

# Police Deception and Dishonesty



THE LOGIC OF LYING  
LUKE WILLIAM HUNT

HUNT



Police Deception and Dishonesty

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ISBN 978-0-19-767216-7



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Published in the United States of America by Oxford University Press  
198 Madison Avenue, New York, NY 10016, United States of America.

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Library of Congress Cataloging-in-Publication Data  
Names: Hunt, Luke William, author.

Title: Police deception and dishonesty : the logic of lying / Luke William Hunt.

Description: New York, NY : Oxford University Press, [2024] |  
Includes bibliographical references and index.

Identifiers: LCCN 2023033840 (print) | LCCN 2023033841 (ebook) |  
ISBN 9780197672167 (hardback) | ISBN 9780197672181 (epub)

Subjects: LCSH: Police—Professional ethics. | Law enforcement—Moral and  
ethical aspects. | Deception. | Police-community relations.

Classification: LCC HV7935.H86 2024 (print) | LCC HV7935 (ebook) |  
DDC 363.2—dc23/eng/20231005

LC record available at <https://lcn.loc.gov/2023033840>

LC ebook record available at <https://lcn.loc.gov/2023033841>

DOI: 10.1093/oso/9780197672167.001.0001

Printed by Sheridan Books, Inc., United States of America

*For my parents*

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## Preface

When a person learns that I quit my job as an FBI special agent to become a philosophy professor, they have questions. Or if they don't have specific questions, they simply want me to help them with their bewilderment. I like to respond that I thought FBI-agent-to-philosopher was the natural career progression. After getting that bad joke out of the way, I eventually receive this question: But *why* did you leave the FBI?

Making significant career and life changes are difficult and complex for most people. In my case, I certainly value the unique experiences I had in the FBI and I am grateful for them all—both the good ones and the bad ones. Although I have no major regrets about my unusual career path, I think it is fair to say that my personality was not suited to all aspects of the job.

When I was preparing to go through the FBI's lengthy application process—leading to a spot at Quantico for New Agent Training—I was also studying for the Graduate Record Examinations (GRE). The GRE is the standardized test that has historically been required for admission into doctoral programs. Considering my bookish interests and introversion, I was drawn to academia from the beginning. It was a close second to Quantico. The FBI just had what seemed like a more multidimensional (intellectual, physical, public service) appeal.

I was thrilled when I finally received a spot at Quantico, and the training itself is something I will always appreciate. It was exhilarating to experience and learn about so many different things: firearms (pistol, shotgun, and M4), defensive tactics, physical fitness obstacle courses, interviewing, interrogation, operational skills (conducting surveillance, executing search warrants, arrest warrants, and so on), investigative techniques and tactics (including those relying on dishonesty and deception), as well as a number of academic topics (such as the various legal and administrative rules governing FBI agents).

After posing for a picture shaking Director Mueller's hand and receiving my FBI credentials, I was sent into the field as an FBI agent. Many of my early experiences on the job were rewarding, with respect to both the work and the friendships with colleagues and mentors. It felt as if life and work were

converging seamlessly and with increasing momentum. But in fact, looking back now, I recall journal entries from the earliest days of my career in which I tried to calm my doubts about being an FBI agent. Basically, I was trying to convince myself that the FBI was as good as it gets and that it would be irrational to think there were better options (such as academia), all things considered.

My doubts became more pronounced as the years went by. Some of them stemmed from new domestic circumstances. Naturally, my life was changed when my wife gave birth to our first son. Priorities began to shift and my time (which was in short supply) became more precious.

On the other hand, some of my misgivings about the job were more idiosyncratic, including those related to my introverted need for space and autonomy. Such needs are not exactly a good fit for FBI agents considering that agents must always be available and must account for almost everything they do—from documenting phone calls to vacation itineraries. Never alone and always under the Bureau's watchful eye, I felt like I was losing my sense of self. It didn't help that FBI agents are routinely polygraphed (both during the application process and while on the job) to determine whether they might be a threat to national security. I recall irrationally fearing that I would lose my job for, say, confessing to the (deceptive) polygrapher that I sometimes took a bathroom break without locking my computer (which is a potential security threat).

To be sure, it is reasonable to think that such oversight is good, at least to a certain point. If the FBI puts too much trust in its agents—or doesn't know where and what agents are doing on their vacations—then perhaps they cannot be held accountable (a concept that is important in this book). So I am quite open to the idea that some facets of my personality were simply not a good fit for the FBI.

I was nevertheless having a successful career—both operationally in the field through securing federal indictments in my investigations, as well as professionally through promotion to Supervisory Special Agent. This brings me to a final, philosophical reason that contributed to my leaving the FBI—the reason that is relevant to this book.

As everyone knows, FBI agents—like most law enforcement officers—routinely rely on tactics involving deception and dishonesty. Consider the use of confidential informants (or “sources”), whom agents (and other law enforcement officers) use to secretly gather information and evidence in support of investigations (or simply to gather intelligence to better understand a

department's operating environment). I do not think that all use of informants is unjustified, though the practice is inherently dishonest and deceptive. For example, agents direct informants to conceal from others their relationship with the FBI, direct informants to participate in constructed (fake) criminal schemes, and direct informants to secretly record encounters with those ensnared in the schemes.

Of course, I cannot reveal anything about the informants with whom I dealt. Generally, though, it is worth noting how this sort of deception and dishonesty gave me another reason to question my career path. Suppose, hypothetically, I had an informant who was in a position to gather information or evidence about criminal or national security matters in another country. Suppose further that engaging in such operational activity would be dangerous (for example, if targets in the other country learned that the informant was an informant). Finally, suppose the informant desperately did not want to engage in such operational activity, including because the informant had regular, domestic concerns regarding safety and family commitments (not unlike myself).

