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Laundering Police Lies

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LAUNDERING POLICE LIES

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Police officers—like ordinary people—are regularly dishonest. Officers lie under oath (testilying), on police reports (reportilying), and in a myriad of other situations. Despite decades of evidence about police lies, the U.S. Supreme Court regularly believes police stories that are utterly implausible. Either because the Court is gullible, willfully blind, or complicit, the justices have simply rubber-stamped police lies in numerous high-profile cases. For instance, the Court has accepted police claims that a suspect had bags of cocaine displayed in his lap at the end of a police chase (*Whren v. United States*), that officers saw marijuana through a covered greenhouse from a moving helicopter hundreds of feet in the air (*Florida v. Riley*), and that a secretive drug dealer just happened to be standing on the front porch holding a bag of drugs at the moment the police showed up (*United States v. Santana*). In the famous case of *Terry v. Ohio*, the Court ignored the fact that the officer changed his story multiple times. And in less-famous cases like *Ornelas v. United States*, the Court has been unfazed when police officers were caught lying about the appearance of crucial evidence.

This Article explores the prevalence of police lying and examines the U.S. Supreme Court's unquestioning acceptance of police lies. In addition to identifying the Court's gullibility and possible complicity, this Article examines criminal procedure doctrines that enable police to bake lies into cases at an early stage. This Article recognizes that the Court cannot eradicate police dishonesty, but advocates for heightened judicial alertness for police lies and an increased willingness to reverse convictions based on them. The Court should additionally utilize its educational function to signal to lower courts, police departments, and the general public—which is more attuned to police misconduct than ever before—that police lying is present and will not be tolerated.

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INTRODUCTION

Some police lie to help convict criminal defendants—at trial, during suppression hearings, on police reports, and in a myriad of other ways. Not all police. And not all the time. But we certainly know that some police lie.[1]

1. *See* ADAM M. GERSHOWITZ, *THE WIRE*: CRIME, LAW, AND POLICY 458 (2013) ("That certain police officers engage in this misconduct is not a new phenomena and it is not surprising."). *See also infra* Part II.

That police lie is not surprising. They are human after all. Social science evidence indicates that ordinary people lie quite frequently.[2] Men and women cheat on their spouses and lie to cover it up. Students cheat on tests. People lie on their taxes. To lie is human. Good people do it, just like bad people do it. This observation is neither new nor surprising.[3]

Nor should it be surprising that state trial judges who handle the bulk of criminal cases in the United States are sometimes fooled into believing police lies. State judges were often prosecutors in their former lives[4] and are therefore more willing (perhaps subconsciously) to believe law enforcement.[5] Moreover, because police regularly testify in court and have often been honest in the past, it is easy for trial judges to assume that police are telling the truth in the present case, even when they are not.[6] Judges are susceptible to confirmation bias just like ordinary people. Put simply, in a world of fast-moving dockets and officers who seem trustworthy, it is not surprising that trial judges sometimes get hoodwinked by police lies.

What *is* surprising is how readily the U.S. Supreme Court seems to believe police lies in cases where they should be more skeptical. Supreme Court justices are supposed to be the most sophisticated lawyers we have—brilliant, savvy, and experienced. These brilliant justices are not forced to make time-pressured decisions with limited information the way that state trial judges must. Supreme Court justices have the benefit of

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2. *See* RALPH KEYES, THE POST-ERA TRUTH: DISHONESTY AND DECEPTION IN CONTEMPORARY LIFE 7–8 (2004).

3. *See infra* Part I.

4. *See* Shontel Stewart*, Addressing Potential Bias: The Imbalance of Former Prosecutors and Former Public Defenders on the Bench,* 44 J. LEGAL PRO. 127, 129 (2019) ("Studies show that 'many judges are former prosecutors while few judges are former criminal defense lawyers.'") (quoting Thomas F. Liotti & Christopher Zeh, *The Uneven Playing Field: Ethical Disparities Between the Prosecution and Defense Functions in Criminal Cases*, 17 TOURO L. REV. 467, 484 (2001)).

5. *See* Tracey E. George, *From Judge to Justice: Social Background Theory and the Supreme Court*, 86 N.C. L. REV. 1333, 1353–54 (2008) ("Researchers have hypothesized that prosecutors are more likely than other judges to vote against criminal defendants because former prosecutors devoted some part of their lives to capturing and convicting wrongdoers."); Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 29 (2001) ("A former-prosecutor judge will likely be more receptive than other judges to government claims in criminal cases."). *Cf.* Esther Nir & Siyu Liu, *Defending Constitutional Rights in Imbalanced Courtrooms*, 111 J. CRIM. L. & CRIMINOLOGY 501, 515 (2021) ("Nearly twenty percent of [defense] attorneys interviewed perceive that judges are conditioned to believe police officer testimony, even when other case evidence indicate that the officer is not being truthful.").

6. Although there are a number of possible psychological principles at work here, confirmation bias is the most obvious. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 309.

extensive briefing,[7] months of time to examine and ponder the record,[8] brilliant law clerks to provide advice,[9] and amicus curiae who can further expand the full context of the case.[10]

Yet, despite all of these safeguards, the Court has relied on police statements in numerous high-profile cases that are, frankly, hard to believe.[11] And in doing so, the Court has accepted these questionable assertions without expressing the slightest bit of skepticism.

For example, take the infamous—and unanimous—decision in *Whren v. United States*,[12] which effectively approved racial profiling by holding that the subjective intent of a police officer is irrelevant in determining the legality of a seizure.[13] The police claimed to see a vehicle stop for an "unusually long time," during which time the driver looked down at the lap of his passenger before speeding off.[14] After following the vehicle, the officers eventually caught up to the car and walked up to find the passenger holding "two large plastic bags of what appeared to be crack cocaine in [his] hands."[15] The Court never stopped to consider

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7. Pursuant to Supreme Court rules, the parties' merits briefs can be up to 13,000 words long. And the petitioner can submit a 6,000-word reply brief. *See* SUP. CT. R. 33.1(g).

8. A trial judge has moments to decide; a Supreme Court justice has months. Given that the Court historically hears its last arguments each April and that decisions are typically issued by late June, the shortest time period the Court has for issuing decisions is two months. But, of course, many cases are argued at the beginning of the Term in October, giving the justices upwards of eight months to issue opinions. *See* Margaret Meriwether Cordray & Richard Cordray, *The Calendar of the Justices: How the Supreme Court's Timing Affects Its Decisionmaking*, 36 ARIZ. ST. L.J. 183, 213, 220 (2004).

9. Of course, the question of how much the justices listen (or should listen) to their clerks has long been debated. *See generally* TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK (2006); ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT (2006).

10. On the rise and importance of amicus briefs in the last few decades, see Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1902 (2016) ("Ninety-eight percent of U.S. Supreme Court cases now have amicus curiae ('friend of the court') filings . . . .").

11. The most obvious objection here is that the Supreme Court (and all appellate courts) are bound by the factual findings of lower courts. That is, of course, usually true. But courts owe no deference to a lower court's factual findings when they are clearly erroneous. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996). Moreover, even if the Supreme Court is bound by factual findings that seem questionable (but not questionable enough to be clearly erroneous), the Court could express general skepticism and highlight police assertions that seem like implausible lies. However, the Court has failed to do so in many instances. *See infra* Part IV.

12. 517 U.S. 806 (1996).

13. *See id.* at 813.

14. *Id.* at 808.

15. *Id.* at 809.

how far-fetched this police description was. Who in their right mind would openly display bags of cocaine in his hands while fleeing from the police? And who would continue to leave those bags of cocaine in their hands as the officers were walking right up to the car? And is it not awfully convenient that the police officers' "suspicions were aroused" when they saw the driver looking at his passenger's lap right before they gave chase?[16] The Government's story was far fetched, to put it mildly. But the Court bought it unanimously without the slightest hint of skepticism.

Whren is not the only case where the police offered (and the Court believed) an implausible story. In *Florida v. Riley*,[17] the Court accepted the officers' story that they saw marijuana plants—through a greenhouse that was ninety percent covered—from a helicopter flying 400 feet above the ground.[18] In *Ciraolo v. California*,[19] the Court accepted a similar police story about spotting marijuana from a plane flying 1,000 feet in the air.[20] Nor did the Court think twice about the police claims in *Payton v. New York*[21] that crucial bullet casing evidence in a murder case was found lying in plain view on a stereo after a warrantless search.[22] Nor did the Court express skepticism in *United States v. Santana*[23] when a reclusive drug dealer who the police had been tracking happened to be standing at the front door holding a bag of drugs when the police happened to show up.[24]

This Article considers police lies in famous Supreme Court cases, such as *Terry v. Ohio*,[25] where the officer's story changed multiple times.[26] It also considers lesser-known cases, such as when the police claimed a rusty screw gave them probable cause to remove a compartment from a vehicle—except the screw was unblemished.[27] After decades of legal scholarship on police dishonesty,[28] we should not be surprised that the police lie. Instead, we should be surprised that the

16. *Id.* at 808.
17. 488 U.S. 445 (1989).
18. *Id.* at 448–49.
19. 476 U.S. 207 (1986).
20. *Id.* at 213–14.
21. 445 U.S. 573 (1980).
22. *Id.* at 576–77, 587.
23. 427 U.S. 38 (1976).
24. *Id.* at 40.
25. 392 U.S. 1 (1968).
26. *See infra* Section IV.B.2.
27. *See Ornelas v. United States*, 517 U.S. 690, 693–94 (1996).
28. *See generally* Julia Simon-Kerr, *Systemic Lying*, 56 WM. & MARY L. REV. 2175, 2203–05 (2015) (summarizing legal research on police dishonesty dating back to 1968).

Supreme Court puts blind faith in police stories and naïvely accepts police lies.

Part I of this Article examines the degree to which the general public lies. In particular, Part I explains that it is not just "bad" people who lie. Good people—trusted people—are dishonest in an alarming number of circumstances. Part II then reviews the literature on police lying, detailing how the police engage in testilying, reportilying, and other dishonesty.

Part III then discusses the legal rules that allow police lies to be baked into criminal cases well before they reach the Supreme Court of the United States. In particular, Part III describes how courts regularly indicate the need to defer to police expertise and training. Part III also considers legal doctrines such as "high crime areas" or "furtive movements" that further enable and entrench police lies.

Part IV then examines U.S. Supreme Court decisions in which the Court accepted police stories that seem utterly implausible. Part IV analyzes canonical, textbook Supreme Court decisions as well as lesser-known decisions.

Finally, Part V considers the steps the Court can take to rein in police dishonesty. Part V considers not just reversing more convictions, but also calling out police dishonesty even when the Court is bound by factual findings that render reversals impossible. Part V explains how the Court can use its educational function to signal to lower courts, the police, and the general public about the need for vigilance in identifying police dishonesty.

I. UNTRUTHFULNESS AS A UNIVERSAL TRUTH

People widely consider lying to be morally wrong.[29] And states and the federal government criminalize dishonesty in some circumstances in an effort to deter lying.[30]

Yet, lying is ubiquitous. "[E]veryone lies."[31] Though difficult to measure precisely, numerous studies have documented that, on average, people lie on a daily basis[32] and may be on the receiving end of a lie up

29. *See* Shoham Choshen-Hillel, Alex Shaw & Eugene M. Caruso, *Lying to Appear Honest*, 149 J. EXPERIMENTAL PSYCH. 1719, 1719 (2020); Bryan H. Druzin & Jessica Li, *The Criminalization of Lying: Under What Circumstances, If Any, Should Lies Be Made Criminal?*, 101 J. CRIM. L. & CRIMINOLOGY 529, 533 (2011).

30. *See, e.g.*, Druzin & Li, *supra* note 29, at 538–50.

31. *Id.* at 530. *See also* Julie L. Borchers, *The (Honest) Truth About Dishonesty, How We Lie to Everyone—Especially Ourselves*, ARMY LAW., June 2017, at 48, 48 (book review).

32. *See, e.g.*, KEYES, *supra* note 2, at 7–8; Kim B. Serota, Timothy R. Levine & Tony Docan-Morgan, *Unpacking Variation in Lie Prevalence: Prolific Liars, Bad Lie*

to two-hundred times a day.[33] Lying and deception "are normal rather than abnormal" behaviors, and "lying is a commonplace feature of our society."[34]

People call out of work sick when they feel well, misrepresent their whereabouts to their spouse, overcharge clients, cheat on tests, stretch their accomplishments, embellish their stories, and conceal painful truths from their kids. People are dishonest even when the consequences of getting caught are significant. Polls have found that over half of employees steal company property,[35] and up to forty percent of people lie on their resumes.[36]

Even individuals in positions subject to extra scrutiny lie sometimes, for instance lawyers who could face formal disciplinary action for lying to clients or judges.[37] Similarly, perjury is widespread despite its perpetrators having just sworn an oath under penalty of imprisonment not to lie.[38] While significant dishonesty like committing fraud is less common,[39] lying in general is "a pervasive feature of human interaction."[40]

Given the prevalence of dishonesty and acceptance of lying as the norm, some have branded modern times as a "post-truth era."[41]

Days, or Both?, 89 COMMC'N MONOGRAPHS 207, 321–22 (2021) (finding, in a fairly large-scale study, that most participants lied daily, with a quarter of participants lying more than twice daily).

33. *See* KEYES, *supra* note 2, at 7–8. Unfortunately, people are generally quite bad at detecting when someone is lying. *Id.* at 218–20.

34. Druzin & Li, *supra* note 29, at 561.

35. *See, e.g.*, Catrine Jacobsen, Toke Reinholt Fosgaard & David Pascual-Ezama, *Why Do We Lie? A Practical Guide to the Dishonesty Literature*, 32 J. ECON. SURVS. 357, 357 (2017); Rene Chun, *Workplace Theft Is on the Rise*, ATLANTIC (Mar. 2019), https://www.theatlantic.com/magazine/archive/2019/03/stealing-from-work-morecommon/580429/ [https://perma.cc/T9WN-3PXC].

36. *See, e.g.*, *What Happens If You Lie on Your Resume?*, INDEED, https://www.indeed.com/career-advice/resumes-cover-letters/what-happens-if-you-lie-on-your-resume (June 24, 2022); Jacobsen, Fosgaard & Pascual-Ezama, *supra* note 35, at 357 (discussing a 2004 poll finding that eighteen percent of participants have lied on their resumes or curricula vitae).

37. *See* Bruce P. Frohnen & Brian D. Eck, *Whom Do You Trust? Lying, Truth Telling, and the Question of Enforcement*, 27 QUINNIPIAC L. REV. 425, 425, 427–30 (2009).

38. *See generally* Angela Chen, *Why Is Perjury So Rarely Prosecuted?*, JSTOR DAILY (Jan. 22, 2016), https://daily.jstor.org/why-is-perjury-so-rarelyprosecuted/ [https://perma.cc/SX9W-77AZ].

39. *See* Serota, Levine & Docan-Morgan, *supra* note 32, at 318 (finding that most participants' lies were "'little white lies,' and 11.4% were characterized as 'big lies'").

40. Druzin & Li, *supra* note 29, at 530.

41. KEYES, *supra* note 2, at 13.

Dishonesty is even expected or assumed in certain contexts, like product advertising, politics, gossip media, or parents lying to their children.[42]

Most people need a reason to deviate from their truthful default to act dishonestly.[43] However, these reasons are not in short supply.[44] Dishonesty can be motivated by anything from greed or a malicious desire to harm people at one end of the spectrum, to "prosocial" reasons (where one's dishonesty is meant to benefit others) at the other.[45] Social mechanisms, cognitive processes, and various external motivators drive people across all ages, professions, backgrounds, and life circumstances to lie.[46] For instance, people are influenced by witnessing peers' dishonest behavior, how a lie impacts others (both positive and negative), and a person's perceived position of power.[47]

People are more comfortable lying when those around them are also lying—especially when the individuals both identify with the same social group.[48] People are more comfortable lying when their targets are anonymous or a stranger.[49] Unsurprisingly, one's propensity to lie tends to increase, at least to a point, as the associated financial gain or other personal benefit from the lie increases.[50] People also lie, ironically, to avoid appearing dishonest.[51] The list of observed social, psychological, and environmental factors affecting one's willingness to act untruthfully is long,[52] and any number of elements can coalesce to drive a person to lie.

It is not only "bad people" who lie. Despite general agreement that lying is morally wrong, virtually all people lie. Under the right conditions, anyone can engage in untruthfulness. While some of this

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42. *See id.* at 4–13, 197–210. *See also Honesty/Ethics in Professions*, GALLUP, https://news.gallup.com/poll/1654/honesty-ethics-professions.aspx [https://perma.cc/EH57-K6FQ].

43. *See* Choshen-Hillel, Shaw & Caruso, *supra* note 29, at 1719.

