A DOUBLE STANDARD IN THE LAW OF DECEPTION: WHEN LIES TO THE GOVERNMENT ARE PENALIZED AND LIES BY THE GOVERNMENT ARE PROTECTED

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INTRODUCTION

The law of deception "giv[es] legal force to everyday norms of interpretation and truth-telling."[1] Societal consensus establishes that lying is wrong and that, when the lies of an individual cause a specific harm, that individual should pay for the harm. Conversely, when a lie does not result in harm, although many may consider the lie immoral, society does not require punishment or liability. The American legal system reflects this idea in "the torts of negligent misrepresentation, defamation, and slander; . . . civil and criminal securities fraud laws; and laws prohibiting false advertising."[2] These areas of the law differ in how they deal with deceptive acts. A common element in each of these legal regimes, however, is the requirement that some actual harm resulted from the deceptive act: a harm requirement.[3] The harm requirement ensures that individuals are only liable for their deceit when they cause an actual injury and also provides a remedy for those harmed by such deceit, provided they can show proof of actual harm. The law also regulates deception in the context of citizen interaction with law enforcement and other government officials.[4] In that context, however, the element of actual harm—despite being nearly ubiquitous throughout the law of deception—disappears.[5]

This area of the law deals with the actions of both citizens who attempt to deceive law enforcement officials and officials who attempt to deceive citizens. In the first category—the actions of ordinary citizens—deceptive acts or false statements to government officials are criminalized under 18 U.S.C. § 1001.[6] This

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1. Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 GEO. L.J. 449, 453 (2012).
2. *Id.* at 454.
3. *See, e.g.*, Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 342 (2005) (stating that economic loss and loss causation are two of the elements of securities fraud); Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997) (listing the final element of a Lanham Act section 43(a) false advertising claim as injury or likely injury to the plaintiff); Tolliver v. Visiting Nurse Ass'n of Midlands, 771 N.W.2d 908, 914–15 (Neb. 2009) (holding that tort of fraudulent misrepresentation is generally an economic tort asserted to recover financial losses).
4. *See infra* Parts II, III.
5. *See infra* Parts II, III.
6. 18 U.S.C. § 1001 (2012).

law aims to prevent the loss of information during law enforcement investigations and to deter individuals who would lie to impede such investigations.[7] Law enforcement officials, however, often expect that suspects may lie to them in criminal investigations, which brings into question whether an actual harm exists where law enforcement officials know they are being lied to, particularly when the lie in question is a simple denial of guilt.[8] The broad application of § 1001 leads to some instances in which no harm occurs, yet the deceiver is still punished—a stark contrast to other areas of the law of deceit that prevent liability without actual harm. The law protects the second category—deceit by government officials (e.g., police officers and prosecutors)—such that officials are not held liable for the lies they tell to suspects or defendants, regardless of the real harm such lies may cause.[9] While not all lies by government officials result in harm, when they do, it is nearly impossible to hold those officials responsible for such deceit. This approach differs drastically from how the law treats lies by citizens both to the government and to each other.

The result is a double standard in the law of deception that governs interactions between private citizens and law enforcement officials. In most areas of the law that govern deceptive acts, a deceived individual must show an actual harm arising from the deceptive act to recover. The opposite is true for deception between citizens and law enforcement. When citizens lie to the police, they face punishment regardless of whether harm resulted. Yet when police lie to citizens, they remain free of liability even when actual harm results. Injured citizens are thus robbed of a remedy that most areas of the law would provide simply because the government, rather than another citizen, deceived them. Individuals who lie or deceive law enforcement but cause no injury, however, are penalized for lies that the law otherwise would not punish. To remedy this double standard, the law that governs citizen interactions with law enforcement should adopt some form of the harm requirement present throughout most of the law of deceit. A harm requirement would allow harmed citizens to hold those who deceive them accountable and would prevent the unfair punishment of citizens whose lies cause no harm.

The law that governs deceit between citizens and law enforcement centers on a strange double standard, and the harm requirement common in the law of deception in other contexts offers a ready solution. Part I of this Note will provide an overview of three areas of the law that deal with deception: the common law of deceit, the law of false advertising, and securities law; and will highlight the harm requirements prominent in each. Part II of the Note will explore lies made to law enforcement officials, initially outlining the legal standard applied to such lies and subsequently arguing that in some circumstances no actual harm results from such

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7. *See* Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CALIF. L. REV. 1515, 1522–23 (2009).

8. *See id.* at 1568.

9. *See infra* Part III.

lies. Part III will discuss lies and deceit perpetrated by law enforcement officials. It will first examine the legal standards that apply to lies police use in undercover work, to conduct searches and seizures, and to facilitate custodial interrogations, as well as the legal and ethical standards that apply to deceptive conduct by prosecutors, particularly in the plea-bargaining process. Part III will further review real harms that occur as a result of lies by both police and prosecutors. The concluding remarks will discuss the practical realities that explain why this double standard exists and argue that the standards applied to deception of and by government officials should be modified to incorporate some version of the harm requirement present in the other areas of the law of deception. The harm requirement presents a needed solution to the problematic double standard in the law of deception that governs deceit between citizens and law enforcement.

I. LAW OF DECEPTION AND THE HARM REQUIREMENT

Generally, for a private individual or entity to be held liable for deception of another, some actual harm must have resulted from the deceit.[10] This Part reviews three major areas in which the law deals with deception—the common law, advertising law, and securities law—and discusses the harm requirements prominent in each as a contrast to the absence of such a requirement in the law governing interactions between citizens and law enforcement.

A. Common Law

The common law addresses deceit in a variety of ways but consistently includes a harm requirement before the perpetrator may be held liable. The examples discussed here include the torts of fraudulent misrepresentation, defamation, and injurious falsehoods, and they reflect how the common law typically treats deception. The Second Restatement of Torts describes the tort of fraudulent misrepresentation, often simply referred to as the tort of deceit, as: "One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or refrain from action in reliance upon it, is subject to liability to the other in deceit *for pecuniary loss caused to him* by justifiable reliance upon the misrepresentation."[11]

This definition is broken down into five basic elements: (1) there is a representation made by the speaker; (2) the representation is false; (3) there is scienter, or intention to deceive on the part of the speaker; (4) there is reliance by the hearer on the misrepresentation; and (5) there are damages.[12] For the purposes of this Note,

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10. *See supra* note 3.

11. RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1977) (emphasis added).

12. *See* Meese v. Miller, 436 N.Y.S.2d 496, 499 (App. Div. 1981). States differ in the way they state these elements as well as how the elements are broken down. *Compare* Int'l Totalizing Sys., Inc. v. PepsiCo, Inc., 560 N.E.2d 749, 753 (Mass. App. Ct. 1990) (holding that "plaintiff must prove 'that the defendant [or its agent] made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act

the final element is the critical component. To bring an action for fraudulent misrepresentation, the person deceived must suffer some actual harm.[13]

The Supreme Court in *United States v. Alvarez* emphasized the importance of the specific harm requirement in instances of fraud.[14] The Court held that the Stolen Valor Act, which prohibited lying about receiving certain military honors, was unconstitutional as a content-based restriction under the First Amendment.[15] However, Justice Breyer in his concurrence distinguished the unconstitutional Stolen Valor Act from areas of the common law that "make the utterance of certain kinds of false statements unlawful."[16] These areas of the common law, Breyer emphasized, are limited in scope because they contain specified harm requirements, something missing from the Stolen Valor Act.[17] Breyer noted limitations found in common law, such as "requiring proof of specific harm to identifiable victims; . . . specifying that the lies be made in contexts in which a tangible harm to others is especially likely to occur; . . . [and] limiting the prohibited lies to those that are particularly likely to produce harm."[18] The remarks of the Supreme Court Justices underscore the significance of the harm requirement as a limitation on laws imposing liability for deceptive statements or acts, a limitation missing from the law of deception dealing with lies by and to government officials.

