Testimonial Deception by Police: An Ethical Analysis

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I

In 1961, the United States Supreme Court held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." No longer was it sufficient for state courts to concern themselves only with the "competence" of the evidence presented to them; they now had to consider whether it had been properly obtained. Although the Supreme Court was only applying in the state sphere what had already applied in the federal sphere, the decision was believed by many to have profound implications for law enforcement. Most criminal charges are heard in state courts, and the ruling placed in jeopardy investigative practices that had been considered essential to police work.

In 1966, the Supreme Court once again constrained law enforcement practices by extending the Fifth Amendment privilege against self-incrimination to custodial interrogation. Police officers were required to inform arrested persons that they had a right to remain silent, that any statements they made could be used as evidence, that they had a right to an attorney, and that an attorney would be provided if it was not possible for them to afford one. Thus were certain ways of inducing confessions or securing evidence rendered unacceptable. Here too the effects were thought to be profound. A strategic edge had been lost in the war against crime.

Following these two decisions - and others made subsequent to them - there were dire predictions about the future of the criminal justice system. It is not obvious that these predictions have come true. Or, to the extent that they have come true, it is not clear that the 1961 Mapp and 1966 Miranda decisions have been major contributors. Why not? I guess one answer is that police have found other ways of doing their work effectively. And I have no doubt that that is part of the explanation. But another part of the explanation is that some of the old practices persist, albeit more "discreetly."

In studies conducted after the Mapp decision, it was found that the evidential grounds for misdemeanor narcotics charges altered dramatically. According to one of those studies, in 67% of 132 cases that came to court shortly before Mapp, narcotics were said to have been found hidden on the defendant's person. In the remaining 33% of cases, the defendant was said to have dropped the narcotics or thrown them to the ground. Of 97 cases prosecuted in a comparable period
after *Mapp*, it was claimed in only 16.5% of cases that narcotics had been found on the person; in the remaining 83.5% of cases it was asserted that narcotics had been dropped or thrown to the ground. Are we to explain this reversal by a change in the practices of those in possession of narcotics, or is it more likely that investigating officers, now aware of the constraints placed on them by *Mapp*, tailored their testimony to conform to legal requirements? “Dropsy” testimony, as it came to be known, enabled law enforcement officers to perpetuate some of the search and seizure practices that *Mapp* had outlawed.

Practices employed to search premises and seize incriminating items were also affected by the *Mapp* decision. Entering closed and private premises without permission or a warrant violates the constitutional right to privacy. Following *Mapp*, investigating officers asserted with increasing frequency that they had simply happened by the premises in question, that the door was open or that it was voluntarily opened to them, and that the incriminating evidence was in “plain view.” Though this was always possible, in many cases it was unlikely. Evidence was being reconstructed to conform to legal requirements.

What is true of search and seizure is also true of interrogatory practices. Subsequent to the *Miranda* decision, investigating officers would claim that confessing suspects had been read their *Miranda* rights when in custody or that statements made without the benefit of the *Miranda* warnings had been made non-custodially. Yet those involved in the criminal justice process knew that on some occasions, at least, such assertions were unlikely to be true, or if true, concealed deficiencies in implementation. However, establishing this without disadvantage to defendants was difficult, since suppression hearings would offer an opportunity for damaging cross-examination, and so such breaches generally went unchallenged.

These examples of testimonial deception are intended to be only illustrative. They do not exhaust the field. Nor do I wish to suggest that the practices outlined occur as frequently now as when the early studies were conducted. A later generation of police officers, trained in post-*Mapp* and post-*Miranda* techniques, may be more willing (albeit grudgingly) to adhere to their strictures.