44. *See id.*

45. *Id.* at 1719–20. A prosocial lie might include giving someone else credit for one's own idea, or a physician exaggerating the hopefulness of a terminal patient's treatment options to preserve their emotional wellbeing. *See also* DAN ARIELY, THE (HONEST) TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE—ESPECIALLY OURSELVES 218–23 (2012) (discussing altruism-motivated lies where the lie benefits one's collaborators).

46. *See* Jacobsen, Fosgaard & Pascual-Ezama, *supra* note 35, at 365–68.

47. *See id.* at 368–70.

48. *See id.* at 368–69.

49. *See* KEYES, *supra* note 2, at 41–42.

50. *See* Jacobsen, Fosgaard & Pascual-Ezama, *supra* note 35, at 369–70.

51. *See generally* Choshen-Hillel, Shaw & Caruso, *supra* note 29.

52. *See* Jacobsen, Fosgaard & Pascual-Ezama, *supra* note 35, at 359–60, 365–74 (reviewing dishonesty studies and surveying numerous observed mechanisms impacting individuals' likelihood of acting dishonestly).

pervasive dishonesty is trivial, the barriers to telling serious and consequential lies are not as high as one might expect. Whether falsehoods are big or small, self-serving or prosocial, harmful or helpful, "lying is part of being human."[53]

II. TESTILYING, REPORTILYING, AND POLICE DISHONESTY

As Part I details, we know that people lie often and that almost every individual has the capacity for dishonesty under the right circumstances. Research indicates that people lie even when the consequences are great, even in one's professional capacity, and even in the face of increased scrutiny. Of course, police are people too. It should therefore not be surprising that police officers also lie in their professional capacity.

A. Police Dishonesty Is Routine

Police lie fairly often. Lying on police reports and during in-court testimony to help convict people of crimes is, unfortunately, common.[54] As one scholar commented over half a century ago: "Every lawyer who practices in the criminal courts knows that police perjury is commonplace."[55] Describing police dishonesty as common is perhaps even an understatement—"[b]y many accounts, lying under oath by law enforcement personnel occurs as a *matter of routine*."[56] Lying under oath is so prevalent that it has been dubbed "testilying"—shorthand coined by police officers themselves.[57] Legal scholars and other commentators have

53. Andy Kessler, *To Lie Is Human*, WALL ST. J. (Aug. 8, 2021, 12:38 PM), https://www.wsj.com/articles/lying-human-politics-parenting-flatten-the-curve-riots-11628433108.

54. Irving Younger, *The Perjury Routine*, NATION, May 8, 1967, at 596, 596–97.

55. *Id.* at 596.

56. Simon-Kerr, *supra* note 28, at 2178 (emphasis added). *See also* Michelle Alexander, *Why Police Lie Under Oath*, N.Y. TIMES (Feb. 2, 2013), https://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html ("[Testilying] is a perversion of the American justice system that strikes directly at the rule of law. Yet it is the routine way of doing business in courtrooms everywhere in America.").

57. Simon-Kerr, *supra* note 28, at 2204. *See* COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, COMMISSION REPORT 36 (1994) [hereinafter MOLLEN COMMISSION].

written extensively about testilying for decades,[58] describing it as an "ever-present reality."[59]

Testilying is widely understood to be driven by the exclusionary rule.[60] The rule's threat of keeping inculpatory evidence out of court incentivizes police officers to fabricate retroactive justifications for their investigative actions in the field.[61] For example, in the immediate wake of the exclusionary rule's extension to state criminal procedure, a study found a significant and "suspicious" uptick of New York City police officers claiming that defendants had dropped contraband on the ground.[62] This uptick coincided with a "steep decline" in reports of officers finding contraband in defendants' homes or on their persons.[63] Scholars have long maintained that the "dropsy" cases are fabricated in order to ensure the plain view doctrine applies and thus permits the evidence to be admissible.[64] Because of the exclusionary rule's influence, most police lying appears to occur in the investigative and pretrial stages of a criminal case, particularly suppression hearings raising Fourth Amendment issues.[65]

Often included under the umbrella of testilying is the fittingly named practice of "reportilying"—officers' knowingly falsifying police reports to fabricate probable cause, avoid evidence suppression, or otherwise help secure a criminal conviction.[66] In some cases, police officers

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58. *See* Simon-Kerr, *supra* note 28, at 2203–04.

59. Steven Zeidman, *From Dropsy to Testilying: Prosecutorial Apathy, Ennui, or Complicity?*, 16 OHIO ST. J. CRIM. L. 423, 425 (2019).

60. *See* Simon-Kerr, *supra* note 28, at 2201–03.

61. *See id.*

62. *Id.* at 2203.

63. *Id.*

64. *See, e.g.*, *id.*; Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1317–18 (1994) ("In an individual case, the dropsy testimony might not seem entirely implausible. After all, it is possible that an individual drug user or dealer might drop contraband at precisely the moment a police officer happened to pass by. It is the repetition of this suspicious story in case after case that suggests fabrication.").

65. Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041–42 (1996).

66. *See* Alexandra Hodson, Comment, *The American Injustice System: The Inherent Conflict of Interest in Police-Prosecutor Relationships & How Immunity Lets Them 'Get Away with Murder,'* 54 IDAHO L. REV. 563, 587 (2018). Police lying in warrant affidavits is also covered under the testilying umbrella. *See* Stephen W. Gard, *Bearing False Witness: Perjured Affidavits and the Fourth Amendment*, 41 SUFFOLK U. L. REV. 445, 447–48 (2008) ("The assumption that police perjury in warrant affidavits is rare and effectively deterred by the warrant application process is counter-intuitive and contradicted by all available evidence. . . . [L]ies and deception are an acceptable feature of much routine law enforcement activity . . . .").

maintain two sets of investigatory files with exculpatory material scrubbed from the version to be used in court proceedings.[67]

The precise extent of police lying is, unsurprisingly, nearly impossible to determine.[68] However, numerous studies on the subject and "overwhelming anecdotal evidence"[69] over the years indicate that testilying and reportilying are "openly entrenched" in many police departments and widely acknowledged by judges, prosecutors, and defense attorneys.[70]

In the mid-1990s, the Mollen Commission Report on the New York City Police Department concluded that testilying was "probably the most common form of police corruption."[71] A 1992 report surveyed judges, prosecutors, and defense attorneys in Chicago and found "a pattern of pervasive police perjury intended to avoid the requirements of the Fourth Amendment."[72] These survey respondents estimated that police officers lie under oath twenty percent to fifty percent of the time when testifying about Fourth Amendment issues and reported "systematic fabrications in case reports and affidavits for search warrants, creating artificial probable cause which forms the basis of later testimony."[73] A staggering ninety-two percent of these respondents, including ten out of the eleven surveyed judges, believed that police officers lie under oath in suppression hearings "at least 'some of the time.'"[74] Similarly, eighty-six percent of the respondents believed that reportilying occurs "at least 'some of the time,'" with a third of the respondents believing that police

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67. Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693, 700 (1996).

68. Hodson, *supra* note 66, at 586; MOLLEN COMMISSION, *supra* note 57, at 36 ("As with other forms of corruption, it is impossible to gauge the full extent of police falsifications."); Cloud, *supra* note 64, at 1313 ("By their very nature, successful lies will remain undetected, and we would expect a perjurer to attempt to conceal his crime.").

69. Michael Goldsmith, *Reforming the Civil Rights Act of 1871: The Problem of Police Perjury*, 80 NOTRE DAME L. REV. 1259, 1266 (2005).

70. Simon-Kerr, *supra* note 28, at 2204. *See also* Slobogin, *supra* note 65, at 1041 ("Whether it is conjecture by individual observers, a survey of criminal attorneys, or a more sophisticated study, the existing literature demonstrates a widespread belief that testilying is a frequent occurrence.") (footnotes omitted); Cloud, *supra* note 64, at 1312 n.4 (collecting sources from primarily the 1960s to 1980s where legal scholars raised the issue of police perjury and demonstrated that it was an openly known practice even then).

71. Simon-Kerr, *supra* note 28, at 2204.

72. Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 76, 81–83 (1992).

73. *Id.* at 83.

74. *Id.* at 107 & n.146.

officers "fabricate evidence to create probable cause in case reports between 'half of the time' and 'most of the time.'"[75]

Nearly two decades later, a 2010 study focusing on the federal district court in Kansas found that police perjury remained a "prevalent and serious problem."[76] This study found that trial court judges' "habitual[]" acceptance of officers' word bolstered the problem of testilying.[77] The study suggests federal district's judges decided issues of officers' credibility in the government's favor 100% of the time in close cases and "reject[ed] even defendants' strongest proof [of dishonesty] about 78% of the time."[78]

A 2018 report investigating, once again,[79] the New York City police found more than twenty-five occasions in just a three-year period where judges and prosecutors believed that a key aspect of an officer's testimony was "probably untrue."[80] The investigation "reveal[ed] an entrenched perjury problem several decades in the making that shows little sign of fading."[81]

Observers—both inside and outside the system—describe the problem of police dishonesty with words such as "systematic," "routine," "prevalent," "commonplace," and, perhaps most troublingly, "accepted."[82]

B. The Reasons for Police Dishonesty

Psychology sheds some light on the prevalence of police dishonesty. Certain social mechanisms, such as being in a position of power and witnessing peers and superiors lie, encourage one's comfort with telling

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75. *Id.* at 100 & nn.113–14.

76. Melanie D. Wilson, *Improbable Cause: A Case for Judging Police by a More Majestic Standard*, 15 BERKELEY J. CRIM. L. 259, 286 (2010).

77. *Id.* at 277, 308.

78. *Id.* at 308.

79. Though large-scale investigations and reports of police lying tend to center around larger jurisdictions or major metropolitan areas, the issue is by no means confined to such areas. *See* Hodson, *supra* note 66, at 587. Individual accounts crop up on a near-constant basis. For example, the Marshall Project tracks major news stories of police lying from around the country, and these reports are often just weeks or even days apart. *See "Testilying,"* MARSHALL PROJECT, https://www.themarshallproject.org/records/5544-testilying [https://perma.cc/E624-92ZC].

80. *See* Joseph Goldstein, *'Testilying' by Police: A Stubborn Problem*, N.Y. TIMES (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html.

81. *Id.*

82. Slobogin, *supra* note 65, at 1041–42 (footnotes omitted).

a lie and are especially salient in the context of a police force.[83] People are more likely to lie when it is openly—and successfully—done by those around them, especially when it is part of a particular social group one identifies with.[84] When people openly lie on a larger and more institutionalized scale, the bar to behaving dishonestly lowers.[85] While these conditions would make lying opportune for many groups of people, several features of policing culture in particular heighten the extent of police dishonesty.

First, police officers who participate in the investigation or arrest of an individual tend to view securing that person's conviction as the end goal and become deeply invested in obtaining that result.[86] Police officers may believe in the defendant's guilt and therefore view the suppression of evidence due to a constitutional violation as the suppression of *truth*.[87] As Professor Christopher Slobogin has explained, "the police do not want a person they know to be a criminal to escape conviction simply because of a 'technical' violation of the Constitution, a procedural formality, or a trivial 'exculpatory' fact."[88] Thus, the police may view lying to secure convictions as "necessary to serve 'higher' values,"[89] namely ensuring that "the guilty [are] brought to 'justice.'"[90]

In a survey of Chicago narcotics officers, about half of the respondents described their usual reaction to evidence suppression as frustration or disappointment.[91] "[One officer's] comments typify this sentiment: 'I am disappointed. I don't like to lose a case on a technicality. It bothers you.' . . . [Another officer] responded, 'I get pissed off.'"[92] A

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83. *See supra* note 47 and accompanying text.

84. *See supra* note 48 and accompanying text; ARIELY, *supra* note 45, at 207 ("As long as we see other members of our own social groups behaving in ways that are outside the acceptable range, it's likely that we too will recalibrate our internal moral compass and adopt their behavior as a model for our own. And if the member of our in-group happens to be an authority figure . . . chances are even higher that we'll be dragged along.").

85. *Id.* at 207–10.

86. *See* Slobogin, *supra* note 65, at 1044.

87. *Id.*

88. *Id.*

89. Stanley Z. Fisher, *"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 7 (1993).

90. Slobogin, *supra* note 65, at 1044. *Cf.* Fisher, *supra* note 89, at 6–7 (stating that police officers produce misleading police reports lacking exculpatory facts and details due primarily to either "deliberate deception" or "a police stake in limiting reports to inculpatory facts" and viewing the gathering and reporting of exculpatory details as "not my job").

91. Myron R. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1044–45 (1987).

92. *Id.* at 1045.

study of the New York Police Department documented similar "deep rooted" sentiments:

> [P]olice officers often view falsification as . . . "doing God's work"—doing whatever it takes to get a suspected criminal off the streets. This attitude is so entrenched, especially in high-crime precincts, that when investigators confronted one recently arrested officer with evidence of perjury, he asked in disbelief, "What's wrong with that? They're guilty."[93]

A second aspect of police culture contributing to testilying is that "institutional pressure to produce 'results' . . . can lead police to cut corners in an effort to secure convictions."[94] Officers with quotas to meet or under general crime control pressures are further incentivized to secure convictions—even if it requires perjury or fabrication—and their superiors under these same pressures often encourage lying to satisfy the demand.[95]

Finally, a powerful contributor to rampant police dishonesty is the unwritten custom that law enforcement officers should not expose a fellow officer's wrongdoing, and they should even help cover it up if necessary.[96] This well-documented custom—often called "The Blue Wall

93. *See* MOLLEN COMMISSION, *supra* note 57, at 41.

94. Slobogin, *supra* note 65, at 1044. *See also* Alexander, *supra* note 56 ("Agencies receive cash rewards for arresting high numbers of people for drug offenses, no matter how minor the offenses or how weak the evidence. Law enforcement has increasingly become a numbers game. And as it has, police officers' tendency to regard procedural rules as optional and to lie and distort the facts has grown as well.").

95. *See* MOLLEN COMMISSION, *supra* note 57, at 40–41; Slobogin, *supra* note 65, at 1044 n.32; Goldstein, *supra* note 80 (describing one officer's anecdotal reports of supervisors and detectives encouraging him to lie about arrests' circumstances); Alexander, *supra* note 56 ("[T]he 'get tough' movement has warped police culture to such a degree that police chiefs and individual officers feel pressured to meet stop-and-frisk or arrest quotas in order to prove their 'productivity.'"). *Cf.* Haven Orecchio-Egresitz, *Police Officers Are Trained to Frame Their Police Reports to Deceive, Former Cop Turned Academic Says*, INSIDER (June 22, 2021, 3:27 PM), https://www.insider.com/former-police-trained-cops-to-frame-reports-to-deceive-2021-6 [https://perma.cc/8Z3Q-59SD] (describing police department supervisor's standard practice of teaching subordinates to falsify use of force reports to frame the suspect as the aggressor).

96. *See* Jennifer E. Koepke, Note, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 WASHBURN L.J. 211, 212–13 (2000). *Cf.* Orecchio-Egresitz, *supra* note 95 (describing the "police culture of misconduct, where officers are trained and socialized to believe they're above the law").

of Silence"—shields an untold amount of testilying.[97] In a recent example of this notorious police custom, a Los Angeles district attorney formally requested from all of the county's law enforcement agencies their lists of officers with histories of dishonesty and other misconduct.[98] After four months, more than forty departments, including the sheriff's department which had about 10,000 sworn deputies, had turned over no names.[99]

III. HOW DOCTRINAL RULES BAKE POLICE LIES INTO CASES AT AN EARLY STAGE

Thus far this Article has detailed how ordinary people lie in a host of circumstances and how police likewise engage in testilying, reportilying, and other types of dishonesty. In a subsequent Section, this Article details famous cases in which the Supreme Court has accepted implausible police lies. But before dissecting Supreme Court decisions, it is important to recognize that the Court does not draft its opinions on a blank slate.

This Part explores how police lies become accepted and are baked into cases well before they get to the Supreme Court. One might initially lay the blame for police lies at the feet of prosecutors and judges because those two players often look the other way or even encourage police dishonesty. It is true that prosecutors and judges bear responsibility for enabling police lies, and this Article acknowledges as much in Sections III.A and III.B. But the reality is more complicated and finds its roots in legal doctrine.

The Supreme Court has set up a regime of extreme deference to police expertise and training. And the Court has created legal doctrines that encourage police to make dubious factual claims. In Sections III.C and III.D, we detail how a strong deference to police expertise and certain legal doctrines (particularly Fourth Amendment rules) allow police to implement lies into cases well before they reach the Supreme

97. *See* Koepke, *supra* note 96, at 213 n.10 (listing several cases where courts acknowledged the presence of a police "Code of Silence"); Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 237–40 (1998); Zeidman, *supra* note 59, at 430. *See generally Blue Wall of Silence*, MARSHALL PROJECT, https://www.themarshallproject.org/records/605-blue-wall-of-silence [https://perma.cc/L5MU-Y8D7] (Dec. 10, 2021, 4:14 PM) (collecting ongoing news stories about the Blue Wall of Silence).