The torts of defamation and injurious falsehoods contain harm requirements as well. However, these torts restrict liability to instances where plaintiffs show specific types of harm. Liability for defamation requires: (1) a false and defamatory statement concerning another; (2) unprivileged publication to a third party; (3) fault on the part of the publisher (amounting to at least negligence); and (4) either actionability irrespective of special harm or the existence of special

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thereon, and that the plaintiff relied upon the representation as true and acted upon it to [its] damage'") (citations omitted), *with* M. B. Kahn Constr. Co. v. South Carolina Nat'l Bank, 271 S.E.2d 414, 415 (S.C. 1980) (articulating the elements as "(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury"), *and* Town & Country Chrysler Plymouth v. Porter, 464 P.2d 815, 817 (Ariz. Ct. App. 1970) (articulating the elements as "(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury").

13. Often this harm is a pecuniary loss, but the Restatement of Torts also provides a cause of action for fraudulent misrepresentations that result in "physical harm to the person or to the land or chattel of another." RESTATEMENT (SECOND) OF TORTS § 557A (AM. LAW INST. 1977). Section 525 only addresses pecuniary loss arising from a fraudulent misrepresentation. Physical harm and economic loss deriving from such physical harm as a result of a fraudulent misrepresentation are covered by section 557A of the Restatement. *Id.* §§ 525 cmt. h, 557A.

14. United States v. Alvarez, 567 U.S. 709, 725–26 (2012).

15. *Id.* at 730.

16. *Id.* at 734 (Breyer, J., concurring).

17. *Id.*

18. *Id.*

harm—defined as pecuniary loss—caused by the publication.[19] Liability may exist irrespective of special harm in cases concerning the imputation of a criminal offense, a loathsome disease, a matter incompatible with the individual's business or profession, or serious sexual misconduct.[20] In these circumstances, the law assumes damage to reputation based on the nature of the allegations, so the plaintiff need not prove special harm.[21] When the harm that results from the defamatory statement does not fall into one of these categories, the defamed person must show that the defamatory statement caused special harm,[22] defined as "the loss of something having economic or pecuniary value."[23]

An action for publication of injurious falsehoods is similar to an action for defamation, but the plaintiff bears a higher burden of proof on certain elements. Publication of an injurious falsehood occurs when a publisher (1) publishes a false statement; (2) knows the publication "is false or acts in reckless disregard of its truth or falsity;"[24] (3) intends to harm the pecuniary interests of another or knows or should know that such harm will result; and (4) pecuniary loss results.[25] Unlike certain defamation actions where damages are presumed because of the nature of the falsehood, the publisher of an injurious falsehood is only liable for the proved pecuniary losses that result from the publication.[26] This harm often arises through the action of third parties who act in reliance upon the statement.[27] Each of these torts—fraudulent misrepresentation, defamation, and publication of injurious falsehoods—contain requirements that a plaintiff suffers harm before he or she can recover.[28] Although these are not the only torts to deal with deception, they share a rule common among most law of deception: without harm, there is no recovery and with actual harm, there is the potential for recovery.[29] This common rule exists for both advertising law and securities law, but it is absent where law enforcement officials are concerned.

B. Advertising Law

The law of advertising may not, on its face, appear to deal with deception, but the laws that regulate advertising deal primarily with false advertisements, or

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19. RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977). When the falsehoods are written and published to others, these elements constitute the tort of libel, and when spoken they constitute the tort of slander. Comment b to section 575 defines special harm as pecuniary or economic loss. *Id.* § 575 cmt. b.

20. *Id.* §§ 571–74.

21. *Id.* § 570.

22. *Id.* § 575.

23. *Id.* § 575 cmt. b.

24. *Id.* § 623A(b).

25. RESTATEMENT (SECOND) OF TORTS § 623A (AM. LAW INST. 1977).

26. *Id.*

27. *Id.* § 623A cmt. b.

28. *See id.* §§ 525, 558, 623A.

29. *See generally* Klass, *supra* note 1 (providing a general discussion of the law of deception and the harm requirement).

advertisements that deceive the consuming public. The two main statutory provisions that regulate false advertising are section 5 of the Federal Trade Commission Act (FTCA)[30] and section 43(a) of the Lanham Act.[31] The Federal Trade Commission (FTC) uses the FTCA to bring enforcement actions against false advertisers.[32] Section 5 of the FTCA prohibits the use or dissemination of "unfair or deceptive acts or practices in or affecting commerce."[33] The statute directs the FTC to prevent people and companies from using such "unfair or deceptive acts or practices"[34] and to define what constitutes an "unfair or deceptive act or practice."[35] The FTC has defined "unfair or deceptive acts or practices" as: (1) "a representation, omission or practice" (2) that is likely to mislead consumers acting reasonably in the circumstances and (3) is material.[36] While the FTC has the authority to define what constitutes an "unfair or deceptive act or practice," the FTCA mandates that the FTC does not have the authority to declare an act or practice unlawful unless:

> [T]he act or practice *causes or is likely to cause substantial injury to consumers* not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.[37]

This section of the FTCA, which explicitly states that an act or practice must either cause or be likely to cause "substantial injury to consumers"[38] means that the FTC must find that a practice causes or is likely to cause harm to consumers to be considered an "unfair or deceptive act or practice." The FTC has complied with this mandate in its definition of materiality, the third element of what constitutes an "unfair or deceptive act or practice." In a policy statement synthesizing how the FTC enforces its deception mandate, the FTC defines "material" as an act or practice that "is likely to affect the consumer's conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely because consumers are likely to have chosen differently but for the deception."[39] Thus, the FTC, in compliance with the FTCA, has limited "unfair or deceptive acts or practices" for which persons or companies may incur liability to those that result in actual injury or harm to consumers.

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30. Federal Trade Commission Act § 5, 15 U.S.C. § 45 (2012).

31. Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2012).

32. *See, e.g.*, Kraft, Inc. v. FTC, 970 F.2d 311, 313 (7th Cir. 1992) (one of many enforcement actions brought by the FTC under section 5 of the FTCA).

33. 15 U.S.C. § 45(a)(1).

34. *Id.* § 45(a)(2).

35. *Id.* § 57a(a)(1)(B).

36. FED. TRADE COMM'N, POLICY STATEMENT ON DECEPTION (1983) (appended to *In re* Cliffdale Assocs., Inc., 103 F.T.C. 110 app. at 174 (1984)) [hereinafter FTC POLICY STATEMENT ON DECEPTION].

37. 15 U.S.C. § 45(n) (emphasis added).

38. *Id.*

39. FTC POLICY STATEMENT ON DECEPTION, *supra* note 36 (emphasis added).

The Lanham Act, which competitors use to litigate false advertisements, contains an explicit harm requirement in the language of the statute.[40] The statute reads:

> [A]ny person who . . . uses in commerce any word, term, name, symbol, or device . . . or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact . . . shall be liable in a civil action by any person who believes that *he or she is or is likely to be damaged* by such act.[41]

The elements that a competitor must show to bring a successful false advertising claim under the Lanham Act are: (1) existence of a false or misleading statement of fact in a commercial advertisement, (2) in interstate commerce, (3) that actually deceives or has the tendency to deceive an appreciable number of consumers in the intended audience, (4) that is material, and (5) that is likely to cause injury to the plaintiff.[42] This last element is a continuation of the thread that runs through each of these areas of the law of deception—the actual harm requirement. Like the harm requirement at common law, both the FTCA and the Lanham Act require that a deceitful advertisement actually harm the individual for liability to result. This limitation serves the same purpose in advertising law as it does in common law: making remedies available for injured individuals while preventing the unfair punishment of advertisers whose deceit does not cause harm. As noted above, this limiting principle does not apply to deception in the context of law enforcement.

