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# TESTIFYING: POLICE PERJURY AND WHAT TO DO ABOUT IT

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O.J. Simpson's trial for the murders of Nicole Brown Simpson and Ronald Goldman provided the nation with at least two pristine examples of police perjury. First, there was the exposure of Detective Marc Fuhrman as a liar. While under oath at trial the detective firmly asserted, in response to F. Lee Bailey's questions, that he had not used the word "nigger" in the past decade. The McKinny tapes and assorted other witnesses made clear this statement was an untruth. That proof of perjury, together with the defense's innuendo that Fuhrman had planted a glove smeared with Nicole's blood on Simpson's property, severely damaged the prosecution's case.<sup>1</sup>

Second, and less well known, is Judge Lance Ito's finding that Detective Philip Vannatter had demonstrated a "reckless disregard for the truth" in the warrant application for the search of Simpson's house. Among other misrepresentations,<sup>2</sup> Vannatter insinuated that Simpson had suddenly taken flight to Chicago when in fact police knew the trip had been planned for months, and unequivocally asserted that the substance found on Simpson's Bronco was blood when in fact it had not yet been tested.<sup>3</sup>

A third possible series of perjurious incidents occurred at the suppression hearing, when both Fuhrman and Vannatter stated that police investigating Simpson's compound had not considered O.J. a suspect, but rather had entered the premises solely out of concern for the athlete's welfare (and therefore had not needed probable cause or a warrant). Although both Judge Ito and

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1. For one account of this series of events, see Jeffrey Toobin, *A Horrible Human Event*, *NEW YORKER*, Oct. 23, 1995, at 40, 41-42.

2. Vannatter also neglected to mention that much of the basis for his assertion that there was probable cause came from a warrantless entry of O.J.'s compound, the legality of which had not yet been litigated. See *infra* text accompanying notes 4-5.

3. For a description of these misrepresentations and how Judge Ito reacted to them, see Wayne R. LaFave, *O.J. Simpson Case Commentaries: Challenging Probable Cause for Search Warrants*, 1994 WL 530235, Sept. 30, 1994, available in WESTLAW, O.J.-Comment database (on file with the *University of Colorado Law Review*).

Magistrate Kathleen Kennedy-Powell accepted these assertions,<sup>4</sup> most who have considered the matter believe otherwise,<sup>5</sup> on the common sense ground that police who knew that O.J. had beaten Nicole on past occasions, found what appeared to be blood on his car, and were unable to locate him after the murders would zero in on him as a possible culprit.

If one believes the defense theory of the case, Fuhrman's and Vannatter's deceitful exploits were a racist attempt to send an innocent person to jail,<sup>6</sup> as well as a form of protective lying, meant to prevent discovery of their own criminal activity in planting evidence. If one believes the prosecution's theory, these lies were merely a well-intentioned effort, albeit an improper one, to ensure conviction of a guilty person. On the latter theory, Fuhrman's denials at trial were meant to avoid a topic that would only have distracted the jury from the "real" issue. Similarly, Vannatter's lies in the warrant application and Fuhrman's and Vannatter's probable dissembling at the suppression hearing were designed to cover up irregularities in the evidence gathering process that, if discovered, might have lead to exclusion of crucial incriminating information.

We may never know with certainty the reason for the perjury in the Simpson case. But we do know that, whatever the motivation, the perjury was wrong. If the lying occurred to frame an innocent person, it was clearly corrupt. If instead it was meant to facilitate conviction of a person the police witnesses thought to be guilty, it was also reprehensible. Although, as we shall see, many police and even some attorneys and judges seem to think otherwise, lying to convict a guilty person is wrong for several reasons. It is wrong because it involves lying under oath to judicial officers and jurors. It is wrong because it keeps from those fact finders information relevant to constitutional and other

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4. Kenneth B. Noble, *Ruling Aids Prosecution of Simpson*, N.Y. TIMES, Sept. 20, 1994, at A16.

