TEXAS TECH SCHOOL OF LAW SYMPOSIUM

CITIZEN IGNORANCE, POLICE DECEPTION, AND THE CONSTITUTION

Lies, Omissions, and Concealment; The Golden Rule in Law Enforcement and the Federal Criminal Code

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Introduction

Thank you for inviting me to a fascinating conference in such distinguished company. Panel three is tasked with tackling two related questions: (1) Do we want citizens to know their rights? and (2) How do we inform them? The short answer the first question, from the perspective of the United States Supreme Court, Congress, and federal and state prosecutors' offices is "no," which rather truncates the answer to the second question. The Court appears to believe that if more citizens know their rights they might actually exercise them, which would mean few consent searches and confessions, and thus fewer solved crimes.[1] This assumption contains, of course, two highly debatable empirical points. Citizens with perfect law professor information about constitutional criminal procedure - knowledge of their right to refuse permission to search,[2] knowledge that their request for an attorney during custodial interrogation must be unambiguous to be honored,[3] knowledge that an original unwarned statement remains

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[1] See Arnold Loewry, Police, Citizens, The Constitution, and Ignorance: The Systemic Value of Citizen Ignorance in Solving Crimes, this symposium (suggesting that "the Court has calibrated the value of ignorance into its jurisprudence, and has consciously calculated its value.").

[2] Cf. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); U.S. v. Mendenhall, 466 U.S. 544 (1980); United States v. Bostick, 501 U.S. 429 (1991) - the Court has developed a surreal definition of "consent" that permits citizens to voluntarily consent to searches when the suspect clearly has no knowledge of the right to refuse consent. See also Janice Nadler, No Need to Shout: Bus Sweeps and the Psychology of Coercion, 2002 S.Ct. Rev. 153 (2003).

[3] Davis v. United States, 114 S.Ct. 2350 (1991). See also Janet Ainsworth, In a Different Register: The Pragmatics of

inadmissible if they refuse to waive their Miranda rights after the warnings are finally given,[4] and knowledge that they must be silent even if no Miranda warnings are given to prevent the use of a statement as impeachment evidence[5] or to lead to derivative physical evidence,[6] may still fail to exercise these rights for any number of perfectly rationale explanations. Just a few of these include that the citizen respects authority [7] or is afraid of the

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Powerlessness in Police Interrogation, 103 Yale L.J. 259 (1993).

[4] Oregon v. Elstad, 470 U.S. 298 (1985) (where suspect provided incriminating statements prior to receiving Miranda warnings, was Mirandized, and then made similar statements because he thought "the cat was out of the bag," the waiver was knowingly and intelligently made). But see Missouri v. Seibert, 542 U.S. 600 (2004) (plurality) (where police deliberately and intentionally used method of questioning before Mirandizing, obtaining an incriminating statement, and then issuing a warning to obtain a second admissible version of the statement, statement was not admissible).

[5] Harris v. New York, 401 U.S. 222 (1971) (creating impeachment exception to exclusion of statements obtained via custodial interrogation without warnings).

[6] Michigan v. Tucker , 417 U.S. 433 (1974) (derivative evidence obtained as fruits of Miranda violation are admissible); U.S. v. Patane, 542 U.S. 630 (2004) (physical evidence discovered as a result of statements taken in violation of Miranda are admissible). For a general discussion of the erosion of the Fifth Amendment's privilege against self-incrimination, see Susan R. Klein, No Time for Silence, 81 Texas Law Rev. 1337 (2003); Susan R. Klein, Miranda Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide, 143 U. Penn. Law Rev. 417 (1994).

[7] Nadler, No Need to Shout, 2002 Sup. Ct. Rev. 175 (2002) (concluding that "symbols of authority" coerce people into consenting to searches during bus sweeps);

police,[8] thinks she has nothing to hide,[9] believes she can outsmart the cops, or believes the police will lie about consent/Miranda warnings anyway.[10] Second, an increase in the exercise of constitutional rights may not lead to decreased clearance rates, as police officers could turn to other methods to enforce the law and solve crimes. Thus, the Court may be incorrect in its prediction that knowledge about rights will lead to the exercise of these rights, along with negative effects on crime clearance.

Alternatively, if the empirical questions are answered in the affirmative, and increased knowledge does lead to increased exercise of the right by citizens not to consent to a search and the exercise of the right to remain silent, and this in turn does lead to an increased percentage of unsolved crimes, we may well find a strong and unpleasant reaction from Congress or the Court. This response might be to counterbalance any programs that teach people about the U.S. Constitution by changes elsewhere in the criminal justice system. As Professor Stuntz has so able demonstrated,[11] no legal rule lives in a vacuum, particularly not criminal procedural or substantive criminal law rules. If the Court were to change the police conduct rules to require law enforcement officers to impart legal information, they might concomitantly change their own "decisional" rules to allow the introduction of

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[8] Lichtenberg (concluding that suspects consent to searches for fear of reprisals if they refuse consent); Dorothy Kagelire, Perceived Voluntariness of Consent to Warrantless Police Searches, 18 U. Applied Soc. Psych. 43 (1988) (about 6% in survey stated that they consented to searches because they feared the police); Wardlow (statistics on fear of police among African-American males in urban areas).

[9] See Illya Lichtenberg, Miranda in Ohio: The Effects of Robinette on the "Voluntary" Waiver of Fourth Amendment Rights, 44 How. L. Rev. J. 349 (2001) (finding that about 90% of those asked to consent to automobile searches by officers consented when no warnings were given, that there was no substantial decrease when warnings were given, and that close to 13% of those consenting possessed illegal narcotics).

[10] See, e.g., Stanley Z. Fisher, "Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports, 28 New Eng. L. Rev. 1 (1993)H. Richard Ulviller, Tempered Zeal (1988).

[11] William Stuntz, The Uneasy relationship between Criminal Law and Criminal Procedure.

evidence taken in violation of these new "conduct" rules.[12] Likewise, Congress may well change the substantive criminal law to provide more opportunities for charging[13] and to make convictions easier to obtain. All political branches have an interest in ensuring that the system continues to function with its present very high rate of guilty pleas, as the public would not tolerate a decrease in clearance rates.[14] Thus, if the Court is correct in its prediction about the effect of knowledge on the exercise of constitutional rights, it or Congress may take other steps to negate this effect.

However, even if knowledge of one's rights does not lead to the free exercise of these rights (either because citizens still will not exercise these rights, or because evidentiary or other rules are relaxed so that the exercise does not assist the citizen), I believe that there may be many other significant benefits of greater citizen knowledge, especially where that knowledge is imparted by government officials. Chief among these would be to and to further the constitutional goal of equal treatment under the law. It is most likely poor, minority citizens

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[12] For a description of the distinction between "conduct" rules and "decisional rules," see Carol S. Steiker, Counter-Revolution in Constitutional Criminal Procedure: Two Audiences, Two Answers?, 94 Mich. Law Rev. 2466 (1996) (suggesting that the Burger and Rehnquist Courts have dismantled the Warren Court's revolution by retaining the Warren Court's "conduct" rules but dramatically changing the Court's "decisional" rules such that unconstitutional conduct does not hamper law enforcement); and Klein, When the Self-Incrimination Clause and Civil Rights Act Collide, Penn., infra n.)).

[13] Sarah Sun Beale, Too Many Yet Too Few, 46 Hastings Law Journal 979 (1995) (over 3,000 proscriptions in federal criminal code).

[14] See Susan R. Klein, The Return of Federal Judicial Discretion in Criminal Sentencing, 39 Valparaiso University Law Rev. 693, 738 (2005) (predicting that Congress and the Courts would respond to Booker by changing whatever rules necessary to ensure that guilty "pleas will remain at a relatively state of equilibrium nationwide."); Susan R. Klein, Enduring Principles and Current Crises in Constitutional Criminal Procedure, 24 Law & Social Inquiry 533 (1999) (outlining the numerous exceptions to Fourth Amendment doctrine and the Fifth Amendment's self-incrimination clause and confession law in reaction to the Warren Court's expansion of rights); Louis Michael Seidman, Criminal Procedure as the Servant of Politics, 12 Const. Comment. 207, 210 (1997) (establishing that empirical studies have shown that Miranda warnings have not reduced the rate at which suspects confess, and suggesting "constitutional protections intended to make prosecution more difficult instead serve [to] make the prosecutor's job easier.").

who aren't fully apprised of their rights, either by formal schooling or from their parents and friend, and it is these same groups who cannot afford to hire an attorney to explain these rights (at least not until the free counsel an indigent receives upon indictment). As I have argued in other contexts, many of our constitutional criminal procedural guarantees were enacted not only (or not at all) to ensure accuracy, but to foster equality among citizens[15] or prevent governmental harassment or overreaching.[16] One might also include in any list of advantages stemming from knowledge the perception of fairness and increase in law-abiding behavior that increased honesty will engender among other law-abiding citizens,[17] the greater likelihood that minority members of society will opt-in to the criminal justice system,[18] and the benefits to the trust relationship between an individual and her government[19] when citizens believe that the government is playing by the rules and treating them with respect.

Assuming such benefits, as I intend to do for the remainder of this essay, we remain in quite a quandary regarding the second question - "how should we inform citizens of their rights?" This raises a host of subsidiary questions; who is the "we" who should explain rights? Under what circumstances is the government the

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[15] Susan R. Klein and Jordan M. Steiker, The Search for Equality in Criminal Sentencing, 2002 Supreme Court Rev. 223 (2003) (suggesting that mandatory sentencing guidelines enhance equality and transparency by prohibiting the sentencer from considering nonneutral factors such as race, gender, and his own penal philosophy, and by providing ex ante what characteristics regarding an offense and an offender are relevant to sentencing and the weight to assign each factor).

[16] Susan R. Klein, Enduring Principles and Current Crises in Constitutional Criminal Procedure, Law & Social Inquiry 533 (91999) (Fourth amendment was not designed to enhance accuracy of criminal trials, but to prevent unreasonable conduct by law enforcement; double-jeopardy clause designed to ensure finality and prevent government harassment by may of multiple prosecutions, Eighth Amendment Cruel & Unusual Punishment Clause to prevent disproportionate punishment).

[17] Tom R. Tyler & Yuen J. Huo, Trust in the Law: Encouraging Public Cooperation With the Police and Courts (2002).