II

Deception is not uncommon in police work. Indeed it is usually argued to be not only indispensable to effective law enforcement but also justifiable. At both the investigative and interrogatory stages of law enforcement activity, deceptive practices are part and parcel of the enforcement enterprise. Even though there is some disagreement, both ethically and legally, about the extent to which deception may be employed, few question that it has a legitimate place in the enforcement armamentarium.
But in the cases I have been outlining, we have an extension of this deception into the testimonial sphere - the making of untruthful or deceptive statements to the court. And here, from my reading of the literature, we are playing a completely different ball-game. Police officers who publicly defend the use of some deception at the investigative and interrogatory stages of law enforcement, will strongly denounce its use at the testimonial stage. Indeed, they will generally deny that it occurs. Such denials are not easy to contest. On the one hand, there is practically no support in the literature for testimonial deception: it is almost universally condemned along with other forms of perjury. And so there is little incentive to admit to its occurrence. On the other hand, the relatively closed social environment of police work makes it very difficult for researchers to obtain data regarding such deception. Police tend to be sensitive about outside scrutiny, and so it is difficult to make claims about testimonial deception without running into problems of evidence.

Yet from my own dealings with police, and in the opinion of lawyers and judges to whom I have spoken, borne out to some extent by the statistical evidence, testimonial deception on the part of investigating officers does occur and, what is more, is often felt by the prosecution team or officers concerned to be justified by the circumstances of the case. The defendant is almost certainly guilty, and it is believed that a conviction should not be undermined by a "procedural" impediment.

I find this state of affairs very unsatisfactory. It is unsatisfactory not only to defendants, but also to the police themselves, whose sense of alienation from the community can only be increased by the situation. Either testimonial deception is unjustified, and police and prosecution should be persuaded to that position, or it is sometimes justified, and needs to be socially recognized and properly circumscribed. The prevailing "code of silence" prevents the issue from being openly debated, and inhibits the institution of any remedies that may be called for.

III

My purpose in this paper, then, is to see what sort of case can be made for limited testimonial deception. I begin by attempting to flesh out the private belief that many police and prosecuting officers have that they are sometimes justified in deceiving the court.

There are several reasons why police officers may be tempted to mislead the court, though only some of these could plausibly qualify as providing the basis for a justification. It is a sad fact that police participants in the trial process are occasionally venal. For self-serving or other equally unpersuasive reasons they are prepared to vacate their formal commitments. Or maybe they wish to cover up their incompe-
tence or to avoid self-incrimination. My concern is not with these forms of dereliction. Nor am I concerned with the moral dilemma which arises when police are called to testify against other officers. The bonds of loyalty between police are intense and important, and psychological inhibitions against "ratting" are considerable.

The sorts of cases on which I want to focus are those in which plain truth telling will jeopardize the processes of justice. I have in mind situations in which there is little doubt that the defendants have committed the offenses with which they have been charged, but where the pre-arrainment investigation has been "procedurally" deficient because of violations of the defendants' Fourth or Fifth Amendment rights. Where these defects have been more or less necessitated by the demands of apprehension, but would be "exploited" by "sharp" defending lawyers or viewed unsympathetically by judges, the investigating officers might feel that the community-supported cause of law enforcement, indeed of justice, requires that testimony be presented in such a way that "procedural" deficiencies are concealed.

There are various considerations that might be taken to reinforce the case for deception in these cases. One of the great frustrations of police - or any - work is to have an undertaking in which one has invested a great deal of energy come to nought. I don't mean simply a failure to turn up an offender or to secure evidence, but the more galling frustration that arises when both offender and evidence have been secured, but conviction is subverted because of what is seen -in the circumstances-as a technicality. Frustrations of this kind can have a significant effect on job satisfaction, morale, and ultimately on the health of the law enforcement system. True, the police reward-system is based on arrests rather than convictions, and some officers are able to detach their investigative activity from its ultimate disposition in the courts - since they can take satisfaction in the fact that they have "done their part" - but many find the nullification of their work dispiriting and believe that it contributes to the disrepute from which they sometimes feel their profession unjustly suffers.

The feeling that deception is justified may be intensified by the controversiality of the rules that threaten to undermine the prosecution case. The exclusionary sanction mandated by Mapp and the rights protected by Miranda have been topics of heated discussion ever since they were introduced. Many on the side of "law and order" have seen them as criminally inspired and subversive of effective law enforcement. Police investigators generally feel sympathetic to such views, and, partly for that reason, may believe that circumspect dissembling with respect to their compliance would be supported by a substantial body of public opinion.