C. Securities Law

Securities law, like the common law and advertising law, regulates fraud and deceit in several ways.[43] The broadest regulation of deceit is Rule 10b-5,[44] promulgated under § 10(b) of the Securities Exchange Act of 1934.[45] Section 10(b) of the Act serves as a fraud catch-all provision that makes it unlawful for any person to (a) employ an artifice to defraud, (b) make any untrue statement of a material fact or omit to state a material fact, or (c) engage in any act or practice that would operate as a fraud or deceit, in connection with the purchase or sale of a

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40. 15 U.S.C. § 1125(a)(1) (2012).

41. *Id.* (emphasis added).

42. *Id.*; Clorox Co. Puerto Rico v. Procter & Gamble Commercial Co., 228 F.3d 24, 33 n.6 (1st Cir. 2000) (citing Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997)).

43. Securities law is a broad and complex area of law. There are many nuances, including variation in standards for omissions versus representations, insider trading regulation, and regulations governing omissions or misrepresentations during registration and public offerings. This Note focuses on the general standard for Rule 10b-5 fraud actions as an example of the importance of the harm element and how it works in the securities context.

44. Rule 10b-5, 17 C.F.R. § 240.10b-5 (2016).

45. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2012).

security.[46] To hold a company or individual liable for securities fraud, plaintiffs use Rule 10b-5, under which a plaintiff must show: (1) the existence of a material statement or omission, (2) that the statement was made with scienter (knowledge or intent), (3) that the statement was made in connection with the purchase or sale of a security by the plaintiff, (4) that the plaintiff relied on the statement, (5) that the plaintiff suffered economic loss, and (6) loss causation.[47]

To recover, a plaintiff in a Rule 10b-5 securities fraud action must show both loss causation and damages, the two elements related to actual harm.[48] Loss causation requires the plaintiff to show that the misrepresentation actually resulted in the plaintiff's loss—a proximate cause requirement.[49] Although this kind of causation may be easily and quickly proven in the previously discussed areas of common law and advertising law, it is more complex in the securities field. If the specific securities related misrepresentation has not caused the plaintiff's harm or loss, he or she cannot recover.[50] For example, if an extraneous factor like a bursting stock bubble or a spike in industry prices caused the plaintiff's losses, that plaintiff will not be able to show loss causation.[51] This can be burdensome for plaintiffs.[52] They often must show that a change in stock prices occurred at the time the misrepresentations were made and that an opposite change in prices occurred when the misrepresentations were remedied, such as when the company disclosed the false or misleading nature of the original representations.[53] However, this burdensome requirement ensures that a company is not held liable for an individual's losses not caused by the company's deceit.

The Supreme Court in *Blue Chip Stamps v. Manor Drug Stores* clarified the importance of the damages requirement to the ability of any plaintiff to bring an action under Rule 10b-5.[54] The Court held that, in order to have standing to bring a suit under § 10(b) and Rule 10b-5, a plaintiff must have actually purchased or sold a security at the time the alleged misrepresentations were made.[55] Otherwise, the harm would be too speculative.[56] Without this rule, anyone could allege that he was dissuaded from purchasing or selling stock, and the sole proof of his reliance and subsequent damages would be his own, potentially uncorroborated, oral testimony.[57] Furthermore, the Court noted that § 10(b) limits damages to "actual

46. *Id.*
47. *See* Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005).
48. *See id.* at 342.
49. *See* AUSA Life Ins. Co. v. Ernst & Young, 206 F.3d 202, 209 (2d Cir. 2000).
50. *See* Bastian v. Petren Res. Corp., 892 F.2d 680, 684 (7th Cir. 1990).
51. *Id.*
52. *See In re* Merrill Lynch & Co. Research Reports Sec. Litig., 289 F. Supp. 2d 416, 419 (S.D.N.Y. 2003).
53. *See Dura Pharm., Inc.*, 544 U.S. at 342–43.
54. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749 (1975).
55. *Id.*
56. *Id.* at 755.
57. *Id.* at 746.

damages to that person on account of the act complained of."[58] The Court in *Dura Pharmaceuticals v. Broudo* further emphasized that "it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection. . . ."[59]

Thus, like the harm requirement in both advertising law and the common law of deceit, individuals must show actual harm resulted from deceit in the securities context in order to recover.[60] Each of these three fields of law deals with the regulation of deceit, ensuring that those who suffer actual harm can hold the responsible party liable while protecting deceivers from having to pay what would essentially be punitive damages where no actual harm occurs. While this discussion does not cover every facet of the law of deception, it illustrates the importance that the law generally places on the harm requirement when one party acts to deceive another, whether in the form of direct lies, omissions, or implied misrepresentations. The harm element in each of these areas of law acts as a limiting factor, ensuring that both recovery and liability are tied to the existence of actual injury. This is missing from the law that regulates lies to and by law enforcement.

II. LIES TO LAW ENFORCEMENT OFFICIALS

In the areas of law previously discussed—common law of deceit, advertising law, and securities law—a plaintiff must show the actual harm he suffered directly resulted from the defendant's fraud or deceit.[61] The effect of the harm element is twofold (1) ensuring that liars and deceivers are only held legally responsible when their actions result in actual harm and (2) providing individuals who suffer injuries as a result of deceitful conduct a potential avenue for remedy. This harm requirement and its limiting effect are conspicuously missing in the context of deceit in private citizens' encounters with law enforcement. This Part will examine the legal standard that applies when individuals lie to law enforcement officers and will explore whether any harm results from such deceit.

A. Legal Standard

Lying to a law enforcement official in the course of a federal investigation in order to minimize the extent of one's misconduct—otherwise known as "defensive deception"[62]—is punishable by a fine and imprisonment of up to five years.[63] Section 1001 provides that:

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58. *Id.* at 734; 15 U.S.C. § 78bb(a)(1) (2012).

59. Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005).

60. *Id.* at 342.

61. *See supra* Part I.

62. *See* Griffin, *supra* note 7, at 1516.

63. 18 U.S.C. § 1001(a) (2012) (stating imprisonment may be up to eight years if the offense involves terrorism).

> [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title. . . .[64]

Historically, the statute only penalized falsehoods that served to cheat the government out of property or money.[65] The statute has since been split into a false claims statute[66] and a false statement statute, § 1001 being the false statement statute.[67] Section 1001 has been applied to numerous federal agencies,[68] so that the potential for a violation exists in interactions with government officials beyond traditional law enforcement agents like police officers. Furthermore, § 1001 punishes an expansive amount of conduct including "not only conduct that impedes an investigation but also evasions or understatements that merely fail to expedite it."[69]

In *Brogan v. United States*, the Court expanded the scope of § 1001 to impose liability for an "exculpatory no"—a simple denial of guilt—which was not previously a punishable offense.[70] The exculpatory no doctrine previously allowed a defendant to escape § 1001 liability for a basic denial of guilt, as well as in circumstances where (1) the speaker was not under oath, (2) the statement did not impair the basic functions of law enforcement, and (3) the truthful answer would have incriminated the speaker.[71] The doctrine aimed to prevent the application of the statute to cases where false statements did not pervert governmental func-

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64. *Id.*

65. *See* Jeffrey L. God, Casenote, *Demise of the Little White Lie Defense - The Supreme Court Rejects the "Exculpatory No" Doctrine Under 18 U.S.C. § 1001:* Brogan v. United States*, 118 S. Ct. 805 (1998)*, 67 U. CIN. L. REV. 859, 860 (1999).