[18] Andrew Taslitz, Bullshitting the People: The Criminal Procedure Implications of a Scatological Term (this issue); Paul Butler, Jury Nullification article in Yale.

[19] Scott Sundby, Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 Columbia Law Journal 1751 (1994).

party responsible for telling citizens of their rights? Exactly which rights should the government discuss and how much information regarding each right is necessary? What is the best method for the government to utilize in relaying such knowledge to its citizens? When should the information be disseminated? It seems to me that we cannot answer any of these question without some theory regarding citizen/government honesty on a more basic level. When is the government acting "honestly" towards its citizens? To be dishonest, must it make a materially false statement, or is concealment or failure to disclose information regarding rights sufficient? How detailed must the disclosed information be? For example, is it sufficient to give a citizen a warning of the right to refuse consent to search under the Fourth Amendment, or is further explanation of Fourth Amendment decisional rules required (when will the citizen have standing to object to the search, when will the exclusionary rule be triggered such that the fruits of the search are excluded, etc.)?

I will attempt to begin to answer some of these questions, and flesh out a federal theory of honesty, by comparing and contrasting the federal constitution's requirement of honesty by law enforcement, prosecutors, and judges during encounters between the government and its citizens with the federal criminal code's requirement of honesty by citizens and public officials during encounters between these citizens and law enforcement, prosecutors, and judges. It appears that the standard of behavior the federal government expects from its citizens in order to avoid violating the federal criminal code is perhaps greater than it expects of its law enforcement personnel in order to avoid violating the federal constitution. In Part I, I provide a very brief description of constitutional regulation of citizen-police encounters, focusing on the difference between lies and omissions or concealment, and on the level of honesty that is required in different locations. For example, there is no constitutional or statutory impediment to lying to a citizen during a sting operation. A much higher level of disclosure is required by the government in order to obtain a suspect's waiver of constitutional criminal procedural guarantees in the trial context than during street encounters. Furthermore, there is some (though not full) disclosure of some (though not all) of the ramifications of waiving trial rights that a federal judge must relay to a criminal defendant during a Rule 11 guilty plea colloquy.

In Part II, I review select portions of the federal criminal code, particularly Perjury under 18 U.S.C. section 1621, False Statements under 18 U.S.C. section 1001, Obstruction of Justice under 18 U.S.C, sections 1505, 1512, and the Mail and Wire fraud statutes, U.S.C. section 1341 and 1343. I will focus here on the differing government expectations regarding direct falsehoods versus concealment or failure to disclose material information. Finally, in Part III, I draw possible analogies between the level of honesty the federal government demands from its citizens upon pain of criminal sanction and the information it provides to criminal suspects, usually upon the risk of evidentiary exclusions

at criminal trials or the possibility of monetary damages in civil rights actions. I conclude that there are significant differences in the level and types of "honesty" that the federal government expects from its citizens compared to its official treatment of these same citizens, and that the Court lacks a theory of honesty[20] sufficiently coherent to justify this violation of the Golden Rule.[21] The government does not treat its citizens the way it expects to be treated in return. I will conclude by suggesting the development of a federal theory of honesty, provided by the government ex ante, that would consistently apply across various contexts.

Part I. Federal Constitutional and Rule of Criminal Procedure Limits on Lies, Omissions, and Concealment by Government Agents

The Court reacts differently to lies by law enforcement officers to citizens regarding their constitutional rights than to concealment of or omission of helpful information about their rights. There appears to be an honesty "hierarchy," which depends primarily upon whether the government official lies versus fails to disclose, and whether the lie or concealment concerns the existence of a constitutional right versus the consequences of these rights or other matters. Lies directly concerning the existence of constitutional rights (even where such lies occur outside of a courtroom) are least tolerated, whereas flagrant intentional lies about "collateral" matters told to gather information concerning a criminal matter are most tolerated. Failure to disclose the existence and contours of trial and non-trial constitutional rights are generally acceptable on the street and during custodial interrogation (except for the required Miranda warning). Failure to disclose important facts that do not concern the existence of constitutional rights are tolerated even in the courtroom, again if they concern collateral matters. Failure to disclose the existence of trial rights before a guilty plea is accepted is governed by U.S.S.C. caselaw and F.R.C.P. 11, and may lead to exclusion of evidence or reversal of a conviction.

I will start with lies the government tells citizens that do not concern the existence or contours of constitutional rights. In undercover operations, government officials regularly lie to

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[20] Saul Levmore, Dean at the University of Chicago, recommended that law schools offer a separate course in "deception" at the Terrell lecture he gave at the University of Texas in 2006. He noted the lack of a theory that explained the tort and contract actions based upon dishonest behavior by defendants, and apparent approval of the lack of honesty by law enforcement personnel. See also Sisely Bok, Lying.

[21] "Do unto others as you would have them do unto you."

citizens about the official's identity,[22] his line of business,[23] his emotional attachment to the citizen,[24] and his motives.[25] None of these lies concerned constitutional rights, and all are permissible. The federal government need not have any reasonable suspicion that the target of the lies is engaged in criminal activity,[26] however the citizen cannot be convicted for engaging in the crime the government official suggests unless the government proves beyond a reasonable doubt to a jury that the citizen was predisposed to commit such a crime prior to government contact. If a defendant is not predisposed, he should be acquitted on the grounds that he was unlawfully "entrapped" by the government.[27] As the Court noted in its most recent pronouncement on entrapment, "[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises.[28] The federal constitution may step in here only where "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government

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[23] Jaconbsen (government agents first pretended to be pen pal named "Carl Long" and then to be lobbying organization known as "Hedonist Society."); U.S. v. Knox, CA 5, No. 96-50340 (5/1/97) (government agent pretended to be drug dealer and money launderer).

[24] U.S. v. Simpson , 812 F.2d 1442 (9th Cir. 1987) (government agent pretended to be emotionally intimate with defendant, engaging in sexual conduct with him).

[25] Sherman v. U.S., 356 U.S. 369 (1958) (undercover agent told defendant he needed to purchase heroin because his treatment was not working); U.S. v. Solario, CA 9, No. 93-50507 (9/20/94) (government agent engaged in drug transaction with defendant in order to obtain contingent fee based upon number of convictions and amount of forfeitures).

[26] Jacobson v. U.S., 112 S.Ct. 535 (1992).

[27] This defense is provided as a matter of Congressional intent, not as a matter of constitutional law. The theory underlying the defense is that Congress did not intend that those entrapped be criminally responsible. Sorrells.

[28] Jacobson , quoting Sorrells . See generally Richard McAdams, Univ. of Chicago, for excellent critique of the entrapment defense.

from invoking judicial process to obtain a conviction."[29]

The primary problem with utilizing deception to catch criminals in this manner is that the government cannot know, at the time it employs the deception, that the citizen is, in fact, a criminal. It is only later, if the citizen agrees to participate in the crime and is found by the jury beyond a reasonable doubt to be predisposed to commit the crime, that he is shown to actually be a criminal and not an ordinary citizen. Any damage to the trust relationship between the citizen found not guilty because of entrapment and her government is thus already damaged by the time the case appears in court. Moreover, the other citizens who witness this behavior are already affected, and the factually innocent citizens who have been targeted will never even appear in court. For them, and for the citizens who obtain acquittals, there is no remedy specifically for the deception. A second problem with entrapment law is that there is no written law, either by Congress of appellate judges, to guide law enforcement officers in advance about the propriety of future official undercover conduct. When will lies be such that the government is implanting the idea to commit a crime in an otherwise innocent mind, such that conviction cannot stand? Because there is no entrapment defense provided in the federal code,[30] and because the issue is resolved by the jury through a general verdict, there are no written guidelines or body of precedents for police to follow.[31]

The next category I will discuss is government lies about the existence of a constitutional right, again told to a citizen outside the courtroom. Unlike those lies told during undercover

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[29] U.S. v. Russell, 411 U.S. 423 (1973) (neither due process nor entrapment principles prevented conviction of defendant for selling methamphetamine where government agent supplied one of the chemicals necessary for the process and purchased the resulting drugs). Though the Court opened the door for a due process claim, few lower courts have walked through. See generally Dana M. Todd, Note, In Defense of the Outrageous Government Conduct Defense in the Federal Courts, 84 KY. L.J. 415 (1995).

[30] Rather, the Supreme Court has reasoned that Congress did not intend to punish a defendant who committed a crime only upon inducement by government agents. U.S. v. Russell, 411 U.S. 423, 435 (1973).

[31] Other than those few appellate decisions reversing criminal conviction because of a finding of entrapment as a matter of law. See Louis Michael Seidman, The Supreme Court, Entrapment, and our Criminal Justice Dilemma, 1981 Sup. Ct. Rev. 111, 136-46 (general verdict of acquittal does nto inform law enforcement agencies at what point the entrapment line is crossed).

operation, where a police officer lies to a suspect about the availability of her fourth amendment protection against unreasonable search and seizure, by telling her unambiguously that she may not refuse consent to search, the resulting consent is invalid and any evidence seized a result of such a search inadmissible. In Bumper v. North Carolina,[32] the police lie was that they possessed a search warrant, and therefore the elderly subject of the consent search had no right to refuse. This lie led directly to the exclusion of any evidence found during this search, and potentially to 18 U.S.C. section 1983 liability for the violation of the suspect's civil rights.[33] On the other hand, where the police simply fail to inform a suspect that she has a right to refuse a so-called "consent" search, even where it is clear that the suspect is unaware of his right to refuse, the consent is generally valid.[34] Similarly, though there is little caselaw on the subject, an undisguised officer presumably cannot falsely tell a suspect that she has no right to an attorney[35] or that a magistrate will not review her arrest for probable cause within 48 hours,[36] though police generally do not generally affirmatively inform a suspect of these rights prior to initiating a conversation or conducting an arrest.

Except for one world infamous case, any requirement that government agents give notice of or disclose the existence or contours of constitutionally-mandated criminal procedural guarantees before criminal charges have been instituted against a citizen[37] has been frequently and resoundingly rejected by the Court. In the exceptional case, Miranda v. Arizona, the Court mandated that law enforcement officials disclose the existence of the constitutional rights to remain silent and consult with an attorney, in order to protect a suspect's Fifth Amendment privilege

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[32], 391 U.S. 543 (1968).

[33] For numerous reasons, however, a section 1983 case is extremely difficult to win. See Klein, Penn. article.