98. Ben Poston, *Few Police Agencies Have Given L.A. Prosecutors the Names of Dishonest Cops*, L.A. TIMES (June 20, 2021, 5:00 AM), https://www.latimes.com/california/story/2021-06-20/few-la-police-agencies-have-given-gascon-dishonest-cop-names [https://perma.cc/CPU9-Q5BL].

99. *Id.*

Court. Finally, Section III.E explains the deferential standard of review that serves as the cherry on top of a system that bakes in police lies.

A. Prosecutors Sometimes Look the Other Way or Implicitly Encourage Police Dishonesty

While prosecutors are overwhelmingly ethical lawyers,[100] they nevertheless play a part in enabling police dishonesty. Let us begin, most obviously, at the individual case level. Police officers and prosecutors often work very closely on cases, with the two units pursuing the common goal of securing convictions.[101] In this role, some prosecutors may actually encourage testilying. For example, a former prosecutor described the "commonly used" technique of steering police testimony and "inducing police perjury" by suggesting to police officers: "'If this happens, we win. If this happens, we lose.'"[102]

Of course, not all individual prosecutors are complicit in police dishonesty. However, most prosecutors know that testilying and reportilying are widespread, and they have significant disincentive to curb or expose it.[103]

The problem goes further up the reporting chain than individual prosecutors. Some prosecutors' offices maintain "*Brady* lists" that track their jurisdiction's police officers with credibility or misconduct issues.[104] But some offices fail to make thorough disclosures; some even go "to great lengths to keep Brady List information from becoming public."[105] In New York City, several district attorney's offices recently began

100. *See* Adam M. Gershowitz, *The Challenge of Convincing Ethical Prosecutors That Their Profession Has a* Brady *Problem*, 16 OHIO ST. J. CRIM. L. 307, 309 (2019).

101. *See generally* Hodson, *supra* note 66, at 582–89; Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 792 (2003) ("[O]ne ought not underestimate the unifying influence of a shared commitment to 'getting the bad guys' . . . .").

102. Orfield, *supra* note 72, at 110.

103. *See* Hodson, *supra* note 66, at 587–88.

104. *See* Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 780 (2015).

105. Martha Bellisle, *Tool for Police Reform Rarely Used By Local Prosecutors*, AP NEWS (Oct. 21, 2021, 10:57 AM), https://apnews.com/article/death-of-george-floyd-religion-police-george-floyd-seattle-b20b50bd1562c70e59fe30689a8a867f [https://perma.cc/F9BL-569M]. *See, e.g.*, George Joseph, *Queens DA Reveals New Internal List of NYPD Officers with Credibility Issues*, GOTHAMIST, https://gothamist.com/news/queens-prosecutors-tracked-nypd-cops-suspected-lying-and-criminal-convictions-documents-show [https://perma.cc/YXN3-5FQJ] (Feb. 22, 2021) (stating that a recent *Brady* list release came only after "a two-year fight to get the information released under the state's public records law").

releasing their lengthy *Brady* lists to the public pursuant to the state's freedom of information law—but only after two years of delays, incomplete disclosures, and a lawsuit.[106]

Moreover, some jurisdictions are very stingy regarding what misconduct will get the officers onto a *Brady* list. For example, in Milwaukee, prosecutors only list officers with actual criminal convictions.[107] Prosecutors in Atlanta, Chicago, Tulsa, and Pittsburgh do not track officers with disciplinary problems at all.[108]

Beyond shaping testimony in individual cases and *Brady* list disclosures there is the high-level question of prosecuting police perjury. As in all other areas, prosecutors have broad discretion over whether to bring criminal charges or to ignore seemingly illegal behavior. And while police perjury is a crime, prosecutors rarely bring charges against police officers, even for obvious instances of perjury.[109] Police perjury prosecutions are exceedingly rare, in large part because "[a] prosecutor who files perjury charges against a police officer risks jeopardizing [the] vital relationship with his law enforcement team."[110]

B. Trial Judges Believe Police Lies

Most criminal convictions in the United States result from plea bargaining and guilty pleas.[111] And the key issue in many prosecutions is whether physical evidence such as drugs found in a pocket or a vehicle will be suppressed.[112] Accordingly, judges, not juries, turn out to be the key decisionmakers in many criminal cases. As the key decisionmakers who will accept or reject police testimony, one would initially expect trial judges to be vigilant in checking for police lies. Yet, many judges are

106. George Joseph, *Gothamist Sues Bronx DA for Failure to Release Database on NYPD Officers with Credibility Issues*, GOTHAMIST (Feb. 22, 2021), https://gothamist.com/news/gothamist-sues-bronx-da-failure-release-database-nypd-officers-credibility-issues [https://perma.cc/DE3D-U3EU].

107. *See* Bellisle, *supra* note 105.

108. *See id.*

109. *See* Hodson, *supra* note 66, at 587–89; Samuel Dunkle, Note, *"The Air Was Blue with Perjury": Police Lies and the Case for Abolition*, 96 N.Y.U. L. REV. 2048, 2090 (2021).

110. Goldsmith, *supra* note 69, at 1268.

111. *See generally* CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (2021).

112. *See* Morgan Cloud, *Judges, "Testilying," and the Constitution*, 69 S. CAL. L. REV. 1341, 1356 (1996) ("[T]he legality of the search for evidence will often be outcome determinative in the litigation.").

jaded by the system.[113] Police perjury is "a problem so old and persistent that the criminal justice system sometimes responds with little more than a shrug."[114] Often, judges will simply not challenge the false testimony that they detect.[115] They may reflexively believe an officer's word over that of a criminal defendant's, or they may believe that a particular defendant is guilty and see the suppression of probative evidence as a greater harm than police perjury.[116] Even in the face of clear credibility issues, some judges are likely averse to challenging the truthfulness of a police officer, especially in open court.[117]

The problem goes beyond judges intentionally ignoring police dishonesty though. Some judges fail to detect police lies because they fall prey to cognitive bias. State judges were often prosecutors in their former lives[118] and are therefore more willing (perhaps subconsciously) to believe law enforcement.[119]

Additionally, judges might believe police lies because certain officers have proven truthful in the past. Police officers are a fixture in criminal courthouses,[120] regularly appearing as the voice of reason among defendants with long rap sheets and credibility problems.[121] And while police do not always tell the truth, they very often do.[122] Many criminal

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113. *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 921 (2006) (explaining how criminal justice insiders become jaded).

114. Goldstein, *supra* note 80.

115. *See, e.g.*, Koepke, *supra* note 96, at 222 n.44.

116. *Id.* at 221–22.

117. *See id.* at 222. The deference that some judges show to police officer testimony is seemingly in conflict with a jury selection rule that provides factfinders cannot be impartial if they would believe the testimony of a police officer over that of another witness. *See, e.g.*, *Hernandez v. State*, 563 S.W.2d 947, 950 (Tex. Crim. App. 1978) (en banc) (holding that when a prospective juror said that she "believed a police officer would always tell the truth," said juror was not impartial and should not be struck for cause).

118. *See supra* note 4.

119. *See* Stewart, *supra* note 4, at 134.

120. *See* Bibas, *supra* note 113, at 912 ("The insiders—the judges, prosecutors, police, and defense counsel who regularly handle criminal cases—are professional repeat players . . . .").

121. *See* Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1379 (2018) ("Even well-intentioned judges make decisions based on implicit cognitive biases in favor of the police. Cognitive bias research shows that when judges expect a police officer to be credible, and a defendant not, those judges are more likely to make evidentiary rulings that align with their expectations.") (footnotes omitted).

122. This assertion is not likely to be accepted by all readers. This skepticism is understandable. After all, this is an article about police lies. Nevertheless, as other scholars have before us, we start with the proposition that the police are typically telling the truth. *See* Cloud, *supra* note 64, at 1321–22 ("Perjury is often accepted because it can be very difficult to determine whether a witness is lying, particularly if we start with

defendants are, in fact, guilty. Dashcam recordings, eyewitness testimony, and physical evidence from prior cases confirm for the judge that certain police officers previously told the truth.[123] When officers have been proven to be honest many times in the past, it is logical for trial judges to believe their story to be true this time, even when it might look questionable to an outside observer.[124] Judges are susceptible to confirmation bias just like ordinary people.

In short, judges are prone to accept police stories, even when they should be skeptical. But the judicial enabling goes deeper. When police perjury is exposed in court, such as through surveillance video plainly contradicting an officer's account, some judges respond by merely dismissing the charges and moving on.[125] Worse yet, some judges place files containing contradictory surveillance video under seal,[126] which hides the dishonesty from public view and effectively sweeps the would-be wrongful conviction under the rug.[127] This in turn encourages deceitful officers to lie again in the future.

C. Deference to Police Expertise and Training

While prosecutors and judges sometimes enable or even encourage police lies, the problem goes deeper than just those actors themselves. Longstanding legal doctrines make it easier for the police to lie.[128] Scholars have long recognized that criminal procedure jurisprudence defers to the police. As Professor David Jaros explains, "criminal

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the reasonable assumption that witnesses who are police officers usually tell the truth."). The idea that police usually tell the truth is reasonable because many crimes are simple and straightforward, with ample evidence of the statutorily prescribed mens rea and actus reus.

123. *See* Mary D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 U.C. DAVIS L. REV. 897, 926 (2017) (noting that "[o]fficers who were previously skeptical of body cameras are also realizing that body cameras can help exonerate them if they are falsely accused of wrongdoing").

124. *See* Findley & Scott, *supra* note 6, at 308–09 (discussing confirmation bias).

125. *See* Goldstein, *supra* note 80.

126. *See id.* ("Officer Martinez tapped the bag with his foot and felt something hard, he testified. He opened the bag, leading to the discovery of a Ruger 9-millimeter handgun and the arrest of the woman. But a hallway surveillance camera captured the true story: There's no laundry bag or gun in sight as Officer Martinez and other investigators question the woman in the doorway and then stride into the apartment. . . . [H]ad the camera not captured the hallway scene, Officer Martinez's testimony might well have sent her to prison. . . . [T]he court sealed the case file . . . .").

127. *See, e.g.*, Goldstein, *supra* note 80; Alexander, *supra* note 56 ("At worst, the case will be dismissed, but the officer is free to continue business as usual.").

128. See David Jaros, *Criminal Doctrines of Faith*, 59 B.C. L. REV. 2203 (2018), for a discussion of criminal constitutional procedure.

constitutional procedure is fashioned with a deep and abiding faith in the motivations of criminal justice system actors."[129] That faith in police officers has enabled courts—including the U.S. Supreme Court—to identify many areas of "police expertise" that should be entitled to deference. In turn, judges find it easier (or perhaps even feel compelled) to give more credit to the claims of police officers.

As Professor Anna Lvovsky documents, the narrative of police expertise took root in the early twentieth century when "police officers in civil and criminal trials commonly shared expert opinions on forensic matters, including the reconstruction of vehicular accidents, firearms and ammunition, the causes of bruising and physical injuries, and handwriting comparisons."[130] Judicial faith in police expertise truly began to expand in the 1950s with the creation of training programs that enabled police to claim expertise in a variety of topics related to narcotics.[131] This police expertise included (and still includes) identifying stash houses, how drugs are packaged, countersurveillance techniques used by dealers, and even whether a particular individual had the intent to use drugs.[132] As Professor Lvovsky explains:

> [B]eginning in the 1950s and accelerating over the next two decades, trial judges recast numerous forms of criminological testimony as the unique province of the police. Whether reconstruing previously lay testimony as "expert" knowledge, welcoming police witnesses on subjects formerly left to medical men, or embracing the police's insights on novel topics like the urban drug trade, judges newly recognized policemen as professionals entitled to a place of epistemic authority in the courtroom."[133]

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129. *Id.* at 2207. *See also* Elizabeth E. Joh, *The Consequences of Automating and Deskilling the Police*, 67 UCLA L. REV. DISCOURSE 134, 150–51 (2019) ("While this judicial deference to police expertise has attracted substantial criticism, it remains the prevailing view of the courts.") (footnotes omitted); Rachel Moran, *In Police We Trust*, 62 VILL. L. REV. 964, 966 (2017) (describing deference to police as a "unifying force between the Supreme Court's Fourth Amendment jurisprudence"); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 298 (describing the unifying theme of some Fourth Amendment cases as "significant latitude to law enforcement").

130. Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2017–18 (2017) (footnotes omitted).

131. *See id.* at 2020–21.

132. *See id.* at 2021.

133. *Id.* at 2021–22.

Today, criminal trials heavily feature testimony by police across all of these subjects.

Even left-leaning justices who tend to be skeptical of police power are willing to acknowledge the importance of police expertise. For instance, Justice Sotomayor has explained:

> [T]he leeway we afford officers' factual assessments is rooted not only in our recognition that police officers operating in the field have to make quick decisions but also in our understanding that police officers have the expertise to "dra[w] inferences and mak[e] deductions . . . that might well elude an untrained person." When officers evaluate unfolding circumstances, they deploy that expertise to draw "conclusions about human behavior" . . . .[134]

As one might imagine, the recognition of police expertise across a range of areas, coupled with the demand for deference to that expertise, provides fertile ground for police to lie and get away with it.

D. Specific Legal Doctrines That Enable Police Lies

So far, we have explained that prosecutors are incentivized to look the other way at police lies and sometimes to even help the police shape their stories. Judges in turn are predisposed to accept police testimony and disinclined to call out prevarications. On top of this, the Supreme Court has repeatedly spoken of police expertise and instructed lower courts to make police not just fact witnesses but also expert witnesses whose testimony will take on added value. These factors make it possible for police lies to take root in individual cases. The problem goes deeper though. The Supreme Court has established criminal procedure rules that inadvertently encourage police to lie and make it easy for the officers to get away with those lies. These doctrinal rules provide the police with countless opportunities to be untruthful in routine cases. This Section discusses some of the most salient doctrinal rules that encourage police dishonesty.

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134. *Heien v. North Carolina*, 574 U.S. 54, 73 (2014) (Sotomayor, J., dissenting) (citations omitted) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

1. *TERRY* STOPS

Terry stops are the most common interaction that individuals have with the police.[135] Police stop millions of individuals per year.[136] The aggressive stop-and-frisk approach in New York City is the most well-known operation,[137] but *Terry* stops and frisks occur thousands of times per day, in every part of the country.[138] And the Supreme Court has shaped the legal rules to be extremely favorable to the police and to encourage police dishonesty.

In *Terry v. Ohio*,[139] the Court approved the detention and frisk of three men who were allegedly casing a store.[140] In upholding the stop and frisk, the Court focused on the fact that the officer was experienced and that it "would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery . . . to have failed to investigate this behavior further."[141]

In the ensuing decades, courts have expanded the importance of officer training, expertise, and perceptions in the *Terry* context. For instance, consider the language in *United States v. Sokolow*,[142] where the Court assessed whether there was reasonable suspicion to stop a suspect in an airport who was suspected of being a drug courier.[143] The Court honed in on the fact that Sokolow was stopped by a "trained agent" and that he matched the drug courier profile created by the DEA.[144] The Court reiterated this view in *United States v. Arvizu*[145] when it explained that the reasonable suspicion standard "allows officers to draw on their own experience and specialized training to make inferences from and

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135. *See* Tonja Jacobi & Ross Berlin, *Supreme Irrelevance: The Court's Abdication in Criminal Procedure Jurisprudence*, 51 U.C. DAVIS L. REV. 2033, 2036 (2018).

136. *See* Caroline E. Lewis, Note, *Fourth Amendment Infringement Is Afoot: Revitalizing Particularized Reasonable Suspicion for* Terry *Stops Based on Vague or Discrepant Suspect Descriptions*, 63 WM. & MARY L. REV. 1797, 1800 (2022).

137. *See, e.g.*, Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City "Stop and Frisk,"* 94 B.U. L. REV. 1495, 1501 (2014).

138. *See* Lewis, *supra* note 136, at 1800.

139. 392 U.S. 1 (1968).

140. *Id.* at 28–31.

141. *Id.* at 23. In conference, Chief Justice Warren told the other justices that "'a trained policeman may read' such actions differently than would an 'ordinary citizen.'" John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749, 785 n.225 (1998).

142. 490 U.S. 1 (1989).

143. *See id.* at 8–10.

144. *See id.* at 10.

145. 534 U.S. 266 (2002).

deductions about the cumulative information available to them that 'might well elude an untrained person.'"[146] As Professor Eric Miller observed, "The 'fact' of training is not merely one among others; rather, it is the 'lens' by which the other circumstances are understood when considering their significance."[147] In turn, training becomes a type of trump card in which courts are pushed to defer to the officer's determination that there was adequate suspicion.[148]

All of this should sound familiar given our discussion in Section III.C of the value that the Supreme Court has placed on police expertise and training. Yet the *Terry* doctrine creates an added problem because of the broad and ambiguous test the Court has adopted for justifying *Terry* stops. The Court has repeatedly said that reasonable suspicion is to be judged under a totality of the circumstances test.[149] And the Court has conceded that "[o]ur cases have recognized that the concept of reasonable suspicion is somewhat abstract."[150] On top of that, the Court has signaled that reasonable suspicion is a very low standard.[151]

When we combine the low standard for reasonable suspicion with the countless factual scenarios that can occur on the street, and an emphasis on police expertise, the result is almost total deference to law enforcement.[152] As Professor Erik Luna has explained, "Using today's limp standard for reasonable suspicion, there may be no limit to the

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146. *Id.* at 273 (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

147. Eric J. Miller, *Detective Fiction: Race, Authority, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 213, 228 (2012).