66. 18 U.S.C. § 287 (2012).

67. 31 U.S.C. § 3729 (2012); *see also* God, *supra* note 65, at 861.

68. *See, e.g.*, United States v. Rodgers, 466 U.S. 475, 479 (1984) (Federal Bureau of Investigation and United States Secret Service); United States v. Tracy, 108 F.3d 473, 476–77 (2d Cir. 1997) (United States Attorney's Office); United States v. Bilzerian, 926 F.2d 1285, 1300–01 (2d Cir. 1991) (Securities and Exchange Commission); United States v. Estus, 544 F.2d 934, 935–36 (8th Cir. 1976) (United States Postal Service); Preuit v. United States, 382 F.2d 277, 277–78 (9th Cir. 1967) (Federal Housing Administration); United States v. Haim, 218 F. Supp. 922, 929 (S.D.N.Y. 1963) (Bureau of Customs).

69. Griffin, *supra* note 7, at 1517.

70. Brogan v. United States, 522 U.S. 398, 408 (1998).

71. *Id.* at 401 (stating that an "exculpatory no" is usually a simple denial of guilt); *see also* United States v. Medina de Perez, 799 F.2d 540, 544 n.5 (9th Cir. 1986). The Ninth Circuit's test, which is generally representative of the tests used by other circuits applying the exculpatory no doctrine, is: (1) the false statement must be unrelated to a privilege or claim against the government; (2) the declarant must be responding to inquiries initiated by a federal agency or department; (3) the false statement must not impair the basic functions entrusted by law to the government entity; (4) the government's inquiries must not constitute a routine exercise of administrative responsibility; and (5) a truthful answer would have incriminated the declarant. *Id.* at 544 & n.5.

tions.[72] In *Brogan*, the Court recognized that preventing the perversion of governmental functions may have been Congress' rationale for enacting § 1001, but it held that the plain language of the statute forbids all deceptive practices, including an "exculpatory no."[73]

According to *Brogan*, even an "exculpatory no" in the form of a simple denial of guilt is an actionable false statement under the statute.[74] In her concurrence in *Brogan*, Justice Ginsburg noted that prosecution for an "exculpatory no" under § 1001 is far removed from the congressional intent behind the statute.[75] She characterized the statute's goals as prohibiting lies to government officials that are designed to "elicit a benefit from the Government or to hinder Government operations."[76] The intent behind § 1001 appears to follow the harm principle present in other areas of the law of deception: when important government interests are harmed by an individual's deceit, there is potential liability for that harm. Where lies to the government truly pervert important governmental interests and functions, such as law enforcement and maintaining the integrity of the criminal justice system, Congress's criminalization of such lies comports with a form of the harm requirement. In this way, § 1001 resembles obstruction of justice or perjury statutes, which serve similar ends and criminalize deception of the government. An important distinction, however, is the overbreadth of § 1001, particularly post-*Brogan*. Both perjury and obstruction of justice charges are limited in their application and are crimes that cause institutional harms to the criminal justice system when perpetrated.[77] Section 1001 however, "makes almost any falsehood actionable, without regard to the stage of the investigation or the relevance of the statement to underlying wrongdoing . . . [and] is sufficiently broad to reach nondisclosure . . . [and] denials that mislead no one."[78]

The way prosecutors apply § 1001 has exacerbated the overbreadth problem.[79] Normally, false statement charges under § 1001 supplement the charges for underlying crimes.[80] A recent trend, however, has seen an uptick in cases in which no stand-alone offense can be proven, so a false statement to the government is the only crime charged.[81] In these cases, "it is the interaction with the government

72. *See* God, *supra* note 65, at 864–65.

73. *Brogan*, 522 U.S. at 403–04. The Court's decision relied heavily on the plain text of the statute and noted that "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so." *Id.* at 408.

74. *Id.* at 408.

75. *Id.* at 408–09 (Ginsburg, J., concurring).

76. *Id.*

77. *See* Griffin, *supra* note 7, at 1523–24.

78. *Id.* at 1522–23; *see also* Steven R. Morrison, *When is Lying Illegal? When Should It Be? A Critical Analysis of the Federal False Statements Act*, 43 J. MARSHALL L. REV. 111 (2009) (providing further critique of the overbreadth and application of § 1001).

79. *See* Griffin, *supra* note 7, at 1522–23.

80. *Id.* at 1516.

81. *Id.*

itself rather than conduct with freestanding illegality that forms the core violation."[82] As Justice Ginsburg points out, even the Solicitor General in oral arguments for *Brogan* observed that § 1001 had the potential to be used to turn "completely innocent conduct into a felony."[83] Section 1001 and its broad interpretation have made deception and false statements that do not necessarily cause harm actionable in their own right simply because they are made by a citizen in the course of an encounter with law enforcement.

B. Where is the Harm?

When § 1001 is used to penalize an "exculpatory no" or a lie that is disbelieved by law enforcement, the statute does not prevent the loss of government information or the hindrance of an investigation but provides a tool for prosecutors to penalize "otherwise unreachable defendants or forc[e] cooperation with an inquiry."[84] Lies to law enforcement do not necessarily result in lost information or hindered investigations. Given the frequency of commonplace deception and lies in everyday interactions between individuals,[85] lies to law enforcement are not unique and should be anticipated.[86] Law enforcement officials understand that a witness will answer questions in a manner that protects herself and minimizes the possibility of criminal liability.[87] The harm Congress sought to prevent with § 1001 was the perversion of government functions.[88] In the criminal context, the relevant government functions include investigating criminal conduct and uncovering the truth.[89] If impeding such investigations represents the harm, the question remains: do all lies to the government covered by § 1001 result in this kind of harm? When § 1001 covers an "exculpatory no" or a lie that law enforcement does not believe, the answer is no.[90]

Courts have, however, held that regardless of whether or not law enforcement agents believe a false statement to be true, § 1001 applies.[91] The Supreme Court conceded in *Brogan* that "perhaps . . . a *disbelieved* falsehood does not pervert an investigation."[92] This allows for an instance in which a law enforcement agent knows that a civilian has lied to him or her and thus does not rely on the

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82. *Id.* at 1515.

83. Brogan v. United States, 522 U.S. 398, 411 (1998) (Ginsburg, J., concurring) (quoting Transcript of Oral Argument at 36, *Brogan* 522 U.S. 398 (No. 95–1579)).

84. Griffin, *supra* note 7, at 1518.

85. *Id.* at 1518–19.

86. *Id.* at 1519.

87. *Id.* at 1520; *see also* Ashcraft v. Tennessee, 322 U.S. 143, 160 (1944) (Jackson, J., dissenting) ("It probably is the normal instinct to deny and conceal any shameful or guilty act.").

88. *See Brogan*, 522 U.S. at 408–09 (Ginsburg, J., concurring).

89. *Id.* at 402.

90. *See* Griffin, *supra* note 7, at 1533–34.

91. *See, e.g.*, United States v. Sarihifard, 155 F.3d 301, 305 (4th Cir. 1998) (holding that a statement was material even though agents called the defendant a liar immediately after it was made).

