent ones. If intelligent suspects, who had not been subjected to the pressures of police interrogation, admitted quite easily to cheating during an examination, one can only imagine the potential effect of lies during police interrogation, let alone during custodial interrogation, on a suspect's inclination to confess.[240] The chances that an innocent person would confess after being confronted with lies regarding the incriminating evidence are greater than those of an innocent person making a confession without such lies.[241] The very presentation of false evidence is fatal to the decision of suspects to confess; they shape their version of events in light of the false evidence out of belief that they have no escape from conviction or that the truth comes out and clears them anyway.[242]

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236. *Id.* at 334.
237. *Id.*
238. *Id.*
239. *See* DAVID WOLCHOVER & HEATON ARMSTRONG, ON CONFESSION EVIDENCE 93 (1996); Kassin, *Inside Interrogation*, *supra* note 142, at 537.
240. On the general effects of custodial interrogations, see Covey, *supra* note 78, at 1886.
241. Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOL. 221, 230 (1997).
242. *Id.* at 225.

The following two sections clarify why lies about the incriminating evidence violate the fundamental Fifth Amendment right of suspects to remain silent during interrogations.

E. Curtailing the Freedom of Choice

Lies in general might hurt a person's ability to choose and make decisions based on relevant information.[243] As demonstrated in numerous studies, a person's beliefs can alter their perception of reality.[244] The offense of deceit, providing false information on medical treatment and fraud in connection with contracts, is perceived as undermining the ability to choose.[245] Likewise, lies during interrogation harm a suspect's ability to make decisions by distorting the information at their disposal and changing their cost-benefit evaluation of confessing.[246] To the extent that the suspect feels that he has no choice but to confess given the incriminating evidence against him, his ability to withstand the pressures of the interrogation is weakened.[247] In Germany, the approach is therefore that the suspect's autonomy to choose silence is compromised if the police feed him misinformation.[248]

Consequently, lies undermine the suspect's right to silence. Silence is a defense strategy. A defendant is entitled to plan his defense strategy, not just by offering his own version of events, but by pointing out the weaknesses and flaws in the prosecution's case.[249] A suspect is also entitled to plan his defense by remaining silent on the assumption that the incriminating evidence against him is weak.[250] Silence in the face of weak evidence is a reasonable defense strategy, based on the assumption that the prosecution would fail to meet the high burden of proof required for a conviction.[251]

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243. BOK, *supra* note 36, at 22; Young, *supra* note 2, at 469.

244. *See* Perillo & Kassin, *supra* note 219, at 327–28.

245. *See* Young, *supra* note 2, at 470.

246. Amelia Courtney Hritz, Note, *"Voluntariness with a Vengeance": the Coerciveness of Police Lies in Interrogations* 102 CORNELL L. REV. 487, 497–98 (2017) (citing BOK, *supra* note 36, at 19–20).

247. *Id.*

248. Ross, *supra* note 77, at 453; *see also* Roppé, *supra* note 96, at 768 ("This right to choose silence is a nullity if interrogators subject the suspect to tactics which disable her from appreciating the significance or consequences of a self-incriminating statement.")

249. Rinat Kitai-Sangero & Yuval Merin, *Probing into Salinas's Silence: Back to the "Accused Speaks" Model?*, 15 NEV. L.J. 77, 103 (2014).

250. John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1070 (1994) (stating that the high burden of proof required for conviction "encouraged defense counsel to silence the defendant and hence to insist that the prosecution case be built from other proofs").

251. *See* Divya Sukumar et al., *Behind Closed Doors: Live Observations of Current Police Station Disclosure Practices and Lawyer-Client Consultations*, 2016 CRIM. L.R. 900, 912 (2017) [hereinafter Sukumar et al., *Behind Closed Doors*] (stating that when the

An innocent suspect might implicate himself during interrogation if he chooses to make a statement because of his proximity to the event or because of forgetfulness, lack of concentration, and stress.[252] Silence can increase his chances of being acquitted or of not being charged in the first place. By contrast, during the interrogation, when the suspect is "persuaded" that the incriminating evidence against him is strong, abandoning silence can be a logical step, based on the assumption that without providing his own version of events to counter the evidence there is no chance of avoiding being brought to justice. Lying about incriminating evidence violates, therefore, the individual's right to remain silent by misrepresenting the benefit of exercising this right, and is liable to damage the chances of a suspect, whether guilty or innocent, to avoid indictment, trial, and conviction.