148. *See id.* ("Through the lens of police professionalism, neither the judiciary nor the public are entitled to opine otherwise."). *See also* Lvovsky, *supra* note 130, at 2068–69 ("[M]ost research into police practices since the 1960s has been deeply critical of police expertise, both as an empirical matter and as a factor in the courts' constitutional analysis. Critics insist that deference gives officers free reign to harass citizens on the streets, removing democratic accountability from our most common point of interaction with the state. They argue that it abdicates the judiciary's duty to uphold constitutional rights, allowing policemen to define the legal limits of a search.") (footnotes omitted).

149. *See Alabama v. White*, 496 U.S. 325, 330 (1990) ("Reasonable suspicion . . . is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the 'totality of the circumstances—the whole picture' . . . .") (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). The same is of course true for probable cause. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983).

150. *Arvizu*, 534 U.S. at 274.

151. *See* Jeffrey Fagan, Terry*'s Original Sin*, 2016 U. CHI. LEGAL F. 43, 53 ("[T]he burden of proof is quite low.").

152. *See id.* at 55 ("[A]fter nearly five decades of *Terry*, courts have rejected a substantive review of the criteria of 'reasonable suspicion.' Instead, courts have consistently decided cases based on some rendering of the reasoning of the officers at the scene (based on a post-hoc account) pursuant to a specific fact, and whether that reasoning was, well, reasonable to an experienced officer.").

commonplace details that can be given a suspicious gloss under the totality of the circumstances."[153]

The deference to law enforcement in turn provides vast opportunity for police to lie and justify stops and frisks that would otherwise be unconstitutional.[154] For instance, it is very simple for an officer to say (truthfully or not) that an individual made "furtive movements" that in turn created reasonable suspicion for a stop and frisk.[155] And given that the reasonable suspicion standard forms the basis for millions of stops each year,[156] the Court's totality of the circumstances approach imbues officers with enormous power to lie frequently.[157] Of course, one of the more pernicious lies that police can tell is that race has nothing to do with a *Terry* stop. In reality, however, police can rely on race[158] and go after the "usual suspects." And they can lie to justify the stop by generating one of numerous race-neutral reasons.[159]

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153. Erik Luna, *Hydraulic Pressures and Slight Deviations*, 2008–09 CATO SUP. CT. REV. 133, 176.

154. *See* Dunkle, *supra* note 109, at 2081.

155. *See* Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in* Terry *Stops in Street Policing*, 82 U. CHI. L. REV. 51, 78 (2015) ("The term 'furtive movements' can be used to refer to an almost-infinite number of actions that an officer might find suspicious.").

156. *See* Lewis, *supra* note 136, at 1817.

157. *See* Anthony O'Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407, 429 & n.79 (2013) (noting that police have "innumerable ways to circumvent . . . flexible standards that are intended to cabin their discretion," including by invoking "experience and expertise").

158. Indeed, in some cases the police may even do so inadvertently because of implicit bias. Consider how Professor Song Richardson explains the *Terry* case itself:

> Because implicit biases are nonconscious, McFadden would be unaware that race affected not only who captured his attention, but also his interpretation of the actions he observed. Once he felt suspicious, he could easily point to the specific facts that he believed made him suspicious without realizing that his feelings might have been triggered by a racial hunch caused by the operation of implicit social cognitions.

L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1154 (2012). *See also* Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513, 1546 (2018) (reviewing implicit bias literature and noting that "[s]tudy participants were more likely to see crime-related objects when associating the object with a black face rather than with a white face").

159. *See* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 971 (1999) ("In stripping away race from the case and substituting the officer-as-expert narrative, the Court in *Terry* essentially created a conceptual construct: an officer who was unaffected by considerations of race and who could be trusted even in a race-laden case like *Terry* to be acting on the basis of legitimate indicia of criminal activity. Such an officer could be trusted with the expanded powers conferred by the *Terry* opinion, notwithstanding the dire warnings of the Legal Defense Fund.").

In short, the *Terry* doctrine takes the police ability to lie and puts it on steroids.

2. HIGH CRIME AREAS

Over two decades ago, the Supreme Court held in *Illinois v. Wardlow*[160] that unprovoked flight upon seeing the police in a high crime area creates reasonable suspicion for police to stop the individual.[161] Of course, it is not hard for police to lie about an individual fleeing for no reason. Cameras are not present everywhere, and the only countervailing evidence would be the testimony of the arrestee that he had not run. But surely it should be harder for police to succeed in having a judge accept false claims about the suspect being in a high crime area, right? Not so. Indeed, police have considerable power to claim (truthfully or not) that they were in a high crime area, and trial judges regularly accept those claims.

As scholars have repeatedly recognized since *Wardlow*, courts have not adopted any consistent definition of "high crime area."[162] While there are some objective metrics that courts can turn to, it is quite common for judges to focus on a police officer's opinion that a location was a high crime area.[163] And police often appear to be lying or at least stretching

160. 528 U.S. 119 (2000).

161. *See id.* at 121.

162. *See* Fagan & Geller, *supra* note 155, at 58 ("But *Wardlow* and other cases left unsettled exactly what constitutes a high crime area . . . ."); Andrew Guthrie Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing "High-Crime Areas,"* 63 HASTINGS L.J. 179, 183 (2011) ("In contested Fourth Amendment hearings, determinations are made on a case-by-case basis, with differing levels of proof, conflicting definitions, and contradictory outcomes.").

163. *See* Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CALIF. L. REV. 345, 347–48 (2019) ("[L]ower courts have been remarkably lax in scrutinizing officers' claims about high-crime areas. The most common approach is to defer to the expertise of the police officer, often adopting his bare testimony that an area is 'high crime' without additional proof.") (footnote omitted); Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 440 (2006) ("It is not surprising that most criminals are stopped in neighborhoods where most crimes occur (also known as 'high-crime areas'); what is surprising is that some courts seem to find it preferable to defer to a police officer's testimony that a stop occurred in a 'high-crime area' than an officer's testimony about a suspect's nervousness."); Andrew Dammann, Note, *Categorical and Vague Claims That Criminal Activity Is Afoot: Solving the* High-Crime Area *Dilemma Through Legislative Action*, 2 TEX. A&M L. REV. 559, 562–63 (2015) ("Because of the dearth of guidance from the Supreme Court, a prevalent practice is for trial courts to merely defer to an officer's *ad hoc* determination that a suspect was in a *high-crime area*. Some courts approach this problem by requiring different levels of verification during evidentiary hearings. But even when trial courts address the *high-crime area* claim, it often results in judicial notice confirming the

the truth. A detailed study by Professors Ben Grunwald and Jeffrey Fagan analyzed over two million traffic stops conducted by the New York City Police Department between 2007 and 2012.[164] They found that officers invoked a high crime area in fifty-seven percent of all stops and across almost every part of New York City.[165] As Professors Grunwald and Fagan put it, "officers are claiming that every block in New York City is high crime at one time or another."[166] And perhaps most importantly they found that "officers' assessments of whether areas are high crime appear inaccurate."[167] Instead, and quite alarmingly, the evidence indicated that "[t]he suspect's race predicts whether an officer deems an area high crime as well as the actual crime rate itself."[168]

Despite these alarming statistics, when an individual case plays out in the courtroom, careful statistical analysis is not what controls. Rather, a seemingly credible officer tells a judge that, based on their years of patrol experience on the streets, the suspect was in a high crime area. There is plenty of room for the officer to lie about how dangerous the area is or how dangerous it should be perceived to be. The judge will likely believe the officer and (as we see in Section III.E) that finding will become part of the record and will be very hard to surmount.[169]

3. PLAIN TOUCH AND SMELL

Other doctrinal areas where the legal rules easily enable police to bake lies into a case at an early stage include the plain touch and plain smell doctrines. Although the law on the books is protective of the individual, the police may tell a very simple lie to circumvent constitutional protections. Once a trial judge believes that lie, it is game over for the defendant.

The plain touch doctrine works in tandem with the *Terry* doctrine. Police are permitted to frisk an individual when they have reasonable suspicion that they are armed and dangerous.[170] In conducting the frisk, the police are limited to an open-handed pat down to search for weapons; they cannot manipulate objects in pockets in an effort to figure out

officers' *ad hoc* determination that the suspect was in a *high-crime area*.") (footnotes omitted).

164. Grunwald & Fagan, *supra* note 163, at 349.

165. *Id.* at 350.

166. *Id.*

167. *Id.*

168. *Id.* at 352.

169. *See* Koepke, *supra* note 96, at 222.

170. Anne Bowen Poulin, *The Plain Feel Doctrine and the Evolution of the Fourth Amendment*, 42 VILL. L. REV. 741, 768 (1997).

whether the suspect has drugs on their person.[171] If a police officer *admits* to using their fingers to feel an object closely, then the evidence will be suppressed.[172] But if the officer lies, the evidence can be admissible so long as the judge believes the officer.[173] The officer need only say two things: (1) that their hands were open when conducting the pat down and (2) that based on their training and experience, they immediately recognized the object to be drugs or other contraband. Police tell this (fanciful) story frequently.[174] A careful review of lower court decisions indicates that "police officers' testimony often appears calculated to meet the legal standard," and that "[i]n case after case, officers testify it was 'immediately apparent' that the object felt during the pat down was contraband."[175] Put bluntly, the plain touch doctrine encourages the officers to lie—and judges often believe them.[176]

A variation on this theme plays out with the plain smell doctrine as well. As long as police can point to probable cause, they can search a vehicle without a warrant.[177] And the officers are not limited to a cursory search. They can thoroughly search throughout the vehicle, including in containers and possibly even in hard to reach places such as inside gas tanks, door-jams and seat upholstery.[178] Courts have long recognized—for good reason—that the smell of marijuana can contribute to the

171. *See Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993).

172. *See id.* at 378.

173. Also problematic are cases in which the officer finds nothing incriminating. If the suspected "contraband" the officer retrieved from the pocket is actually a stick of chewing gum or other innocuous object, the officer will not be able to arrest the individual for possession of drugs or other contraband. The questionable search will never reach the light of day. Thus, the only cases that will come before the courts are those in which the officer's expertise actually led her to contraband. *See* Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1504 ("[T]he vast majority of Fourth Amendment intrusions are experienced by innocent individuals, who simply do not have the incentive to bring their complaints to the Court's attention."). This, in turn, likely further reinforces law enforcement's claim to judges that the officers can instantaneously recognize small objects in pockets as narcotics.

174. As one scholar explained, "Because few seizable items other than weapons can be identified by feel, one might expect plain feel to be a tool of limited utility. On the contrary, many cases report prosecution reliance on *Dickerson* and plain feel to justify seizures." Poulin, *supra* note 170, at 751.

175. *Id.* at 760–61, 761 n.85.

176. *See id.* at 755 ("[I]n the courtroom, *Dickerson* may encourage law enforcement witnesses to conform their testimony to the most helpful legal standard by making exaggerated claims of tactile sensitivity or even committing perjury.").

177. *See Carroll v. United States*, 267 U.S. 132, 149 (1925).

178. *See, e.g.*, *Chambers v. Maroney*, 399 U.S. 42, 44, 47–48 (1970). For a discussion of the unconventional searches that can occur in the anatomy of the vehicle, see Adam M. Gershowitz, *The Tesla Meets the Fourth Amendment*, 48 BYU L. REV. 1135, 1149 (2023).

probable cause necessary to search a vehicle.[179] And most courts go further and conclude that odor alone can be sufficient to create probable cause.[180] Indeed, even though many states have legalized some forms and quantities of marijuana, courts have clung to the dubious conclusion that odor alone can create probable cause.[181]

The plain smell doctrine (like its cousin, the plain view doctrine) affords police ample opportunity to lie or exaggerate. Those lies or exaggerations are accepted so often that it is big news when judges reject the officers' claims. For instance, in 2018, a New York City judge called out an officer and wrote that "[t]he time has come to reject the canard of marijuana emanating from nearly every vehicle subject to a traffic stop."[182] A *New York Times* article about the judge's ruling noted that "[i]t is exceedingly rare for a New York City judge to accuse police officers of routinely lying to cover up illegal searches."[183] The *Times* noted that "several officers said in interviews that they had doubts their colleagues consistently told the truth about what they had smelled" and quoted one anonymous detective as saying "some officers, particularly in plainclothes units, lied about having smelled marijuana because of how frequently he heard it used as justification for a search."[184]

In short, the structure of the plain touch and plain smell doctrines make it incredibly easy for the police to lie. The police need only tell simple lies—"Based on my training and years of experience, I immediately recognized that my palm touched drugs" or "I smelled marijuana." These simple lies are particularly salient because by themselves they can control the outcome of a case.

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179. *See, e.g.*, *State v. Sisco*, 373 P.3d 549, 552 (Ariz. 2016).

180. *See* ROBERT A. MIKOS, THE EFFECT OF CANNABIS LAW REFORMS ON PROBABLE CAUSE TO SEARCH 6 & n.4 (2020) (white paper on file with authors); Michael A. Sprow, *Wake Up and Smell the Contraband: Why Courts That Do Not Find Probable Cause Based on Odor Alone Are Wrong*, 42 WM. & MARY L. REV. 289, 312 (2000); *United States v. McSween*, 53 F.3d 684, 687 (5th Cir. 1995) ("It is well settled that, in a case such as this, the detection of the odor of marihuana justifies 'a search of the entire vehicle.'") (quoting *United States v. Reed*, 882 F.2d 147, 149 (5th Cir. 1989)).

181. *See, e.g.*, *People v. Molina*, 208 N.E.3d 579, 588 (Ill. App. Ct. 4th 2022) ("Just because defendant can legally possess some amounts of cannabis under specified conditions does not mean that all forms of possession are presumed to be legal.").

182. *See* Joseph Goldstein, *Officers Said They Smelled Pot. The Judge Called Them Liars*, N.Y. TIMES, https://www.nytimes.com/2019/09/12/nyregion/police-searches-smelling-marijuana.html (Sept. 13, 2019).

183. *Id.*

184. *Id.* For a discussion of how officers frequently claim the smell of marijuana as a basis to conduct an automobile search yet do not find any drugs, see Alessandra Dumenigo, Comment, *Let's Make Some "Scents" of Our Fourth Amendment Rights: The Discriminatory Truths Behind Using the Mere Smell of Burnt Marijuana as Probable Cause to Search a Vehicle*, 33 ST. THOMAS L. REV. 283, 299–300 (2021).

Although the plain touch and smell doctrines are particularly illustrative examples of how criminal procedure rules foster police dishonesty, they are by no means exclusive. Another prominent example is the independent source exception, which allows police to search first, lie about finding nothing, and then search a second time pursuant to a lawful warrant.[185] Or consider interrogations, where myriad rules (or lack thereof) promote police lying. After inventing the *Miranda* doctrine, the Court could have required that waivers be in writing,[186] that counsel be provided before a valid waiver,[187] or that interrogations be videotaped.[188] The Court could have (but failed to) clearly forbid the two-step interrogation process, in which officers get an un-Mirandized confession and only then give the warnings and procure a second confession.[189] The Court imposed no such rules, however. Instead, the Court established doctrinal rules and vague standards that enhance officers' ability to lie.[190]

E. Appellate Deference to Fact-Finding Locks in Police Lies

No discussion of "baking the cake" of police lies into a case would be complete without a discussion of the standards of review that are applicable to appellate courts. As we explain below, once a trial judge

185. Worse yet, police can falsely claim that probable cause came from an "anonymous" informant. When the police find contraband, the fake informant, unsurprisingly, is proven correct. When the officers next claimed to rely on that fake informant, courts would be influenced by the officers' past "successful" track record. *See* Craig M. Bradley, Murray v. United States*: The Bell Tolls for the Search Warrant Requirement*, 64 IND. L.J. 907, 917–18 (1989).

186. *See North Carolina v. Butler*, 441 U.S. 369, 372–73 (1979).

187. Only a handful of states even require counsel for juveniles before a *Miranda* waiver. *See* Kevin Lapp, *Taking Back Juvenile Confessions*, 64 UCLA L. REV. 902, 936 (2017).

188. *See* Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337, 397–98 (2001) ("By viewing the entire interrogation, judges can see the suspect's demeanor, whether police read a suspect *Miranda* warnings, what, if any, questions the suspect asked during recitation of the *Miranda* warnings, and whether there was a true understanding that led to a constitutionally required knowing and voluntary waiver of rights.") (footnote omitted).