The situation faced by police is not one in which some abstract justice is being pursued, but one in which a just result is sought in circumstances where there is every reason to believe that defendants are guilty of the offenses charged. The targets of their deception are often
themselves deceivers and, it is felt, deserve no better from others. To use deception against them is only to play according to rules they themselves have set. In seeking to deceive the community and its officers, they have forfeited the right to truthfulness. Taking into account, then, the "victims" of their deception, police may not feel too much compunction if their testimony is "tidied up" to meet constitutional requirements. Remember, we are not talking about the fabrication of evidence against innocent people, but those whom the police have every reason to believe to be guilty, and, moreover, usually those with a history of law-breaking.12

Not that it is solely a matter of reciprocation, of deceiving deceivers. There are in addition important social benefits to be gained. Not only do recalcitrant criminals get what they deserve, but their conviction and punishment is socially beneficial. The securing of an "ordered liberty" requires that those who breach the community's rules with impunity not benefit from it. Their conviction may function to deter and prevent other violations of law.

We may buttress this appeal to the social advantages of testimonial deception by looking more generally at the limited character of the moral injunction against lying. Put in its strongest terms, the fundamental problem with deceiving others is that in doing so we manipulate them. We seek to bend their beliefs and behavior to ends of our own devising by withholding from them information that would enable them to come to rational conclusions and to make rational decisions of their own. In deceiving them, we deny them the dignity of rational choosers, people not only capable of assessing evidence, but also entitled to assess it for themselves. Deception, then, is no light matter. Nevertheless, very few of us would go so far as to eschew all deception. It is not absolutely impermissible. There are other social values besides that of truthtelling, and sometimes those values may weigh so heavily, and the untoward consequences of a particular instance of deception may weigh so lightly, that some deception will be considered justifiable. Indeed, we have even accommodated some of these occasions into our language via the notion of a "white lie." And given that we already recognize circumstances in which the moral costs of deception may be traded for interpersonal and social benefits, why should we not also include within the ambit of legitimate exceptions occasional recourse to testimonial deception?

Let this suffice for the beginnings of a case that attempts to give some moral standing to the limited use of testimonial deception. I present it as an effort to articulate what I perceive as a submerged and unwillingly confessed sense that it is sometimes right to "tailor" evidence so that it conforms to legal requirements more adequately.

But before I assess its merits, I want to qualify it in one respect. For convenience I have focused almost exclusively on the individual police officer and the justificatory reasons he or she might have for engaging in testimonial deception. But it would be wrong to see this pheno-
menon individualistically. Police officers easily reflect the ethos of their work situation, and the likelihood of their engaging in testimonial deception will significantly increase if there is peer group or agency support for or acquiescence in limited testimonial deception. In addition, some “aggressive” prosecutor’s offices exert their own pressure on police to present their testimony in a constitutionally rigorous form, even if this means its “dressing up.”

IV

I now want to indicate some difficulties with which an argument of this kind, for all its cumulative appeal, must come to terms. First of all, there is the underlying temptation to consider testimonial deception a relatively unproblematic extension of deception that is permitted and permissible at earlier stages of the law enforcement process. Indeed, what is considered artificial and problematic is the attempt to rule out deception at the later stage. As Jerome Skolnick expresses the point, it is thought odd that the law permits the policeman to lie at the investigative stage, when he is not entirely convinced that the suspect is a criminal, but forbids lying about procedures at the testimonial stage, when the policeman is certain of the accused’s guilt.13

However, whatever the psychological incentive to do so, there are moral obstacles to arguing from the limited permissibility of deception at the investigative and interrogatory stages of the law enforcement process to its equally or slightly more limited permissibility at the testimonial stage.