[34] Schneckloth and Mendenhall, infra n. __.

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[36] Gertein v. Pugh

[37] The Sixth Amendment prevents the government from deliberately eliciting statements from a suspect in the absence of her counsel or waiver of her right to counsel, however this right does not attach until adversary judicial criminal proceedings have been instituted (generally arraignment or indictment). Brewer v. Williams, 430 U.S. 387 (1977).

against self-incrimination from the compulsion inherent in custodial interrogation.[38] Additionally, once the government has initiated formal charges against an accused, the Sixth Amendment prevents law enforcement from deliberately eliciting statements regarding that specific offense from the suspect without a waiver of the right to counsel.[39] Aside from that, the government need not inform a citizen or suspect of his rights nor ensure that the citizen is otherwise aware of his rights.

For example, as noted above police need not inform a suspect that he has a right to refuse a consent search,[40] the government need not inform an unindicted suspect that one of his "friends" is actually an undercover operative working for the police,[41] an officer is not required to inform a suspect that the invocation of his right to remain silent allows reapproach by an officer to interrogate on a different offense, but invocation of his right to an attorney bars such reapproach,[42] the interrogating officer need not inform the suspect that the attachment of his Sixth Amendment right to counsel on a specific charge will not bar questioning on a different charge unless the suspect specifically invokes his Miranda right to an attorney,[43] and a traffic cop need not inform a motorist detained pursuant to a valid traffic stop that the stop

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[38] 384 U.S. 436 (1966), see infra n. ___.

[39] See Moran v. Burbine, 475 U.S. 412, 432 (1986). Texas v. Cobb, 532 U.S. 162, 171 (2001).

[40] Schneckloth v. Bustamonte, 412 U.S. 218 (1975).

[41] Illinois v. Perkins , 496 U.S. 292 (1990) (where Sixth Amendment right to counsel has not attached, undercover officer maasquerading as a burglar in a jail cell need not blow his cover by Mirandizing a suspect before eliciting information from him).

[42] Compare Michigan v. Mosely, 423 U.S. 96 (1975) (holding that once a suspect asserts his Miranda rights, he can be questioned at a later time regarding a different crime after receiving a new set of warnings) with Arizona v. Robertson, 486 U.S. 675 (1988) (holding that once a suspect invokes his Miranda right to an attorney, he cannot be questioned even about a different crime).

[43] McNeil v. Wisconsin , 501 U.S. 171 (1991) (holding that the attachment of Sixth Amendment right to counsel for robbery charge did not bar custodial interrogation after Miranda waiver on unrelated charge); Texas v. Cobb, 532 U.S. 162 (2001) (attachment of right to counsel on burglary charge did not extend to related murder of victim charge).

is over and that he is free to go before initiating questioning on unrelated matters.[44] An officer need not inform a citizen that if he is invited into the citizen's home, anything incriminating that the officer sees in "plain view" is seizable without a warrant, [45] an officer need not tell passengers in cars pulled over for traffic violations that they are free to leave,[46] a grand jury witnesses need not be told that she can assert her privilege against self-incrimination in the grand jury room, or that she can bring an attorney whom she can consult with between questions,[47] an officer need not tell the person who answers the door that if such person tells the officer that the homeowner would not consent to the search, the officer can no longer obtain apparent consent from the visitor to search,[48] a suspect who believes the investigation concerns only firearm offenses validly waives his Miranda rights without being informed that the officer actually intends to question him about a murder,[49] a suspect need not be told that an attorney hired by a family member was waiting to speak to him, despite the government's assurances to the attorney that the suspect would not be interrogated until attorney and client had a chance to meet, [50] and a government prosecutor pursuing a civil matter need not inform a civil defendant that her answers to deposition questions may be used against her in a subsequent civil trial.[51] A suspect who asks for an attorney in a tentative manner

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[44] Ohio v. Robinette, 519 U.S. 33 (1996).

[45] Horton v. California , 496 U.S. 128 (1990) (plain view exception).

[46] New USSC here.

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[49] Colorado v. Spring, 479 U.S. 564 (1987).

[50] Moran v. Burbine, 475 U.S. 412 (1986). The 6-3 majority did admit that the government's conduct was "objectionable as a matter of ethics," and it shared the suspect's "distaste for the deliberate misleading of an officer of the court." However, the undisclosed information did not affect the voluntariness of the Miranda waiver, as it did not deprive the suspect of the "knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."

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during custodial interrogation need not be informed that if she asked again less ambiguously, her request would be honored,[52]

In each of these cases, law enforcement is withholding relevant information concerning constitutional rights which would be very helpful to the citizen in making a decision on her future course of conduct. In most of these cases, the peace officer or prosecutor is well aware of the right at issue, and of the citizen's probable desire to have the information the official possessed about this right in making her decision as to how to react to the government conduct. However, as the Court has noted, "the possibility that [an] encounter [between the government and an individual] may have important consequences at trial, standing alone, is insufficient to trigger" a right to disclose the existence of a constitutional right.[53] In a few of these cases the government is not simply failing to disclose the existence of a right. Rather, one could plausibly argue that the government is actually concealing information and misleading the suspect by offering some but not all of the information the suspect needs. For example, by taking a driver's license and telling him to wait for a ticket, the officer may be implying that the passengers in the vehicle are also detained. A prosecutor asking questions on a civil forfeiture matter may be indicating, by his failure to give Miranda warnings or other self-incrimination clause information, that the answers won't be used by the government to pursue a criminal charge against that plaintiff. By offering Miranda warnings and accepting a suspect's refusal to waive these rights, an officer may be implying that any resulting statements are inadmissible, though the officer knows they are admissible for impeachment purposes and to lead to derivative physical evidence.[54] By offering a suspect Miranda warnings after he has given incriminating statements, an officer is impliedly affirming the suspect's belief that the prior statement is admissible and that there is no longer any reason to keep quiet.[55] As one member of the

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[52] Davis, supra n. 3.

[53] Moran v. Burbine , 475 U.S. at 432 (discussing Sixth Amendment right to counsel).

[54] Harris and Patane, supra n. 5. These additional warnings are given in England when certain specified offenses are charged. Suspects are told that a jury may draw adverse inferences from silence.

[55] See Elstad , n. 4. The Court rejected the defense contention that the officer should have supplemented the Miranda warnings with a statement that the suspect's earlier admission was inadmissible in court. The Court "has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness."

dissent in United States v. Drayton noted in the context of a bus sweep, the failure to warn bus passengers that they had a right to refuse to consent to a search of their baggage led to the "reasonable inference" that "the 'interdiction' was not a consensual exercise, but one the police would carry out whatever the circumstances; that they would prefer 'cooperation' but would not let the lack of it stand in their way."[56]

However, the police have no duty to disclose information in any of the above examples because the Supreme Court has held that they do not. There is no theory of honesty or theory about the relationship between a citizen and his government driving these decisions. They are simply ad hoc decisions, predictable only in that it will be extremely rare for the Court to find a duty to disclose rights-based information. The only recent example that comes to mind is the concurring opinion that provided the fifth vote necessary for a rare holding that further disclosure was required. In Missouri v. Seibert,[57] a suspect was subjected to custodial interrogation without Miranda warnings, as instructed to do by his superiors, and the suspect made an incriminating statement. The officer than Mirandized the suspect, received a waiver, and obtained a similar statement. While the Court in Elstad held that a second statement was admissible when the officers had unintentionally failed to Mirandize the suspect,[58] the Court reached a different result in Seibert. Justice Kennedy opined that a deliberate two-step strategy, where the purpose of the police is "to obscure both the practical and legal significance of the admonition when finally given," does not constituted a valid waiver of Miranda and the postwarning statements are excluded, "unless curative measures are taken before the postwarning statement is made."[59] Such a curative measure might include "an additional warning that explains the likely inadmissibility of the prewarning custodial statement." There was no way prior to Seibert for an officer predict what if any disclosure would be necessary in

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[56] 536 U.S. 194, 211 (2002) (Souter, J., dissenting, joined by Justices Stevens and Ginsburg).

[57] 542 U.S. 600 (2004).

[58] In fact there was some question, even on cert., as to whether the officer had to Mirandize the suspect at all, as the encounter occurred at the suspect's house. However, the state conceded on appeal that the suspect was in custody.

[59] Seibert. Justice Souter, writing for the 4-member plurality, held that the Miranda warnings, when given after questioning, do not effectively apprise a suspect of her constitutional rights.

that context, as there is no written document where disclosure responsibilities are presented, nor any theory about what circumstances mandate disclosures. Instead, the officer must wait until there is a Supreme Court case on point, and would then officer would need legal training in understanding Supreme Court caselaw.

Once the government has physical custody of a suspect, this curtailment of liberty triggers only the disclosure of those particular rights contained in the Miranda warnings. During custodial interrogations, law enforcement officers must inform a suspect of her right to remain silent, that anything she says can be used against her in court, that she has the right to consult an attorney, and if she cannot afford an attorney one will be appointed for her.[60] Once that is done, however, and the police obtain a waiver, they are free to lie to suspects regarding what evidence they already possess, and need not disclose any other constitutional rights. Nor, as we have seen above, must they explain the ramifications of the assertion or waiver of the rights contained in Miranda, such as when statements taken in violation of Miranda are inadmissible and when they can be used to impeach or lead to derivative evidence.[61] While in the original Miranda decision the Court repeated the standard language requiring a express waiver made "voluntarily, knowingly, and intelligently,"[62] a bit over a decade later the Court adopted the position that an implied waiver was sufficient, and it could be inferred from words and actions.[63] Perhaps because of this lower standard, or perhaps because officers have adapted to this new regime, a Miranda waiver is easily and frequently obtained (80 percent of suspects waive their rights),[64] the rights need not be explained by an attorney or

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[60] Miranda v. Arizona, 384 U.S. 436 (1966).

[61] See supra nn. 3 - 6.

[62] Miranda, 384 U.S. at 444 (1966). This standard was derived from the original waiver standard first announced in Johnson v. Zerbst, 304 U.A. 458, 464 (1938) which held that a constitutional right may not be waived unless there is "an intentional relinquishment or abandonment of a known right or privilege."

[63] North Carolina v. Butler, 441 U.S. 369 (1979) (explicit statement of waiver is not required, so that defendant's statement that "I will talk to you but I am not signing any form" sufficient).