Why would such a person agree to operate for law enforcement and intelligence agencies? There are many possible reasons, but one reason is that such agencies often have leverage over informants—such as evidence that the informant committed a crime. In exchange for gathering evidence, the officer or agent might agree to ask the prosecutor to consider reducing the informant's criminal exposure. In other words, a bargain is reached between the informant and the law enforcement officer, even if the bargain is steeped in deception and dishonesty. Did the informant have a “real choice” given the nature of the government's leverage? Was the government justified in subjecting the informant to the risk of harm in order to acquire evidence?<sup>1</sup>

The broader point is that one reason these situations troubled me was that I could identify with the informants I handled. That may sound odd. But even if our lives appeared to have taken dramatically different paths (which wasn't always the case), I could typically see how I (or anyone) could end up in the informant's position had things been slightly different. I was especially uncomfortable with the institutional power—the power to compel one to engage in dangerous operations relying on deception and dishonesty—law

<sup>1</sup> I examined these questions in *The Retrieval of Liberalism in Policing* (New York: Oxford University Press), ch. 4.

enforcement officers had over people who weren't much different from you and me (aside from a few chance twists and turns in life).

So that is a long, multipart way of answering the question about why I left the FBI. I suppose that sort of answer isn't a surprise given that I now work in a field known for verbosity. If this brief biographical sketch isn't interesting, I hope it at least illustrates a central point about why I wrote this book: Police deception and dishonesty—and the way it plays a role in communities and the lives of countless individuals—is something we should all care about.

It is for this reason that I tried to write the book for everyone—regardless of whether you are a professional academic or simply someone who cares about institutions and ethics. If you fall into the latter group, then perhaps you will be most interested in the real-world cases studies examined in the second part of the book. If you find the theoretical material in the first part of the book a bit monotonous, I encourage you to move to the Interlude and then jump right into the second part of the book. You can always pick your way around the theoretical material when the mood strikes. If you are a professional academic, then perhaps your reading interests will be the opposite. The book is not intended to be precious, and I hope readers will focus on the parts they find most interesting.

A related point is that I hope the book's discussions of theory and practice are ecumenical—that is, I hope they are more or less general in their extent and application, regardless of your moral and political views. I'll give you two examples, one scholarly and one political.

First, there are three prominent philosophical approaches to ethical reasoning: (1) *consequentialist ethics*, which generally suggests that decisions about what we ought to do should be based on the consequences of our decisions; (2) *deontological ethics*, which generally suggests that decisions about what we ought to do should be based on rules and duties that reach beyond the consequences of our decisions; and (3) *virtue theory*, which is generally about examining and understanding the nature of virtue (moral character) instead of consequences and deontological duties.

As we will see, the arguments in this book are sympathetic to each of these three approaches to ethical reasoning. It seems clear that one reason unconstrained police deception and dishonesty is problematic is that it can have bad consequences—from the erosion of community trust to wrongful convictions (as when a deceptive and dishonest police interrogation compels people to confess to crimes they did not commit). Empirical data confirms

these consequences.<sup>2</sup> On the other hand, one of the book's central themes is that it can be wrong for the police to deceive and lie *even if* the deception and dishonesty results in *good* consequences (though I am not a radical Kantian, as I will explain in the Introduction). This view is based on assumptions regarding political morality, including authority, legitimacy, and constraints on the *means* the police may use to bring about good consequences such as enhanced security. Finally, the book considers how honesty may be construed as a *virtue* that is relevant to both individuals and institutions. Some will see this sort of ecumenical approach as problematic, but staking out entrenched positions and failing to look for common ground is often a mistake.

Now for the political example. There is no doubt that policing is a controversial, hot-button topic. There are loud calls not only to “defund the police,” but also to *abolish* the police. On the other end of the spectrum, some pundits argue that we need *more* policing—or simply that policing needs only minor reform. I have written about this debate elsewhere—and will return to it briefly in the book's Epilogue—but I hope there are at least some points in the book on which we can all agree.<sup>3</sup> In one sense, some of my conclusions will sound radical (police need to be less proactive and more reactive), but I suppose the conclusion is decidedly less radical when considering arguments in favor of getting rid of the police altogether.

\* \* \*

That is the story of how and why I came to write this book. All writers are in some sense influenced by their life stories, and I want to be candid about the possible ways my story might have influenced this book, wittingly or not. In any case, this Preface will mercifully conclude the memoir aspects of the book, though I will occasionally incorporate professional anecdotes in the coming chapters where appropriate. I hope to do this with humility and the understanding that mine is but one perspective on policing.

L.W.H., Tuscaloosa, Alabama, Summer 2023

<sup>2</sup> For example, Innocence Project, a nonprofit legal organization focused on exonerating people who have been wrongly convicted, has documented that false confessions (which may be based on police deception and dishonesty during interrogation) account for almost 30 percent of wrongful convictions. See “Explore the Numbers: Innocence Project's Impact,” Innocence Project, <https://innocenceproject.org/exonerations-data/> See also Saul Kassin's extensive scientific study of the connection between false confessions and police interrogation practices, including *Duped: Why Innocent People Confess—and Why We Believe Their Confessions* (Lanham: Prometheus Books, 2022).

<sup>3</sup> I examined “defunding the police” and “police abolition” in “The Limits of Reallocation and Algorithmic Policing,” *Criminal Justice Ethics* 41, no. 1 (2022).

## The Logic of Lying

### *Five Presumed Justifications for Police Dishonesty*

#### 1. Cover

The police seek to enter a man's home to investigate an alleged crime. The man refuses to let the police in his home without a warrant; the police enter anyway, tackling the man and pinning him to the floor. The man is handcuffed and taken to sit in jail for two days. The police file a criminal complaint charging the man with resisting arrest to cover for their use of force. Prosecutors eventually drop the charges.

*Thompson v. Clark* (2022)

#### 2. Control

The police tell a woman she is facing a forty-year prison sentence for a drug charge unless she serves as a police informant. The police want the woman to have oral sex for money with the target of an investigation so the police can charge the target with soliciting a prostitute. The police wire the woman to record the encounter and give her a napkin, instructing her to spit the target's semen into it to provide physical evidence of the sex act. The woman completes the act. In fact, she was only facing a six-to-ten-year prison sentence for the drug charge.

*Alexander v. DeAngelo* (2003)



### 3. Catch

FBI agents construct an undercover sting operation to arrest a man in a terrorism plot. The investigation relies heavily on an FBI informant, who poses as a terrorist to provoke the man by inspiring, planning, financing, and equipping the proposed terrorist attack. The man is convicted and sentenced to serve a twenty-five-year prison sentence as a result of his involvement with the FBI informant.