92. *Brogan*, 522 U.S. at 402.

information, avoiding any potential harm from the lie, yet the civilian faces criminal liability under the statute.[93] This is not a mere hypothetical. Some courts have found that the false statement need not have actually influenced the investigating agency for the speaker to be criminally liable,[94] and others have held that the statement need not even have been received by the investigating agency in order for a defendant to be found guilty.[95] These cases demonstrate the application of § 1001 regardless of whether harm results from the deception.

Although the government has a strong interest in investigating crimes without impediment, broad application of § 1001 criminalizes conduct that does not impede investigations or cause any other harms.[96] Not only does this standard prevent some cases from receiving the full investigation they deserve,[97] it flies in the face of the well-settled principle found throughout the law of deception that in order for an individual to be held liable for lies or deceit, some actual harm must result. The incorporation of a harm requirement similar to the one present in other areas of the law that penalize deceit would go a long way toward remedying the overbroad application of § 1001. The limitations a harm requirement would bring to the regulation of deceit in the context of civilian interaction with law enforcement would help bring this area of law in line with the rest of the law of deception.

III. LIES BY LAW ENFORCEMENT OFFICIALS

In contrast to the liability imposed on civilians regardless of harm under § 1001, law enforcement officials are generally not liable for their own lies and deceptions, which often do result in concrete harms. The broad criminalization of citizen lies to government officials paired with the near immunity granted to lying law enforcement officials presents a troubling double standard. Part III explores the legal standards applied to deception by two types of law enforcement agents—first, the

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93. *See, e.g.*, United States v. Whitaker, 848 F.2d 914, 916 (8th Cir. 1988) (holding that false statement may be material even if agent who hears it knows it is false); United States v. Campbell, 848 F.2d 846, 852–53 (8th Cir. 1988) (holding that it is not necessary to show government relied on statement); United States v. Dick, 744 F.2d 546, 553 (7th Cir. 1984) (holding that false statement may be material under § 1001 even if agency did not rely on it); United States v. Keller, 730 F. Supp. 151, 159–60 (N.D. Ill. 1990) (holding that statement may be material even if agent who hears it already knows the truth).

94. *See, e.g.*, United States v. Gafyczk, 847 F.2d 685, 691 (11th Cir. 1988) (holding actual influence unnecessary); United States v. Kwiat, 817 F.2d 440, 445 (7th Cir. 1987) (holding liability depends on reasonably anticipated effect at the time the statement was made, not on the actual result); United States v. Lichenstein, 610 F.2d 1272, 1278 (5th Cir. 1980) (holding lack of *actual* influence was immaterial where the statement had the *capacity* to pervert the functioning of the agency), *abrogated on other grounds by* United States v. Gaudin, 515 U.S. 506, 512 (1995).

95. *See, e.g.*, United States v. Corsino, 812 F.2d 26, 31 (1st Cir. 1987) (holding statement may be material even if agency ignored or never read it), *abrogated on other grounds by* United States v. Gonsalves, 435 F.3d 53, 72 (1st Cir. 2006); United States v. McIntosh, 655 F.2d 80, 83 (5th Cir. 1981) (holding the same).

96. Griffin, *supra* note 7, at 1521.

97. *Id.* at 1524. When police officers and prosecutors know they can charge under § 1001 once a lie has been told, they may halt an investigation because they do not need to prove all of the elements of a crime in order to impose criminal liability on a defendant. *See id.*

police and second, prosecutors—highlighting the practical difficulties of imposing liability on such agents for their deceit; this Part then discusses the real harms that may befall the individuals whom those agents deceive.

A. Police Legal Standards

This Section focuses on lies told by police officers to the suspect or suspects of a crime, usually for the purpose of identifying, apprehending, and charging the perpetrator of a specifically identified crime. Deceptive practices, in the form of lies by police officers, are found in three primary contexts: undercover work, searches and seizures, and interrogations.[98] The law accommodates lies by police in each of these three areas, with the main restrictions on police conduct coming from the Constitution and subsequent court interpretations of the rights found therein. The Fourth Amendment protects "[t]he right of the people to be secure . . . against unreasonable searches and seizures" and mandates that "no Warrants shall issue, but upon probable cause."[99] The Fifth Amendment provides individuals with the right against self-incrimination, ensuring that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself," and also contains a due process clause, which guards against deprivation "of life, liberty, or property, without due process of law."[100] Finally, the Sixth Amendment ensures that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[101] While these Amendments appear to protect a broad range of rights, particularly for the criminally accused, the Supreme Court has not interpreted these rights to protect criminal suspects from police officers who lie to them.

Undercover work by police or their informants inevitably involves lying, but neither police nor their informants are generally liable for lies they tell as undercover agents. The primary means of challenging the lies police or informants tell during undercover work comes from the Fourth Amendment protection against unreasonable searches and seizures.[102] Lies told while undercover, however, have been almost uniformly found to be constitutional under the Fourth Amendment under the "third-party doctrine."[103] The Supreme Court has found that citizens assume the risk that their associates—third parties—are government agents, and any expectation of privacy or confidentiality is unreasonable and not protected by

98. Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 778 (1997).

99. U.S. CONST. amend. IV.

100. U.S. CONST. amend. V.

101. U.S. CONST. amend. VI.

102. *See* Slobogin, *supra* note 98, at 778–81.

103. *See, e.g.*, Lewis v. United States, 385 U.S. 206, 206–07 (1966) (holding that Fourth Amendment is not violated when undercover agent calls suspected drug dealer and arranges to buy marijuana at dealer's home).

the Fourth Amendment.[104] This means that, generally, lies undercover police tell suspects are permissible because everyone assumes the risk that he or she is speaking to a government agent when interacting with another person.

There are three limits on the use of undercover officers or informants: (1) the entrapment defense, (2) the Due Process Clause of the Fifth Amendment, and (3) the Sixth Amendment right to counsel.[105] These restrictions are limited in scope and rarely impact police undercover work. Courts will seldom overturn convictions based on entrapment because the claim requires proof that the individual was not predisposed to commit the crime in question.[106] Absence of predisposition is incredibly difficult to show, and often undercover operations are aimed at individuals who are predisposed to the criminal conduct.[107] The Due Process clause has been interpreted to prevent police activity that "shocks the conscience,"[108] but deception alone rarely, if ever, passes this high bar.[109] Finally, the right to counsel guaranteed by the Sixth Amendment only applies to a formally charged defendant. The Sixth Amendment protection thus rarely applies to undercover police work, which usually takes place prior to indictment.[110]

Police may also lie to conduct searches or seizures, often providing a pretextual reason for the search or seizure.[111] Courts have generally approved pretextual searches and seizures as long as actual authority to conduct the search itself exists, even if the officers provide the pretextual reason to the person searched.[112] These kinds of lies are considered "techniques of the trade,"[113] and police generally know that as long as they can provide a legal explanation, the search or seizure will be upheld.[114]

Explicit lies about the extent of an officer's authority to perform a search or seizure are unconstitutional under the Fourth Amendment.[115] Police at times

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104. *See* Hoffa v. United States, 385 U.S. 293, 303 (1966); Lopez v. United States, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting) ("The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society.").

105. *See* Slobogin, *supra* note 98, at 779–81.

106. *See id.* at 779–80.

107. *See id.*

108. *Id.* at 780 & n.22.

109. *See id.* at 780. Examples of Due Process violations that may "shock the conscience" include: obtaining evidence through physical force, the commission of a serious crime, or outrageous "overinvolvement" in a crime. *See* Hampton v. United States, 425 U.S. 484, 491–93 (1976) (Powell, J., concurring); Slobogin, *supra* note 98, at 780.

110. Slobogin, *supra* note 98, at 780–81.

111. *Id.* at 781–82.