[64] Paul G. Cassell and Bret S. Hayman, Police Interrogation in the 1990s, and Empirical Study of the effects of Miranda, 43

a judge, and the waiver need not be "intelligent" in the sense of it being a good idea for the defendant to talk (it never is). The Miranda warnings and waiver act as automatic admissibility of resulting statements under the Due Process Clause.[65]

The Court labels "voluntary" (and therefore admissible) confessions after Miranda warnings and waivers where cops employ "trickery and deception"[66] such as lying to defendants about fingerprints,[67] witness statements,[68] health of the victim,[69] results of polygraph tests,[70] and whether a co-conspirator has turned on him.[71] The only lies that are off limits are threats to physically

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U.C.L.A. L. Rev. 839 (2996) (finding 83.6% waiver rate).

[65] Susan R. Klein. Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure, 99 Mich. L. Rev. 1030 (2001) (courts now assume that if there was a proper Miranda waiver the resulting statement is voluntary, without engaging in the pre-Miranda due process analysis to determine if the statement is nonetheless coerced, thus the jurisprudence surrounding confession rules post-Miranda have made it easier for police to obtain confessions and more difficult for courts to ferret out the coerced ones); William J. Stuntz, Miranda's Mistake, 99 Mich. L. Rev. 975 (2001).

[66] See generally Welsh White, Miranda's Waning Protections" Police Interrogation Practices after Dickerson (2004) (summarizing modern interrogation techniques).

[67] .

[68] Allison D. Redlich, et. al., The Police Interrogation of Children and Adolescents, in Interrogations, Confessions and Entrapment 107 (G. Daniel Lassieter ed. 2004) (noting that under current law police are permitted to tell suspects that they have an eyewitness or fingerprints on the weapon when they do not, in order to obtain incriminating statements)
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[69] .

[70] .

[71] Frazier v. Cupp, 394 U.S. 731 (1969) ("The fact that the police misrepresented the statements that [the coconspirator] had

injure,[72] and promises of leniency in the criminal matter.[73] There is little attempt by the Court to explain why certain lies are acceptable but others render the confession unduly coercive. [74] Again, there is simply no theory regarding dishonesty by governmental officials toward citizens - when is a lie prohibited, when are omissions sufficiently like lies to be actionable, and what sorts of lies are less culpable than others.

Contrary to these cases concerning lies about identity and lies about constitutional rights that concern pre-trial police behavior, a prosecutor and judge must obtain a knowing, voluntary, and intelligent waiver of a citizen's trial rights. [75] This generally means that the government must actually disclose the existence of a constitutional trial right and explain the contours of the right to the suspect before she can waive it. A suspect cannot waive her Sixth Amendment rights to an attorney and jury trial without full knowledge of these rights. Such information is generally imparted by the defense attorney and the trial judge. For example, to waive the right to a jury trial in the federal system, the defendant must have "the approval of the court and the consent of the government. [76] A defendant cannot waive his Sixth Amendment right to be present at trial without the "fully informed and publicly acknowledged consent of the client." [77] A judge will not allow a defendant to waive his right to counsel in favor of representing himself without a full and frank discussion of the

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made is, while relevant, insufficient ... to make this otherwise voluntary confession inadmissible."). See generally Richard Leo, The Third Degree and the Origins of Psychological Interrogation in the U.S., in Interrogations, Confessions and Entrapment 37.

[72] .

[73] .

[74] The Court is not better at providing a theory of coercion than it is at providing a theory of honesty. See, e.g., unconstitutional conditions cases, involuntary confession cases, Berman article.

[75] .

[76] See Singer v. U.S., 380 U.S. 24 (1965); Fed. Rule Crim. Proc. 23(a).

[77] Taylor v. Illinois, 484 U.S. 400 (1988).

wisdom of such a move.[78]

Thus this duty is more than just a requirement that the government tell truth when asked, and more than a requirement that the government simply not conceal relevant facts from the suspect. Before a citizen can waive all of her trial rights and plead guilty to a federal criminal offense (as 97% of federal criminal suspects do),[79] federal judges have an affirmative duty, pursuant to the federal constitution and Fed. Rule of Crim. Proc. 11, to explain what the suspect's trial rights are, and inform the suspect how he can exercise these rights. The Federal Rules provide a list of disclosures that the federal judge must relay to the defendant in open court before accepting her plea: (1) the government's right, in prosection for perjury or false statement, to use against the defendant any statement that he gives under oath; (2) the right to plead not guilty; (3) the right to a jury trial; (4) the right to be represented by counsel at each stage of the proceeding, and if necessary have court appointed counsel; (5) the right to confront and cross-examine witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel attendance of witnesses; (6) that the defendant is waiving these trial rights if he pleads guilty; (7) the nature of the charges; (8) the maximum penalty; (9) any mandatory minimum penalty; (10) forfeitures; (11) court authority to order restitution; 12) court's obligation to impose a special assessment; (13) the application of the Federal Sentencing Guidelines; (14) terms of any appellate waivers.[80] The court "must address the defendant personally, give him this advice, and be sure that he understands it."[81] This rule is applied rigorously, and is a constitutional matter quite aside from the Rule.[82]

Prior to the 1975 and 2002 amendments to the Federal Rules of Criminal Procedure, rule 11 did not list every particular piece of advice the judge must offer, but instead required that the

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[78] Faretta v. California, 422 U.S. 806, 835 (1975) (defendant "should be made award of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'").

[79] Booker.

[80] FRCP 11(b)(1) (West 2005).

[81] Wright, section 171, Vol. 1A (West 1999 and 2004).

[82] McCarthy v. U.S>, 394 U.S. 238 (1969); Boykin v. Alabama, 395 U.S. 238 (1969); Bousley v. U.S., 118 S.Ct. 1604 (1998)..

defendant be apprised of all "consequences" of the plea. Circuit courts developed case law to determine which "consequences" must be included - direct consequences must be listed, but collateral consequences need not be. Many courts continue to use this language today. Not surprisingly, much dispute ensued regarding what was a "direct" versus a "collateral" consequence. For the majority of courts, collateral consequences which need not be disclosed include loss of civil rights,[83] increased punishment for repeat offenders,[84] deportation,[85] and ineligibility for federal benefits.[86]

The present Rule 11, with its 14 categories of advice, is a hodgepodge of what must and need not be told to a suspect, without any attempt at a unifying theory.[87] It appears that all of the warnings concern what may happen to a defendant at trial, and none concern how the outcome of the trial (other than the prison term) will change his life. For example, a judge or defense attorney need not tell defendant of immigration repercussions of conviction, but must tell him of the maximum penalty, though the former is often much more important to a defendant than the latter, particularly after the passage of the Illegal Immigration Reform and Immigration Responsibility Act of 1996. [88]. An equally

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[83] Cuthrell v. Director Patuxent Inst., , 475 F.2d 1364 (4th Cir. 1973) (guilty plea not rendered involuntary where defendant not informed that under Maryland law his plea must subject him to commitment for treatment), cert. denied 414 U.S. 1005.

[84] U.S. v. Lambros , 544 F.2d 962 (8th Cir. 1976); U.S. v. Hernandez, 234 F.3d 252 (5th Cir. 2000) (defendant need not be advised of the dangers of concurrent sentences posed by 18 U.S.C. section 3584 before a guilty plea is accepted).

[85] U.S. v. Garza-Sanchez , 217 F.3d 808 (9th Cir., 2000), cert. denied 531 U.S. 1180.

[86] U.S. v. Morse, 36 F.3d 1070 (11th Cir. 1994).

[87] See generally Chen and Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell Law Rev. __ (2002) (arguing that Rule 11's provisions that judges and lawyers need not advise defendants of collateral consequences of a guilty plea is inconsistent with the rule in Strickland v. Washington requiring effective assistance of counsel).

[88] As a result of the IIRIRA, more crimes are included, deportation is made mandatory in many circumstances, and judicial review is significantly curtailed. Many defendants are not informed or misinformed by counsel or the court about the immigration consequences of a guilty plea.

significant example is that the prosecutor need not disclose exculpatory information related to guilt or punishment to the suspect before offering and accepting a plea, [89] though the constitution demands that such evidence be revealed to a defendant were she to go to trial.[90] Though obviously of critical importance to a defendant (who might well refuse to plead guilty if she knew of the existence of such exculpatory information), it is not part of the Rule 11 colloquy.

Part II. The Federal Criminal Code's Limits on Lies, Omissions, and Concealment by Citizens

The federal prohibitions against outright lying by citizens to federal officials are the easy cases, both normatively and doctrinally. Any theory of dishonesty will ban outright knowing material falsehoods except in the most narrow of circumstances. A citizen told under oath that he must tell the truth cannot justifiably complain if subject to a perjury charge under 18 U.S.C. section 1621 or 1623 if makes a materially false statement.[91] Similarly, outright knowing material false statements are criminal when made to law enforcement personnel under the first subsection of 1001, regardless of the defendant's fear of self-incrimination if he were to refuse to answer.[92] Likewise, if a citizen knows there is a pending proceeding before a court, Congress, or an agency of the United States, she may not corruptly or forcible

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[89] United States v. Ruiz , 536 U.S. 622 (2002) (reserving issue of whether a suspect can waive the right to obtain evidence that establishes that he is actually innocent of the crime charged).

[90] Brady.

[91] Some version of the primary perjury statute, 18 U.S.C. section 1621, has been around for nearly a century. 18 U.S.C. section 1623 was added by Congress in 1970 in response to perceived evidentiary problems with the original statute. The elements of both offenses are (1) the testimony/document was given under oath; (2) the testimony was false; (3) the defendant knew that the testimony/document was false; and (4) the matter was material. See Bronston v. United States, 409 U.S. 352 (1973) (literal truth is a defense to perjury, even if the jury found that defendant intended to mislead the questioner). 1963 applies only to perjury before court (not Congress), includes use of false materials, eliminates the two-witness rule, and allows conviction based upon either proof of falsity or irreconcilable contradictory declarations.

[92] Brogan v. United States, 522 U.S. 398 (1998) (exculpatory no doctrine is not a defense to 18 U.S.C. section 1001's proscription against false statements to the FBI).

obstruct the administration of law,[93] which includes such activities as intentionally destroying documents to prevent their use by an agency,[94] intentionally lying to a grand jury witness so that he will pass along perjurious testimony in a pending grand jury proceeding,[95] or preventing a witness from providing information to a law enforcement agent relating to the commission of a federal offense.[96] The federal government clearly expects that all citizens answer truthfully when called upon to do so by the government.