*United States v. Cromitie* (2013)

### 4. Confess

A teenager is interrogated by the police about his involvement in the rape of a woman in a park. The teen says he didn't do it. The police say they know the teen is lying because they have fingerprints from the victim's pants—though no fingerprints exist. The teen confesses and is incarcerated for several years. It is later discovered that the teen was not the rapist.

"Central Park Five" case (1989)

### 5. Convict

Three suspects carjack a cabdriver, forcing him out of his vehicle and stealing his vehicle. The police show the victim photographs of men who fit the description of the carjackers, but the victim initially recognizes only one carjacker. A detective testifies that he then prepared two photo lineups that included the additional two suspects and that the victim identified the two suspects from the lineup. The two additional suspects were charged with the carjacking. In fact, the photo lineups were fabrications; some of the photos in the lineups did not even exist at the time the detective testified that he administered the lineup.

*Eastern District of New York, Docket No. 18-CR-97 (PKC)* (2018)

## Introduction

### On Beating a Broken Bone with a Boot

Would you tell a lie to a criminal if it meant he would stop beating your broken arm with a boot? Martin Scorsese's film, *The Departed*, is based on Boston's real-life Winter Hill Gang—a group of mostly Irish American mobsters led by Whitey Bulger from the late-1970s to the mid-1990s. In the film, Billy Costigan (played by Leonardo DiCaprio) is a newly minted police officer who goes undercover to infiltrate the criminal organization run by Irish mob boss Frank Costello (a character based on Bulger, played by Jack Nicholson).<sup>1</sup> His cover is a criminal conviction for assault and battery, followed by probation and court-ordered counseling. The cover helps provide Costigan with the requisite street credibility to join Costello's crew.

But there's a problem: Given Costigan's background as an officer, how can Costello trust that Costigan has truly left the police and embraced a life of crime? On their initial meeting, Costello takes Costigan into a backroom in a bar. Costigan's right arm is encased in a plaster cast to protect a bone he broke in a recent fight. After Costigan's cast is forcibly removed, Costello repeatedly slams a boot onto Costigan's broken arm while screaming the question: "Are you still a cop?" Costigan—in excruciating pain—yells a lie to Costello repeatedly: "I am not a fucking cop!" Satisfied, Costello stops the beating and welcomes Costigan into the fold.

The film sticks out to me because it was released the same year (2006) that I graduated from the FBI's New Agent Training at Marine Corp Base, Quantico, in Virginia. In fact, Costello (like Whitey Bulger in real life) was an FBI informant.<sup>2</sup> So both the film and real life include multiple layers of deception and dishonesty—coinciding with the wide variety of deceptive tactics that I learned during New Agent Training at Quantico. After several

<sup>1</sup> Jeremy Kagan, *Director's Closeup 2* (Lanham: Scarecrow Press, 2013), 50.

<sup>2</sup> Adam Nagourney and Ian Lovett, "Whitey Bulger Is Arrested in California," *New York Times*, June 23, 2011.

years as an FBI Special Agent, I made the natural career transition to academic philosophy (there's my joke). Oddly enough, I soon realized that Enlightenment-era philosopher Immanuel Kant had something to say about Officer Costigan's lie to Costello.

In his infamous essay, *On a Supposed Right to Lie from Philanthropy*, Kant indicates that it would be wrong to, say, lie to a knife-wielding stranger who shows up at your door looking for your friend. Suppose you think the stranger is a would-be murderer hunting your friend (who happens to be hiding in your bedroom). And yet Kant seems to suggest that it would be wrong to lie to the stranger about your friend's location.<sup>3</sup> This is a decidedly unusual conclusion to reach about the limits (or lack thereof) of honesty. Indeed, it sounds like the sort of implausible conclusion many people have come to expect from philosophers. Surely it can't be wrong to lie to a murderer at your door in order to protect your friend. Likewise, surely it can't be wrong for an undercover police officer to lie to a crime boss who's mercilessly beating the officer's broken arm with a boot.

Let me assure you that I'm sympathetic to the worry that Kant's commitment to honesty is a bit extreme. But perhaps it's not quite as extreme as it seems. Kant's position is not that you owe something to the murderer personally (beyond the basic duty to treat the murderer as a person, not an object).<sup>4</sup> The murderer at your door is clearly acting unjustly, and so you don't owe him the truth specifically.<sup>5</sup> The reason that Kant might think truth-telling is justified in such cases is based on the value of truth-telling to the *moral community* generally.<sup>6</sup>

<sup>3</sup> Immanuel Kant, "On a Supposed Right to Lie from Philanthropy," in *Practical Philosophy*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1996), 605–16.

<sup>4</sup> I am not a consequentialist, but someone sympathetic to consequentialism might argue that a liar does not necessarily treat another person as a "mere means" if the liar lies for the good of someone other than the person to whom the lie is directed; perhaps the liar could fully recognize the intrinsic value of the person on the receiving end of the lie, but think that the harm caused to that person is outweighed by the good that the lie brings about. We will consider a variety of ways to think about these and related issues.

<sup>5</sup> For example, Allan Wood interprets Kant to mean that not telling the truth to a murderer at the door is a wrongful lie only if the speaker's declaration was not coerced or extorted by the murderer (and the speaker's declaration was necessary). Allan Wood, *Kantian Ethics* (Cambridge: Cambridge University Press, 2008), 248. It is worth noting that Kant is not terribly concerned about the morality of deception that does not include lying. For insightful analysis and critique, see Thomas Carson, *Lying and Deception: Theory and Practice* (Oxford: Oxford University Press, 2010), ch. 3. For an approach to police lying that is sympathetic to Kantianism (while recognizing problems with Kantian absolutism), see Sam Duncan, "Why Police Shouldn't Be Allowed to Lie to Suspects," *Journal of the American Philosophical Association* 9, no. 2 (June 2023): 268–283.

<sup>6</sup> See Karen Stohr, *Choosing Freedom: A Kantian Guide to Life* (New York: Oxford University Press, 2022), 176–184, for an incisive, accessible discussion of these points.