189. *Compare Oregon v. Elstad*, 470 U.S. 298, 309, 318 (1985), *with Missouri v. Seibert*, 542 U.S. 600, 614–17 (2004) (plurality opinion) (distinguishing *Elstad* on the facts).

190. Indeed, this was clear as early as *Miranda* itself, as the dissent pointed out: "Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers." *Miranda v. Arizona*, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).

accepts a police lie, it is very hard for higher courts—including the U.S. Supreme Court—to undo it.

At the outset, it might seem that higher courts are not tightly bound by police lies. In *Ornelas v. United States*,[191] the Supreme Court held that a trial judge's decision on whether there was reasonable suspicion or probable cause was subject to de novo review.[192] The Court explained that deferring to trial judges on the question of adequate suspicion would permit "the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause" and that "[s]uch varied results would be inconsistent with the idea of a unitary system of law."[193]

But the idea that higher courts have the final say on reasonable suspicion and probable cause decisions is not how the system works in reality. The reason is that higher courts must show great deference to the trial judge's findings of fact (and occasionally, when there is a trial, the jury's findings). Within one paragraph of reiterating a de novo standard of review for determining whether there was reasonable suspicion or probable cause, the *Ornelas* Court "hasten[ed] to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers."[194] The Court went on to explain that

> [a] trial judge views the facts of a particular case in light of the distinctive features and events of the community; like-wise, a police officer views the facts through the lens of his police experience and expertise. The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference. . . . In a similar vein, our cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists.[195]

There are two important aspects to this passage: First, the Supreme Court has insulated trial judges' factual findings from reversal by imposing a highly deferential "clearly erroneous" standard of review.

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191. 517 U.S. 690 (1996).

192. *Id.* at 699.

193. *Id.* at 697 (quoting in part *Brinegar v. United States*, 338 U.S. 160, 171 (1949)).

194. *Id.* at 699.

195. *Id.* at 699–700.

Second, the Court indicated—as it has repeatedly in other cases[196]—that police officers have expertise and are therefore entitled to deference in how they interpret the facts on the ground. In short, the Court has adopted a regime of *double* deference—deference to trial judges *and* police—that prevents higher courts from second-guessing what happened. So, while an appellate court can evaluate, de novo, whether the facts amounted to reasonable suspicion, the appellate court cannot re-litigate or even rigorously question the factual findings it has been presented.

Consider an example to see how appellate courts are boxed-in by the standard of review. Imagine that a suspect (Sam) has moved to suppress a small bag of drugs that a police officer found in his pocket. The officer observed Sam standing by a tree in a public park "for a long time." During the twenty minutes the officer observed Sam, two people came up to talk to him and both shook hands with Sam. The officer saw "furtive movements" in which Sam put his hand in and out of his pocket. And upon seeing the officer from across the park, Sam turned and quickly walked away. The officer—based on her decades of drug interdiction experience—believed Sam was dealing drugs in the park. Upon stopping and frisking Sam, the officer discovered a bag of drugs in his pocket.

At the suppression hearing, Sam testified that he was hanging out in the park and ran into two friends and shook their hands the same way that people do in professional and social settings all the time. Sam also testified that he did not put his hand in and out of his pocket in any type of furtive movement. The officer then testified that, based on her training and decades of experience in the field, that Sam did make furtive movements in and out of his pockets. The officer also stated that the handshakes were a way for Sam to covertly exchange drugs for cash. Finally, the officer testified that, in her experience, turning and walking quickly away upon seeing an officer was also suspicious. The trial judge—a former prosecutor who is well known to be unsympathetic to criminal defendants—found that Sam's testimony was not credible and instead credited the entirety of the police officer's testimony. The judge found that the officer had reasonable suspicion and denied Sam's suppression motion.

On appeal—as dictated by *Ornelas*—the question of whether there was reasonable suspicion is reviewed de novo.[197] So the appellate court can conclude that a suspect standing in the park for twenty minutes, making furtive movements, shaking hands with two people in a way that can hide the exchange of drugs, and walking quickly away upon seeing

196. *See supra* Section III.C.

197. *Ornelas*, 517 U.S. at 699.

a police officer does not amount to reasonable suspicion. But, given how low the standard is for reasonable suspicion, it will be the rare court that finds this fact pattern or a similar scenario to be so thin as to not create reasonable suspicion. In short, the legal question is not hard and not open to much debate. If the officer is telling the truth, Sam loses.

What therefore really matters in Sam's case (as in practically every case) is the truthfulness of the officer. Given that reasonable suspicion is judged by the totality of the circumstances and is a very low standard, the truth of the police statements is the whole ballgame. So appellate judges should want to ask a lot of questions. For instance, in Sam's case, can we be sure that the officer's training and expertise really equipped her to identify furtive movements? If so, are we really sure that the officer was telling the truth about furtive movements? Did the handshakes seem normal, or did they look like drug exchanges? How does the officer know the difference? Did Sam turn "immediately" upon seeing the officer or was it a longer amount of time? How quickly did Sam actually walk when he turned away? Was Sam walking away so quickly as to be suspicious, or did he walk at a pace that would be normal for a young energetic person, but perhaps not an older person?

Of course, the appellate court cannot ask these questions because the appellate court cannot second guess whether the officer is telling the truth. The trial judge has already locked in the officer's story by finding that she was truthful. Unless the trial judge's findings were "clearly erroneous," which is a very high standard to overcome, the officer's statements are taken as gospel. Moreover, notice that the fact that the judge is "a former prosecutor who is well known to be unsympathetic to criminal defendants" is not part of the analysis on appeal in any way. That trial judge, whether biased on not, has sealed Sam's fate simply by finding the officer's story to be credible.

The extreme deference to police expertise and trial judge factfinding leaves the defendant in an unenviable situation on direct appeal. But that pales in comparison to how unfavorable the habeas process is. Police dishonesty is especially common in the search and seizure context.[198] Yet, pursuant to the Supreme Court's decision in *Stone v. Powell*,[199] Fourth Amendment claims are not cognizable on habeas review, so petitioners can never raise most claims of police lies after direct appeal has ended.[200] This means that there is usually no avenue for the federal courts to even review the honesty of state police officers.

198. *See supra* Section II.A.
199. 428 U.S. 465 (1976).
200. *Id.* at 481–82.

Beyond the Fourth Amendment context, the habeas process is also extremely unhelpful when dealing with police lies. When criminal procedure questions are cognizable on habeas review—for instance, *Miranda* violations[201]—possible police dishonesty will be judged under a standard of review that is extremely unfavorable to those who have been convicted. Under the Antiterrorism and Effective Death Penalty Act, habeas relief cannot be granted unless the lower court made an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[202]

Where does that leave us? By the time a case makes it to the Supreme Court, the cake is fully baked. Claims that the police have experience, training, and expertise have been accepted by trial courts and reinforced by appellate courts. The police story—the underlying facts—has been accepted as true by the trial judge and repeated by appellate courts that cannot second-guess the facts unless they were clearly erroneous. And for cases that the Court hears on habeas review there is an added layer of protection for police lies because factual conclusions will not be reevaluated unless the state court made an "unreasonable" determination of the facts.[203]

In light of the deferential standard of review, it is perfectly understandable that the Supreme Court does not re-litigate the factual assertions made by the police—even when those factual assertions seem implausible. But the Supreme Court is not only in the business of rendering outcomes. The Court writes long opinions—sometimes very long opinions—that are supposed to guide repeat players. Accordingly, when the Court is presented with what appear to be police lies, we should expect the justices to speak up, even if they are not in a position to reverse the underlying convictions. Yet, as Part IV explains, the Court often sits quietly and simply validates police dishonesty without signaling to tomorrow's officers that they should not lie in future cases.

IV. SUPREME GULLIBILITY: ACCEPTING IMPLAUSIBLE POLICE STORIES WITHOUT SKEPTICISM

Thus far, we have established that ordinary people frequently lie, that police regularly lie, and that various legal doctrines enable police lies and embed them in criminal cases. In this Part we explore cases in which the U.S. Supreme Court was exposed to police lies, but failed to

201. *See Withrow v. Williams*, 507 U.S. 680, 683 (1993) (declining to extend *Stone v. Powell* to *Miranda* claims and allowing such claims to be cognizable on federal habeas review).

202. *See* 28 U.S.C. § 2254(d)(2).

203. *See id.*

recognize or acknowledge them. Before turning to those cases, we begin by explaining how the Court has more than adequate institutional competence to identify police dishonesty.

A. We Should Expect the Supreme Court to Spot Police Dishonesty

The Supreme Court should be well-equipped to detect many of the police lies that cross its path. The justices are among the most brilliant and educated legal minds. They have decades of experience adjudicating cases. When considering matters before them, the justices have at their disposal extensive briefing from the parties, savvy law clerks to provide research and advice, amicus curiae to provide expanded context and insight, and several months to examine the case free from the time pressure that is typical in trial courts.[204] Given how prevalent and publicly scrutinized police dishonesty is, the justices have every reason to know that they may be confronted with police lies in some criminal cases.[205]

The Court has openly acknowledged that criminal cases involve police dishonesty. Justice Blackmun demonstrated a clear awareness of the then-burgeoning phenomenon of testilying, stating: "There are studies and commentary to the effect that the exclusionary rule tends to lessen the accuracy of the evidence presented in court because it encourages the police to lie in order to avoid suppression of evidence."[206] Two years later, in *Franks v. Delaware*,[207] the Court established a hearing process for trial courts to follow when warrant affidavits contained false statements that the officer included "knowingly and intentionally, or with reckless disregard for the truth."[208] The Court's decision to create this new procedure demonstrated the justices' recognition that police dishonesty is an enduring issue—not a one-off occurrence in that particular case.

The Court has also held that absolute immunity from Section 1983 suits applies to police officers who gave perjured testimony against

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204. *See supra* notes 7–10 and accompanying text.

205. *See supra* Part II.

206. *United States v. Janis*, 428 U.S. 433, 447 n.18 (1976) (citing in support several legal scholars' writings on the increase of police perjury after *Mapp v. Ohio*'s exclusionary rule holding).

207. 438 U.S. 154 (1978).

208. *Id.* at 155–56. Admittedly, however, the *Franks* standard remains highly tolerant of police dishonesty. *See* Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 27 (2010) ("Isn't the message of *Franks* that officers can lie, as long as they are careful not to leave a trail and that even then, as long as the information in the affidavit supports a search or seizure, a few extraneous lies won't hurt the process? If that is not the intended message of *Franks*, it is the consequence of its holding.").

criminal defendants.[209] Justice Marshall's dissenting opinion discussed "the apparent prevalence of police perjury."[210] He even identified one of the systemic factors perpetuating testilying, noting that "prosecutors exhibit extreme reluctance in charging police officials with criminal conduct because of their need to maintain close working relationships with law enforcement agencies."[211] Justice Stevens likewise recognized the potential for police perjury when he noted that officers' testimony may be influenced by their desire to secure convictions and cast doubt on "giving 100-percent credence to every word of the officer's testimony."[212]

Although the Supreme Court appears well aware of police perjury in criminal cases, it has nonetheless relied on plainly implausible and likely false police testimony in many high-profile cases.

B. Cases in Which the Supreme Court Unequivocally Adopted Implausible Police Accounts

Many high-profile criminal procedure cases decided by the Supreme Court over the decades have featured far-fetched police accounts. In most of these cases, the Court did not express any skepticism toward these tales. Instead, it unequivocally accepted what the police officers said happened.

1. *WHREN* AND THE COCAINE IN THE LAP

Let us begin with one of the Supreme Court's most infamous criminal procedure decisions of all time: *Whren v. United States*.[213] *Whren* established the rule that the subjective intent of the police—even if it was racial profiling—does not matter for purposes of determining the legality of a stop. All that matters is whether there was an objectively valid basis for the stop.[214]

In *Whren*, two plainclothes vice-squad officers were patrolling a "high drug area" in Washington, D.C.[215] They saw a truck occupied by Whren and Brown—two young Black men—stopped at a stop sign.[216] The officers were suspicious of the men because they paused at the stop sign

209. *Briscoe v. LaHue*, 460 U.S. 325, 326 (1983).
210. *Id.* at 365 (Marshall, J., dissenting).
211. *Id.* at 365–66 (Marshall, J., dissenting).
212. *James v. Illinois*, 493 U.S. 307, 321 (1990) (Stevens, J., concurring).
213. 517 U.S. 806 (1996).
214. *Id.* at 813.
215. *Id.* at 808.
216. *Id.* at 808, 810.

for more than twenty seconds, and Brown, the driver, looked over to Whren's lap at one point.[217] The officers initiated a traffic stop, but as they U-turned to approach the truck, the truck "turned suddenly to its right, without signaling, and sped off."[218] The officers followed the truck, quickly caught up to it, and pulled over the vehicle.[219]

One of the officers, Officer Soto, approached the driver's window and "immediately observed" Whren, in the passenger seat, holding two large plastic bags of crack cocaine in his hands in plain view.[220] Seeing the drugs in Whren's lap enabled the officers to escalate this simple traffic stop into an arrest of both men and a search of the entire vehicle for more narcotics.[221]

The stop was unquestionably barred under the police department's regulations, which prohibited plainclothes vice officers in unmarked vehicles from enforcing traffic laws unless the traffic violation was "so grave as to pose an *immediate threat* to the safety of others."[222] Clearly, no immediate threat to safety existed here. "The reason for the stop was obviously pretext,"[223] and this would become the codefendants' central challenge.[224] The Supreme Court ultimately held that an officer's subjective motivations for a stop or "whether a 'reasonable officer' would have been moved to act upon the traffic violation" are irrelevant; all that matters is whether the police can point to a valid basis for the stop.[225]

Absent from the Supreme Court's opinion—as well as oral argument—was any skepticism regarding the implausible facts of this

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217. *Id.* at 808.

218. *Id.*

219. *Id.*

220. *Id.* at 808–09.

221. *See* Tracey Maclin & Maria Savarese, *Martin Luther King, Jr. and Pretext Stops (and Arrests): Reflections on How Far We Have Not Come Fifty Years Later*, 49 U. MEM. L. REV. 43, 54 (2018).

222. *Whren*, 517 U.S. at 815 (quoting D.C. METRO. POLICE DEP'T, GENERAL ORDER 303.1, at 3 (1992)).

223. Josh Bowers, *Annoy No Cop*, 166 U. PA. L. REV. 129, 156 (2017). Pretextual stops are those "where the intent is not to sanction a driving violation but to look for evidence of more serious criminal wrongdoing." CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 30 (2014). They are "fishing expeditions for criminality," and, for Black people, inextricably bound up with racism. Maclin & Savarese, *supra* note 221, at 47–50.

224. *See Whren*, 517 U.S. at 809; Maclin & Savarese, *supra* note 221, at 54–55; Nirej Sekhon, *Purpose, Policing, and the Fourth Amendment*, 107 J. CRIM. L. & CRIMINOLOGY 65, 76 (2017) ("[Whren] argued that the stop would not have occurred absent the investigating officers' ulterior motive: to find drugs.").

225. *Whren*, 517 U.S. at 814–15.

case.[226] Why would Whren be holding two large bags of illegal drugs as he and Brown sped away from police officers? And why, after being pulled over, and as the officers were walking up to their vehicle, would he continue to hold them right in his hands for the officers to plainly see? Was it truly the officers' exceptional luck and the defendants' exceptional blunder that led these officers to encounter a large quantity of illegal drugs in plain view during this minor traffic stop? It is precisely this far-fetched "fact" that allowed the officers to arrest the men and subsequently search the rest of the vehicle, where they discovered additional narcotics.[227] Aside from the criminal codefendants themselves, no one outside of the arresting officers, Officers Littlejohn and Soto, can corroborate or fact-check this testimony—including the convenient detail that the officers saw the driver look down into Whren's lap at one point before the stop. Yet, the Court accepted the officers' story outright, without a hint of doubt.[228]

While it seems pretty obvious that the officers were lying, it is of course impossible to know to an absolute certainty. People do dumb things and it is *possible* that the defendants simply acted foolishly. But common sense and intuition, coupled with knowledge of how prevalent police dishonesty is, strongly suggest otherwise.

The prospect that the police were lying became even clearer a few years after the case was decided (though of course the Supreme Court could not have considered such later events). A few years after *Whren*, a newspaper exposé revealed extensive police misconduct, including misconduct by Officers Littlejohn and Soto.[229] Illegal means of securing convictions, particularly drug convictions, appeared to be the norm in their particular vice squad—and Littlejohn and Soto were no exception.[230] Throughout the 1990s (recall that Whren's and Brown's arrests occurred in 1993), both Littlejohn and Soto were "the subject of citizen complaints of alleged misconduct."[231] Although none of these complaints were upheld, "among other things, Littlejohn had been accused of planting evidence."[232]

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226. *See generally* Transcript of Oral Argument, *Whren v. United States*, 517 U.S. 806 (1996) (No. 95–5841).