However, the duty of a citizen to disclose or volunteer information, even information which that citizen knows the government would find useful and wishes to possess, is less clear. There are circuit splits under many of the federal statutes listed above regarding when affirmative disclosure is required (though all find criminal liability for outright falsehoods). For example, there is one section of 18 U.S.C. section 1001, the statute prohibiting materially false statements to any branch of the federal government, that additionally prohibits not merely false representations, but rather nondisclosure or concealment of material facts.[97] This statute, as originally enacted in 1872, was

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[93] Some version of obstruction prohibition can be traced to the Judiciary Act of 1831, but the modern versions were enacted in the 1982 Victim and Witness Protection Act and the 2002 Sarbanes-Oxley Act. There are too many obstruction statutes to list here. The most frequently used provisions are 18 U.S.C. section 1503, which prohibits obstruction before a federal curt or grand jury, 18 U.S.C. section 1505, which prohibits obstruction before departments, agencies and committees, and 18 U.S.C. section 1512, which prohibits witness tampering. See generally Julie O'Sullivan, White Collar Crime (West 2005).

[94] Anderson v. U.S. (USSC 2005) (1512 conviction reversed because jury misinstructed that defendant need not intend to violate the law).

[95] U.S. v. Aguilar, USSC (1503 conviction of federal judge reversed because government failed to prove that the defendant's actions had the "natural and probable effect" of impeding a pending proceeding).

[96] U.S. v. Veal (11th Cir. 1998).

[97] 18 U.S.C. section 1001(a)(1) (West 2002) makes it a crime to knowingly and willfully falsify, conceal, or cover up by any trick, scheme or device a material fact. By contrast, 18 U.S.C. section 1001(a)(2) makes it a crime to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation. For both the false statement and concealment

limited to frauds against the government by military personnel and to frauds causing money or property loss. It was expended in 1918 and again in 1934 to cover frauds upon the U.S. government by any person, and to frauds which frustrate government programs as well as those which cause monetary loss.[98] Now that it applies to all citizens and covers concealment, just when must a citizen disclose information to the executive, legislative, or judicial branches of the Untied States? It would be unprecedented to require that citizens seek out federal officials in order to disclose information which may be damaging to those disclosing it.

Most circuit courts hold that a the concealment prong of 1001 requires proof of a duty to disclose before one is liable.[99] Some courts go further and additionally require proof of an "affirmative act" before one is guilty under the concealment theory.[100] Of course the $64,000 question is when does a citizen have a duty to disclose? There is no written source for such a duty, in either state or federal criminal codes. Rather, it is simply alleged by a federal prosecutor and then found, or not, by each particular grand and petit jury, and upheld, or not, by each appellate court. Essentially, most courts hold that when a government official inquires about a fact, either in person or by statute, the target of this inquiry or statute has a duty to disclose enough information so that the government is not misled regarding the subject of the inquiry.

For example, in United States v. Woodward,[101] a defendant who arrived in Los Angeles from Brazil was asked to complete a Customs

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prongs, the subject of the lie or concealment must concern a matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.

[98] See generally Welling, Beale, and Bucy, Federal Criminal Law and Related Actions section 12.8 (West 2000); United States v. Bramblett, 348 U.S. 503 (1955).

[99] But see U.S. v. Austin., 817 F.2d 1352 (9th Cir. 1987) (requiring independent duty to disclose would be inconsistent with the purpose of section 1001, because it is a catchall that reaches fraud not prohibited by other statutes).

[100] See, e.g., United States v. Wright, 211 F.3d 233, 238 (5th Cir. 2000); United States v. Curran, 20 F.3d 560, 566 (3rd Cir. 1994) (concealment "must be established through evidence of wilful nondisclosure by means of a 'trick, scheme, or device'").

[101] 469 U.S. 105, 108 & n. 5 (1985) (per curiam) (citing London with approval).

form which included the question "Are you or any family member carrying over $5,000" in cash? He falsely checked the "no" box, leading to his convictions for making a false statement in violation of 18 U.S.C. section 1001, and wilfully failing to report that he was carrying in excess of $5,000 cash, in violation of 31 U.S.C. section 1058.[102] The Woodward Court held that a 1001 offense is not necessarily a lesser-included offense of 1058 under Blockburger because one could commit the 1001 violation by lying rather than by concealing. For example a defendant-traveler who was not asked by a Customs Agent to complete a currency report required by 31 U.S.C. section 5316[103] may still be guilty under 31 U.S.C. section 1958, but not have concealed a material fact sought in that report by means of trick, scheme or device, and therefore his conduct would not violate 18 U.S.C. section 1001's concealment prong.[104] One does not "trick" the government by concealing information until there is a duty to reveal such information, which apparently would not be triggered until the government requested the information.

In a more recent case, Peter Bacanovic, Martha Stewart's stock broker, could have refused to discuss her stock trades with the SEC (though perhaps on pain of licensure removal). However, once he agreed to discuss the matter, he could not offer part of the story, nor omit any relevant parts of the conversation. As the Second Circuit noted, "Defendants legal duty to be truthful under section 1001 included a duty to disclose the information he had regarding the circumstances of Stewart's December 27th trade, even though he voluntarily agreed to speak with investigators. . . . Trial testimony indicated that the SEC had specifically inquired about Bacanovic's knowledge of Stewart's trades. As a result, it was plausible for the jury to conclude that the SEC's questioning had triggered Bacanovic's duty to disclose and that ample evidence existed that his concealment was material to the investigation."[105]

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[102] The Ninth Cir. had held that the 1001 charge was a lesser included offense of the CMIR charge, and that therefore the defendant could only receive on conviction. The court reasoned that the willful failure to file the report is a form of concealment prohibited by 1001, and that there fore every violation of 1058 is also a violation of 1001. Woodward at n. 3.

[103] requiring that a traveler declare in excess of $10,000 cash if entering or leaving the United States.

[104] Id. at ___, citing with approval United States v. London, 550 F.2d 206, 213 (5th Cir. 1977).

[105] United States v. Stewart, 433 F.3d 273, 318-319 (2nd Cir. 2006).

Cases have held that there is a duty to disclose information based upon the signing of a contract,[106] statutes or other regulations,[107] the obtaining of government benefits,[108] the terms of a plea agreement,[109] submission of a loan,[110] the application for a

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[106] United States. v. Moore , 446 F.3d 671 (7th Cir. 2006) (where defendant's mother was elected to Milwaukee's Common Council and appointed her daughter as head of a nonprofit organization that received federal funds from the City through the Dept. of Housing and Urban Development, defendant had a duty to disclose this family relationship to the city, based upon her signing a contract to obtain HUD bock grant funds and upon her communications with City officials who were investigating the conflict-of-interest problems).

[107] Moore, 466 F.3d 673, 680 (7th Cir. 2006); U.S. v. Snook, 366 F.3d 439 (7th Cir. 2004) (EPA regulations required that petroleum refinery submit all test results to the EPA, even if the performance of these tests were not required by law).

[108] United States v. Westover, 107 Fed. Appx. 840 (10th Cir. 2004) (where defendant was unemployed when he originally applied for public housing, but obtained a new job with a trucking company after he signed the certification but before he moved into public housing, court affirmed conviction under concealment prong "by failing to report income to THA that would affect the amount of rent subsidies he was entitled to receive."); U.S. v. Failing, 96 Fed. Appx. 649 (10th Cir. 2004) (where defendant was retired railroad engineer who received disability benefits from the Railroad Retirement Board, conditional on his not having any employment that paid more than a certain amount per month, his accurate representation that he had been working one day a month at a golf course was misleading, as he failed to disclose that he had also taken a job as a security screener at an airport).

[109] U.S. v. Triana, 468 F.3d 308 (6th Cir. 2006) (defendant plead guilty to Medicare/Medicaid fraud and, as a condition of he supervised release was to refrain from any involvement with the filing of Medicare claims, conviction under concealment prong of 1001 upheld where defendant formed medical companies but failed to report the extent of his involvement to the Probation Office).

[110] U.S. v. Rice , 449 F.3d 887 (8th Cir. 2006) (defendant incurred a duty to disclose all relevant information, including the sale of his soybean crop, when he submitted an application for a loan to the Farm Service Agency).

federal position,[111] and the voluntary submissions of forms,[112] even where the filing of these forms are not required,[113] or the answer of questions by federal officials, even where the citizen has no statutory or other duty to respond.[114] Once a citizen responds to the government, however, "that person has an obligation to refrain from telling half-truths or from excluding information necessary to

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[111] United States v. Hatch , 434 F.3d 1 (1st Cir. 2006) (defendant completed series of forms during application for position as air traffic controller, and reported only one of his three prior convictions). Defendant's duty to disclose the convictions arose when he chose to complete the application and mail it to the FAA.

[112] U.S. v. Snook , 366 F.3d 439 (7th Cir. 2004) (where defendant's refinery performed tests of the levels of certain chemicals in its waste more often than required, but statute required that refinery had to submit those test results to the EPA, and defendant met concealment prong by selectively disclosing only passing test results)..

[113] United States v. Shaw, 150 Fed. Appx. 863, 877 (10th Cir. 2005) (where defendant, an engineering consultant who arranged for a couple to purchase an old refinery, submitted a "Notice of Demolition and Renovation" to the EPA though only the owner was required to submit this form; conviction under concealment prong of 1001 upheld because "although Shaw may not have had a duty to report the presence of asbestos to the EPA, once he did so, he was obligated to provide truthful information under section 1001."). Defendant had no pre-existing duty to disclose, however, because he did submit the forms, and the because the forms explicitly asked about the presence of asbestos, the defendant in voluntarily submitting the forms acquire a duty to disclose his knowledge of the asbestos.

[114] U.S. v. Tatoyan , 474 F.3d 1174 (9th Cir. 2007) (where customs agent informed defendants as they were about to board a plane that they had to report any amount of cash over $10,000, they incurred duty to disclose cash to government); Moore (even if defendant was ignorant of her legal obligations to disclose familial relationships as contained in her contract with the government and HUD regulation 24 C.F.R. section 570.611(b), her duty arose when City officials began submitting inquiries to her about the relationships between the nonprofit organization, her mom, and her sister).

make that person's statement truthful.[115] Thus, a citizen need not report criminal activity, personal financial information (not required by tax or other statutes), or other information that might be useful to the federal government, unless a federal official specifically requests this information, or the citizen volunteers some (but not sufficient) information about an event such that the story is misleading. On the other hand, if the government does not ask any questions, and the citizen has no statutory or other duty to disclose, than she may remain silent.