5. See, e.g., Wayne R. LaFave, *O.J. Simpson Case Commentaries: Over the Wall: A New Theory Regarding Entry of the Simpson Compound*, 1994 WL 562135, at 1, Oct. 15, 1994, available in WESTLAW, O.J.-Comment database (on file with the *University of Colorado Law Review*) ("The LaFave poll (admittedly unscientific and consisting of nothing more than the random reactions of friends, colleagues and students with whom I have discussed the Simpson case) indicates that most people have responded to [these claims] with a fair degree of incredulity.").

6. See Toobin, *supra* note 1, at 41-42.

issues. And it is wrong because the police cannot be counted upon to get guilt right.

Perhaps most importantly, police lying intended to convict someone, whether thought to be guilty or innocent, is wrong because once it is discovered, it diminishes one of our most crucial "social goods"—trust in government.<sup>7</sup> First, of course, the exposure of police perjury damages the credibility of police testimony. As the aftermath of the Fuhrman debacle has shown, the revelation that some police routinely and casually lie under oath makes members of the public, including those who serve on juries, less willing to believe *all* police, truthful or not. One comment that a New York prosecutor made about the impact of the Simpson case illustrates the point: "Our prosecutors now have to begin their cases defending the cops. Prosecutors have to bring the jury around to the opinion that cops aren't lying. That's how much the landscape has changed."<sup>8</sup>

Police perjury can cause other systemic damage as well. Presumably, for instance, the loss of police credibility on the stand diminishes law enforcement's effectiveness in the streets. Most significantly, to the extent other actors, such as prosecutors and judges, are perceived to be ignoring or condoning police perjury,<sup>9</sup> the loss of public trust may extend beyond law enforcement to the criminal justice system generally.

7. The idea of trust as a social good is presented in SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 26-27 (1978) ("[T]rust is a social good to be protected just as much as the air we breathe or the water we drink. When it is damaged, the community as a whole suffers; and when it is destroyed, societies falter and collapse.").

8. Joe Sexton, *Jurors Question Honesty of Police*, N.Y. TIMES, Sept. 25, 1995, at B3 (quoting Michael F. Vecchione, Brooklyn District Attorney Charles J. Hynes's deputy in charge of trials). Consider also these words:

[I]t has to be recognized that, while there is no reason to suppose that policemen as individuals are any less fallible than other members of society, people are often shocked and outraged when policemen are exposed violating the law. The reason is simple. Their deviance elicits a special feeling of betrayal. In a sense, they are doubly condemned; that is, not just for the infringement itself but even more for the breach of trust involved. Something extra is involved when public officials in general and policemen in particular deviate from accepted norms: "That something more is the violation of a fiduciary *relationship*, the corruption of a public *trust*, of public *virtue*."

MAURICE PUNCH, *CONDUCT UNBECOMING* 8 (1985) (quoting Albert J. Reiss, Jr., *Foreword to THE LITERATURE OF POLICE CORRUPTION* ix-x (Anthony E. Simpson ed., 1977)).

9. See *infra* text accompanying notes 35-52.

Although both lying to convict the innocent and lying to convict the guilty thus deserve condemnation, this article will focus on the latter because it is the more resistant to change and the more prevalent (two traits that are not unrelated). Lying to convict the innocent is undoubtedly rejected by most police, as well as by others, as immoral and unjustifiable. In contrast, lying intended to convict the guilty—in particular, lying to evade the consequences of the exclusionary rule<sup>10</sup>—is so common and so accepted in some jurisdictions that the police themselves have come up with a name for it: “testilying.”<sup>11</sup>

Part I of this article describes the nature and causes of testilying in more detail. Part II then examines several proposals for curtailing it, ranging from expansion of the warrant requirement to the use of polygraph examinations at suppression hearings. All of these proposals are found at least partially wanting, if for no other reason than that they are aimed at suppressing lying by the police, rather than at reducing the pressure that causes it. Part III thus advances another proposal, or actually a trio of proposals. Specifically, it suggests that redefining probable cause in a more flexible manner and replacing the exclusionary rule with a damages remedy, together with clear rewards and punishments connected with lying, would significantly decrease testilying by diminishing the urge both to lie and to cover it up. While these proposals may be viewed as drastic medicine, they are defensible in their own right, and at the same time may go a long way toward shoring up the trust in the police and other government officials that is essential to a well-functioning law enforcement and criminal justice system.