227. *See* Maclin & Savarese, *supra* note 221, at 54.

228. *See id.* at 53, 56 (emphasizing that the "subjective intent or motivation of the police . . . are constitutionally irrelevant" and that "the Court was quite dismissive of the defendants' constitutional arguments").

229. Kevin R. Johnson, *The Song Remains the Same: The Story of* Whren v. United States, *in* RACE LAW STORIES 419, 439–40 (Rachel F. Moran & Devon Wayne Carbado eds., 2008).

230. *Id.* at 426.

231. *Id.* at 439–40.

232. *Id.* at 439.

In the three years between Whren's and Brown's arrests and the Supreme Court's *Whren* decision, Soto was sued for false arrest and excessive use of force.[233] "Local judges raised questions about whether Soto and Littlejohn testified truthfully in drug cases."[234] In 2004, the D.C. Circuit reversed a firearm and narcotics conviction after the trial court prevented the defendant from calling "witnesses willing to testify that Soto had a reputation within the local legal community as untruthful."[235] These witnesses included a local defense attorney who would testify that Soto lied in other cases, and testimony from another witness who Soto allegedly wrongfully arrested on drug charges in the mid-1990s.[236] In 2003, a year after receiving a medal from the Washington, D.C. mayor honoring his police service, Littlejohn was indicted for perjury.[237]

As noted above, when the Supreme Court decided *Whren*, it did not have any of the information about how Officers Littlejohn or Soto conducted themselves in other cases or their reputation in the community. This information bolsters only the idea that the officers lied in *Whren*, not that the Court should have known of their propensity to lie. But none of the background information about the officers is necessary to cause a reasonable person to question their story in *Whren*. When police say that they can tell there are drugs in a car because the driver looked down at the passenger's lap, and that the passenger was holding bags of drugs in his lap after racing away from the police and being caught, the story is so fanciful that the Court should have been highly skeptical.

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233. *Id.*

234. *Id.* at 439–40.

235. *Id.* at 440.

236. *Id.*

237. *Id.* This 2003 perjury indictment of Littlejohn alleged that he lied to a grand jury in 2002, which was convened for yet another indictment of Littlejohn—that time regarding a vehicle search he conducted in 2001. At the 2002 grand jury, Littlejohn testified that he had not discussed the search with another officer named Officer Schmidt. That claim was contradicted by Officer Schmidt himself, a prosecutor who interviewed Littlejohn, and phone records. Littlejohn was acquitted for the 2003 perjury indictment. His defense attorney successfully argued that Littlejohn's allegedly perjured testimony had not hampered the grand jury's investigation, and was therefore not illegal. Following the 2003 acquittal, the United States Attorney's Office stated that it was "unlikely this office would ever use [Littlejohn] again as a witness." Littlejohn stated: "This whole investigation is just a witch hunt to get me." Jason Cherkis, *Officer Acquitted of Lying*, WASH. CITY PAPER (Mar. 12, 2004), https://washingtoncitypaper.com/article/249812/officer-acquitted-of-lying/ [https://perma.cc/7CJM-4JYW].

2. *TERRY* AND THE NUMBER OF TRIPS TO THE WINDOW

The Supreme Court's decision in *Terry v. Ohio* is one of the most famous and important criminal procedure decisions in history.[238] The officer's testimony was crucial to establishing the basis to stop and frisk the suspects, and the Court completely accepted it despite almost certain dishonesty.

In *Terry*, a police officer named Martin McFadden said he saw two Black men, John Terry and Richard Chilton, "casing" a store.[239] Officer McFadden observed them taking turns walking past the store window and looking in, and he feared they were about to initiate an armed robbery.[240] He confronted the men to investigate further and performed a pat down search of their outer clothing, which revealed two firearms.[241]

The number of times Terry and Chilton walked past the store window and looked in was "the most important fact in the case" because nothing else about Officer McFadden's observations suggested criminal activity.[242] Officer McFadden did not previously know either of the men.[243] They were wearing "the standard dress of the day," and they exhibited no other unusual behavior as McFadden watched them.[244] McFadden had no experience observing individuals casing a store, and in fact had never, in thirty-five years of walking the beat, apprehended a robber.[245] When asked during Chilton's trial whether he would have pursued the men if their location was not a storefront but, rather, a courthouse, McFadden answered, "I really don't know."[246] Thus, "how many times they looked in the store window is crucial" and "[t]he body of law which stems from *Terry* is dependent upon this single fact."[247] However, that number changed repeatedly over the lifespan of the case:

> In the police report filed the same day as the incident, Officer McFadden wrote that the men did this "about

238. *See, e.g.*, Jennifer E. Laurin, Terry*, Timeless and Time-Bound,* 15 OHIO ST. J. CRIM. L. 1, 1–3 (2017).

239. *Terry v. Ohio*, 392 U.S. 1, 5–6; Thompson, *supra* note 159, at 966.

240. *Terry*, 392 U.S. at 6.

241. *Id.* at 6–7.

242. Lewis R. Katz, Terry v. Ohio *at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 454 (2004).

243. *Id.* at 430.

244. *Id.*

245. *Id.* at 432, 490 (quoting Transcript of Richard D. Chilton's Trial, *reprinted in* 72 ST. JOHN'S L. REV. 1387, app. B at 1420 (John Q. Barrett ed., 1998) [hereinafter Chilton Trial Transcript]).

246. Chilton Trial Transcript, *supra* note 245, at 1421.

247. Katz, *supra* note 242, at 431–32.

> three times each." . . . At the suppression hearing three times each became "at least four or five times apiece," which later turned into four to six trips each. Moreover, at trial, when asked how many trips he observed, Officer McFadden replied, "about four trips, three to four trips, maybe four to five trips, maybe a little more, it might be a little less. *I don't know, I didn't count the trips*."[248]

By the time this case was before the Supreme Court, the number somehow jumped to "between five or six times apiece—in all roughly a dozen trips," and later increased to a remarkable twenty-four trips past the storefront.[249]

McFadden may have simply had a faulty memory. It is more plausible to conclude though that he intentionally stretched the number as the case carried on in order to provide a stronger factual basis for his hunch about the men. After all, this hunch was rooted in his general feeling that the men "didn't look right to [him] at the time,"[250] that he "just didn't like 'em,"[251] and likely racial profiling as well.[252]

The officer's subjective and improper motivations should have been a red flag that caused the Court to look more carefully at the fluctuating number of visits to the window that the suspects supposedly made. The Court, however, never questioned the officer's changing story.

3. *SANTANA*, *PAYTON*, AND THE EVIDENCE AT THE FRONT DOOR

This Section illustrates two cases in which the Court accepted police stories about crucial evidence just happening to be prominently displayed when the officers arrived at the scene. In both cases, it made no sense that the evidence would be displayed as conveniently as it was.

First, consider the landmark decision in *Payton v. New York*, in which the justices actually sided with the defendant and established that

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248. *Id.* at 431 (footnotes omitted).

249. *Terry v. Ohio*, 392 U.S. 1, 6, 23 (1968).

250. Chilton Trial Transcript, *supra* note 245, at 1456.

251. Louis Stokes, *Representing John W. Terry*, 72 ST. JOHN'S L. REV. 727, 730 (1998).

252. *See* Thompson, *supra* note 159, at 963–72 (analyzing the "important racial dimension" to *Terry* and postulating that the suspicion and actions of Officer McFadden, a White officer, were motivated by racial profiling toward the Black suspects); Katz, *supra* note 242, at 432 ("Terry and Chilton's street behavior and the supposed target of their interest are extremely important issues because they are all that set apart these suspects from any other two people on the street, unless it was their race."); I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 859 n.133 (2008).

police need a warrant to make an arrest in a home.[253] In that case, the Court overturned a New York statute that allowed police to make a warrantless entry to make a routine felony arrest.[254]

In rendering a pro-defendant ruling, the Court nevertheless managed to accept a highly implausible police story. The officers had conducted an intensive two-day murder investigation that led to the suspect's home.[255] They forcibly entered and conveniently found crucial evidence—a shell casing—sitting on top of a stereo set in plain view.[256] The shell casing was quite important for securing Payton's conviction, as investigators determined that it and two shell casings found at the murder scene were fired from the same rifle.[257] The Court never doubted that these officers happened to encounter incriminating evidence right in plain view—despite knowing that the same officers had just warrantlessly entered Payton's home and searched the entirety of the home thereafter.[258] The Court never questioned why someone who committed murder two days prior would have a shell casing from the murder weapon effectively on display in their home.

A similarly implausible police story was front and center in *United States v. Santana*.[259] In *Santana*, an undercover narcotics officer in Philadelphia arranged to purchase heroin from the defendant along with an intermediary drug dealer.[260] The intermediary, Patricia McCafferty, was to complete the purchase from the real target of this operation: a known drug dealer named "Mom Santana."[261] McCafferty had access to Santana and knew where Santana resided and operated from.[262] McCafferty entered Santana's house, reemerged shortly thereafter, and retrieved the drugs from her bra once back in the officer's car.[263] The officer promptly arrested McCafferty, and a different set of officers mobilized to go back to the house to arrest Santana.[264] As the officers pulled up to Santana's house, they supposedly saw Santana "standing in the doorway of the house with a brown paper bag in her hand."[265] The

253. 445 U.S. 573, 576 (1980).
254. *Id.*
255. *Id.*
256. *See id.*; *People v. Payton*, 380 N.E.2d 224, 226 (N.Y. 1978), *rev'd*, 445 U.S. 573 (1980).
257. *Payton*, 380 N.E.2d at 226.
258. *See id.*
259. 427 U.S. 38 (1976).
260. *Id.* at 39.
261. *See id.*
262. *See id.* at 39–40.
263. *Id.* at 40.
264. *Id.*
265. *Id.* (footnote omitted).

officers stated that Santana began to retreat back into her house as they approached her, and when they grabbed her just inside the vestibule, "two bundles of glazed paper packets" full of heroin fell out of the paper bag she was holding.[266]

Santana's initial location in the doorway is a decisive detail as to legality of her arrest. Officers may arrest an individual upon probable cause even without a warrant, so long as the arrestee is located in a public place.[267] Because Santana was "exposed to public view . . . as if she had been standing completely outside her house," she was in a "public place" when she stood in her home's threshold.[268] And, her retreat from that "public place" as the officers approached made the encounter a "hot pursuit" authorizing a warrantless entry into her home to arrest her.[269]

The officers' story is questionable, at best. First, think of the initial drug deal. Santana went to great trouble to keep herself insulated from public view. The buyer had to come into the house to get the drugs. That was the whole point of the undercover police operation. The idea that Santana—who the police believed to be an experienced and savvy drug dealer—was just standing in the doorway when the police happened to return is contrary to the whole premise of the drug investigation. The person the police had to go to such great lengths to buy drugs from just happened to be standing in the doorway when the police very quickly returned to the house.[270] And on top of that, Santana was conveniently holding a bag of drugs in the doorway!

Moreover, things become even more questionable when we consider the officers' stated reason for returning to the house. One officer claimed that they had to catch Santana with the money used in McCafferty's purchase, bills which the undercover agent had marked.[271] But there would be no way to do that if Santana kept herself hidden away in the house (as she had previously done) because the police could not lawfully enter the house without an arrest warrant.[272] Indeed, some officers acknowledged in their trial court testimony that the mission was not in fact to recover the "bait money" but to arrest Santana.[273]

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266. *Id.* at 40–41.

267. *Id.* at 42 (citing *United States v. Watson*, 423 U.S. 411 (1976)).

268. *Id.* (citing *Hester v. United States*, 265 U.S. 57, 59 (1924)).

269. *Id.* at 42–43 (citing *Warden v. Hayden*, 387 U.S. 294 (1967)).

270. The Court does not specify the time elapsed, but it describes the events between McCafferty's purchase, McCafferty's arrest, and the other officers going to Santana's residence just two blocks away as happening in rapid succession. *See id.* at 40–41.

271. *Id.* at 41.

272. *See id.* at 42.

273. *Id.* at 41.

The officers' story becomes even less believable when they add that Santana was holding in plain view a paper bag full of illegal drugs.[274] Further, Santana conveniently had on her person $135, including the marked bills that the officers required as key evidence for her charges.[275] In spite of these many doubtful details, the Supreme Court readily accepted this story, raising no skepticism whatsoever.

4. *RILEY*, *CIRAOLO*, AND THE EVIDENCE VISIBLE FROM NAVIGABLE AIR SPACE

In the late 1980s, the Court heard two "flyover" marijuana cases in which the police claimed to see marijuana plants from a helicopter and an airplane.[276] In both cases, it seems likely the police either (1) lied about being able to recognize marijuana from so far up in the air, or (2) flew at a lower height that was not in navigable airspace (and thus not a lawful vantage point) and lied about the height of the aircraft.[277]

The first flyover case was *California v. Ciraolo*.[278] Officers were suspicious of marijuana growing activity, but they were not able to get a ground-level vantage point and lacked enough evidence for a warrant.[279] So the officers flew in a private plane over the defendant's house.[280] Flying at an altitude of one thousand feet, the officers claimed that they "readily identified marijuana plants" growing in a fifteen-by-twenty-five-foot plot.[281] The officers did not claim to have used binoculars.[282] The key question for our purposes, of course, is whether police can identify growing marijuana from a moving aircraft that is more than three football fields above.

The second flyover case was *Florida v. Riley*. In that case, the officers used a helicopter to fly above private property at an altitude of four hundred feet.[283] But in *Riley* the plants were inside a greenhouse shielded by roofing panels covering ninety percent of the structure.[284] And once again the officers did not claim to have used binoculars or other

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274. *Id.* at 40–41.

275. *Id.* at 41.

276. *California v. Ciraolo*, 476 U.S. 207 (1986); *Florida v. Riley*, 488 U.S. 445 (1989).

277. For a discussion of the prevalence of police dishonesty in warrant affidavits, see generally Gard, *supra* note 66.

278. 476 U.S. 207 (1986).

279. *See id.* at 209.

280. *Id.*

281. *Id.*

282. *See id.* at 213.

283. *Florida v. Riley*, 488 U.S. 445, 448 (1989).

284. *Id.*

sight-enhancing technology.[285] Rather, the officers claimed that by using the naked eye, they could distinguish the marijuana from other nearby plants—evidently from four hundred feet in a moving helicopter and through roofing panels that covered ninety percent of the structure.[286]

Both stories seem far-fetched. Common sense dictates that it is difficult to identify plants from one thousand feet or from four hundred feet when they are inside a greenhouse that is ninety percent covered. Indeed, the photographs that the officers took from the sky did not show enough detail to establish that the officers saw marijuana plants.[287] In *Ciraolo*, the Court acknowledged that the officer "testified that the photograph did not identify the marijuana as such because it failed to reveal a 'true representation' of the color of the plants: 'you have to see it with the naked eye.'"[288] In *Riley*, the defendant's brief pointed out that "[t]he photographic evidence . . . also cast[s] doubt that the marijuana was observed at 400 feet."[289] Nevertheless, the Court did not question whether the officers really saw marijuana or whether they really were in navigable airspace (as opposed to a lower altitude). The justices accepted the officers' accounts as the undoubted truth and upheld their aerial observations in both cases.[290]

If the Court had been skeptical of the officers' veracity and ordered further briefing or fact-finding, what would it have likely found? A commercial airline pilot, a NASA physicist, and an ophthalmologist explained that it would be very difficult to identify marijuana plants from such heights.[291] From a vertical vantage point, it is exceedingly difficult to tell whether the plant you are looking at is one foot tall or ten feet tall. Further, police would not simply be trying to identify plants. Most plants and shrubbery, of course, are not illegal. Only marijuana plants are illegal. And to identify a marijuana plant—as opposed to just a regular cluster of plants—the officers would need to see the detail of its leaves—

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285. *See id.*

286. *Id.* For reference, 400 feet is longer than a football field, and 1,000 feet is longer than three.

287. *See* Brief for Respondent at *28, *29 n.29, *Florida v. Riley*, 488 U.S. 445 (1989) (No. 87-764).

288. *California v. Ciraolo*, 476 U.S. 207, 212 n.1 (1986).

289. Brief for Respondent at *29 n.29, *Florida v. Riley*, 488 U.S. 445 (1989) (No. 87-764).

290. *See Ciraolo*, 476 U.S. at 209; *Riley*, 488 U.S. at 448.

291. We are grateful for conversations with Matt Inman, Dr. Jennifer Inman, and Dr. Keith Mathers. Interview with Matt Inman, commercial airline pilot, in Williamsburg, Va. (June 2022); Interview with Dr. Jennifer Inman, PhD in Physics, in Williamsburg, Va. (June 2022); Telephone Interview with Dr. Keith Mathers, M.D. Board Certified in Ophthalmology (June 2022).

something that is not readily ascertainable from a height of one thousand feet or through a covered greenhouse at four hundred feet.