For example, in United States v. Gibson,[116] the superintendent of a mine was charged under the concealment prong of 18 U.S.C. section 1001 based upon his alerting mine personnel that Mine Safety and Health Act inspectors ("MSHA") were on site so that they could cover up violations of the Act. The district and circuit courts dismissed as there was no duty to disclose violations of the Act to the government, only currently hazardous conditions. "[T]he government] essentially alleged that, by preventing the safety inspectors from observing the actual working conditions in the mine, the defendant failed to disclose willful violations of the MSHA (or, more precisely, the defendants failed to allow the safety inspectors to discover the violation on their own). Such 'disclose,' however, is not required by the regulations. 18 U.S.C. section 1001 is not violated unless there is a duty to disclose the concealed facts."[117]

Under the concealment prong, even literally true statement are actionable under 1001. For example, once a person files a form with the U.S. government, they acquire a duty to disclose all information necessary to make their literally true statement non-misleading. In United States v. Diego,[118] the defendants participated in sham marriages in order to obtain favorable immigration statutes. Defendant's true statements to immigration officials that they were validly married under New York state law becomes the concealment of a material fact subjecting him to criminal liability. Though he did not lie to the government, he had a duty, according to the U.S. Attorney's Manual, to provide sufficient information on his immigration form such that the

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[115] U.S. v. Cisneros , 26 F.Supp.2d 24, 42 (D.C.C. 1998) (:Since Cisneros responded to the questions, he had a duty to include all information necessary to make his statements truthful").

[116] 409 F.3d 325 (6th Cir. 2005).

[117] Id. at 333.

[118] 320 F.2d 898 (2nd Cir. 1963).

government official reading it could tell that the marriage was one of convenience.[119]

The concealment prong caselaw under 1001 is very similar to the mail, wire, and securities fraud cases involving failure to disclose. Mail fraud includes two types of schemes to defraud; (1) an affirmative lie[120] or (2) failure to disclose the breach of a fiduciary duty.[121] There are two possible objects to a scheme to defraud; (1) obtaining money or property, or (2) depriving the victim of honest services or good government.[122] The affirmative lies told to obtain money or property are, of course, the easy cases. Any theory of honesty will require that neither citizens nor the government materially misrepresent facts to others in order to deprive them of money. The failure to disclose cases, especially where the failure to disclose deprives the victim of the intangible right to honest services or good government, are the cases that raise difficult issues. These are essentially the same issues as are raised by the cases brought under the concealment prong of the false statement statute - when is the failure to disclose enough like a lie to make it actionable, and to whom do citizens owe the right to honest services. In the mail fraud area, circuit courts generally require first that the government prove a fiduciary duty to the victim of the fraud, and then that the defendant breached this duty by failing to disclose material information to whomever he owed the duty. These mail fraud concealment cases can further be broken down into two sub-categories: (1) cases where the defendant is a private person depriving another private person of honest services or property;

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[119] Id. at 930. The conviction in Diego was reversed because it was charged as a false statement, when it fact it was literally true. Thus the U.S. Attorney's Manual recommends "casting the indictment in terms of a 'concealment of a material fact' rather than the making of a false statement or representation." U.S. Attorney's Manual, Title 9, sec. 912.

[120] See United States v. Brown (11th Cir. 1996) (corporate conviction reversed because lie was not one reasonably calculated to deceive a person of ordinary prudence)

[121] See United States v. Siegel (2d Cir. 1983) (failure to disclose noncorporate use of off-book money breached duty to shareholders).

[122] see NcNally v. United States (USSC 1987) (mail fraud conviction reversed as Court rejects citizen's intangible right to honest government by public officials as an appropriate object of fraud under 1341). This decision was essentially overturned by Congress in 1988 with enactment of 18 U.S.C. section 1436 (including in definition of "scheme to defraud" the deprivation of honest services and good government).

and (2) cases where the defendant is a public official or quasi-public official,[123] depriving the citizens of a state of their right to honest government.[124]

In the absence of a fiduciary relationship, citizens need not disclose information to other citizens or to the government, even when the failure to disclose will result in loss. Such a relationship can be based upon employment, a contract, familial ties, or statutes. Employees owe a fiduciary duty to their employers, and public officials owe a fiduciary duty to the electorate. However, that statement does not answer the same $64,000 question I posed regarding the false statement concealment prong cases.[125] Exactly when does this duty arise and what exactly is one's duty once the fiduciary relationship has been established?

Some examples here would surely assist us. I will start with the private citizen cases. In the very well-known U.S. v. Seigel case,[126] the theory of the prosecution was that the defendants, corporate managers, breached their duty to shareholders by failing to disclose that they had sold defective toys off the book and used the money for some combination of personal enrichment and union bribes. The fraud was not the taking of the money, but the failure to reveal to the shareholders that they had taken the money. As Judge Winters noted in his dissent, the court reads "the wire fraud statute to create a federal law of fiduciary obligations imposed on corporate directors and officers, thereby setting the stage for the development of an expandable body of criminal law regulating intracorporate affairs." In other words, where does this federal law of fiduciary duty come from? Where can a corporate officer or

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[123] Sufficient if D has authority over public distribution of insurance contracts, even if he is head of Democratic Party (not a public official). U.S. v. Turner, 465 F.3d 667 (6th Cir. 2006) (candidate in local election, unlike elected official, could not deprive public of honest services, as they did not yet owe the public a fiduciary duty).

[124] See, e.g., U.S. v. Woodard , 459 F.3d 1078, 1086 (11th Cir. 2006) ("But as a public official, [the Atlanta police officer] owed a fiduciary duty to the public to make governmental decisions in the public's best interest," and his "conspiracy to benefit from an undisclosed conflict of interest will support his conviction for conspiracy to deprive the public of his honest services.")

[125] See supra n. 97 and accompanying text.

[126] 717 F.2d 9 (2nd Cir. 1983).

lawyer go to learn about this disclosure obligations?[127] There is no Restatement of Fiduciaries, Model Fiduciary Code, or any other state or federal law where these obligations are spelled out. Yet most circuits accept this theory and rebuff any attempt to limit the federal criminalization of private fiduciary duties through a vagueness challenge.[128]

The same theory of concealment is used against state and local officials, who commit fraud by failing to disclose information to the citizens or the state, thus depriving the state of the honest services of the public official. In McNally v. United States[129] the defendant, Chairman of the state Democratic Party, defrauded the citizens of Kentucky of their right to his honest services by failing to disclose that he had an ownership interest in one of the business receiving a commission for the state's award of workman's compensation insurance. Likewise in United State v. Margiotta[130] the Chairman of the Republican Committee in Nasseau County, New York, defrauded the citizens of good government by failing to disclose that the Broker of Record selecting insurance companies for municipal properties kicked back part of his commission to other persons designated by Margiotta. Financial gain to defendant (or loss to the state or its citizens) is not generally required, and frequently not proven.[131] These public official mail fraud

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[127] See John Coffee, Jr., From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics, 19 Am. Crim. L. Rev. 117 (1981). See also United States v. Bronston, 658 F.2d 920 (2nd Cir. 1981) (attorney convicted of mail fraud for breach of fiduciary duty to disclose conflict of interest to law firm); U.S. v. Wallach, 935 F.2d 445 (2d Cir. 1991) (corporate shareholders deprived of the right to control how the corporation's money was spent).

[128] U.S.v . Rydicki (2nd Cir. en banc 2003).

[129] 483 U.S. 350 (1987) (reversing conviction because honest services not part of the mail fraud statute), subsequently overruled by Congress in its enactment of 18 U.S.C. section 1346, defining "scheme to defraud" under 1434 as included a "scheme to deprive another or the intangible right of honest services." (West 2006).

[130] 688 F.2d 108 (2nd Cir. 1982).

[131] U.S. v. Gordon , 183 Fed. Appx. 202 (3d Cir. 2006) (neither financial harm to the public nor personal gain to the defendant is required for honest services mail fraud); U.S. v.

non-disclosure cases often fall into two categories, "(1) bribery, where a legislator was paid for a particular decision or action; or (2) failure to disclose a conflict of interest resulting in personal gain, which, in the public sector, is oftentimes prescribed by state and local ethics laws."[132] However, a violation of state law is not required in most jurisdictions for either subcategory, and most cases, including McNally and Margiotta, do not include or establish such a violation.[133]

Some jurisdictions have attempted to limit the disclosure requirements of public officials by requiring that the official fail to disclose the violation of a state criminal law. In the famous United States v. Brumley,[134] the Fifth Circuit held that employee of the Texas Industrial Accident Board could be found guilty of mail fraud based upon the failure to disclose a breach of his fiduciary duty, thus depriving the citizens of the state of Texas and the members of the Board of their right to honest services by a state employee. Mr. Brumley had taken "loans" from attorneys practicing before his board, and did not reveal this practice to his supervisors or the citizens of Texas. The Fifth Circuit found that the "honest services" that a defendant owes must be owed under state law, and Mr. Brumley violated this state law duty by committing the criminal offense of bribery in violation of the Texas Penal Code. Similarly, the Third Circuit has held that there must be a state fiduciary duty based upon state law in order for there to be a successful prosection under the failure to disclose mail fraud prosecution, as a basis in state law is the best method for limiting the reach of this statute.[135]

Russo, 166 Fed. Appx. 654, 660 n. 9 (3d Cir. 2006); U.S. v. Long, 95 Fed. Appx. 483 (4th Cir. 2004) (mayor saved County time and expenses, but did not benefit personally); U.S. v. Spano, 421 F.3d 599, 602-03 (7th Cir. 2005) ("A participant in a scheme to defraud is guilty even if he is an altruist and all the benefits of the fraud accrue to other participants").

[132] U.S. v. Antico, 275 F.3d 245, 261 (3d Cir. 2001). See also McNally, n. 1 (Stevens, J., dissenting) (listing public sector cases where judges, State Governors, chairman of state political parties, state cabinet officers, city aldermen, Congressman, and other state and federal officials have been convicted of defrauding citizens of their right to honest governmental services).