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10. See *Mapp v. Ohio*, 367 U.S. 643 (1961) (requiring exclusion of evidence seized in violation of the Fourth Amendment); see also *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring exclusion of evidence seized in violation of the *Miranda* warnings requirement).

11. COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, CITY OF NEW YORK, COMMISSION REPORT 36 (1994) (Milton Mollen, Chair) [hereinafter *MOLLEN REPORT*] (“Several officers also told us that the practice of police falsification in connection with such arrests is so common in certain precincts that it has spawned its own word: ‘testilying.’”).

## I. THE NATURE OF TESTILYING

Whether it is conjecture by individual observers,<sup>12</sup> a survey of criminal attorneys,<sup>13</sup> or a more sophisticated study,<sup>14</sup> the existing literature demonstrates a widespread belief that testilying is a frequent occurrence. Of course, there is Alan Dershowitz's well-known assertion (made long before his participation in the O.J. Simpson case) that "almost all" officers lie to convict the guilty.<sup>15</sup> Dershowitz may have been engaging in hyperbole, but his claim is not as far off as one might think. In one survey, defense attorneys, prosecutors, and judges estimated that police perjury at Fourth Amendment suppression hearings occurs in twenty to fifty percent of the cases.<sup>16</sup> Jerome Skolnick, a veteran observer of the police, has stated that police perjury of this type is "systematic."<sup>17</sup> Even prosecutors—or at least former

12. Irving Younger, *The Perjury Routine*, THE NATION, May 8, 1967, at 596-97 ("Every lawyer who practices in the criminal courts knows that police perjury is commonplace."); see also David Wolchover, *Police Perjury in London*, 136 NEW L.J. 181, 183 (1986) (estimating that police officers lie in 3 out of 10 trials).

13. Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 107 (1992) (survey of prosecutors, defense attorneys, and judges indicates a belief that, on average, perjury occurs 20% of the time, with defense attorneys estimating it occurs 53% of the time in connection with Fourth Amendment issues; only 8% believe that police never, or almost never, lie in court); see also Fred Cohen, *Police Perjury: An Interview with Martin Garbus*, 8 CRIM. L. BULL. 363, 367 (1972) ("[A]mong all the lawyers that I know—whether they are into defense work or prosecution—not one of them will argue that systematic police perjury does not exist. We may differ on its extent, its impact . . . but no trial lawyer that I know will argue that police perjury is nonexistent or sporadic."); N. G. Kittel, *Police Perjury: Criminal Defense Attorneys' Perspective*, 11 AM. J. CRIM. JUST. 11, 16 (1986) (57% of 277 attorneys believe police perjury takes place very often or often).

14. See Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62*, 4 CRIM. L. BULL. 549, 549-50 (1968) (presenting data showing that "dropsy testimony"—i.e., police testimony that an arrestee had dropped drugs as the police came upon them—increased after *Mapp v. Ohio* imposed the exclusionary rule on state police, indicating that the "police are lying about the circumstances of such arrests so that the contraband which they have seized illegally will be admissible as evidence.").

15. ALAN M. DERSHOWITZ, THE BEST DEFENSE xxi-xxii (1983) ("Rule IV: Almost all police lie about whether they violated the Constitution in order to convict guilty defendants.").

16. Orfield, *supra* note 13, at 83 ("Respondents, including prosecutors, estimate that police commit perjury between 20% and 50% of the time they testify on Fourth Amendment issues."). It should also be noted that many of these respondents did not consider lying at a suppression hearing perjury, *infra* text accompanying note 47, which would have the effect of deflating these percentages.