### The Book's Thesis

Although I won't dwell on Kant's work (mercifully), this book pursues a related thesis: human society—including especially institutions such as the police—requires cooperative relations steeped in honesty in order to be viable. That is a big, sweeping claim that will require a lot of unpacking, but I think the evidence will bear it out. The idea is that the police institution cannot function in society effectively without honesty as a normative foundation. Think about the police role in society for a moment. They investigate crimes, they use force to make arrests, they patrol cities and highways, they search for missing persons, they respond to emergencies, they respond to non-criminal social problems, they address crowd-control at large public events—the list goes on and on. In short, the police are often the primary point-of-contact between citizens and the state—the agents that we see in public on a day-to-day basis.

As a direct point-of-contact between citizen and state, the police institution presents the community with an accessible opportunity to evaluate the state's trustworthiness. We can do our best to acquire knowledge on our own through experience—by doing our homework and learning about the world directly. But to survive in a political community, we all must rely on others at some point.<sup>7</sup> Relying on others—at both an individual and institutional level—requires a degree of trust and mutual forbearance that cannot exist under widespread conditions of deception, dishonesty, and fraud. Now think about the significance of this idea with respect to political institutions such as the police—an institution that has profound power and authority over the community. It's plausible to think that honesty and trust are crucial if we want any semblance of a viable, functioning society—including a viable, functioning police institution.

Empirical research bears out these points.<sup>8</sup> For example, researchers have recently used survey data to explore the relationship between *social trust* (general trust among members of a society) and *legal trust* (trust in legal institutions such as the police) in African states, concluding that trust in the legal system (such as the police institution) is a function of social trust. One

<sup>7</sup> Kant says that there can be no society if people do not express their thoughts genuinely. Immanuel Kant, *Lectures on Ethics*, trans. Louis Infield (Indianapolis: Hackett Publishing, 1963), 224.

<sup>8</sup> See, e.g., *Social Trust*, ed. Kevin Vallier and Michael Weber (New York: Routledge, 2021): part I (empirical work on social trust); as well as Ben Bradford, Jonathan Jackson, and Mike Hough, "Trust in Justice," in *The Oxford Handbook of Social and Political Trust*, ed. Eric M. Uslaner (New York: Oxford University Press, 2017), 633–654.

important takeaway from this research is that social and legal trust are only connected when legal officials (such as the police) are viewed as representative of most members of society.<sup>9</sup> We should thus ask: To what extent have deception and dishonesty been normalized for the police compared to other members of society? Relatedly, empirical research in the United States and the United Kingdom suggests a deep relationship between trust, legitimacy, and justice: legal trust is important to public cooperation with authorities such as the police, meaning that both the public *and* the police have a lot at stake.<sup>10</sup>

Even if you're on board with the value of trust, I suspect you're still skeptical of Kant's conclusion about the concrete case of the murderer at your door. Likewise, I suspect you're skeptical that it's always wrong for a police officer to lie to a suspected criminal. I'm skeptical of these sorts of moral absolutes, too, and I will not argue that police deception and dishonesty is *always* wrong.

However, I will argue for what may seem like a novel and controversial thesis—namely, that good faith is the rule in policing and deception and dishonesty are the rare exceptions. My sense is that the book's thesis only seems controversial because we have become numb to the widespread, illiberal, anything-goes, dishonest, and deceptive policing that exists today. To be sure, there are times and places for dishonesty and deception in policing, but we will see that there are good reasons to think that those times and places should be much more limited than current practices suggest.

### So the Police Can Officially Lie to Me? Yes.

Despite an incredulous response to Kant's conclusion about the murderer at the door, many people are equally incredulous when they think about the more basic question: *Are the police really permitted to deceive and lie to me in the course of an official investigation?* They are indeed. And the bad cases of police dishonesty can be especially bad, leading to devastating miscarriages of justice. These are not one-off cases—they're far more common than you might think. One of the most well-known examples is the Central Park Five case.

<sup>9</sup> Andreas Bergh, Christian Bjørnskov, and Kevin Vallier, "Social and Legal Trust: The Case for Africa," in *Social Trust*, ed. Kevin Vallier and Michael Weber (New York, Routledge, 2021).

<sup>10</sup> See, e.g., Bradford, Jackson, and Hough, "Trust in Justice."

A young woman—who had been jogging in Manhattan's Central Park—was found near death in one of the park's wooded ravines on April 19, 1989. The woman had been brutally beaten and raped but could not remember the attack when she was able to communicate weeks later. However, five teenagers confessed to the police in the days after the crime. The boys—aged fourteen through sixteen—had been in the park with a larger group of young people who had been harassing other park-goers.

By the time the teenagers had given videotaped confessions, they had been in custody and interrogated sporadically for fourteen to thirty hours.<sup>11</sup> They were told—individually—that the others had implicated them in the crime.<sup>12</sup> The US Supreme Court—in *Frazier v. Cupp* (1969)—had long before condoned this sort of dishonesty, which helped pave the way for tactics used against the Central Park Five. In the *Frazier* case, the Court allowed a confession into evidence after the police falsely told the suspect that the suspect's cousin confessed and implicated him.<sup>13</sup>

The police in the Central Park Five case also claimed to have physical evidence, including fingerprints, that could link the teenagers to the crime. When one of the teenagers denied being in the park on the night of the crime, a detective said he "knew" the teen was there—including because "we have fingerprints from the woman's pants, which are satiny and smooth, and if they match yours, you're going for rape." This was a blatant lie; there were no fingerprints at all, as the detective later admitted. But upon hearing of the supposedly damning evidence, the teenager "changed his story and admitted to taking part in the attack on the woman, striking her twice with a pipe and grabbing her breasts."<sup>14</sup> Ultimately, all five teenagers were convicted and incarcerated.

Eventually it became clear—from both the original evidence and new evidence—that the attack had not been a gang rape, but rather by a serial criminal acting alone. The intense focus on the five teenagers meant that the true criminal—Matias Reyes, who was on a rape, assault, and murder

<sup>11</sup> For an account of the police's use of deceptive, coercive interrogation tactics (including against minors), see Douglas Starr, "The Interview," *The New Yorker* (December 1, 2013).