[133] See nn. ___ - ___ (citing to cases rejecting Brumley).

[134] 116 F.3d 728 (5th Cir. 1997) (en banc).

[135] U.S. v. Panarella , 277 F.3d 678 (3rd Cir.); U.S. v. Murphy, 323 F.3d 102 (3rd Cir); U.S. v. Gordon, 183 Fed. Appx. 202 (3d Cir. 2006) (unpublished) (Delaware County public official had an obligation to disclosure her relationship with the president of

Requiring the violation of a state law and the failure to disclose such violation before federal conviction certainly limits the universe of possible information that must be disclosed to the citizens and regulatory bodies of the state. The problem with these cases is that the court is interpreting a federal criminal prohibition, and one that makes no reference to state law.[136] Neither did Congress make any reference to state law when it codified the honest services cases by enacting 18 U.S.C. section 1346.[137] While this interpretation perhaps best advances federalism goals, and best limits potential prosecutorial abuses, it appears made up of whole cloth.

The Fourth, Seventh, Eleventh, and D.C. Circuits all reject Brumley but do not have a uniform system for determining when a public official has a fiduciary duty, nor what constitutes a breach. Most of these circuit expressly state that there need not be a predicate in state law for a fiduciary duty to be found.[138] Federal law determines whether there is a fiduciary duty,[139] though

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a development company with business before the County, as her conduct violated both state and county laws). The Fifth Circuit in Brumley did not yet decide whether a state criminal law violation is required, but in the third circuit "honest services fraud does not require a violation of criminal law, but rather a violation of a state-created fiduciary duty. Gordon, at 211.

[136] And Congress certainly does know how to reference state law when it so chooses. See RICO Act (18 U.S.C. section 1961(1), including nine state law offenses as predicates), Fed. Sentencing Manual (including state convictions in Chap. 3 determinations of criminal history category).

[137] 134 Congr. Rec. [H33296] (daily ed. Oct. 21, 1988); 134 Cong. Rec. S17,360-02 (daily ed. Nov. 10, 1988).

[138] U.S. v. Bryan, 58 F.3d 933 (4th Cir.); U.S. v. Long, 95 Fed. Appx. 483 (4th Cir. 2004) ("Although no violation of state law is required to obtain a conviction under the mail fraud statute ... the district court in its instructions on the mail fraud counts ... indicated that the jury must find a violation of W. Va. Code section 61-5-17 to support a conviction"), vacated on other grounds, Long v. U.S., 543 U.S. 1098 (2005); U.S. v. Bush, 522 F.2d 641 (7th Cir.) (mail fraud conviction need not be grounded in state law); U.S. v. Martin, 195 F.3d 961 (7th Cir.) (Posner, J.) (Seventh Cir. is currently in an anti-Brumley stance, but is open to changing doctrine if an effective appeal were put forward); U.S. v. Paradies, 98 F.3d 1266 (11th Cir) (rejecting Brumley and stating that it agreed with Judge Wood's dissent therein).

[139] But see U.S. v. Lemire , 720 F.2d 1327 (D.C. Cir.) (fiduciary duty owed need not arise from either state or federal

there is no written federal code establishing the contours of this federal fiduciary duty.[140] As with the private fiduciary cases lack of a Restatement of Private Fiduciaries, there is no written body of federal law, in the United States Code or elsewhere, describing the fiduciary duties of federal, state or local officials. As noted by Judge Winters in his dissent in Margiotta, "the courts have, with precious little analysis, brought virtually all participants in government and politics under the rubric fiduciary, the obligations imposed are wholly the creation of recent interpretations of the mail fraud statute itself. A reading of cases in this area, however, shows how little definition there is to these newly created obligations which carry criminal sanctions. For all we can find in the case law, no distinction is made between the fiduciary obligations of a civil servant, political appointee, elected official, candidate or partisan political leader. Juries are simply left free to apply a legal standard which amounts to little more than the rhetoric of sixth grade civics classes."[141]

Part III. The Golden Rule: Justification for the Federal Failure to Treat its Citizens as it Expects to be Treated.

It appears from the discussion above that the federal government is not as honest with citizens as it expects citizens to be honest the it. I have divided caselaw regarding dishonesty into general categories: outright lies versus failure to disclose pertinent information; and (2) lies/nondisclosures about constitutional rights versus lies about extraneous matters. In both of these categories, different standards apply contingent upon which parties is lying. It is never acceptable to lie to the government, regardless of what the lie concerns or whether the citizen is in or outside the courtroom (except for the very rare case where the lie is declared to be immaterial), yet the government may lie to citizens when it has what it considers to be good reasons, so long as the lie does not involve the existence of a constitutional criminal procedural guarantee. Citizens frequently have a duty to disclose to federal officials material facts regarding finances, fraud, the investigation of crime, or whatever else the government request, yet the government rarely has the equivalent duty to disclose the existence or contours of

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law).

[140] U.S. v. Margiotta , 688 F.2d 108 (2nd Cir.); U.S. v. Frost, 125 F.3d 346 (6th Cir.) (adopts the Margiotta test, federal law determines whether there is a fiduciary duty).

[141] Margiotta, 688 F.2d at 139-43 (Winter, J., dissenting in part and concurring in part). See also Geraldine Szott Moohr, Mail Fraud and the Intangible Rights Doctrine, Someone to Watch Over Us, 31 Harv. J. on Legis. 182 (1994).

constitutional rights to its citizens. We should expect there to be a better justification for dishonesty that the government can get away with it. I will seek such a justification below.

False statements

Outright lies regarding the existence of constitutional rights by law enforcement appear to be on the same plane as outright lies by citizens to the government regarding pending criminal investigations. Federal Criminal Code provisions bar a citizen from lying under oath to the government at any proceeding legitimately constituted to investigate a matter within that body's jurisdiction.[142] The constitution appears to demand the same when police request a consent search from a citizen. Police cannot falsely tell the citizen that he must consent to a search. It is probably unacceptable for government agents to lie about the existence of a constitutional right in most contexts, at least where the police are not disguised as non-government agents.[143]

However, police can lie to suspects during custodial interrogation regarding the existence and admissibility of evidence. They can also tell whopping lies to citizens during undercover sting operations, again about matters extraneous to constitutional rights. How can this be squared with citizens' obligation to tell the truth about all material matters under oath for judges, certain federal law enforcement agencies, or Congressional hearings (perjury), to tell the truth to law enforcement officers instigating a crime (1001) regardless of whether the citizen has taken an oath or is inside a courtroom, to not obstruct justice by convincing witnesses to lie or lying directly to a witness who will testify (Obstruction under 1512), etc.? Perhaps one can argue that police officers are not lying about a material matter during custodial interrogation and stings, but citizens are lying about material matters in the criminal offense context. This seems to me a relatively weak position. That information lied about by cops is material to citizen within the Court's meaning of term - is the information capable of affecting the decision of listener?[144]

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[142] Perjury, Obstruction, false statements under 1001.

[143] Miranda warnings not required from jailhouse snitches, Illinois v. Perkins, supra n. __ (where suspect does not realize he is being questioned by a government agent); Disguised government agent can ask suspect to sign an affidavid stting that he is not a government agent, and indicate that this prevents a fourth amendment search, Jacobsen.

[144] U.S. v. Gaudin, 515 U.S. 506, 509 (1995) (a statement is "material" if it has "a natural tendency to influence, or [is] capable of influencing, the decision of the decision-making body to which it was addressed.") Neder v. U.S., 527 U.S. 1 (1999)

Next, one could argue that since the government is trying to solve an criminal investigation in both contexts above (undercover stings and lying to suspects during custodial interrogations), it must have truthful information from citizens in order to achieve these aims. On the other hand, this same goal of ferreting out crime provides the government with good reason to use deception, and there is no corresponding duty on the part of the government to be truthful to its citizens. This argument would perhaps be more persuasive if the sole goal underlying the constitutional criminal procedural guarantees is truth-seeking; the accuracy of the outcome of criminal trials. However, the constitution demands that the government respect certain rights of individuals even where respecting these rights prevents the government from discovering truthful information. For example, the goal of Fourth Amendment search and seizure law is to respect privacy and autonomy, the Fifth Amendment self-incrimination clause protects against government overreaching and harassment. These goals frequently run counter to the truth seeking function of trial. Therefore, one needs a theory regarding when the government's interest in truth seeking trumps its interest in protecting citizens from governmental abuse. With no general theory about honesty in the relationship between a government and its citizens, one cannot decide when lying is appropriate.

Finally, one might argue that it is acceptable for government to practice deception, but unacceptable for its citizens to do so, because the government officials are the "good guys" and the target citizens are the criminals. We can trust the government to use deception only where necessary and only if it is a last resort (there no other way to accomplish the goal of the particular sting operation because the organized crime group is so secretive, or there is no other way to solve a particular crime without a confession).[145] The government has an acceptable motivation to lie - trying to solve crime, whereas citizens have an unacceptable motive to lie - not getting caught committing a crime or fraud. There are many problems with this reasoning. The first is that we cannot be sure that the government has proper motivation (to prevent crime with the least effect on individual liberties, rather than to find short-cuts to solve cases, score good public relations press, or use crime-fighting as a pretext for political or other goals) other than their say so. As the Court has stated regarding the warrant requirement, because of the competitive nature of law enforcement we need a impartial magistrate to pass on probable cause.[146] In fact, our system of checks and balances contained in separation of powers and federalism was designed because government

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(materiality is element of mail, wire, and bank fraud statutes).

[145] See standard for Wiretaps under Title III.

[146] .

promises are insufficient.

Another problem with the "good motivation" rationale is that we cannot know whether deception was necessary without knowing in advance whether the target of the sting or interrogation technique is guilty. If the citizen is innocent, then the use of deception against him is more difficult to justify.

Should we be persuaded accept some version of the "good motivation" rationale, this would still not lead to the wholesale adoption of our present policies regarding deception. Rather, it should lead to having some person (perhaps a judge) or some institution (perhaps an undercover operation committee located within the Department of Justice) deciding in advance whether deception is permissible in a given set of circumstances. This person or group would publish guidelines in advance as to when deception will be permitted, and government officials will have to seek permission to use deception, if time permits. For example Prof. Chris Slobogin has suggested in this symposium that the government create interrogation warrants.[147] A similar notion could be utilized for sting operations, permitting government agents design such an investigation only where there is reasonale suspicion to believe the target is engaged in serious criminal activity.[148] Again, having review of planned deception in advance would help prevent the unnecessary use of deception, and might offer some comfort to those on the receiving end of this kind of governmental behavior.