17. Jerome H. Skolnick, *Deception by Police*, CRIM. JUST. ETHICS, Summer/Fall

prosecutors—use terms like “routine,”<sup>18</sup> “commonplace,”<sup>19</sup> and “prevalent”<sup>20</sup> to describe the phenomenon. Few knowledgeable persons are willing to say that police perjury about investigative matters is sporadic or rare, except perhaps the police, and, as noted above,<sup>21</sup> even many of them believe it is common enough to merit a label all its own.<sup>22</sup>

Although testilying can occur at any stage of the criminal process, including trial, it usually takes place during the investigative and pretrial stages, since it is most frequently an attempt to cover up illicit evidence gathering. One of the best descriptions of such perjury comes from the Mollen Commission, named after Judge Milton Mollen, who led an investigation into corruption in the New York City Police Department in the early 1990s:

Officers reported a litany of manufactured tales. For example, when officers unlawfully stop and search a vehicle because they believe it contains drugs or guns, officers will falsely claim in police reports and under oath that the car ran a red light (or committed some other traffic violation) and that they subsequently saw contraband in the car in plain view. To conceal an unlawful search of an individual who officers believe is carrying drugs or a gun, they will falsely assert that they saw a bulge in the person's pocket or saw drugs and money changing hands. To justify unlawfully entering an apartment where officers believe narcotics or cash can be found, they pretend to have information from an unidentified civilian informant or claim they saw the drugs in plain view after responding to the premises on a radio run. To arrest people they suspect are guilty of dealing drugs, they falsely assert that the defendants

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1982, at 40, 42.

18. Scott Turow, *Simpson Prosecutors Pay for their Blunders*, N.Y. TIMES, Oct. 4, 1995, at A21 (Turow was a prosecutor for several years.).

19. Younger, *supra* note 12, at 596 (Younger was a prosecutor and a judge.).

20. H. RICHARD UVILLER, *TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR'S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE* 116 (1988) (Uviller was a prosecutor for 14 years.).

21. *See supra* note 11 and accompanying text.

22. *See id.*; *see also* ROBERT DALEY, *THE PRINCE OF THE CITY* 73 (1978) (describing perjury that “detectives . . . committed all the time in the interest of putting bad people in jail”); Myron R. Orfield, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 CHI. L. REV. 1016, at 1049-50 (1987) (Seventy-six percent of police surveyed believe police shade the facts regarding probable cause, 56% believed perjury was infrequent and 19% believe it was reasonably common.).

had drugs in their possession when, in fact, the drugs were found elsewhere where the officers had no lawful right to be.<sup>23</sup>

As this excerpt suggests, the most common venue for testilying is the suppression hearing and the most frequent type of suppression hearing perjury is *post hoc* fabrication of probable cause.<sup>24</sup> However, lying about events in the interrogation room may be routine as well. Professor Richard Uviller's on-the-spot observations of the police led him to conclude, for example, that police may often "advance slightly the moment at which the Miranda warnings were recited to satisfy the courts' insistence that they precede the very first question in a course of interrogation."<sup>25</sup>

The Mollen Report excerpt also refers to testilying during the warrant application process, which the Fourth Amendment requires take place under oath.<sup>26</sup> Although estimating its prevalence is difficult, police misrepresentation on the application form and in oral testimony to the warrant magistrate has been recounted by numerous observers.<sup>27</sup> Most frequent, it seems, is the invention of "confidential informants" (like the "unidentified civilian informant" referred to in the excerpt), a ploy that allows police to cover up irregularities in developing probable cause or to assert they have probable cause when in fact all they have is a hunch.<sup>28</sup>

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23. MOLLEN REPORT, *supra* note 11, at 38.

24. See also JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL 212-19 (2d ed. 1975).

25. UVILLER, *supra* note 20, at 116.

26. "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . ." U.S. CONST. amend. IV.