<sup>12</sup> The reporting on the Central Park Five case is voluminous. See, e.g., Saul Kassin, "False Confessions and the Jogger Case," *The New York Times* (November 1, 2002); Jim Dwyer, "The True Story of How a City in Fear Brutalized the Central Park Five," *The New York Times* (March 30, 2019); Aisha Harris, "The Central Park Five: 'We Were Just Baby Boys,'" *The New York Times* (May 30, 2019); Nigel Quiroz, "Five Facts About Police Deception and Youth You Should Know," *Innocence Project* (May 13, 2021).

<sup>13</sup> *Frazier v. Cupp*, 394 U.S. 731 (1969).

<sup>14</sup> Ronald Sullivan, "Detective Says He Tricked Jogger Suspect," *The New York Times* (July 24, 1990).

spree—was left on the streets. In 2002, while serving time for other crimes, Reyes confessed that he alone bludgeoned and raped the jogger; his was the only DNA recovered. The Central Park Five convictions were vacated. It might seem odd for a person to confess to a crime they did not commit (assuming interrogation does not involve physical abuse), but such confessions are all too common when a person (especially a young person) is subjected to hours-long interrogation that includes deception and dishonesty, including (false) promises (e.g., that the person can go home if they say what the police want to hear). Given an extreme power imbalance, it can indeed be rational for innocent people to plead guilty.<sup>15</sup>

The police tactics in the Central Park Five case serve as a very limited example of the myriad deceptive and dishonest tactics at the police's disposal. These tactics fall broadly into the category of *investigative lies*: telling lies to gather evidence and make arrests in investigations. The coming chapters will consider a variety of deceptive and dishonest investigative tactics in policing, including the well-known phenomenon of undercover and sting operations. These operations often involve the construction of an elaborate, false world to induce a person to commit a crime. We will also consider cases in which the police misrepresent a person's criminal liability (telling a person they are facing forty years of prison when in fact they are eligible for ten) to get the person to do something for the police (such as collect evidence as a police informant).

Other types of police dishonesty fall under the category referred to as "testilying": the illegal practice of lying under oath in official proceedings (perjury) to get a conviction.<sup>16</sup> In a related way, the police might tell lies (in reports and in charging documents) about a person's conduct in order to justify an (unjustified) police encounter, or to frame a suspect.

The rise of testilying is commonly attributed to the Supreme Court's decision in *Mapp v. Ohio* (1961).<sup>17</sup> The Fourth Amendment to the US Constitution states that people have a right to be free from "unreasonable searches and seizures," such as searches and seizures conducted without probable cause. The *Mapp* case held that the exclusionary rule—the rule

<sup>15</sup> For a judge's perspective on related issues, see Jed S. Rakoff, "Why Innocent People Plead Guilty," *The New York Review of Books* (June 20, 2014).

<sup>16</sup> See, e.g., Christopher Slobogin, "Deceit, Pretext, and Trickery: Investigative Lies by the Police," *Oregon Law Review* 76, no. 4 (Winter 1997): 776; Christopher Slobogin, "Testilying: Police Perjury and What to Do About It," *University of Colorado Law Review* 67 (1996): 1040.

<sup>17</sup> *Mapp v. Ohio*, 367 U.S. 643, 660 (1961); Slobogin, "Testilying," 1040.

barring the use of unconstitutionally obtained evidence against a suspect—applied to state-level prosecutions.

In other words, after *Mapp*, if the police engage in an unconstitutional search (say, enter your house without probable cause or a warrant), then any incriminating evidence seized from your house can be excluded from being used against you.<sup>18</sup> One way to circumvent the exclusionary rule is to lie about the grounds for an (unreasonable and unconstitutional) search or seizure—such as when the police testify (falsely) that you dropped drugs when the police approached you ("dropsy cases"), giving the police probable cause to conduct a search or seizure.<sup>19</sup>

This book considers the many varieties of police deception and dishonesty—investigative lies, testilying, and everything in between—and how these varieties are intertwined. Examining the police institution holistically, we will see that there is no single case, historical event, or factor that explains police deception and dishonesty. Police deception and dishonesty has become a normative foundation of the police institution, but that means neither that the logic of lying is justified nor that the police should embrace that logic.

### But I Can Lie to the Police, Right? Wrong.

It's thus clear that the police can pursue their work dishonestly and deceptively. But you might think: Sure, police make mistakes, but their heart is in the right place because, ultimately, they're simply trying catch the bad guy. Besides, the police are only leveling the playing field because there is no law that prevents the public from lying to the police, right? Wrong. Criminal justice is supposed to be about uncovering the truth. Although the police are—paradoxically—allowed to pursue truth with untruth, members of the public are generally forbidden from lying when under police investigation.

<sup>18</sup> It is worth noting the difference between a deterrence-based rationale for excluding evidence from an integrity-based rationale. A deterrence-based rationale asks if the exclusionary rule will deter the police from obtaining evidence in ways that violate citizens' rights. An integrity-based rationale asks about the effect of admitting the evidence on the court's integrity, the notion that it will undermine rule of law values by condoning lawbreaking by the police. This is good example of the line between consequentialist and nonconsequentialist rationales for honesty and nondeception in police work. See Stuart P. Green, "The Legal Enforcement of Integrity," in *Integrity, Honesty, and Truth Seeking*, ed. Christian B. Miller and Ryan West (New York: Oxford University Press, 2020), 35–62.

<sup>19</sup> See, e.g., Steven Zeidman, "From Dropsy to Testilying: Prosecutorial Apathy, Ennui, or Complicity?" *Ohio State Journal of Criminal Law* 16 (2019): 426.

Indeed, it is a crime to defraud and lie to the state—including law enforcement officers—but not a crime for them to lie to you. Here are some familiar examples.<sup>20</sup>

*Conspiracy to defraud* is a crime when two or more people conspire to defraud the government in any manner and for any purpose.<sup>21</sup> In *Hammerschmidt v. United States*, the US Supreme Court explained the nature of “defraud”:

To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention.<sup>22</sup>

So monetary or proprietary loss is not required; instead, the fraud may simply involve dishonesty, deceit, and trickery that interferes with a lawful government function. I mention this particular crime because we will see that the police can analogously defraud a person of their rights using dishonesty, deceit, and misrepresentation.<sup>23</sup>

*Perjury* is the crime of willfully stating—contrary to an oath—any material matter that a person does not believe to be true. It is also a crime to do so in a written statement made under penalty of perjury.<sup>24</sup> As an example,

<sup>20</sup> For the sake of uniformity, I consider four federal provisions, though there are similar laws at the state level. It's important to note that law enforcement officers themselves are of course subject to these provisions. However, unlike the general public, law enforcement officers and other government officials have the power to use these provisions as *tools* against others.