Skolnick registers the difficulty by speaking of each stage of the “detecting process” being “related to a set of increasingly stringent normative constraints.”14 His point, I take it, is roughly this. During the initial stage of investigation suspects are subject to few constraints. There is little external pressure on guilty suspects to confess or to betray their guilt. Indeed, it is most likely that they will be engaged in a contest of stealth so as to avoid detection. The situation can be likened to a “state of nature” in which something like the “law of the jungle” operates, and cunning is paramount. Here, deception, insofar as it is likely to trap the unwary criminal rather than to entrap the unwary innocent,15 has much to be said for it.16 At the interrogatory stage, however, particularly where the suspect is in custody, the situation has been weighted in favor of the investigating officers. To ensure that the suspect’s rights are not breached and that any statements made are voluntarily tendered, deception must be used much more cautiously. The constraints are even greater at the testimonial stage, where the government can draw on all its resources. Here, the adversarial system serves to preserve the suspect’s rights by providing for the accusing and defending parties to present before an impartial fact-
finder the strongest possible cases for their contentions, constrained by systemic rules designed to ensure equality of opportunity between the contenders and optimal conditions for fact-finding. Among those rules is the requirement that those who testify "tell the truth, the whole truth, and nothing but the truth." The police officer who deceives at this stage of proceedings deceives not the suspect but the court.

There is, therefore, no simple inference to be drawn from what is permissible at one stage to what is permissible at another. Furthermore, at the testimonial stage the public commitment to equality and justice seems to demand something approaching an absolute commitment to truthfulness.

Lest it be thought that those very purposes of justice would be better served by testimonial deception, at least in the sorts of cases that we're discussing, we should add two further considerations. First, the requirement of testimonial truthfulness is to be assessed, not just on a case by case basis, but also as an ongoing practice. Even though, in individual cases, just outcomes may be secured only if search and seizure or Miranda requirements are compromised, and the courts are deceived about their fulfillment, the practice of permitting deception where conviction of an alleged offender seems to require it would almost certainly be counterproductive. It would undermine our confidence in the adversarial system's ability to optimize fair outcomes. Justice in the short-term would be achieved at the expense of minimal long-term injustice. The prohibition on perjury may allow some offenders to slip through the net, but the net will be much less likely to hold the innocent. This connects with the second point. The so-called "procedural" rules or "technicalities" which threaten the police case, and are used to exclude damaging evidence or testimony, are meant to protect substantive moral requirements. They pick out protocols designed to safeguard the moral minima governing the interpersonal dealings of citizens in a free society. It is out of concern for the human rights of suspects - the rights of those who are only suspected of committing an offense - that the exclusionary rules have been introduced. So, though justice at one level may sometimes be secured by testimonial deception in regard to the satisfaction of Fourth and Fifth Amendment requirements, this will involve its compromise at another level. Granted, the Mapp and Miranda requirements may, because of the particular circumstances involved, provide an excessive shield for criminal activity. But on the principle that reasons of public good do not justify the violation of rights, governments may have to be content with collecting less evidence, physical and oral, than their resources enable, or, if collected, with securing fewer convictions than the evidence warrants.

A recognition that police officers who engage in testimonial deception deceive the court rather than the suspect also provides a partial response to the claim that lying suspects deserve no better. Even if
that were to be so, the court - as a social instrument - deserves better. The adversarial system is a socially sanctioned means for testing allegations within a framework responsive to the rights of interested parties, and those who flout its rules set themselves above one of our society's key institutions.

But quite apart from this, it is less than obvious that liars may themselves be lied to. No doubt liars place themselves in something of an invidious moral position if they complain about others deceiving them. It will smack of rank hypocrisy for them to do so. But this is far from allowing that others are thereby justified in lying to them. Liars may deserve to have their liberties circumscribed in certain ways, but lying may not be an appropriate way. One of the strong points of the adversarial system is its recognition of the standing of accused persons - their entitlement, as responsible beings, to be tested by means that acknowledge personhood, that do not sacrifice them to abstract or social ends. Perhaps the accused has acted unworthily and warrants our retributive response. But responding by lying constitutes a repetition rather than a rectification of the wrong that prompted it. The moral defections of others provide no justification for one's own.

However, as I indicated earlier, deception need not always be wrong, and we sometimes justify lying by reference to the evils it will avoid. And so what may be seen as the evil of allowing a guilty person to go free is used to justify testimonial deception. It is not that suspects are deserving of deception by virtue of their deception, but that their deception is justified because by their deception they attempt to conceal their deservingness of punishment. Certainly we use an argument of this kind at earlier stages of the investigative process. It is tempting to use it also at the testimonial stage.