112. *See, e.g.*, Whren v. United States, 517 U.S. 806, 813 (1996) (holding pretextual traffic stop was constitutional because the subjective mental state of the police is irrelevant to Fourth Amendment analysis); United States v. Trigg, 878 F.2d 1037, 1041 (7th Cir. 1989) (finding legality of arrest depends on whether there is authority for it).

113. Slobogin, *supra* note 98, at 783.

114. *Id.* at 785.

115. *Id.* at 784.

overstate their authority, lying, for example, about having a warrant or the content of a warrant in order to gain consent for a search or seizure.[116] Although such deception violates the Fourth Amendment, the officer does not incur liability and the defendant's recourse is limited. The court may exclude evidence gained as a result of the lie from the government's case in chief at trial, but only if the court finds the police conduct deliberate and culpable and deems exclusion capable and worth the cost of deterrence.[117] Thus, even if police use this unconstitutional tactic, they may face no real repercussions, and instances where evidence is actually excluded at trial are rare.[118]

Finally, courts generally do not find lies by police during custodial interrogations problematic.[119] In fact, the leading police interrogation manual preaches the merits of deception as an interrogation technique, suggesting that police officers show fake sympathy, reduce guilt through lies, exaggerate the crime, lie to indicate that there is already enough evidence to convict, and lie about confessions made by co-defendants.[120] While only voluntary confessions may be constitutionally admitted at trial, courts have found that deception during an interrogation is just one factor in assessing voluntariness and does not on its own render a confession involuntary.[121] *Miranda v. Arizona* established the only real protection from coercive questioning that currently stands between a suspect in custody and the police.[122]

In *Miranda*, the Court required warnings to inform suspects of the applicable constitutional rights—namely, the right to counsel and the right to remain silent—as a constitutional protection against psychologically coercive techniques.[123] The Court's reasoning suggested that police-dominated custodial interrogation can "overcome a person's will to refrain from self-incrimination,"[124] but it held that the required warnings

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116. *Id.* at 781–82.

117. Herring v. United States, 555 U.S. 135, 144 (2009) ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.").

118. *See id.* at 146–48.

119. *See, e.g.*, State v. Ulch, No. L-00-1355, 2002 WL 597397, at *4 (Ohio Ct. App. Apr. 19, 2002) (holding that appellant's due process rights were not violated where a detective lied during an interrogation while encouraging appellant to make a statement); State v. Myers, 596 S.E.2d 488, 492 (S.C. 2004) (finding defendant's confession valid in the absence of evidence that defendant's will was overborne or that the confession was not voluntary).

120. Slobogin, *supra* note 98, at 785–86. Instances where the exclusionary rule has been applied due to lies by police include: where police misled the magistrate in their application for a warrant, where the warrant was so obviously invalid that no officer could reasonable rely on it, and where the magistrate abandoned his or her neutral and detached posture. *Id.*

121. Dorothy Heyl, *The Limits of Deception: An End to the Use of Lies and Trickery in Custodial Interrogations to Elicit the "Truth"?*, 77 ALB. L. REV. 931, 943 (2014).

122. Miranda v. Arizona, 384 U.S. 436, 471 (1966); *see also* Heyl, *supra* note 121, at 937–38.

123. *Miranda*, 384 U.S. at 471.

124. *See* Heyl, *supra* note 121, at 937.

would be enough to eliminate the police-dominated atmosphere essential to what causes a person's will to be overborne.[125] As a result of the *Miranda* decision, courts considering the constitutionality of the coercive tactics police use in custodial interrogation have focused primarily on whether the officers provided *Miranda* warnings rather than whether police deception created coercion.[126]

Constitutional protections do exist for individuals when they interact with police officers, but those protections are strictly limited in scope. A number of justifications explain why the law allows police officers such broad discretion to lie and deceive suspects. For instance, this discretion enables law enforcement to more easily apprehend criminals, protect innocent victims, and address unique circumstances, such as hostage situations.[127] Society cannot, however, guarantee that police officers will always lie for approved purposes. Additionally, the harms that may befall citizens to whom the police lie, as discussed in Part IV.B, are particularly serious. The lack of accountability for police lies that result in harm is troubling, particularly in contrast to the remedies available for harm that results from the lies of other members of society. In most other contexts, when a person is deceived and suffers an actual harm as a result, the law does more to provide the harmed person a means to hold the deceiver liable than it does to protect the deceiver.

B. Harms to Suspects

Numerous harms may arise from the deceptive acts of police officers in the course of undercover work, searches and seizures, and custodial investigations, but two are related and particularly significant: false confessions and wrongful convictions. Many of the harms that arise from police officers' lies are self-evident upon reflection: a suspect may disclose information or evidence that leads to his or her arrest and eventual prosecution to an undercover officer, or one may consent to a search or seizure on a pretextual basis. A suspect in custody may waive his or her constitutional right against self-incrimination while in a police-dominated interrogation and be subsequently "compel[led] . . . to speak where he would not otherwise do so freely."[128] When an innocent individual is deceived, the harm may not be apparent from the outcome of the interaction, whereas when police lies induce an individual hiding criminal activity to divulge that information, the harm seems

125. *Miranda*, 384 U.S. at 467.

126. *See* Heyl, *supra* note 121, at 937–38; *see also* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 116–17 (1997) (noting that the Due Process *May 16, 2013, at A23)Process Cmakerto unilaterally make these decisions (minimal) e,ion of Constitution similar to ICCPR; can*Clause still provides little to no protection against coercive interrogation techniques).

127. *See* Slobogin, *supra* note 98, at 775–76.

128. *Miranda*, 384 U.S. at 467.

more fully realized, if unsympathetic. The harm that befalls the suspect hiding criminal activity does not induce much sympathy in society because the goal of the criminal justice system is to catch and prosecute criminals. Innocent individuals, however, suffer real injuries as a result of police lies, such as having their privacy and other rights violated. One of the most problematic harms affects exclusively innocent people: false confessions.

False confessions, and wrongful convictions based on those false confessions, present a real problem that "occur[s] with alarming frequency."[129] In New York State alone, "scores of innocent people have confessed during custodial interrogations . . . to committing brutal crimes,"[130] and as many as fifty trial convictions involving just one detective had been reopened because that detective's "overbearing and allegedly illegal tactics may have sent innocent men to prison."[131] The psychological interrogation techniques implemented by police, which often include lies and deception, are so effective that— if not used properly— they can result in confessions from innocent people.[132] One of the leading causes of wrongful convictions is false confessions.[133]

The primary injury that results from a false confession and wrongful conviction is apparent: an individual suffers harm when he or she pays a fine or serves jail time for a crime he or she did not commit. In fact, at the federal level, § 2513 of Title 28 of the United States Code provides that an individual who was unjustly (wrongfully) convicted and incarcerated may collect up to $50,000 in damages for each year of incarceration, and individuals who were incarcerated and unjustly sentenced to death may collect up to $100,000 for each year they were incarcerated.[134] Many states have similar compensation statutes.[135] Forcing an individual to pay for a crime that he or she did not commit constitutes a miscarriage of justice. When this occurs as a result of police deception, the lying officer should be held responsible, just as the law holds typical deceivers liable for the harm they cause.

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129. Steve A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 920–21 (2004).

130. Heyl, *supra* note 121, at 931.

131. *Id.*; *see also* Frances Robles, *A Conflict is Seen in a Review of a Detective's Conduct*, N.Y. TIMES, May 16, 2013, at A23.

132. *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 985 (1997).

