

Training Cops to Lie - Pt 1

The tangled web of police deception

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Truth or Consequences

Police lie. It's part of their job. They lie to suspects and others in hopes of obtaining evidence. These investigative lies cover a wide web of deception - a web that can get tangled. Some investigative lies are legal, some are not, and some generate significant disagreement amongst courts, prosecutors, the public and officers themselves.

There are serious consequences here. Officers can:

- Be sanctioned by the courts.
- Be sued.
- Be disciplined in the job.
- Lose the public's confidence.
- Have evidence suppressed, a case dismissed and a criminal freed.

Proper training in this complex arena is critical.

Not All Lies Are Created Equal

Effective interrogation of a suspect nearly always involves a deception - expressed or implied. The deception is that it's in a suspect's best interest to talk to police and confess without an attorney present. It's not. A completely truthful officer would tell suspects this. A completely truthful officer would also find confessions extremely rare. (See below, *Deceptive Police Interrogation Practices: How Far Is Too Far*)

And confessions "are a good thing." Just ask the Supreme Court:

Admissions of guilt are more than merely 'desirable,' they are essential to society's compelling interest in finding, convicting and punishing those who violate the law. - *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973).

But just as important,

The police must obey the law while enforcing the law. - *Spano v. New York*, 360 U.S. 315, 320 (1959).

So, what's the law when it comes to police lying to suspects to get confessions?

- Courts agree due process requires that confessions be voluntary. That means they can't be coerced.
- Courts agree coercion can be psychological as well as physical.
- Most courts agree they'll decide whether the confession was voluntary or coerced based on a "totality of the circumstances."

Totality of the circumstances can include:

- Police conduct - *what* officers say and do and *how* they say and do it, e.g., the length of the interrogation and whether police offer refreshment or breaks.
- The environment - e.g., are police questioning the suspect in a 6' X 8' windowless room where they stand between him and the only exit?
- The suspect's age and mental status.
- Etc. - *anything else* that bears on the coercive nature, or not, of the interrogation.

One Person's Lie May Be Another's Coercion

Now that we have the basics on the law, we should all be able to agree on what deception is legal and what isn't, right? Let's see. You, dear Reader, work the following scenario and we'll compare results.

Seventeen-year-old Deborah Margolin was brutally murdered. According to her brothers, she was sitting outside her rural home when a stranger drove up and told her a calf was loose at the bottom of the driveway. Deborah went to get the animal - and never returned. Later the same day, her father found her mutilated body in a creek.

When you and other officers arrive, Deborah's brothers describe the stranger and his vehicle. You recall that Miller lives nearby, and he and his car match the descriptions. Miller has previously been convicted of a sex offense and arrested for statutory rape.

That night, you and another officer question Miller at his job. He agrees to accompany you to the station for further questioning. He's taken into an interrogation room and read his rights, which he waives. The interrogation is taped, so its circumstances are not in dispute.

It's clear that you, the interviewing detective, make no threats and engage in no physical coercion. On the contrary, you assume a friendly, understanding manner and speak in a soft tone of voice. You also give Miller certain information, some of which is false.

You initially tell Miller Deborah is still alive. Later you say she has just died. In fact, she was found dead hours earlier. Throughout the interview, you emphasize that whoever committed such a crime has mental problems and is desperately in need of psychological treatment.

You tell Miller you believe he committed the crime and then you present yourself as a friend who wants to help if he'll just unburden himself. You state several times that Miller is not a criminal who should be punished but a sick individual who should receive help. One hour into the interview Miller confesses, then collapses, and is taken to the hospital.

This is a real case - *Miller v. Fenton*, 796 F.2d 598 (3rd Cir. 1986). Do you think the brutal murder and the investigation were getting any media attention and public interest?

Before trial, Miller moved to suppress his confession. The defense argued that the detective's method of interrogation constituted psychological manipulation of such magnitude that it rendered his confession involuntary. The trial court denied the defense motion and Miller was convicted at a trial in which his confession was admitted.

Miller appealed his conviction. A 3-judge state appellate court unanimously reversed the conviction. Based on the same facts, they ruled the detective engaged in deceptive coercion that *shocked the conscience* and violated due process.