F. Curtailing the Obligation to Prove Guilt

In the verdict acquitting Mark Kuznetsov of the charges of murder, the Tel Aviv District Court in Israel described the dynamics that led the defendant to make a false confession during the interrogation, citing excerpts from conversations between the accused and the jailhouse snitches. One of the jailhouse snitches asked "So what you want to write? Admit your guilt?" The defendant replied "Yes," and added "That I didn't kill him is certain." The defendant gave the same response in an answer to the question of another jailhouse snitch, "I didn't act in self-defense. I never touched him. . . I know I didn't touch, but there is something, that person, who testified. . . that I cut. . . all is built on this, plus my fingerprints." The defendant also explained "I have no way of proving that I didn't commit murder."[253]

These conversations reflect the sense of despair in which innocent suspects find themselves when facing their inability to refute the false incriminating evidence against them. Suspects are not exposed to the police's evidence. They are asked by their interrogators to provide their story in response to a false version. Lies prevent suspects from addressing the real incriminating evidence against them during the interrogation, from requiring that the

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evidence disclosed by the police is not strong, solicitors in England advise their clients to remain silent).

252. Rinat Kitai-Sangero, *Respecting the Privilege Against Self-Incrimination: A Call for Providing* Miranda *Warnings in Non-Custodial Interrogations*, 42 N.M. L. REV. 203, 230 (2012).

253. File No. 1172/04 DC (TA), State of Israel v. Kuznetzov (Dec. 12, 2005), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

police carry out forensic tests, and from seeking methods of inquiry that could prove their innocence.[254]

At trial, in the adversarial system, the prosecution's case is presented before hearing the defense.[255] The first narrative being presented enjoys a psychological advantage because people tend to adopt a position on the basis of it, and feel that the first narrative has become "theirs."[256] But the party presenting second has a great advantage in the fact that the obligation to prove the assertions rests on the first party, and the second party has the opportunity to respond to this version and refute it.[257]

Imagine that the prosecution's witness testifies at trial to having seen the defendant stab the victim with a knife. Forensics testifies that the defendant's fingerprints were found on the knife used in the stabbing. Considering such overwhelming evidence, the defendant abandons the defense. But it turns out that the prosecution intentionally used false witness testimony to make it almost impossible for the defendant to cope with the evidence and consequently force him into admitting guilt. This situation is obviously absurd. Perjury is a criminal offense. Misrepresentation of evidence at trial by state agents is strictly prohibited.[258]

Some might say that a crucial difference exists between defense at trial and making statements during police interrogations. In court, the defendant is entitled to cross-examine the prosecution's witnesses. If witnesses perjure themselves, the defendant will waste resources such as time and money cross-examining false witnesses. He will bring an expert on his behalf to examine fingerprints which are not his. In contrast, during the interrogation, the suspect does not present evidence and does not cross-examine witnesses. He only presents his version of events to the interrogator.

But it is possible to argue that even at trial the presentation of false evidence would undermine the confidence of the guilty defendant and lead her to plead guilty. If the defendant does not admit her guilt at the end of the prosecution's case, the prosecution can declare at this point that it presented false evidence and indemnify the defendant for the funds she spent to contend with it. Obviously, no legal system recognizes such a scenario.

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254. *See* Ross, *supra* note 77, at 454.

255. Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 121 (1987).

256. G.O.W. Mueller, *The Position of the Criminal Defendant in the United States of America*, *in* THE ACCUSED 87, 116 (J.A. Coutts ed., 1966); Nunn, *supra* note 121, at 789, 792.

257. *See* Nunn, *supra* note 121, at 798.

258. *See* Brady v. United States, 397 U.S. 742, 757 (1970).

During the investigation stage, the interrogators are not required to disclose incriminating evidence to a suspect.[259] Withholding evidence does not constitute a lie. Thus, interrogators may eschew disclosure so the suspect cannot concoct a story that fits the evidence presented,[260] and to help them identify inconsistencies between the evidence and the suspect's recollection.[261] Furthermore, it is possible to argue that, even if the police had an obligation to disclose incriminating evidence, such evidence is still fluid and changes during investigation. The purpose of the investigation is to gather evidence. It is not possible to put the cart before the horse. Although a certain level of suspicion is required to turn an individual into a suspect,[262] interrogators are not expected during the interrogation, especially in its early stages, to have evidence that establishes the suspect's guilt beyond a reasonable doubt.