This, however, returns us to our earlier point about the capacity of the adversarial system to accommodate deception. We are, of course, assuming that the suspect is guilty, and perhaps in the cases outlined that is highly likely. But in making this assumption we are taking a somewhat privileged position. Other parties in the law enforcement process may have their own perceptions about the facts of the case, and if police may deceive when it helps to secure endorsement of what they or the prosecution perceive to be the facts of the matter, that permission can hardly be withheld from the defense. The trouble is, once permitted at this stage of proceedings, there is very little control over its use. The very nature of the activity - its secrecy - puts it beyond easy surveillance, and unlike deception used at the investigative and interrogatory stages, whose legitimacy may be tested in court, where, at the point of closure - the court - deception is permitted, it is not open to scrutiny. As I stated earlier, it is crucial that before the impartial fact-finder, the adversaries be pledged to tell the truth, the whole truth, and nothing but the truth.

However, this still leaves us with the problem of police frustration - the aggravation of seeing undoubted offenders avoid the judgment of
law. One response is simply to deny the relevance of police frustra-
tion - to say, if you like, that if police cannot do their job well enough
to secure convictions, that is no reason for cooking the books. A
more sympathetic response is to suggest that police may set their
sights too high: their task is to apprehend suspects, not to convict.
For them, it is arrests and not convictions that should count. Convic-
tion is the business of the court. Yet neither of these responses is
likely to be completely satisfying. For one thing, the public expects
more, and if the police and prosecution cannot make a case that holds
up in court, the police are seen as failing to do their homework
properly.

But there is something else as well. I have been assuming that the
adversarial system is in reasonable working order, and that when cases
come to court, the odds are fairly clearly in favor of a just outcome. I
suspect that many, including some police officers, would be cynical
about that assumption. The adversarial system, fine in conception, is
seen by them to be unsatisfactory in practice. For the major partici-
pants, justice is the name, but winning is the game. Contending law-
yers are not embarked on holding before the fact-finder the most
favorable construction of their client’s case, so that the fact-finder
may be in a position to make an impartial assessment based on all the
relevant data. Instead, they are verbal gladiators, determined to out-
flank and subdue their opposition, exploiting rather than abiding by
the rules of combat. My impression from talking to police officers is
that they have little respect for lawyers, and sometimes for judges, and
that this is often mutual. The police officer in court is in alien terri-
tory, where some are out to "get" him, and his obligations to the
court are qualified. In these circumstances, testimonial deception may
not always seem out of place. It constitutes a strategic move in a game
where the pace is fast and the stakes are high.

I do not want to claim that this presents a completely accurate pic-
ture of the adversarial system in practice. But I think it captures some-
thing that is widely believed, and that has some connection to real-
ity. And if that is the case, might we not see testimonial deception as
a rectifying strategy, an attempt to restore the adversarial system to its
role as a medium of justice? We might even liken testimonial decep-
tion to a form of civil disobedience, a protest against a system that is
failing to deliver what it promises.

But if this is what testimonial deception is all about, I think it fails
to make good its claims. If the adversarial system is flawed in practice,
those flaws are not eliminated or rectified by adding a further source
of error. True, deficiencies may sometimes be counterbalanced in the
instant, but the overall structure for fact-finding will be weakened. At
best, testimonial deception represents an ad hoc and dangerous stra-
tegy for securing just outcomes. At worst, it makes a mockery of the
system.

Further, though police officers may sometimes construe what
they're doing as a protest against a flawed system, the very secrecy of their activity distinguishes it from the standard case of civil disobedience. The protest is in no sense a public one. Indeed, publicly, police resolutely deny that they engage in testimonial deception. In arguing against testimonial deception in this way, I do not want to be seen as taking an absolutist position. A legal system may become so corrupted in its operation, or the acquittal of a dangerous felon may pose such serious social danger, that testimonial deception becomes a serious option. But such cases, at least in our own society, are few and far between, and testimonial deception is more likely to be corrupting than correcting.