5. Other Questionable Police Stories Central to Supreme Court Decisions

Finally, it is worth considering two other famous Supreme Court decisions where ordinary people might stop and question whether the police were telling the truth—even if there is nothing specific to cast doubt on their claims.

Consider the famous interrogation case of *Rhode Island v. Innis*[292] in which the police quickly got a Mirandized suspect to confess by supposedly talking to each other rather than asking the suspect any questions.[293] After being arrested for murder and robbery, three different officers on the scene successively gave Innis the *Miranda* warnings.[294] In response, Innis "stated that he understood those rights and wanted to speak with a lawyer."[295] The officers prepared to transport Innis to the police station and decided that three officers, one seated in the back with Innis, would ride along.[296] A police captain specifically instructed the officers not to question, intimidate, or coerce Innis in any way, and the vehicle departed.[297]

Only a few minutes later, after traveling no more than one mile, the vehicle returned to the scene and Innis readily led officers to the shotgun used in his suspected crimes.[298] According to the officers' testimony, this sudden change of heart was due to two of the officers exchanging just two or three comments to one another about how they hoped to find the weapon soon.[299] In particular, one officer said to another, "there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves."[300] In that moment, Innis allegedly "interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located."[301] He was Mirandized for

292. 446 U.S. 291 (1980).
293. *Id.* at 294–95.
294. *Id.* at 294.
295. *Id.*
296. *Id.* at 294; *id.* at 305 (Marshall, J., dissenting).
297. *Id.* at 294.
298. *Id.* at 295.
299. *Id.* at 294–95.
300. *Id.*
301. *Id.* at 295.

a fourth time, led officers to the weapon, and was ultimately convicted of kidnapping, robbery, and murder.[302]

The Supreme Court concluded that the officer's statement about the vulnerable children accessing the gun did not amount to interrogation because it was not reasonably likely to elicit an incriminating response.[303] In the intervening decades, thousands of law students have debated whether a reasonable person would in fact incriminate themselves following such a comment from the police. But is there not another element that the Supreme Court (and some law school classrooms) are missing?

Should we really believe that the officers danced around Innis without directly asking him where the weapon was? Framed differently, was Innis really tricked by the farcical back-and-forth between the officers in which they expressed concern for vulnerable children? He had been Mirandized three times and had the savvy to invoke his Fifth Amendment rights and ask for a lawyer.[304] Yet, the Court easily accepts that Innis incriminated himself anyway, after a mere few minutes and based on a silly ploy from the officers. A much more plausible scenario is that the police truly did ask Innis questions that would amount to a *Miranda* violation. Perhaps events played out exactly as the officers relayed. But there is plenty of reason to be skeptical. And the Court expressed none of that skepticism.[305]

Supreme Court skepticism was similarly absent in *United States v. Arvisu*,[306] where the officer claimed suspicion based on how the children were sitting.[307] Specifically, a border patrol agent claimed that, while seated in his patrol vehicle, he observed a minivan as it passed by at twenty-five to thirty miles per hour.[308] The agent stated that he noticed the children in the back seat were sitting "as if their feet were propped up on some cargo on the floor."[309] The agent suspected that the minivan was smuggling narcotics or people, and he pulled it over.[310] The agent gained consent to search the van and found, under the feet of the children

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302. *Id.*

303. *Id.* at 301–02.

304. *See id.* at 294.

305. *Cf.* Bennett Capers, *Criminal Procedure, The Police, and* The Wire *as Dissent*, 2018 U. CHI. LEGAL F. 65, 74 ("[T]he Court assumed that two officers . . . were not engaged in *interrogation*, because of course that would mean the officers were circumventing *Miranda*, and officers would not engage in such trickery, the officers were good officers, concerned only with public safety.") (footnote omitted).

306. 534 U.S. 266 (2002).

307. *Id.* at 270.

308. *Id.*

309. *Id.*

310. *Id.* at 270–71.

in the back seat, a black duffel bag full of marijuana.[311] While the Court did debate whether the agent's observations created reasonable suspicion for the stop, it did not examine whether it was plausible that the officer could have noticed something suspicious from such a quick view of the minivan driving past.[312]

Once again, it is possible the officer in *Arvisu* was telling the truth. Maybe he had incredible perceptive ability. Maybe a second's glance was all that was necessary to tell that children's feet were propped up and that contraband would be underneath them. But a normal person would at least pause at the boldness of this claim. The Supreme Court took no such pause and never questioned the truthfulness of what the officer claimed.

B. Cases in Which the Court Expressed Some Skepticism toward Police Stories but Nonetheless Adopts Them

In other significant criminal procedure cases, the Court *did* acknowledge some doubtful aspects of the police officers' accounts but proceeded to accept the police account and issue pro-police rulings anyway. This Section considers three such cases.

1. *MURRAY* AND HIDING AN INITIAL WARRANTLESS SEARCH

A prime example of police deception is *Murray v. United States*,[313] the leading case on the independent source doctrine.[314] In *Murray*, law enforcement officers were surveilling an individual for possible drug trafficking.[315] After observing a truck leave a warehouse, the officers forced entry into the building without a warrant.[316] Inside the private premises, they found in plain view several large bales of marijuana.[317] They left without disturbing the bales and immediately sought a search warrant for the warehouse while other officers continued surveilling the

311. *Id.* at 271–72.

312. *See id.* at 273–77. During oral arguments, Justice Stevens noted his suspicion that the officer's decision to stop the minivan was based on discovering that the vehicle was registered in a high drug-crime area, rather than the various observations adding up to reasonable suspicion. *See* Transcript of Oral Argument at 20, *United States v. Arvisu*, 534 U.S. 266 (2002) (No. 00-1519). However, his statements appeared to cast doubt on the subjective motivations for the stop or the presence of sufficient reasonable suspicion—not on the veracity of the officer's claims.

313. 487 U.S. 533 (1988).

314. *See id.* at 535.

315. *Id.*

316. *Id.*

317. *Id.*

property.[318] In the search warrant application, however, the officers left out any mention of this plainly illegal entry.[319] During litigation, the government claimed that the officers did not rely on any of their observations from the illegal, warrantless entry in their search warrant application.[320]

The question in *Murray* was whether the officers' initial, clearly unlawful entry of the warehouse tainted the warrant and thus required the exclusion of the evidence seized in the second, lawful search.[321] The majority opinion, written by Justice Scalia, held that the "independent source exception" applied because the evidence was lawfully discovered through a source independent of the illegal act.[322] Because the probable cause and warrant application for the second search did not depend on anything the officers observed in the first, illegal search, the evidence was not tainted.[323]

The Court sided squarely with law enforcement in *Murray*. But unlike the cases Section IV.A discusses, the justices did at least debate the prospect of police dishonesty. That debate focused less on whether the officers in *Murray* lied, and instead on whether future officers would use the independent source doctrine to lie.

In dissent, Justice Marshall, joined by Justices Stevens and O'Connor, "expressed grave concern over the incentives the new 'independent source' exception to the exclusionary rule would create for the police."[324] He explained that the majority's holding gives officers an incentive to perform illegal, "confirmatory" searches "to determine whether it is worthwhile to obtain a warrant."[325]

Justice Scalia disagreed, arguing that an officer would be "foolish" to take that route because the officer would then have the "onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it."[326] Justice Scalia's view, however, neglects to consider that the police officer would simply not mention the first illegal search to a court or in the police report. After

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318. *Id.*

319. *Id.* at 535–36.

320. *See id.* at 537.

321. *Id.*

322. *Id.* at 535, 541–42.

323. *Id.* at 541–43.

324. David J.R. Frakt, *Fruitless Poisonous Trees in a Parallel Universe:* Hudson v. Michigan*, Knock-and-Announce, and the Exclusionary Rule*, 34 FLA. ST. U. L. REV. 659, 701 (2007).

325. *Murray*, 487 U.S. at 546–47.

326. *Id.* at 540.

all, "if the officers were unethical enough to engage in a search without a warrant, why would [we] expect them to be honest about their illegal behavior?"[327] No one but the police would ever know that there had been a previous warrantless search.[328]

Accordingly, in Murray's case and future cases, there is a great probability of police lies.[329] Officers can make an illegal warrantless search. Then they can implicitly lie to the court by omitting mention of it. Or they can explicitly lie in the warrant application by using the information they learned from the illegal warrantless search and attributing it to other sources, such as an anonymous informant.[330]

Most of the Justices in *Murray* were willing to overlook the officers' blatantly illegal entry and the considerable possibility that they committed perjury in the warrant application. Instead, the Court placed great confidence in the officers' assurances that the illegal search "contributed nothing" to their decision to seek a warrant.[331]

2. *DICKERSON* AND IMMEDIATELY RECOGNIZING DRUGS BY TOUCH

A second example of the Supreme Court accepting a police lie after discussing the prospect of dishonesty is *Minnesota v. Dickerson*,[332] which allowed police to claim that they immediately recognized drugs during a pat-down.[333]

In *Dickerson*, the officer was patrolling a building that he "considered . . . to be a notorious 'crack house.'"[334] After seeing the suspect walk out of the building and change direction, the officer performed a *Terry* stop and frisk.[335] The pat down revealed no weapons, but the officer did feel a small lump in the front pocket of Dickerson's

327. Frakt, *supra* note 324, at 701.

328. *See id.*

329. As Justice Marshall explained, "When . . . the same team of investigators is involved in both the first and second search, there is a significant danger that the 'independence' of the source will in fact be illusory, and that the initial search will have affected the decision to obtain a warrant notwithstanding the officers' subsequent assertions to the contrary." *Murray*, 487 U.S. at 548–49.

330. *See* Bradley, *supra* note 185, at 918.

331. Brief of the American Civil Liberties Union and the Civil Liberties Union of Massachusetts as Amici Curiae in Support of the Petitioner at 14, *Murray v. United States*, 487 U.S. 533 (1988) (No. 86-995) (arguing that "[i]t defies common sense to believe that the agents ignored the knowledge" gained from the first, unlawful search of the warehouse).

332. 508 U.S. 366 (1993).

333. *Id.* at 375.

334. *Id.* at 368.

335. *Id.* at 368–69.

nylon jacket.[336] After examining the lump a bit further with his fingers, the officer concluded that it was crack cocaine wrapped in cellophane.[337] During an evidentiary hearing, the officer testified that he could feel through the jacket that the tiny cellophane wrapping was knotted.[338] He then reached into Dickerson's jacket pocket and retrieved a 0.2-gram lump of crack cocaine—the size of an aspirin tablet[339]—in a tiny plastic bag.[340] The Supreme Court unanimously held that, if during a lawful pat-down of a suspect's outer clothing a police officer feels something immediately apparent as contraband, the officer may seize it without running afoul of the Fourth Amendment.[341]

The record in *Dickerson* raised serious concerns about the officer's honesty. As the Supreme Court of Minnesota explained in lower court proceedings:

> The officer's "immediate" perception is especially remarkable because this lump weighed 0.2 grams and was no bigger than a marble. We are led to surmise that the officer's sense of touch must compare with that of the fabled princess who couldn't sleep when a pea was hidden beneath her pile of mattresses. But a close examination of the record reveals that like the precocious princess, the officer's "immediate" discovery in this case is fiction, not fact.[342]

Similar concerns arose in oral argument before the Supreme Court. Dickerson's lawyer urged the justices to consider that touch, unlike sight which can be corroborated by others, is a highly subjective sense on which to depend.[343] He raised doubts about the "claim that the officer instantaneously recognized that this object was a piece of crack cocaine."[344] The defense lawyer sounded "reportilying"[345] alarm bells, noting that "what an officer feels can only be described after he pulls it out of the pocket and writes down in his police report what it is that he

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336. *Id.* at 369.

337. *Id.*

338. Robert Fraser Miller, "*I Want to Stop This Guy!" Some "Touchy" Issues Arising from* Minnesota v. Dickerson, 71 N.D. L. REV. 211, 238 (1995).

339. *See* Brief for Respondent at 1 n.1, *Minnesota v. Dickerson*, 508 U.S. 366 (1993) (No. 91-2019).

340. Miller, *supra* note 338, at 238–39.

341. *Dickerson*, 508 U.S. at 375–77.

342. *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992).

343. Transcript of Oral Argument at 46–47, *Minnesota v. Dickerson*, 508 U.S. 366 (1993) (No. 91-2019).

344. *Id.* at 47.

345. *See supra* Part II.

saw."[346] Dickerson's lawyer also noted that the officer's testimony about Dickerson's jacket fluctuated throughout the record, describing the jacket as "thin" at one point but later as "kind of fluffy."[347] One justice may have sensed the implausibility of the officer's account, noting that the drugs the officer alleged to have plainly felt were "the size of a piece of chewing gum."[348]

Ultimately, by a 6-3 vote, the Court held that the officer's search, in which he manipulated the lump with his fingers to explore it further, went beyond *Terry*'s constitutional requirement that pat-down frisks remain limited to open-handed touch.[349] The Court's decision to invalidate the officer's search and seizure was based on the officer feeling the lump more closely with his fingers—*not* on the implausibility of the officer's claim that he could feel a lump under these circumstances and know precisely what it was. Although ultimately a win for Dickerson, the majority still fully adopted the officer's account, despite the significant skepticism throughout the record that he truly could have felt an aspirin-sized lump wrapped in cellophane through Dickerson's outerwear and identified it as crack cocaine. In short, the majority refused to reject the officer's highly questionable claim that he was able to feel tiny lump through the jacket's exterior and immediately recognize that it was cocaine.[350]

3. *ORNELAS* AND THE NOT-SO-RUSTY SCREW

In *Ornelas v. United States*, the Supreme Court acknowledged a blatant lie by police but nevertheless ruled in favor of the government.[351] In *Ornelas*, a police officer specializing in drug enforcement investigated a vehicle parked at a motel.[352] "The car attracted [his] attention for two reasons: because older model, two-door General Motors cars are a favorite with drug couriers because it is easy to hide things in them; and because California is a 'source State' for drugs."[353] The officer learned that the registered owners were listed in a drug trafficking database, and

346. Transcript of Oral Argument at 46, *Minnesota v. Dickerson*, 508 U.S. 366 (1993) (No. 91-2019).

347. *Id.* at 49.

348. *Id.* at 25.

349. *Minnesota v. Dickerson*, 508 U.S. 366, 379 (1993).

350. Notably, Chief Justice Rehnquist stated in his concurrence that he would have remanded the case for further proceedings as to whether the officer legitimately had "probable cause to believe that the lump was contraband." *Id.* at 383 (Rehnquist, C.J., concurring in part).

351. 517 U.S. 690 (1996).

352. *Id.* at 691–92.

353. *Id.* at 692.

successfully sought consent to search the vehicle.[354] As part of the search, the officer dismantled an interior panel of the car that "felt somewhat loose," discovering two kilograms of cocaine inside.[355]

The officer later testified "that a screw in the door-jam adjacent to the loose panel was rusty, which to him meant that the screw had been removed at some time."[356] In the lower courts, the prosecution "place[d] great weight" on the rusty screw as support for probable cause for removing the panel.[357] However, "the screw was not rusty."[358] Both the trial judge and the Seventh Circuit judges hearing the case on appeal examined the screw themselves and found that "[t]here is not the slightest trace of rust or of anything that looks like rust."[359] Therefore, it seems that "the officer engaged in 'testilying,' and deliberately misrepresented that the screw was rusty to establish the probable cause necessary to engage in the search of the door panel."[360] Multiple courts had determined that this testimony was clearly untrue, and the Supreme Court was plainly aware of this falsehood as well.[361]

The Court had granted certiorari to resolve a conflict regarding the appropriate standard of appellate review for reasonable suspicion and probable cause determinations.[362] The Court held that appellate courts should conduct de novo review of whether there was reasonable suspicion to conduct an investigatory stop or whether there was probable cause to conduct warrantless searches.[363]

The officer's lie about the rusty screw was not critical to the Court answering the legal question about the proper standard of review. But the Court addressed (and minimized) the police lie anyway. After recognizing that the officer had lied (which seemingly would benefit Ornelas on remand), the Court took pains to note that an experienced narcotics officer like the one in this case might infer that a somewhat

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354. *Id.* at 692–93.

355. *Id.* at 693.

356. *Id.*

357. *See United States v. Ornelas-Ledesma*, 16 F.3d 714, 719 (7th Cir. 1994) *overruled by Ornelas v. United States*, 517 U.S. 690 (1996).

358. *Id.*

359. *Id.*

360. Miller, *supra* note 147, at 230 (footnote omitted).

361. *See Ornelas*, 517 U.S. at 694 ("The Magistrate found, as a finding of fact, that there was no rust on the screw and hence concluded that Deputy Luedke had an insufficient basis to conclude that drugs would be found within the panel."); Transcript of Oral Argument at 26, *Ornelas v. United States*, 517 U.S. 690 (1996) (No. 95-5257) (discussing that the screw "turn[ed] out not to have been rusted").