Interrogators can also make mistakes regarding existing incriminating evidence against the suspect. Consider a suspect identified in a lineup. The police communicate this fact to the suspect. Under the pressure exerted by the strength of the evidence, the suspect admits to the crime, or alternatively invents a false alibi. Later, the interrogators receive information that the identifying witness was not at the scene of the crime and that he has a motive to falsely implicate the suspect. They reach the conclusion that they cannot rely on the identification that was made. In another case, the police may make a mistake tracking the whereabouts of the suspect on the day of the offense. The interrogators tell the suspect that the tracking proves his presence at the scene of the crime. The suspect confesses due to this honest error.

In the adversarial system, bearing the obligation to prove the accusations, the prosecution is first to present its evidence, allowing the defendant to address and refute it. Indeed, as noted, at the interrogation phase, no duty

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259. Ross, *supra* note 77, at 457; Sukumar et al., *Strategic Disclosure*, *supra* note 153, at 307.

260. Sukumar et al., *Behind Closed Doors*, *supra* note 251, at 903 (citing Ed Cape, *Transposing the EU Directive on the Right to Information: A Firecracker or a Damp Squib?*, 2015 CRIM. L. REV. 48, 58–59); Sukumar et al., *How the Timing of Police Evidence Disclosure Impacts Custodial Legal Advice*, 20 INT'L J. EVIDENCE & PROOF 200, 200 (2016) [hereinafter Sukumar et al., *Timing of Police Evidence Disclosure*].

261. Sukumar et al., *Behind Closed Doors*, *supra* note 251, at 903 (citing Cape, *supra* note 260, at 58–59).

262. Interrogations should be based on probable cause, according to which the facts and circumstances of the case are sufficient to justify a reasonable person's belief that the suspect committed the offense attributed to him. *See* Dunaway v. New York, 442 U.S. 200, 216 (1979); Beck v. Ohio, 379 U.S. 89, 91 (1964) (citing Henry v. United States, 361 U.S. 98, 102 (1959); Brinegar v. United States, 338 U.S. 160, 175–76 (1949)).

is imposed on the interrogators to disclose incriminating evidence to the suspect. But one ought not to expect suspects to justify themselves and prove their innocence, if they cannot address the incriminating evidence against them. Thus, solicitors in England tend to advise their clients to exercise their right to silence during interrogations when police do not disclose their evidence.[263] An accused person's defense is damaged if he cannot provide explanations, even at the interrogation phase, for incriminating evidence held by the police. Through lies, police interrogators not only deprive the suspect the possibility of addressing the true incriminating evidence, but also force him to shape a defense to rebut fake evidence and push him to conclude there is no point in denying guilt or remaining silent. As opposed to the presentation of accurate evidence or of unintentionally inaccurate evidence, presentation of fake evidence is tantamount to perjury.

IV. CONCLUSION

The constitutional protections of *Miranda* ought to extend to bar the use of lies concerning incriminating evidence against suspects, aimed at extracting confessions. Lies concerning incriminating evidence force suspects to provide their version of events without knowledge of the true facts, and to shape their defense based on false evidence. They assume guilt, do not allow suspects to respond intelligently to the accusation leveled against them, and create the false impression that remaining silent is futile. Consequently, such lies violate the fundamental principles of constitutional criminal law—imposition of the obligation to prove the accusations on the state, the presumption of innocence, and the Fifth Amendment right to remain silent. They increase the risk of suspects becoming entangled in lies and making false confessions, resulting in false convictions.

263. Sukumar et al., *Strategic Disclosure*, *supra* note 153, at 309 (citing Katie Quinn & John Jackson, *Of Rights and Roles: Police Interviews with Young Suspects in Northern Ireland*, 47 BRIT. J. CRIMINOLOGY 234, 241 (2007)); *see* Sukumar et al., *Behind Closed Doors*, *supra* note 251, at 902 (citing Sukumar et al., *Timing of Police Evidence Disclosure*, *supra* note 260, at 206–09). Indeed, pre-interview disclosure is a common practice in England, though the disclosure is not necessarily full. *Id.* at 907–08.