End of story? Not yet. The state supreme court reinstated the conviction - but only by the hair's breadth of a 4:3 split decision. After that, Miller took his appeal through federal district court and the United States Supreme Court, and had his conviction affirmed on procedural grounds with neither federal court addressing whether the police conduct was unlawfully deceptive.

The moral of this agonizingly long story? Courts are judges, judges are lawyers, and

You can't get two lawyers to agree to kill a rat in a bathtub. - Karl S. Johnstone, Superior Court Judge, Retired.

This is the tangled web officers must navigate every day. A web that even judges on the same court, looking at the same facts and applying the same law - with the benefit of briefs, the arguments of counsel and the assistance of law clerks - disagree on.

And what are the possible consequences for officers if they get it "wrong" (that is, a court later disagrees with them) in the crucible of a high profile investigation of a horrific crime?

- The confession may be suppressed, along with any *fruits of the poisonous tree*.
- The case may be dismissed - if there is insufficient evidence without the suppressed evidence.
- The officer and, by extension, the entire department may face public condemnation and the censure of the court in a written opinion. (Recall that the 3-judge appellate court in Miller wrote that the police deception shocked the conscience.)
- If the case is high profile and politically hot enough, officers may face job discipline over their use of deception, even if they cleared it with the local prosecutor ahead of time. (Just ask the FBI agents who questioned Richard Jewel in the Atlanta Olympics bombing case. See, web link below.)

So, what can and should the profession do to prepare officers for this tangled web with its critical consequences? Stay tuned for *Training Cops to Lie - Part 2*, where we'll look at:

- More police deception scenarios.
- The psychological effect on officers of lying.
- A training model for the use of police deception.
- Policies and procedures for employing police deception.
- The response of police leadership to the use of police deception.

Training Cops to Lie, Pt 2

OR Parameters of Police Deception

The "L" word

It was the use of the "L" word that did it. If I had titled last month's article *Legal Parameters of Strategic Deception*, instead of *Training Cops to Lie*, I doubt there would have been a brouhaha. If you'd like to see a brouhaha, just click on the web link to Part 1, below, and read all the way through the comments at the end of the article.

My intent in Part 1 was to posit that the U.S. Supreme Court has recognized that the duties of law enforcement may require limited, officially sanctioned deception in the course of criminal investigations. *United States v. Russell*, 411 U.S. 423, 434 (1973). ("Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer.")

Even criminal defense attorneys empathize with this necessity,

I have not read many reported decisions in which the Courts have been enthusiastic about trick, deception, and artifice by law enforcement personnel, but the Courts do understand that in the real world, a world in which crime loves darkness, stealth, and concealment, crime can sometimes only be detected and prosecuted through those same means.

(See web link to J.D. Obenberger's article.)

The Supreme Court has referred to these sanctioned ruses as "strategic deception." *Illinois v. Perkins*, 496 U.S. 292, 297 (1990).

It was also my intent in Part 1, to look at some court decisions on police deception for some legal guidance on a topic so complex and murky that the courts don't even agree.

Then I intended in Part 2, and possibly subsequent articles,

- To look at some scenarios and see if we could apply case law in a way that would help officers in the field ensure they acted legally.
- To raise consciousness about some of the psychological affects of employing deception in the investigation of criminal activity.
- To discuss appropriate training for the use of police deception.
- To consider agency policies and procedures for employing police deception.
- To examine the response of police leadership to the use of police deception.

But use of the "L" word - lie - rather than something like *strategic deception*, created an uproar that I had neither intended nor anticipated.

Can we face the truth about lying?

I was taken aback by the intensity of negative response to the idea of law enforcement using *any* deception in investigating criminal activity. Such a posture would eliminate any undercover investigations of drug trafficking, prostitution, pimping, child pornography, public official misconduct, corporate corruption, and an endless list of etceteras. I was chagrined by the notion, as one reader commented, that I had unwittingly provided reactionary "cop bashers with more ammunition."

In retrospect, I'm glad for several reasons that the "L" word set a fire where *strategic deception* hasn't even have lit a spark.