<sup>21</sup> 18 U.S.C. § 371.

<sup>22</sup> *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924). Note that there are a variety of laws that prohibit specific acts of fraud, including mail fraud, wire fraud, and so on.

<sup>23</sup> As we will see, there are many deceptive and dishonest tactics that are difficult to identify and access. Consider the many techniques that police use when conducting an interrogation: displaying a false air of confidence with the mere goal of “confirming details,” disingenuously implying empathy for the suspect's unhappy childhood, disingenuously minimizing the moral seriousness of an offense in question, disingenuously blaming society for a suspect's predicament, and so on. It would be odd to say that a police officer can never pretend to be empathetic because, otherwise, only genuinely empathetic officers would be permitted to appear so. Accordingly, we will need to distinguish these sorts of cases from deceptive and dishonest policing that is on par with fraud and deviations from the rule of law. I will argue that examples of the latter would include, say, tactics such as falsely telling a suspect that his prints were found at the scene of the crime or that his co-conspirator has confessed.

<sup>24</sup> 18 U.S.C. § 1621. See *Bronston v. United States*, 409 U.S. 352 (1973), for the standard for perjury.

Grammy-award-winning (“Lady Marmalade”) rapper Lil’ Kim was convicted on charges of perjury for lying to investigators and to a federal grand jury about her involvement in a shooting at a New York hip-hop radio station in 2005. She served almost a year in a federal detention center for the lie.<sup>25</sup>

*False statements* are criminalized when a person knowingly and willfully makes materially false, fictitious, or fraudulent statements or representations in the course of any matter under the jurisdiction of the government. This includes falsifying, concealing, and covering up material facts through tricks and schemes.<sup>26</sup> The threat of a false statement is a particularly powerful tool for federal law enforcement officers (such as FBI Agents) because the violations include any lie made during an investigation. There is no requirement that the lie occur under oath or in an official proceeding. In 2004, Martha Stewart was famously convicted of lying to the FBI over the course of an insider trading investigation—as well as obstructing justice.<sup>27</sup>

*Obstruction of justice* makes a person criminally liable when they corruptly obstruct or impede (or try to influence, obstruct, or impede) the administration of law in a government proceeding. “Corruptly” means acting with an improper purpose (or influencing another to act that way), which includes making false or misleading statements and withholding, concealing, altering, or destroying documents and other information. We can thus see how obstruction of justice may converge with the false statements law.<sup>28</sup> Stewart's insider trading case included charges of false statements and obstruction of justice, though many considered her dishonesty relatively mild and the severity of her charges questionable. To add insult to injury, she was roundly shamed, and her public humiliation was relished by many.<sup>29</sup> I am no Martha Stewart apologist; certainly, there are aspects of her career and principles with which one might disagree. My point is simply that we should consider the contradiction of criminalizing and shaming citizen acts of deception and dishonesty while unquestionably condoning and normalizing most police deception and dishonesty.

James Comey—the FBI Director who was fired by Donald Trump in 2017—oversaw Stewart's case while serving as the United States Attorney for

<sup>25</sup> Tom Hays, “Prosecutor: Lil’ Kim Lied About Shootout,” *AP News* (March 1, 2005).

<sup>26</sup> 18 U.S.C. § 1001.

<sup>27</sup> Josh Saul, “What Do Michael Flynn and Martha Stewart Have in Common? A List of People Charged With Lying to the FBI,” *Newsweek* (December 1, 2017).

<sup>28</sup> 18 U.S.C. § 1503, 1505, and 1515(b).

<sup>29</sup> Martha Nussbaum, *Hiding from Humanity* (Princeton: Princeton University Press, 2004), 242–244.

the Southern District of New York. He focused on the seriousness of lying in a press conference in 2003: "This criminal case is about lying—lying to the F.B.I., lying to the S.E.C., lying to investors." He then added (perhaps a bit sanctimoniously) the following assessment of the case: "It's a tragedy that could have been prevented if . . . [Stewart] had only done what parents have taught their children for eons . . . that if you are in a tight spot, lying is not the way out. Lying is an act with profound consequences."<sup>30</sup> Recall that Comey—who was often called a "boy scout"—wrote a book about "the toxic consequences of lying" in 2018.<sup>31</sup>

The irony of Comey's statement is that the police often find themselves in tight spots that could be aided by a bit of lying and deception. And when they do lie and deceive, we often just assume that such tactics are justified parts of the job. Indeed, citizens lie and break the law when they shouldn't, and it's plausible to think the police—in order to do their job and get the truth—need to be able to lie as well. But it's worth taking a moment to reflect on the presumed default justification of police deception and dishonesty—and whether norms of deception and dishonesty should be treated as more of a reciprocal, two-way street.

### The Puzzle and the Plan to Solve It

If the goal of an investigation is to find the truth—and the public are legally compelled to tell the police the truth—it's rather strange that the police can lie, deceive, and misrepresent facts in ways that effect that search for truth. One idea is to level the playing field and be more lenient with the public, allowing them to lie to the police more readily. But as we will see in the coming chapters, this solution undermines the societal value of truth-telling within communities. To be sure, there are often good reasons to prohibit (and even criminalize) lying to the state. Deception, dishonesty, and fraud harm important investigations, waste public resources, and, of course, frustrate the search for the truth.

Another idea is to seek principled constraints on the police powers of deception and dishonesty. That is the idea behind the book's thesis, and I think

<sup>30</sup> Constance L. Hays, "Prosecuting Martha Stewart: The Overview; Martha Stewart Indicted by U.S. On Obstruction," *The New York Times* (June 5, 2003).