133. *See* Craig J. Trocino, *You Can't Handle the Truth: A Primer of False Confessions*, 6 U. MIAMI RACE & SOC. JUST. L. REV. 85, 85 (2016). As of January 29, 2016 there had been 325 DNA exonerations by the Innocence Project since 1989, 27% of which were caused by false confessions. *Id*. at 85 n.1. For examples in New York alone, *see* Heyl, *supra* note 121, at 931–32.

134. 28 U.S.C. § 2513(e) (2012).

135. *See* Stephanie Slifer, *How the Wrongfully Convicted are Compensated for Years Lost*, CBS NEWS (Mar. 27, 2014), http://www.cbsnews.com/news/how-the-wrongfully-convicted-are-compensated/. In New York for example, Marty Tankleff spent seventeen years in prison before being exonerated, and in January 2014 he won a settlement of nearly $3.4 million in his wrongful conviction suit against the state of New York. *Id.*

There are a number of secondary harms that arise from false confessions and wrongful convictions. Coerced false confessions harm the crime victim and the public at large because the real perpetrator remains free to commit more crimes.[136] Moreover, confessions, once obtained, can halt investigations in their tracks, which prevents police from pursuing other avenues of investigation.[137] When police extracted the false confession of five young boys in the "Central Park Jogger" rape case, the true perpetrator, Matias Reyes, was free to rape a pregnant woman in her apartment, where she died from stab wounds three hours later while her three young children were locked in another room.[138] The harms from a false confession also resonate throughout the criminal trial process: prosecutors may be less likely to negotiate for plea bargains; defense lawyers may be more likely to see a case as hopeless and pressure a client to plea to any deal available; pretrial release by bail can be more difficult to obtain; and sentencing may be more severe.[139] False confessions and wrongful convictions also injure public confidence in and the perceived legitimacy of the criminal justice system.[140] These are only some of the most egregious harms that can result from police deception. Unlike most areas of the law of deception, the avenues for holding deceptive police officers responsible when they cause these harms are few and far between. There is no easy solution to finding the balance between which police lies to protect and which lies to punish, but the practical immunity that police officers currently enjoy with regard to deception does not appear to strike the right balance.

C. Prosecutor Legal Standards

Deception by prosecutors may occur during the plea-bargaining process, where lies are particularly problematic. Deception in this context may occur when a prosecutor threatens to heighten charges against a defendant or prosecute third parties to induce a defendant to agree to a plea bargain although the prosecutor may have no intention of taking such actions. Prosecutors do not have the express authority to deceive defendants in this way, but the broad prosecutorial discretion prosecutors enjoy throughout the plea-bargain process makes challenging any deception that may occur during that process exceptionally difficult.[141] Thus, if a defendant seeks to hold a prosecutor liable for deception in the plea-bargain process, he or she must attempt to challenge an entirely discretionary decision.[142]

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136. *See* Trocino, *supra* note 133, at 86.

137. *Id.*

138. *Id.* at 87.

139. *Id.* at 91.

140. James R. Acker, *The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free*, 76 ALB. L. REV. 1629, 1631 (2013).

141. *See* Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978).

142. *See id.*

This results in practical immunity for prosecutors because their decisions are heavily guarded by their discretion.

Prosecutorial discretion includes decisions not to pursue charges, decisions to pursue charges, and decisions about what charges to pursue.[143] Decisions not to charge often go unchallenged due to separation of powers concerns and reluctance on the part of courts to become "superprosecutors" by second-guessing the prosecutor's decision not to bring a case.[144] As stated by the Second Circuit, "federal courts have traditionally and . . . uniformly refrained from overturning, at the insistence of a private person, discretionary decisions of federal prosecuting authorities not to prosecute . . . ."[145] Greater room for prosecutor deception exists when prosecutors actually bring charges. For example, a prosecutor may threaten to charge a defendant with a higher crime to induce the defendant to plead guilty, even if the prosecutor has no such intention. Such a deception cannot, however, be challenged, so long as the prosecutor has probable cause to believe that the defendant committed the offense.[146] This is the case even where a prosecutor threatens heightened charges in order to dissuade a defendant from exercising his or her constitutional rights.[147]

Because constitutional challenges to prosecutorial discretion are so difficult to bring prior to the initiation of trial,[148] the main limitations on prosecutorial deception during plea bargaining come from professional standards of conduct. The American Bar Association's Model Rules of Professional Conduct for Attorneys specifically address the special responsibilities of a prosecutor.[149] Rule 3.8(a) states that a "prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."[150] This rule, where adopted,[151] places an ethical restriction on prosecutorial discretion such that prosecutors should not prosecute if they have *actual knowledge* that no probable

143. *See*, *e.g.*, *id.*; Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379–80 (2d Cir. 1973).

144. *See Inmates of Attica Corr. Facility*, 477 F.2d at 380.

145. *Id.* at 379.

146. *Bordenkircher*, 434 U.S. at 364 ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

147. *Id.* at 364–65 (holding that even where a prosecutor threatened, and actually brought, heightened charges in order to deter defendant from exercising constitutional right to a jury trial, no violation of the Due Process Clause of the Fourteenth Amendment occurred).

148. *See* United States v. Goodwin, 457 U.S. 368, 384 (1982) (holding that challenges of vindictive prosecution are not valid in the pre-trial setting, but only apply to actions taken after an adjudication of guilt).

149. MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2014).

150. *Id.* r. 3.8(a).

151. Not all jurisdictions have adopted the exact language from the Model Rules. For example, Massachusetts's rules state that prosecutors should refrain from prosecuting charges where the prosecutor "lacks a good faith belief that probable cause to support the charge exists" and adds that prosecutors should "refrain from threatening to prosecute a charge where the prosecutor lacks a good faith belief that probable cause to support the charge exists or can be developed through subsequent investigation." MASS. SUP. JUD. CT. R. 3:07 (2017).

cause exists to support a charge.[152] To file charges, the individual prosecutor need only subjectively think that the person more likely than not committed the crime.[153]

This has been interpreted as a very liberal standard. In one case, even though a prosecutor's conduct was found incompetent, the court determined he had not violated a state version of Rule 3.8 because he did not have actual knowledge that the indictments he pursued lacked the support of probable cause.[154] In another case, a court held that the actual knowledge standard could not be replaced with a negligence or "reasonably should know" standard.[155] Even though the prosecutor should have known that his indictment was not supported by probable cause, the court held he had not violated a state version of Rule 3.8 because he in fact did not know.[156] Similar to the Model Rules of Professional Conduct, the American Bar Association's Criminal Justice Section Standards for Prosecution Function state that "[a] prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause."[157] These standards present incredible difficulty for a deceived defendant seeking to challenge the prosecutor's deceitful claim that he will bring a charge or the actual bringing of the charge. The defendant must prove the prosecutor's state of mind—that he had no intention of bringing the charge or that he actually knew that no probable cause existed to support the threat of indictment.

The heavy protection of discretion may grant a prosecutor practical immunity for deceit during the plea-bargain process. First, how does a defendant determine whether a prosecutor has *actual knowledge* that a charge is not supported by probable cause? Doctrinal rules suggest that a prosecutor's actual knowledge is based on the following: "(1) only the government's evidence is included . . . without reference to the defense's claims, (2) the credibility (or lack thereof) of the government's witnesses is not worthy of consideration, and (3) legally inadmissible hearsay may be taken into account."[158] As noted above, even where an individual thinks she can show a problem with a prosecutor's charging decision, "judges appear hesitant to question executive department law enforcement decisions before they reach fruition in court."[159] Second, prosecutorial misconduct does not in itself provide a ground for relief for a criminal defendant unless a constitutional right is implicated and the misconduct has prejudiced the defen-

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152. *See, e.g.*, Livingston v. Va. State Bar, 744 S.E.2d 220, 226 (Va. 2013); *In re* Lucareli, 611 N.W.2d 754, 755 (Wis. 2000).

153. Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2188 (2010).

154. *Livingston*, 744 S.E.2d at 226–27.

155. *In re Lucareli*, 611 N.W.2d at 761–62.

156. *Id.*

157. AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-4.3 (4th ed. 2015).

158. Medwed, *supra* note 153, at 2188–89.

159. *Id.* at 2190.

dant.[160] Finally, there is a serious lack of transparency surrounding prosecutorial charging decisions.[161] The nature of the process by which criminal charges proceed is one of deference to prosecutors and extreme secrecy.[162] In fact, Rule 11 of the Federal Rules of Criminal Procedure prohibits judges from participating in the plea-bargaining process in any way.[163] While prosecutors are not specifically authorized to deceive or lie to defendants in order to come to a plea deal, the difficulty of challenging or even recognizing when such a deception has taken place results in practical immunity for such lies.[164]

D. Harm to Defendants

Manifold harms befall the defendants whom prosecutors deceive. Some of those harms are similar to those that befall suspects to whom police lie. For example, when an innocent defendant accepts a plea bargain because of deceptive practices by prosecutors, an innocent person is punished for a crime he or she did not commit. The Supreme Court in *North Carolina v. Alford* specifically authorized defendants to plead guilty without an express admission of guilt.[165] These kinds of pleas have become known as Alford pleas. Once again, innocent people going to jail for crimes they did not commit results in decreased public confidence in the criminal justice system and a risk to public safety while the true perpetrator walks free.[166] Another harm also results from Alford pleas: when a defendant enters a guilty plea, he or she "waives most nonjurisdictional constitutional rights, such as the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination."[167] The guilty plea also results in a waiver of the right to challenge certain errors or defects committed by the government prior to plea entry including: illegal search and seizure, coerced confession, entrapment, improper selection of a grand jury, denial of the right to a speedy trial, sufficiency of arrest, and certain prosecutorial defects and statutory claims.[168] When a defendant accepts a plea bargain and enters the plea of guilty, these rights are instantly out of reach for that defendant. The waiver of constitutional rights by an

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160. *See, e.g.*, United States v. Isgro, 974 F.2d 1091, 1094 (9th Cir. 1992); *cf.* United States v. Jamil, 707 F.2d 638, 645–46 (2d Cir. 1983) (rejecting suppression of evidence despite prosecutor's alleged violation of ethics rule barring communication with represented person).

161. Medwed, *supra* note 153, at 2191.

162. *Id.* at 2191–92.

163. FED. R. CRIM. P. 11(c)(1).

164. Rule 11 of the Federal Rules of Criminal Procedure sets a practical limit on prosecutorial discretion in plea bargaining because it requires a judge to determine that the plea being entered is voluntary before accepting a plea of guilty. *Id.* R. 11(b)(2). However, a judge addressing a defendant in open court will not be able to deduce everything that went on during the plea-bargaining process, and in fact the court may not participate in plea discussions. *Id.* R. 11(c)(1).

165. North Carolina v. Alford, 400 U.S. 25, 37 (1970).

166. *See supra* Part III.B.

167. *Guilty Pleas*, 45 GEO. L.J. ANN. REV. CRIM. PROC. 472, 506 (2016).

168. *Id.* at 507–08.

innocent defendant is a waiver of rights specifically designed to protect the innocent and certainly results in harm. The deprivation of constitutional rights may seem like a conceptual harm, but the existence of a statutory provision—§ 1983 of Title 42 of the United States Code—that provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution"[169] indicates that society considers the violation of a constitutional right a real harm.

The harms to the victims of deceptive schemes and lies perpetrated by police officers and prosecutors are real and concrete. If individuals other than government officials caused them, these injuries would meet the actual harm requirement that underlies liability in other areas of the law that regulate deception. Even though the harms are not directly pecuniary in nature (a common requirement in other areas of the law of deception), the harms are certainly actual and may result in pecuniary damage indirectly.[170] It bears repeating that this state of affairs stands in stark contrast to the criminalization of false statements made to government officials by citizens, regardless of harm. Inconsistent with the law of deception in other contexts, this double standard should be remedied with the implementation of a harm requirement.

CONCLUSION

The law deals with deception in a variety of settings. At common law, the torts of deceit and defamation allow individuals harmed by another's deception to hold the deceiver liable for any resulting damages. In advertising law, the government can punish those who publish false and deceitful advertisements that harm the consuming public, and competitors can hold each other liable for damages suffered because of false advertising. In securities law, buyers and sellers of a company's securities can hold that company liable for deceptions that result in harm to those buyers or sellers. The consistent element among each of these areas of law is actual harm. Without some measurable damage that occurs due to a deceptive practice, defendants cannot be found liable under any of the above-mentioned legal schemes.

This format for how the law handles deceit is flipped on its head in two ways when individuals encounter government agents in the law enforcement context. First, deceitful statements or actions by an individual interacting with a law enforcement official are automatically criminalized, although harm in the form of perversion of government interests is often lacking. Second, when those same law enforcement officials lie to or deceive individuals and actual—often extreme—harm results, the deceitful officials are in effect immune from liability. This double standard stands in stark opposition "to the general abhorrence of falsehoods in

169. 42 U.S.C. § 1983 (2012).

170. *See supra* Part III.B (discussing harm to suspects); *see also* 28 U.S.C. § 2513(e) (2012) (providing monetary remedies for constitutional violations).

other legal contexts."[171] Most legal contexts include "severe punishment of those who lie."[172] In contrast, the law generally tolerates government lies.[173]

The realities of our criminal justice system provide some explanation and justification for why this double standard exists. False statements to government officials can cause similar institutional harms to those caused by perjury and obstruction, such as undermining the integrity of the criminal justice system and the courts, and obscuring information necessary to enforce the law and protect public safety.[174] Additionally, we allow police officers to lie to suspects to facilitate important goals, such as saving lives, protecting innocent victims in hostage situations, calming worried citizens, and catching criminals.[175] Likewise, prosecutorial discretion, even when it may involve deception, is not easily challenged because of the need for individualized justice and the finite resources of law enforcement agencies.[176] Often the harms that result from the lies told by police and prosecutors are not the product of malicious intent on the part of either, but rather come from negligence and a lack of training.[177]

These rationales for the criminalization of lies to the government and protection of deceit by the government do not justify the expansive scope of this double standard. While heightened standards for perjury and obstruction charges work to prevent actual harm to the justice system, many false statement charges exist regardless of actual harm to any government interest, and in fact, may serve to insulate the prosecution's underlying case from scrutiny and preclude judicial oversight.[178] The fact that police officers can use deceit to catch actual criminals does not mean they should be insulated from culpability when their lies result in false confessions and wrongful convictions that cause serious harm. Similarly, the preservation of resources and individualized justice that may result from prosecutorial discretion in plea bargaining does not justify the possibility that deceit in the process may result in innocent people waiving constitutional rights and being punished for crimes they did not commit. The legal implications of deceit in interactions between citizens and law enforcement officials are important enough that, as a society, we should modify our legal standards to incorporate the actual harm requirement, an essential limitation in the law of deception.

171. Heyl, *supra* note 121, at 941.
172. *Id.*
173. *Id.*
174. *See* Griffin, *supra* note 7, at 1523.
175. *See* Slobogin, *supra* note 98, at 775–78.
176. Medwed, *supra* note 153, at 2189.
177. Ofshe & Leo, *supra* note 132, at 983.
178. *See* Griffin, *supra* note 7, at 1524.