- If there are reactionaries who are going to blame officers for the balances our courts draw, and not enforce the law if they don't agree with it, I want to know that. And I want prosecutors to know how to voir dire for such people during jury selection on a case in which officers have used legally sanctioned deception.
- Not all the comments were "knee-jerk" or extreme. Some were inquiring citizens *and officers* with honest concerns about any use of deception. This raises a separate question: *Does legal equals ethical?* That is, just because the law says police can use deception, should they? And what are some of the consequences officers, prosecutors and the criminal justice system might face if the public doesn't think a legal use of deception was ethical?
- It's been interesting to see the reaction to telling the truth about police lying and the "how" and "why" *the system* hides behind jargon.

Addressing this latter point first, it was the Supreme Court that coined the phrase *strategic deception*, in sanctioning some police lying in the investigation of crimes. Did the court hope to thus shroud the bargain *they* had struck "in the real word, a world in which crime loves darkness, stealth, and concealment, (and) crime can sometimes only be detected and prosecuted through those same means?"

Hiding the truth behind jargon.

Using jargon to make palatable what we ask officers to do to keep the rest of us safe and secure against those who would harm us isn't unique to the criminal justice system.

Our politicians, and under their direction, our military, has engaged in the same linguistic contortions.

- In 1947 the Department of War changed its name to the Department of Defense.
- The Cambodian invasion was called an "incursion" and the war was officially a "police action," even though 2 million people died. (The president could declare a police action without congressional approval.)
- In 1974, a US Air Force colonel in Phnom Penh, Cambodia said to American reporters, "You always write it's bombing, bombing, bombing. It's not bombing, it's air support."
- We didn't retreat in Vietnam; we staged a "phased departure."
- "Neutralize" is the current euphemism for killing someone (CIA Manual).
- "Collateral damage" is the unintended killing of civilians.

And don't forget all the corporate buzzwords such as "right-sizing," "relayering," and "reengineering," for describing firing people.

I'm glad I used the "L" word instead of *strategic deception*. While I didn't anticipate the breadth of depth of response, I take heart from the ever wise Anonymous, who said,

Never fear to use little words. Big, long words name little things. All big things have little names, such as life and death, war and peace, dawn, day, night, hope, love, and home. Learn to use little words in a big way.

I don't believe that soldiers and police officers should be the only ones facing the truth of what we ask and authorize them to do on our behalf. We already ask them to face enough on their own while we sleep safely in our beds.

In this ongoing series of articles, we will face squarely the bargains we - the courts and the citizenry - ask police officers to make on our behalf. And if we find the bargain distasteful when truthfully revealed, we - the citizenry and the judiciary - need to address that.

But before I continue in this series with examining our legal system's criterion for police lying in the investigation of crimes, reader response to Part 1 reveals we first need to look at:

The Truth About the Truth in Our Criminal Justice System - A criminal trial is NOT about finding the truth.

So log on next month and keep those comments coming.

A Trial is NOT About the Truth Just ask defense attorneys

Previously on Officer.com...

In an article titled *Training Cops to Lie - PT 1* (web link below), I intended to begin a series on the legal and ethical parameters of police deception in investigating criminal activity.

In the melee of comments generated by that article, some readers expressed outrage about any police deception. That this would mean the elimination of all undercover activity to investigate drug trafficking, child prostitution or pornography, terrorism, or any other criminal activity engaged in secretly was not discussed by these outraged readers - but other readers noted the point.

One rationale of the outraged readers was that the Criminal Justice System, including trial, is a search for the truth and that any deception employed during that search would subvert the entire process.

Before I can proceed with my intended series some misperceptions might need to be cleared up.

A criminal trial is not about the truth... just ask defense attorneys and the courts.

A web site to help criminal defense attorneys with jury instructions asserts,

It is important for the jury instructions to assure the jurors understand that... the question in a criminal case is not whether the defendant committed the acts of which he is accused. ...In other words, the instructions should avoid language that perpetuates the juror's intuitive inclination to make the trial a search for the truth. (Web link below.)

The issue, according to defense attorneys, is whether the prosecution has proven the elements of the crime(s) charged beyond a reasonable doubt.

As a former state and federal prosecutor, I do not disagree that is the issue under the current rules of our criminal justice system. And defense attorneys do not want that system to even suggest to jurors that the trial or their job has anything to do with seeking, finding or determining the truth.

Moreover, some courts are agreeing that any suggestion to jurors that a criminal trial is about the truth is *improper*. (See web link to Second Circuit ruling, which joins other courts.)