<sup>31</sup> Michiko Kakutani, "James Comey Has a Story to Tell. It's Very Persuasive," *The New York Times* (April 12, 2018).

there are compelling reasons in favor of the idea. Naturally, a police institution based on deception and dishonesty affects society much more significantly than Martha Stewart's lies. A police institution based on deception and dishonesty can undermine democratic self-governance (by degrading public knowledge regarding truth) and erode public faith in the police institution itself. We don't have to look hard to see these effects in society.

Ta-Nehisi Coates makes a similar point about public faith in the police institution by drawing upon the distinction between "power" and "authority."<sup>32</sup> The former is derived from external force and the latter is derived from cooperation (consensual and trusting relationships, reciprocation, and so on) that leads to legitimacy. The erosion of authority contributes to the police's need to rely on external force and power. Coates describes how this leaves the community skeptical of the police: Some groups simply don't trust the police because there is "a belief that the police are as likely to lie as any other citizen."<sup>33</sup> This is another of the book's themes—the idea that a lack of societal trust (by the police and the community) leads to preemptive defection from cooperative overtures. Both the police and the public proactively seek to lie and deceive each other.

The situation I've described suggests a puzzle about policing. Things don't have to be this way, but, as a matter of fact, the police have been entrusted to promote that facet of justice that we broadly call security. As with other state institutions, the police institution is supposed to be based on legitimacy. Legitimacy is in part a function of authority, which is in part based on reciprocal public relationships generating rights and duties.<sup>34</sup> Reciprocal relationships by their nature require trust and faith.<sup>35</sup>

<sup>32</sup> Ta-Nehisi Coates, "The Myth of Police Reform," *The Atlantic*, April 15, 2015.

<sup>33</sup> *Ibid.*

<sup>34</sup> A familiar account of police legitimacy is "a property of an authority or institution that leads people to feel that authority or institution is entitled to be deferred to and obeyed." Jason Sunshine and Tom R. Tyler, "The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing," *Law & Society Review* 37, no. 3 (2003), 513–548. My focus will be on *political* legitimacy, which includes a variety of theories. For example, legitimacy may be based on consent: If a person immigrates to the United States, we might say that the person has consented (perhaps tacitly) to being governed by the state. The state thus has authority to enforce the law against the person and does so legitimately as long as the state acts in accordance with the terms of the agreement with the person (in other words, the terms to which the person consented upon immigration). If the state acts outside the terms of the agreement (e.g., governs outside the rule of law), then the state acts without authority and thus illegitimately.

<sup>35</sup> I suppose you could argue that the police and criminals have—in a sense—a reciprocal relationship that is not based on trust and faith (the criminal breaks the law, and the police enforces the law). However, I will focus on the common way that reciprocation is tied to cooperative societal activity in moral and political philosophy: "A necessary condition of co-operative activity is trust, where this involves the willingness of one party to rely on another to act in certain ways." Bernard Williams, *Truth and Truthfulness* (Princeton: Princeton University Press, 2002), 88.

So here's the puzzle: Despite the necessity of trust and faith in reciprocal relationships, the police institution has embraced deception, dishonesty, and bad faith as tools of the trade for providing security—indeed, it seems that providing security is *impossible* without those tools. This presents a sort of paradox, which is plausibly related to the erosion of the public's faith in the police institution and the weakening of the police's legitimacy: Trust seems important to the police institution, but so do deception, dishonesty, and bad faith.

This book suggests that one way to solve the puzzle is to show that many of our assumptions about policing and security are unjustified. Specifically, they are unjustified in the way many of our assumptions about security were unjustified after 9/11, when state institutions embraced a variety of brutal rules and tactics in pursuit of perceived security enhancements.

Analogously, the police are not justified in pursuing many of the supposed security enhancements that we think are necessary, including many proactive tactics that rely upon deception, dishonesty, and bad faith. Proactive and other deceptive policing that is on par with fraud and deviations from the rule of law is illegitimate. The upshot is that the police institution should become a more reactive (legitimate)—and less proactive (illegitimate).<sup>36</sup> I know this sounds odd (it is intuitive to want to preemptively stop criminals before they act, for instance), but I think we will see that the widespread use of deceptive and dishonest tactics is inconsistent with fundamental norms of political morality—and can also have debilitating effects on both communities and the police institution itself.<sup>37</sup>

<sup>36</sup> This conclusion builds upon my earlier work regarding the liberal *limits* of policing (*The Retrieval of Liberalism in Policing*), which I discuss in the final section of this Introduction. The conclusion also builds on the excellent work of other philosophy and police scholars, such as Jake Monaghan and his idea of "legitimacy-risk profiles." Jake Monaghan, "Boundary Policing," *Philosophy & Public Affairs* 49, no. 1 (2020).

<sup>37</sup> There is not always a clear distinction between proactive and reactive tactics, and, as we will see, proactiveness can certainly be a justified depending on the context (such as emergency situations in which life is at stake). Or consider how a police officer walking the beat, developing personal relationships with the residents (in part to prevent crime before it happens) might be both proactive and justified; moreover, these and other proactive tactics (such as putting more officers on the street before a large public event) may not involve deception or dishonesty. It is thus important not to paint with too broad a brush, and so we will need to distinguish between nondeceptive (and/or justified) proactive policing and deceptive and dishonest proactive policing this is unjustified because it is on par with fraud and deviations from the rule of law. In any event, it is important to note that—for every advocate of proactive policing—there are critics (and empirical data supporting their criticism) of proactive policing—even when the proactive tactics are not directly based on deception and dishonesty. See, for example, Rachel Boba Santos, "Predictive Policing: Where's the Evidence?" in *Police Innovations: Contrasting Perspectives*, ed. David Weisburd and Anthony Braga (Cambridge: Cambridge University Press, 2019), 366–98.

Chapter 1 begins with the assumption that—given basic natural facts about humans—there are certain characteristics that the rules of any human society must possess. For example, law must, to some degree, account for human vulnerability (including vulnerability to fraud) in a way that permits survival. Not only would it be impossible for a society and legal system that fails this standard to be justified and legitimate, it would be impossible for such a society to exist. Chapter 1 builds on these ideas by showing how specific legal principles are grounded in universalistic positive morality (UPM). The chapter does this in part by developing the emerging field of empirical jurisprudence as it relates to areas of law relevant to a state's use of force and brutality, as well as areas of law relating to agreements that require cooperation and trust (e.g., contractual arrangements).