27. JONATHAN RUBINSTEIN, CITY POLICE 386-88 (1973) (describing the preparation of false search warrants as routine, with supervisors often selecting the officers most skilled in perjury as the ones to seek the warrant); see also Orfield, *supra* note 13, at 102-08 (describing improper use of "boilerplate" language in warrant applications). In *Albright v. Oliver*, 114 S. Ct. 807 (1994), the complaint alleged that a detective repeatedly used an informant (on 50 occasions) despite the fact that on each occasion her information turned out to be false and charges were dismissed. *Id.* at 823 n.3 (Stevens, J., dissenting).

28. One of the more extreme examples (one hopes) is described in *Commonwealth v. Lewin*, 542 N.E.2d 275 (Mass. 1989), in which the court concluded that in all likelihood an informant named "John," who supplied the basis for 31 search warrants over a 10-month period, and for many others over a five-year period, never existed. *Id.* at 284. Many have speculated that the "informer" involved in *Spinelli v. United States*, 393 U.S. 410 (1969), did not exist. See, e.g., Joseph D. Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury*, 1971 LAW F. 405, 427, 456-57.



Finally, police perjury also occurs in connection with the fabrication of their reports. Although not technically testimony, police know these reports may be dispositive in a case resolved through plea bargaining, and can be compared to testimony in cases that aren't. As a result, "reportilying" also appears to be pervasive in some jurisdictions. The Mollen Commission, for instance, described how narcotics police "falsify arrest papers to make it appear as if an arrest that actually occurred inside a building [in violation of departmental regulations] took place on the street."<sup>29</sup> Professor Stanley Fisher has also documented prolific use of the "double filing" system, in which the official police file forwarded to the prosecution and provided to the defense is cleansed of exculpatory facts or possible impeachment evidence.<sup>30</sup>

The most obvious explanation for all of this lying is a desire to see the guilty brought to "justice." As law enforcement officers, the police do not want a person they know to be a criminal to escape conviction simply because of a "technical" violation of the Constitution, a procedural formality, or a trivial "exculpatory" fact. As Skolnick puts it, the officer "lies because he is skeptical of a system that suppresses truth in the interest of the criminal."<sup>31</sup> A related reason for police dissembling is the institutional pressure to produce "results," which can lead police to cut corners in an effort to secure convictions.<sup>32</sup> Peer practice may also play a role. One reason Skolnick says police perjury is "systematic" is that "police know that other police are perjuring themselves."<sup>33</sup>

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29. MOLLEN REPORT, *supra* note 11, at 38.

30. Stanley Z. Fisher, "Just the Facts, Ma'am": *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 N. ENG. L. REV. 1, 36-38 (1993).

31. Skolnick, *supra* note 17, at 43. See also Carl B. Klockars, *Blue Lies and Police Placebos*, 27 AMER. BEHAV. SCI. 529, 540 (1984) (Police lie at suppression hearings because they see search-and-seizure rules, and other evidentiary rules, as procedural rules "the violation of which does not affect a perpetrator's factual guilt").

32. Indeed, significant evidence suggests that police supervisors, driven by the same crime control and quota pressures that drive field officers, actively encourage testilying. See MOLLEN REPORT, *supra* note 11, at 40-41 (describing how supervisors train officers in how to commit perjury); ALLAN N. KORNBLUM, *THE MORAL HAZARDS: POLICE STRATEGIES FOR HONESTY AND ETHICAL BEHAVIOR* 80 (1976) (describing New York City police practice of "flaking," or planting evidence on suspects to meet "norms of production").

33. Skolnick, *supra* note 17, at 42.

These motivations are probably not the whole explanation, however. The police officer who lies to convict a criminal is generally lying under oath in a public legal forum.<sup>34</sup> Thus, the lying officer is exposed to criminal charges in a proceeding involving a legally trained adversary and open to—indeed, usually directed against—those who can prove the perjury.