A criminal trial is not about the truth... according to the Rules

A story I heard long enough ago that I can't attribute it aptly demonstrates one of the dilemmas officers face. It goes like this.

A retired officer is called to testify in a case he'd investigated before he retired. The clerk administers the oath,

Do you swear to tell the truth, the whole truth and nothing but the truth?

Standing with his right hand raised in solemn dignity, the retired officer pauses thoughtfully, then replies,

No.

This gets everyone's attention. The Judge clears her throat and says,

Excuse me, Officer, perhaps I misunderstood. What did you say?

The retired officer replies,

With all due respect, Your Honor. I've never been allowed to tell the whole truth in a criminal case before. Have the rules changed?

The rules haven't changed. Most officers know that the Rules of Evidence prohibit them from telling the whole truth and if they were to tell the whole truth, even inadvertently, the Judge might declare a mistrial.

Most police officers also know that they are expected to swear to tell the whole truth anyway. And so we see a reader commenting to *Training Cops to Lie - PT 2* (web link below) that every time he or she swears to tell the whole truth, he or she is lying - and the system not only expects but demands this.

What are some of these rules? There's Federal Evidence Rule 404(b), which most states have adopted in very similar form. It provides that jurors are prohibited from hearing about any other bad acts or conduct of the defendant other than those for which he is on trial. There are exceptions but the prosecutor has to brief the matter beforehand and have the judge rule on it.

This means a jury doesn't get to know the defendant was out on parole following a kidnapping, torture and rape conviction in a subsequent trial for child sexual abuse.

It also means that if a defense attorney suggests on cross examination that it was unfair of the arresting officer to not allow the defendant to practice the Field Sobriety Tests even once before deciding he'd failed them and putting the defendant in jail when the officer got to practice administering the tests numerous times before the officer was tested, the officer may not truthfully reply that the defendant practiced at least twice when he was previously arrested and convicted of drunk driving.

Another rule is the *exclusionary rule*. Established by the Supreme Court in *Weeks v. United States* (web link below) it was intended to deter police misconduct by holding that evidence seized in violation of the Constitution is inadmissible at trial. The Court subsequently made the rule binding on the states in *Mapp v. Ohio* (web link below).

Deterring police misconduct is a good thing. While some argued there were other means for doing that rather than giving a criminal defendant a windfall of suppressing relevant, truthful incriminating evidence (civil lawsuits, job actions, etc.), the Supreme Court decided such deterrence was worth sacrificing the truth.

In *United States v. Leon* (web link below), however, the Supreme Court decided the exclusionary rule was being used by defense attorneys in a way the Court never intended after a U.S. District Court suppressed drugs found in Leon's apartment *pursuant to a warrant*. Another judge subsequently ruled the issuing magistrate had made an error. There was no suggestion of police misconduct.

The Supreme Court could find little benefit in applying the exclusionary rule where there has been good-faith police reliance on an invalid warrant. "*The exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates.*" The Court considered it unlikely that the rule could have much deterrent effect on the actions of truly neutral magistrates with whom a higher judge later disagrees.

The good faith exception makes good sense. But, unlike the exclusionary rule, the Supreme Court has not made it applicable to the states.

This means that in states that have not adopted the good faith exception, such as Alaska when this author was a state prosecutor there, police can do everything right in the investigation, obtain a warrant, and, if a trial judge later disagrees with the magistrate's finding of probable cause, all of the relevant, truthful evidence seized pursuant to that warrant is suppressed.

Permit two points regarding this last suppression of the truth:

- Magistrates and judges are lawyers and you can't get two lawyers to agree to kill a rat in bath tub. Why do you think the Supreme Court, confronted with the same facts and case law and lots of time and briefings and arguments of counsel, disagrees 5 to 4 on matters that officers may have only moments to decide?
- What police misconduct is deterred in this instance? Obtaining a warrant from a neutral magistrate?

It is not the intent of this article to take issue with defense attorneys, the rules and court decisions that insist a criminal trial is not about the truth, although the author encourages readers to do just that. (Okay, I admit taking issue with states not adopting a good faith exception to the exclusionary rule)

Rather, the intent is to clarify misperceptions that a criminal trial in our justice system as it now stands is intended to determine the truth of whether a defendant committed the crimes charged.