It is the secrecy of testimonial deception that is at the heart of the problem. If it is the shared opinion of police officers that the adversarial system has become, if not a charade, then a somewhat unruly ballgame, and that deception is the only way to play, then this is something that they need to bring forcefully to the attention of a public that expects them to "deliver." That they can hardly do if the pressures for and incidence of testimonial deception are underplayed or denied. And if the exclusionary and Miranda rules make unrealistic demands of law enforcement officers, crippling their investigative work, then a public which has supported those rules needs to be made aware of the costs it must pay to keep them in place. It may be prepared to pay those costs. But if it is not, then it should enter into dialogue with the police about suitable modifications or alternatives. That discussion cannot take place as long as police continue to engage in testimonial deception, and then seek to deceive the public about its occurrence.18

Notes


4 Apparently some police officers have attempted to explain the discrepancy in terms of a change in the behavior of narcotics possessors:

A person in possession of narcotics who sees a policeman approaching has a dilemma that grows out of the exclusionary rule. If the officer has a warrant for his arrest, the narcotics will be discovered and usable as evidence unless he can discard them. If the officer has no warrant, the person should retain the narcotics since any search necessary to discover

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them will probably be illegal and the exclusionary rule will prevent their use in evidence. Knowing the difficulty that an uncertain prosecutor will have in resolving this dilemma, a police officer without a warrant may rush a suspect, hoping to produce a panic in which the person will visibly discard the narcotics and give the officer cause to arrest him and a legitimate ground to use this evidence.


It is true, as Oaks points out (p. 740), that the Columbia study cited above assumes that what counts for the differences is a change in police behavior rather than that of narcotics possessors, and a careful investigation should have tested the latter possibility. However, the fact that explanations like the above have to be resorted to in order to lend credence to that possibility suggest that the methodological deficiency is not fatal. Barlow's study is more circumspect, though her figures are comparable to those in the Columbia study. She considers three alternative explanations for the increase in "dropsies," but indicates that although it is impossible to rule them out, an explanation in terms of perjurious testimony is the most plausible (pp. 556-60). That accords with Oaks's assessment.


7 I realize that testimonial deception does not ipso facto constitute perjury. Testimonial deception may take the form of withholding rather than giving false information. And it is at least arguable that some non-perjurious testimonial deception is morally less problematic than perjury. But since I am concerned with forms of deception that are likely to be formally perjurious, I shall not usually distinguish them. We should note, too, that legal constraints on testimonial deception extend beyond perjury. A prosecutor is not permitted to withhold exculpatory information (e.g. to the effect that a witness's testimony is perjured), even when it has not been specifically requested. "Exculpatory information" comprises any evidence that would influence the outcome of a trial in favor of the defendant, by way of either guilt or punishment. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) and U.S. v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976).

8 Dallin Oaks reports (pp. 741-42) on some of the situations in which police officers "fabricate" testimony to avoid exclusionary rule problems. The practice is also discussed by Irving Younger in "The Perjury Routine," The Nation, (May 8, 1967), 596-97. He later reiterated his concern judicially in People v. McMurtry, 64 Misc. 2d 63, 314 N.Y.S. 2d 194 (New York City Criminal Court, 1970). The latter case, almost ten years after Mapp, also makes it clear why defendants have no easy redress. When their word is set against the word of the police officer, the officer's word almost always prevails. Defendants are usually "tainted" complainants. See also People v. Bemis, 28 NY 2d 361 (1971).


10 Though whether they have "done their part," in circumstances where an arrest is
made that cannot be proceeded with because of constitutional violations, may be questioned. See Howard Cohen, "Overstepping Police Authority," Criminal Justice Ethics, VI, 2 (Summer/Fall, 1987), 52-60.


12 See Oaks, 742.

13 Jerome H. Skolnick, "Deception by Police," Criminal Justice Ethics, 1, 2 (Summer/Fall, 1982), 43.

14 Ibid., p. 41.


16 Not that the end will justify the use of any deceptive means likely to trap the unwary (or even wary) criminal. Howard Cohen has usefully suggested the following constraints:

(a) the means must plausibly be able to achieve the end; (b) no better means are available to achieve the end; and (c) the means must not ultimately subvert the end.


18 This paper was originally delivered as a public lecture at the State University of New York, Brockport, on February 5, 1987. It has been revised to take account of discussion following that lecture. In addition, I received helpful comments on an earlier draft from William Heffernan, Tziporah Kasachkoff, and Patrick V. Murphy.