Chapter 2 motivates political approaches to normativity (what societies should do) and public justification (a rationale for the state's exercise of power in a way that society members can accept) by showing how *good faith* is an indispensable normative foundation of policing as a political institution given assumptions about UPM. Here, we will examine some of the core philosophical work on honesty, transparency, and fraud. Institutional bad faith is contrary to fundamental commitments of UPM, giving rise to a crisis of legitimacy. If we mostly defer to the police regarding our security—to enforce rules and sanction the rule breakers—then we must have some degree of confidence that the institution itself will act with a disposition of good faith. There would not be much point in deferring to a social institution such as the police if it does not operate in good faith—if, for instance, the police themselves enhance human vulnerability by acting with brutality and bad faith (recall the Central Park Five case), defrauding people and undermining the rule of law (issues related to UPM). It's not a stretch to think that the contemporary police institution is actually (not hypothetically) facing a related crisis of legitimacy.

Policing is of course complicated, and the book's solution will inevitably include exceptions (recall the broken-arm-boot-bashing scenario), which will be explored through case studies in Chapters 3 and 4. This part of the book follows an Interlude—which sets forth a methodology for examining the real-world problems—and draws upon the theory from Chapters 1 and 2 to address important case studies. For example, there are principled reasons why one might argue that deception and dishonesty are (sometimes) justified in emergency situations in which life is at stake (consider kidnapping, human trafficking, and so on), but not the endless cycle of illegal drug

investigations that can put officers, informants, and suspects at risk of physical harm—as well as erode public trust and legitimacy. These issues will be considered in a variety of contexts, including sting operations, deceptive interrogation practices, and pretextual encounters.

Additional complicating factors arise when we consider the overlap between domestic law enforcement and national security and intelligence work (which is conducted not only by law enforcement agencies such as the FBI, but also local and state police—often as part of a “Joint Terrorism Task Force,” for example). These considerations raise questions about the connections between (dis)honesty, good faith, trust, and transparency, as well as various domains of authority and democracy. For example, we will consider the idea that transparency is important to state authority, but that transparency is often in direct opposition to honesty and trust. Consider how state requirements of transparency might encourage state officials to *increase* their deception and dishonesty by telling “half-truths” to the public (thus decreasing their trustworthiness).<sup>38</sup> We will thus need to examine how *too much* transparency may circumvent honesty, not that transparency itself is inherently bad.

There is a lot of ground to cover, but we will take what I hope is an engaging, discursive path that draws upon a rich variety of literature and case studies. Chapter 1 begins with Dante Alighieri’s fourteenth-century epic poem, *The Divine Comedy*.

#### Postscript: A Special Note to the Two or Three People Who Read My Prior Work on Policing

Skip this section if you are not one of the people in this category. If you do fall into this category, your patience and readership are very much appreciated. But you might be wondering: *Why does it take three books to express one’s views on the legal and philosophical problems in policing?*<sup>39</sup> It would be disingenuous—a lie, perhaps—to say that I had not considered the fact

<sup>38</sup> See Onora O’Neill, *A Question of Trust: The BBC Reith Lectures 2002* (Cambridge: Cambridge University Press, 2002).

<sup>39</sup> My first book on policing was *The Retrieval of Liberalism in Policing* (New York: Oxford University Press, 2019), which I discuss briefly in this postscript. My second book on policing was *The Police Identity Crisis: Hero, Warrior, Guardian, Algorithm* (New York: Routledge, 2021), which examines the police role and identity from within a broader philosophical context—arguing that prominent conceptions of the police are inconsistent with collective conceptions of justice.

that this book will allow me to complete a sort of trilogy on policing. But the serious answer is that the problems of policing are difficult and must be examined from multiple perspectives.

In my first book, *The Retrieval of Liberalism in Policing*, I embraced a version of nonideal theory—or, theorizing about how to address injustice in the world as it actually exists (instead of theorizing about the ideal of justice). The methodology employed in that book is based on the argument that our efforts to address injustice in the existing world should be politically possible, effective, morally permissible, and prioritize grievances given basic assumptions about the liberal ideal of justice.

Given basic assumptions about the ideal of justice, I argued that liberal personhood is a nonideal theory priority rule—meaning that our efforts to address injustice in the existing world (specifically, injustice regarding the police’s use of informants, operations that might give rise to entrapment, and surveillance) are ultimately constrained by personhood. I set forth what I took to be a relatively uncontroversial account of personhood—a tripartite conception based on reciprocity, moral agency, and human dignity—steeped in liberal legal and political philosophy. This priority rule is necessarily tied to governance by rule-of-law principles because—I argued—undue police discretion (discretion that perverts the rule of law) can itself be an affront to personhood. The goal was to retrieve the aspirational ideals of liberalism.

The nonideal methodology—and the “personhood-rule-of-law” framework—are consistent with the arguments in this book. However, this book approaches the underlying issues (police deception and dishonesty) at a different level of inquiry. Why do this, especially if these issues ultimately reduce to a lower (more fundamental) level of personhood and the rule of law?

The reason is straightforward: There will be some cases and questions in which it is more appropriate (more explanatory power, in other words) to address morality in terms of lower-level (more fundamental) questions of justice broadly construed (political philosophy), while in other cases there will be higher-level (less fundamental) questions regarding specific doctrines and laws and the extent to which they are consistent with legal norms and principles (jurisprudence). For example, many of the cases that we will examine in this book cannot be explained adequately simply by reference to “personhood” or “the rule of law,” even if they in some sense reduce to those concepts. The cases more specifically raise jurisprudential questions relating to narrow doctrines regarding things such as good faith and fraud (which in



turn raise specific questions about honesty, transparency, trust, and so on). These cases and ideas reach beyond my earlier work.

So these "higher" and "lower" levels of inquiry are not mutually exclusive, and I will try to highlight connections between the different levels of inquiry (and my prior work) where appropriate. My hope is that this book is consistent with—not a departure from—my earlier work, while introducing new ways to examine the legal and philosophical problems in policing. The problems are complex and multifaceted, and I continue to believe that our search for answers will benefit from many different views of the cathedral, so to speak.

PART I  
THE IVORY TOWER