Next on Officer.com...

Stay tuned next month as we return to the legal and ethical parameters of police deception. Unlike one reader's comment to *Training Cops to Lie - PT 2* that anything goes on the street as long as you tell the truth in the courtroom, it's much more complicated. Officers need to understand the ethical and legal parameters and the possible attendant consequences to using deception to investigate criminal activity.

What is considered legal can depend as much on the jurisdiction in which you investigate crime as it can on the investigative tactics used. And what is considered ethical can depend on whose ox is being gored.

Keep those reader comments coming.

If Courts Clash on Police Deception What's a Cop Supposed to Do?

Up until now...

This is the fourth in a series of articles examining the legal and ethical parameters *and* societal implications of police deception in criminal investigations. Web links are listed below for the first 3 articles:

- Training Cops to Lie - PT 1: The tangled web of police deception
- Training Cops to Lie - PT 2: OR Parameters of Police Deception
- A Trial is NOT About the Truth - Just ask defense attorneys

This series has provoked lively reader comments. They range from forceful attacks on any use of police deception - including undercover operations - to vigorous defenses of court-sanctioned uses of strategic deception, along with public policy arguments for these positions.

This article in the series looks at some more court decisions on what deceptions are *legally* permissible. The author's primary intent is to provide this case law as guidance for police officers. However, the author encourages readers to continue to voice their opinions, questions and concerns about what the courts are deciding.

Art, morality, obscenity and the courts

G.K. Chesterton, a 19th-century English essayist and poet said,

Art, like morality, consists of drawing the line somewhere.

Similarly, Supreme Court Justice Stewart wrote in the obscenity and free speech case of *Jacobellis v. Ohio* (web link below) that "hard-core pornography" was hard to define, but that "I know it when I see it." His Honor may be able to draw the line between what's obscene and what isn't but apparently different people see things differently - including judges.

The state court deemed the film at issue in *Jacobellis* obscene. The U.S. Supreme Court reversed that ruling, holding that the film was not obscene and so was constitutionally protected. However, the Court could not agree as to a rationale, yielding four different opinions from the majority, with none garnering the support of more than two justices, as well as two dissenting opinions.

Police officers need and want to know where the line is on the legally sanctioned use of deception in criminal investigations. Unfortunately, it's not only blurry, it's moving, which cops know makes for a difficult target.

Bold lines

Courts do not sanction police lying about their authority to search or seize, for example, telling a suspect that if they don't consent to a search the officer will just go get a warrant when the officer does not have probable cause.

Nor may police lie about investigating a non-existent burglary in order to gain consent to enter and search a home.

The first deception undermines the Fourth Amendment's probable cause requirement. The second could undermine the voluntary, knowing and intelligent requirements for valid consent.

A general limitation in undercover work and interrogations is that the police deception may not be of such a nature that it would coerce an innocent person to commit a crime (undercover work) or falsely confess (interrogations).

In *Training Cops to Lie - Pt 1*, we saw that most courts agree they'll decide whether the deception is unconstitutionally coercive based on a "totality of the circumstances."

The U.S. Supreme Court set out the totality of the circumstances criteria in *Frazier v. Cupp*, 394 U.S. 731 (1969). During interrogation, the officer told Frazier, falsely, that his cousin had confessed and implicated Frazier in the crime. The Supreme Court held the deception did not coerce the defendant so as to render his confession involuntary

Totality of the circumstances can include:

- Police conduct - *what* officers say and do and *how* they say and do it, e.g., the length of the interrogation and whether police offer refreshment or breaks.
- The environment - e.g., are police questioning the suspect in a 6' X 8' windowless room where they stand between him and the only exit?
- The suspect's age and mental status.
- Etc. - *anything else* that bears on the coercive nature, or not, of the interrogation.

How courts apply these lines, however, is not only contradictory but blurry.

Falling between the lines

In *Training Cops to Lie - PT 1*, we saw how 14 trial, state and federal appellate judges disagreed 7 to 7 in the case of *Miller v. Fenton*, 796 F.2d 598 (3rd Cir. 1986), on whether factually undisputed deception was legal.

Let's look at some other court decisions.