362. *Ornelas*, 517 U.S. at 695.

363. *Id.* at 697.

loose panel inside a car suggests the presence of hidden drugs.[364] Therefore, the majority wrote, the "appeals court should give due weight to a trial court's finding that the officer was credible and the inference was reasonable."[365] In other words, the Court acknowledged the police lie, but nevertheless strongly signaled that the lower court should not rely on the lie to reverse the conviction on remand.

* * *

In sum, even when the justices have recognized and discussed police lies, they seem unphased by the police dishonesty. In *Murray*, *Dickerson*, and *Ornelas*, the Court did not let police lies stop them from establishing pro-law enforcement rules that would enable further lying in future cases.

V. SKEPTICISM, REVERSALS, AND SIGNALING TO THE POLICE, THE PUBLIC, AND LOWER COURTS

This Article has established that police (just like regular people) lie, that existing criminal procedure doctrine bakes those lies into cases, and that the Supreme Court has repeatedly accepted such lies without expressing skepticism. The remaining question is what the Court should do in response.

At the outset, we should acknowledge that we do not know how to make the police and the general public stop lying. If the literature in Parts I and II is any indication, such a task is impossible. If we cannot eliminate police lies, then the key question is how the Court should handle them.

There are, of course, bold steps the Court could take. The Court could end its longstanding practice of privileging police expertise and experience.[366] The Court could rigorously scrutinize claims of expertise. Rather than accepting an officer's unsupported claim that they searched two thousand cars for drugs,[367] the Court could insist on the government

364. *Id.* at 700.

365. *Id.*

366. We do not focus on police body cameras because the Court lacks authority to mandate them. Additionally, there is reason to be skeptical of how much police dishonesty they would reduce. *See* Goldstein, *supra* note 80 ("Many police officials and experts express optimism that the prevalence of cameras will reduce police lying. . . . Yet interviews with officers suggest the prevalence of cameras alone won't end police lying. That's because even with cameras present, some officers still figure — with good reason — that a lie is unlikely to be exposed. Because plea deals are a typical outcome, it's rare for a case to develop to the point where the defendant can question an officer's version of events at a hearing. 'There's no fear of being caught,' said one Brooklyn officer who has been on the force for roughly a decade.").

367. *See Ornelas*, 517 U.S. at 700.

submitting some evidence that the officer had been successful in conducting such searches. Or the Court could reverse longstanding criminal procedure doctrines that enable police lying.[368] For instance, the Court could abandon the hopelessly broad "high crime neighborhood" test or it could impose a more rigorous level of suspicion on *Terry* stops and frisks. While such bold doctrinal changes may be advisable, we are aware that they are incredibly unlikely. Accordingly, we will direct our attention toward more realistic reforms that the Court could adopt without drastically altering existing jurisprudence.

We propose five interconnected solutions. First, the Court should be more alert for police dishonesty. And the legal community should take steps to educate the justices about police dishonesty through amicus briefs that specifically explain the prevalence of lying. Second, the Court should reverse convictions that are based on obvious police lies. Third, the Court should seek to deter police misconduct by loudly calling out police lies, even if the convictions cannot also be reversed. Fourth, the Court should serve an educational role and signal to the general public—which is more attuned to police misconduct than ever before[369]—that police lies are present and need to be dealt with. Fifth, the Court should signal to lower courts to be vigilant in identifying police dishonesty.

First, the Supreme Court should be more observant for police lies. The justices should open their eyes to the literature about the degree to which people lie generally, and the police lie specifically. The expansive literature discussed in Parts I and II above is a good place for the justices to start.

Of course, every law professor's dream is to design a reading list for the justices. And those dreams almost always go unrequited. No one can make the justices read social psychology literature and law review articles. But there is a way to package that literature that might get the justices' attention—submitting it in amicus briefs. To be sure, the justices have said that they do not read every amicus brief that is filed.[370] But they do read some of them and their clerks read most of them.[371] Moreover, the odds of getting the justices' attention are even higher if the amicus briefs are filed by the elite lawyers who regularly argue Supreme Court

368. *See supra* Part III.

369. *See* Goldstein, *supra* note 80 (observing "run-of-the-mill drug cases as well as . . . police shootings [are] so notorious that they are seared into the national consciousness").

370. *See* Jayna Marie Rust, *How to Win Friends and Influence Government Contracts Law: Improving the Use of Amicus Briefs at the Federal Circuit*, 42 PUB. CONT. L.J. 185, 193 (2012) (describing which briefs Justice Ginsburg read).

371. Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 43 (2004).

cases.[372] And the impact would be greater still if a version of that brief were filed in multiple cases involving potential police dishonesty. In short, no one can make the justices read the literature on lying, but the Supreme Court bar could do a public service by putting that literature on the justices' desks in case after case.

Second, when the Court detects police statements that seem "clearly" dishonest, the Court should follow long-settled jurisprudence and not show deference to factual conclusions that are clearly erroneous.[373] The Court has made clear that police are entitled to deference based on their expertise and training and that factual findings of trial judges and juries should not be disregarded unless clearly erroneous.[374] But the Court has never suggested that police are free to engage in bald-faced lies. In cases involving obvious police lies, the Court should reverse convictions and it should do it vocally. Reversing convictions not only serves justice in the individual case, but should theoretically deter future police misconduct. *Whren* is an example of a case where law enforcement's story is so far-fetched that it should not be entitled to deference.

But of course, in many cases the Court will not be able to say that the police were clearly lying. Instead, it may simply seem very likely that the police were lying. The airplane and helicopter flyover cases fit in this category.[375] We cannot be certain that the police lied about seeing marijuana from four hundred feet in *Riley* or one thousand feet in *Ciraolo*.[376] However, based on discussions with a NASA physicist, an ophthalmologist, an airline pilot, and basic common sense, it seems very likely that the police did lie. The officers may have been flying at an altitude below lawfully navigable airspace when they spotted the marijuana, or they may never have seen the marijuana at all. But we cannot say for certain. The justices have talented law clerks, but they likely do not include a Ph.D. in physics, a commercial airline pilot, or a medically trained ophthalmologist. And while the justices can dig up this

372. This is what our colleagues Alli Larsen and Neal Devins labeled the "'the amicus machine'—a systematic, choreographed engine designed by people in the know to get the Justices the information they crave, packaged by lawyers they trust." Larsen & Devins, *supra* note 10, at 1915.

373. For background on the standard, see WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.7(c) (6th ed. 2020).

374. *See Ornelas*, 517 U.S. at 699–700.

375. *See Florida v. Riley*, 488 U.S. 445 (1989); *California v. Ciraolo*, 476 U.S. 207 (1986).

376. *See supra* Section IV.A.4.

information on their own, mining for facts outside the record presents risks of inaccuracy.[377]

This raises a tricky question. What should the Court do when it thinks it is likely, but not clear, that the police lied? In those cases, reversal under a clearly erroneous standard is off the table. But that does not mean the justices have no avenue to deter police misconduct. The third thing that the Supreme Court can do is express skepticism about the honesty of the officers—even when they have no choice but to uphold the conviction. In *Riley* and *Ciraolo*, it would have been useful for the Court to say, "We are bound by the factual findings of the lower court, though we think it quite likely the police lied to the lower court. We will be vigilant to look out for such dishonesty, and the lower courts should as well."

Of course, police do not carefully review dicta in Supreme Court decisions. Most officers likely never read a single Supreme Court decision.[378] But police departments do provide training to officers. And those who conduct the training—often lawyers—do read the Supreme Court's criminal procedure decisions and distill them for officers.[379]

It is possible that some justices have been skeptical of police lies in the past, but said nothing. Their thought process might go like this: "Well, we are bound by the trial court's factual findings and there is no point in raising the possibility of police dishonesty when we cannot relitigate the facts." That is unwise. Sweeping potential police dishonesty under the rug because it will not change the outcome of a case ignores America's policing problems. As Professors Friedman and Ponomarenko have explained, the courts are, in reality, the supervisors of police agencies.[380] The lawyers who train police officers should be made aware that the Court notices police lies—even if they cannot reverse particular convictions.

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377. *See* Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1298–99 (2012) ("Given the limited time for deciding a case and the limited research resources available to the judiciary, judges and Justices are institutionally ill-equipped to evaluate questions of psychology, social science, physics, or medicine. And, consequently, when Justices deal in matters outside their expertise, they are more likely to make a mistake.") (footnote omitted).

378. Justin Driver, *The Supreme Court as Bad Teacher*, 169 U. PA. L. REV. 1365, 1396 (2021) ("The point here is not to suggest that patrolling officers, after a long day of walking their respective beats, decompress by curling up in the evening with the Court's latest slip opinions. They overwhelmingly do not.").

379. *See id.*

380. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1832, 1843–44 (highlighting that Florida regulates its citrus industry more than its police).

Now what lesson might police take from a Supreme Court decision in which the Court expresses skepticism that the officer was lying but nevertheless upholds the defendant's conviction? The lesson might be counter-productive—that officers can lie and get away with it. We must acknowledge, as Professor Justin Driver has recently explained, that the Court's decisions, particularly in the Fourth Amendment area, can signal to the police what they can get away with.[381]

But it is also possible that attention to police lies and Supreme Court skepticism will have a different effect. The lawyers who train police officers will surely have read the Supreme Court's statements expressing skepticism. These lawyers might pass along the following message to officers: "The Court is watching and it may not be so forgiving next time." Police may thus get a message—in the same way that they do when their misconduct leads to reversals of convictions—that police dishonesty is counter-productive. If there is any chance that police will be deterred by the Court signaling skepticism in police honesty, it should do so.[382]

But let us assume that the police get no message from Supreme Court dicta. Or, worse yet, the Court sends an unfortunate message: police can get away with lying. That still does not mean there is nothing to be gained from the Court calling out what appear to be police lies. This brings us to the fourth thing the Supreme Court can do when it encounters police dishonesty—educate and add to the public consciousness.

The Court is not just in the business of deciding cases and directly deterring police officers. The Court also speaks to the general public. As Professor Eugene Rostow explained more than seventy years ago, "[t]he Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar."[383] The idea of the Court as an educator has been widely embraced by "liberals, conservatives, communitarians, republicans, and feminists."[384]

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381. *See* Driver, *supra* note 378, at 1370 ("[T]he Supreme Court sometimes issues opinions validating unconstitutionally repressive policies, and in the process transmits incorrect lessons about our constitutional order that subsequently become prevalent throughout the nation. In so doing, the Court provides instruction that not only fails to edify, but affirmatively misinforms.").

382. *See* Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOUS. L. REV. 103, 131 (2021) ("Judges have a duty to provide guidance and instruction to future litigants, judges, and other legal actors by articulating legal rules and principles in their opinions.").

383. Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

384. Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 962 n.2 (1992) (referencing Alexander Bickel, Robert Bork, Mary Ann Glendon, Ralph Lerner, Michael Perry, and Robin West).

Supreme Court opinions, of course, are not a perfect vehicle for educating the public. As one joke goes, if the justices are teachers, their classes are not well attended and the students typically do not do the reading.[385] Yet, even with this caveat, the Court's opinions arguably do a better job of signaling principles, ideals, and aspirations of the government than dense statutes, administrative regulations, and executive orders.[386] As Justice Kennedy has explained: "Judges are teachers. By our opinions, we teach."[387]

We are in the midst of a national conversation about race and policing.[388] Even if the Court allows convictions to stand, offering critical comments about police dishonesty enhances that conversation. The Court's authority will signal to both the public and to other governmental institutions that it is aware of policing problems and that they should be as well. The Court can signal that even if its hands are tied in individual cases that other actors should step in. Based on the Court's identification of police lies, legislatures could take action to better regulate the police and departments could take initiative to impose internal guidelines.

The final thing the Court can do is to signal to other judges. The Court's primary constituency—the group that reads its opinions most closely—is lower court judges. And the Court can influence lower court judges by speaking in plain and noteworthy language.

In any given year, the Supreme Court decides only a handful of high-profile Fourth or Fifth Amendment cases[389]—the cases that state trial judges are most likely to read. And, of course, those are the very cases in which police lies are most likely to show up. If the Court were to make plainspoken statements in occasional Fourth and Fifth Amendment cases that they believed police officers were lying, thousands of judges (as well as future judges who are in law school and legal practice) would read about those police lies. The lower-court judges (and lawyers and law students) would then hopefully internalize those statements and keep them in mind as they consider law enforcement testimony in the future.

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385. *See id.* at 1009. For further criticism of the idea that the Court serves an educational function, see Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 175–79 (1998).

386. *See* James E. Fleming, *Taking the Constitution Away from the Courts*, 86 CORNELL L. REV. 215, 227 (2000) (reviewing MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999)).

387. Driver, *supra* note 378, at 1368.

388. *See* Laura King, Kurtis Lee & Jaweed Kaleem, *George Floyd's Death and the National Conversation: Pain, Anger and Hope*, L.A. TIMES, https://www.latimes.com/world-nation/story/2020-06-05/george-floyds-death-sparks-voices-on-americas-deep-pain-and-searing-rage (June 6, 2020, 4:02 PM).

389. *See* Nicholas Kahn-Fogel, *An Examination of the Coherence of Fourth Amendment Jurisprudence*, 26 CORNELL J.L. & PUB. POL'Y 275, 298 (2016).

In sum, the U.S. Supreme Court surely lacks the power to stop all police lying. But the Court can take five steps to reduce police dishonesty: (1) being more alert for police lies; (2) reversing more convictions that involve police lies; (3) calling out police lies even when it is not possible to reverse convictions; (4) educating the general public about police lies; and (5) signaling to lower courts that they should be more vigilant in identifying police lies.

CONCLUSION

There is vast evidence that police—like ordinary people—are regularly dishonest. Police lie at trial, in suppression hearings, in reports, and in countless other situations. That police lie is not surprising. What is more shocking is that the U.S. Supreme Court accepts these lies.

This Article has documented numerous high-profile and legally significant Supreme Court decisions that were almost certainly based on police lies. In *Whren v. United States*, the Court insulated racial profiling from Fourth Amendment scrutiny even though the officers likely lied about the passenger having bags of drugs in his lap after a police chase. In the airplane and helicopter flyover cases, the Court found that police did not conduct a Fourth Amendment search even though it is nearly impossible to believe that the officers truly saw marijuana plants from the altitude where they claimed to be flying. In *Payton v. New York* and *United States v. Santana*, the Court set forth critical rules about when police need a warrant, but both cases were almost certainly based on police lies about the location of the underlying evidence. The Court has ignored police lies in little known cases such as *United States v. Ornelas*, where probable cause was premised on a police officer claiming to find a rusty screw even though the screw was brand new. And the Court has tolerated dishonesty in landmark criminal procedure decisions like *Terry v. Ohio,* where the police officer continually changed his story.

Even when the Court has discussed police dishonesty, it has only touched on it in passing while upholding convictions. In *Minnesota v. Dickerson* (the plain touch doctrine case), the Court did not call out the officer's implausible claim that he could identify drugs that were the size of an aspirin during a pat-down. And in *Murray v. United States*, the Court failed to chastise the police for their dishonesty, even when the police illegally searched and then implausibly claimed not to have used any of the information obtained in their subsequent search warrant application.

Of course, the Supreme Court cannot stamp out all police dishonesty. Nor can it simply reject factual evidence in the record that is not clearly erroneous. But that does not mean the Court should stand by

and do nothing in the face of police dishonesty. Many of the high-profile cases highlighted in this Article involve obvious police lies. When faced with such lies, the Court owes no deference to the factual findings of the lower courts and can therefore reject the police claims and reverse the convictions.

In other cases, the Court will need help to recognize police dishonesty. Lawyers can aid in this regard by filing amicus briefs that educate the Court about the prevalence of lying by ordinary people and the problem of police dishonesty in particular.

Just as the Court needs to be educated about police dishonesty, there is an opportunity for the Court to act as an educator itself. In some cases, the justices will have reason to believe the police are lying, but the Court will not be able to say for certain. Even if the Court cannot reverse a conviction, it can still use the power of its bully pulpit to highlight police dishonesty. Lower courts read Supreme Court decisions with great care. If they see the Supreme Court questioning whether police tell the truth, those lower-court judges may learn to scrutinize the claims of law enforcement officers more carefully in their own cases. And even though individual police officers likely do not read Supreme Court decisions, their police departments do employ lawyers to train the officers. When the Supreme Court calls out police dishonesty and credibly threatens to reverse future convictions, the message will filter down to the officers on the street that the courts are watching carefully. And supervisors in the police departments might take Supreme Court pronouncements as a reason to implement internal guidelines and create a culture that is less welcoming of police dishonesty.

Finally, by calling out police lies the U.S. Supreme Court can signal to the general public that police lies are a problem. We are at a moment of national reckoning on police misconduct. The Court can further that national conversation (and resultant reforms) by refusing to look the other way when police lie.