Nondisclosure

As noted in Part II, the federal government is obligated to disclose the existence of constitutional criminal procedural guarantees only where it requests a pre-trial waiver of a defendant's trial rights (Fed. Rule of Crim. Proc. 11), and must disclose only a few constitutional rights during custodial interrogations (the Miranda warnings). How can this be squared with the citizens' obligation to disclose all pertinent information to government officials under mail fraud and false statement statutes?

For example, in concealment prong cases under 18 U.S.C.

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[147] Cite (suggesting that police officials request an interrogation warrant when they wish to use deception during custodial interrogations). Alan Dershowitz made a similar proposal a few years ago suggesting torture warrants before the governmnet used that extreme method of collecting information.

[148] Maura F.J. Whelan, Lead Us Not Into (Unwarranted) Temptation: A Proposal to Replace the Entrapement Defense with a Reasonable Suspicion Requirement, 133 U.Pa.L.Rev. 1193 (1985).

section 1001, the citizen creates his obligation to disclose damaging information to the government by either initiating the encounter (asking for a loan, a job, government benefits), or voluntarily responding to the questions of a federal official (agreeing to talk to the SEC, but then disclosing only favorable facts).[149] If the citizen triggers a duty to disclose information to the government when she initiates an encounter, why doesn't the government trigger a similar duty on itself when it approaches a citizen and initiates an encounter? Once government asks citizen to consent to a search or answer questions about a crime, why isn't there a corresponding duty to disclose sufficient information about the citizen's rights so as to make the little disclosure there is non-misleading?

First, one could argue that even if there is a duty on the government's part to disclose certain information, the examples I have given in the Introduction and Part I of this essay (failure to disclose that a citizen can refuse to consent to search, failure to disclose that a suspect's request for counsel must be unambiguous, failure to disclose that unwarned statements can be used to impeach, etc.) all concern "collateral" matters and thus need not be disclosed. Even if the government's approach toward a citizen triggers some fiduciary duty to disclose information, these examples are excluded as "collateral" to core constitutional rights. Even in the Rule 11 context, collateral matters need not be disclosed. The primary problem with this argument is resolving the issue of what is collateral. There is presently no good answer in either Rule 11 or custodial interrogation context. We would need Congress or the Court to provide a list of what matters are collateral and what matters directly concern a defendant's constitutional rights. This same list should apply to the government during its Rule 11 colloquy and should bind the cops in making disclosures to citizens and suspects.

Another justification for the differing standards of honesty is that the government has no fiduciary duty to disclose rights to the citizen until it has or is about to curtail the citizen's liberty (custodial interrogation or criminal trial). Contrary to this, the citizen has a fiduciary duty to disclose to the government at an earlier time. This still leaves as a riddle why the government's duty to disclose information regarding criminal procedural rights is not yet triggered at the pre-trial stage, yet a citizen's obligation to disclose to the government is triggered when the government is just beginning to conduct an investigation. The police can stop a citizen to conduct a search yet fail to inform the citizen of his Fourth Amendment right to refuse a consent search. However, under mail fraud and false statement caselaw, a citizen cannot fail to disclose material information once she agrees or is bound to talk to the government official. It thus appears that duty to disclose to a suspect is not triggered

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[149] See Part II of this essay for cases.

until the trial - then Rule 11 colloquy requires disclosure of all trial rights, and a knowing and intelligent waiver. For citizen, on the other hand, what the duty to disclose consists of and when it is triggered uunder the false statement and mail fraud statutes depends upon what Circuit you live in.

All of the scholarly and judicial criticisms of obstruction, false statements, and mail fraud law; (1) that a suspect has insufficient notice in advance what behavior is "dishonest", (2) that it is unfair to make him wait until jury tells him after the fact (when too late to avoid conviction or civil rights action), and (3) that no federal law defining when a citizen has a fiduciary relationship under the mail fraud statute and when failure to disclosure constitutes a breach of this duty, apply equally well to law enforcement officers making snap disclosure decisions in the field. Police officers lack notice in advance regarding what they need to disclose; it is unfair to make the officer wait until jury tells him after the fact, when too late to avoid civil rights action; and there is no police manual or federal law cops can turn to define obligations. Congress or the Court must consider what level of disclosure is required in government-citizen encounters, and provide this information to cops and citizens in advance.

For example, the Supreme Court has now held that in the examples I provided in Part I regarding citizen/police encounters, there is no duty to disclose information about constitutional criminal procedural guarantees. However, since there is no theory tying these decisions together, there is little way for an officer to know in advance what his future disclosure duties are. He finds out after the fact, when the decision works its way up to the U.S. Supreme Court. This will rarely affect him personally, as qualified immunity[150] will protect him from a civil suit for the violation of the citizens civil rights.[151] On the other hand, when a citizen is deciding what she needs to disclose to a state, local or federal government, citizens of a state, or state agency on pain of a criminal mail fraud charge, she will not have the comfort of qualified immunity to protect her as she waits to hear first from the jury, and then from the appellate court, whether she had a duty to disclose. Except for those few jurisdictions which require the violation of a state law before finding a duty to disclose,[152] most jurisdictions have no real theory regarding when a citizen must disclose information to others. A federal duty to disclose exists when a jury (or sufficiently similar case law) tells us that it did

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150 Scott v. Harris, No. 05-1631 (USSC 2007).

151 42 U.S.C> section 1983.

152 Brumley (no federal mail fraud prosecution based upon honest services absent the violation of a state statute creating a fiduciary duty).

exist on these facts.[153] Citizens should be entitled to the same notice as law enforcement officers - in both situations, there should be a theory of when disclosure is required, and this theory should be transformed into written public law.

It is difficult to justify imposing one set of disclosure obligations on citizen's conduct toward government, but a different set of disclosure obligations on government's conduct toward citizens. In another example, in Moran v. Burbine,[154] six Justices refused not only to require that an officer who knew that a suspect's attorney was waiting to talk to him to disclose that fact, but also refused to exclude evidence where the officer mislead the suspect's attorney by falsely promising not to question the suspect. The majority found that the constitution mandated that the suspect be informed of his right to assistance of counsel, but not that the suspect be informed that counsel wished to see him. Justice O'Conner wrote that the information withheld by the police "would have been useful to Burdine; perhaps even might have affected his decision to confess. But, we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." The Court lacked "the authority to mandate a code of behavior for state officials wholly unconnected to any federal right or privilege."[155]

I believe that this essay is the first to compare these words with language in federal criminal cases whereby citizens are imprisoned for violating a code of behavior for state officials that federal prosecutors have created. A disclosure obligation in a situation like Burbine would, of course, be related to a federal right - the Sixth Amendment right to counsel. The trouble is that there is no written standards for what useful information public officials possess regarding the suspect's Sixth Amendment rights should be disclosed to citizens (though in that case we might say that information the police promise to disclose should be disclosed). The panel in Brumley, using language much like that of Justice O'Connor in Burdine, noted that the federal mail fraud statute ought not to mandate a code of behavior for state officials. Nonetheless, in the majority of jurisdictions federal prosecutors together with juries create disclosure obligations for private and public fiduciaries that are no more or less clearly related to federal rights (mail fraud under 1343 and false

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[153] Margiotta (creating federal mail fraud offense out of state method for awarding contracts based upon nepotism and personal favors, though this behavior is condoned by the state).

[154] Supra n.__

[155] Id. at ___.

statements under 1001) than the disclosure denied to Mr. Burdine was related to the Sixth Amendment. The federal code contains no mention of fiduciary obligations at all, much less their content. Yet the federal courts do require disclosure by the citizen to the government. In both cases, we need a theory regarding when information possessed by one party to a citizen-government encounter should be disclosed, and these disclosure standards should be written ex ante.

Conclusion

I started this essay attempting to resolve the issue of whether there is a net benefit to citizen knowledge of their constitutional rights and, if so, how the government can best accomplish this goal. I discovered that even if I accepted that the government should try to educate its citizens, I could not develop a plan of action without some general theory of deception. There is much scholarship bemoaning the lack of constitutionally mandatory disclosure requirements on the part of government actors regarding relaying information concerning constitutional criminal procedural guarantees to citizens. [156] Likewise, there is some scholarship describing the government's right to demand disclosure of incriminating facts by citizens on pain of criminal sanctions, some of it criticizing the lack of standards for ordinary citizens to turn to in figuring out their disclosure obligations to the government. However, there is no scholarly attempt to interweave these two strands. Thus, I attempted to begin to develop a holistic theory of governmental-citizen deception by comparing federal constitutional and statutory requirements of honesty and disclosure by law enforcement, prosecutors, and judges with the federal criminal code's requirement of honesty and disclosure on the part of ordinary citizens and government employees.

The federal constitution and the Federal Rules of Criminal Procedure ban lies to suspects regarding the existence of constitutional rights, but permits lies of other sorts during sting operations and during custodial interrogations. There appears to be no obligation to disclose rights pre-trial beyond that mandated by the Miranda warnings, though Rule 11 does require disclosure of constitutional rights before the acceptance of a guilty plea. The federal criminal code, on the other hand, outlaws all forms of lying to the government, and requires affirmative disclosure of unfavorable facts in many circumstances by private citizens and state employees.

I cannot account for all of the differences in these contexts. For example, why is the government allowed to lie to us, but we cannot return the favor? Why isn't the government's duty to disclose relevant facts to citizens, both facts regarding the

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[156] Arnold Loewy.

existence and contours of constitutional rights and other facts material to decisions that citizens need to make, triggered by the relationship the government establishes when it approaches a citizen to initiate an encounter? Why isn't a law enforcement officer's fiduciary duty to a citizen triggered simply by their employment with the federal government, the way public officials have a duty to disclose to the state and its citizens under the mail fraud statute, and private citizens have a duty to disclose facts to their employers, triggered by either state law or some formless and unwritten federal law of public and private fiduciary duty? I suggest that we cannot answer questions concerning when a lie is impermissible and when the failure to disclose is to be treated as a lie without an overarching theory of deception. Once we define deception, we can begin to construct a code of behavior that is applicable to both government and non-governmental actors.