In *In re D.A.S.*, 391 A.2d 255, (D.C. App. 1978), the police pretended to compare the defendant's fingerprints to a fingerprint on the victim's checkbook and pronounced them a match. In truth, no fingerprints were recovered. The defendant confessed to the robbery and the Court held that the deception did not render the confession involuntary.

In re D.A.S. came on the heels of *Oregon v. Mathiason*, 429 U.S. 492 (1977) in which the Supreme Court upheld police falsely telling the defendant they had found his fingerprints at the scene. See also, *Michigan v. Mosley*, 423 U.S. 96 (1975) (confessing suspect had been told that another person had named him as the gunman.)

In *Illinois v. Perkins*, 496 U.S. 292 (1990), the Court held 8 to 1 that Perkins was not coerced when he confessed to committing a murder to an undercover police officer who was falsely posing as another inmate.

In *State v. Cayward*, 552 So. 2d 971 (Fla. App. 2 Dist. 1989), police interviewed a 19-year-old suspect in the rape and murder of his 5-year-old niece. Prior to the interview, the local prosecutor told police it was lawful to falsely tell the suspect they'd had the victim's underwear scientifically tested and the results showed semen stains on it from him - and to show him a false lab report of the results.

The suspect came to the station voluntarily, waived his Miranda rights, and, after denying his involvement, confessed when told about and shown a false lab report.

The trial court concluded the deception would not coerce an innocent person to confess. The appellate court disagreed. It held the verbal lie was lawful but the false documents were not. Notably, the court seemed much more concerned that such documents could inadvertently make their way into court records and be mistakenly viewed as true than with the coercive effect of the reports on the defendant. Other courts have disagreed with Florida.

In *Arthur v. Commonwealth*, 480 S.E. 2d 749 (Va. 1997), the appellate court held that police showing a suspect "dummy" reports indicating his fingerprints and hair were found at the crime scene was not unduly coercive. The court addressed the *Cayward* court's concern by noting the police kept the false documents in a separate file from the actual investigative and lab reports.

In *Sheriff, Washoe Co. v. Bessey*, 914 P. 2d 618 (Nev. 1996), the Nevada Supreme Court criticized the *Cayward* court's distinction between a verbal lie and the same lie "embodied in a piece of paper," concluding there was no real difference. The court upheld police creating a "falsified lab report" showing a defendant had committed a sexual assault against a minor, stating, "*There was nothing about the fabricated document presented in this case which would have produced a false confession.*"

In *People v. Henry*, 518 N.Y.S.2d 44 (N.Y. App. Div. 1987), the court upheld a confession obtained after police confronted the defendant with fake polygraph test results indicating he had lied to police.

,p> In *State v. Whittington*, 809 A. 2d 721 (Md. App. 2002), police placed an invisible powder on a pen they gave to the suspect so when they later conducted a fake gunpowder residue test, it appeared to her she still had gunpowder on her hand. The court found this deception was not unconstitutionally coercive.

Still other courts have sided with the *Cayward* decision and reversed convictions based upon confessions obtained after the police presented fabricated evidence to the defendant.

In *State v. Patton*, 362 N.J. Super. 16 (App. Div.) (2003), an officer posing as an eyewitness was "interviewed" on an audiotape that was later played to the defendant who, despite his early denials of involvement, confessed upon hearing the tape. The trial judge permitted the admission of the confession *and the false tape*. The subsequent conviction was reversed on appeal.

How should police draw the lines on investigative deception?

If there's wide disagreement amongst judges looking at the same facts and law, how is a cop trying to do the right thing but also being expected to use all legally available tools to investigate and solve serious crimes supposed to figure this stuff out?

Stay tuned as we try to answer this question. In future articles in this series we're going to look at:

- Does legal equal ethical in the use of police deception?
- Does ethical depend on whose ox is being gored, that is - on whom the deception is being used?
- Do the legal and ethical parameters of deception depend on how serious the crime that is being investigated is? What if it could prevent a death?
- If legal doesn't equal ethical, what should be the guiding standard for police?
- Applying the legal and ethical parameters to a real case.
- What about the issue of false confessions?
- What kinds of effects can deception have on the officers using it?
- What should police leadership be doing in this critical, complicated, provocative, high stakes area of policing?