That perjury persists despite these risks can be explained by one simple factor: police think they can get away with it. Police are seldom made to pay for their lying. To some extent, this immunity may be due to their own expertise at deceit. Many prosecutors and judges believe perjury is systematic and often suspect it is occurring in individual cases. But they also frequently claim that they are not sure enough to do anything about it,<sup>35</sup> after all, the typical situation pits a police officer, well trained on how to “constitutionalize” a case, against a person charged with a crime, who is decidedly less aware of the relevant law.

However, many observers believe that perjury is frequently apparent, and that, even so, prosecutors and judges rarely take action against it.<sup>36</sup> The Simpson trial is a case in point. As Alan Dershowitz stated:

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34. Although police reports are not testimony, in some jurisdictions they are written under oath. In others, falsification of a report can result in statutory penalties. See Fisher, *supra* note 30, at 9 n.36.

35. See UVILLER, *supra* note 20, at 111 (asserting that perjury “is extremely elusive, almost impossible to identify with certainty in a particular instance”); Fisher, *supra* note 30, at 10 n.40 (stating that Uviller’s experience mirrors his own).

36. See Alan M. Dershowitz, *Controlling the Cops; Accomplices to Perjury*, N.Y. TIMES, May 2, 1994, at A17 (“I have seen trial judges pretend to believe officers whose testimony is contradicted by common sense, documentary evidence and even unambiguous tape recordings. . . . Some judges refuse to close their eyes to perjury, but they are the rare exception to the rule of blindness, deafness and muteness that guides the vast majority of judges and prosecutors.”); Nat Hentoff, *When Police Commit Perjury*, WASH. POST, Sept. 5, 1985, at A21 (describing the view of Michael Avery that prosecutors and judges do nothing about obvious police perjury); David Rudovsky, *Why It Was Hands Off on the Police*, PHILA. INQ., Aug. 28, 1995, at A7 (describing instances in which prosecutors and judges ignored “hard evidence” of false warrant applications, false police reports, and perjury in a series of Philadelphia cases); Marty I. Rosenbaum, *Inevitable Error: Wrongful New York State Homicide Convictions, 1965-1988*, 18 N.Y.U. REV. L. & SOC. CHANGE 807, 809 (1990-91) (“[A] substantial number of the wrongful convictions . . . resulted from prosecutorial misconduct . . . includ[ing] . . . the conscious use of perjured testimony.”); Younger, *supra* note 12, at 596 (“[T]he policeman is as likely to be indicted for perjury by his co-worker, the prosecutor, as he is to be struck down by thunderbolts from an avenging heaven.”).

[T]he prosecutors knew that Fuhrman was a racist, a perjurer, and an evidence planter before they put him on the stand. An assistant district attorney, among others, warned the Simpson prosecutors about Fuhrman. The prosecutors also saw his psychological reports, in which he admitted his racist attitudes and actions. The only thing they didn't know is that Fuhrman—and they—would be caught by the tapes.<sup>37</sup>

While Dershowitz's take on the issue might be tainted by his involvement in the case, the view of Scott Turow, a former prosecutor, is not. As he stated in a *New York Times* op-ed piece about the prosecution's use of Fuhrman and Vannatter, "[t]he fact that the district attorney's office put these officers on the witness stand to tell [their] story and that the municipal judge at the pretrial hearing, Kathleen Kennedy-Powell, accepted it is scandalous. It is also routine."<sup>38</sup>

Probably the most stunning evidence of prosecutorial and judicial nonchalance toward police perjury is Myron Orfield's study of the Chicago system.<sup>39</sup> His study is stunning because, unlike many of the comments on this issue,<sup>40</sup> Orfield's findings are based on the views of prosecutors and judges as well as those of defense attorneys. In his survey of these three groups (which together comprised twenty-seven to forty-one individuals, depending on the question), 52% believed that at least "half of the time" the prosecutor "knows or has reason to know" that police fabricate evidence at suppression hearings, and 93%, including 89% of the prosecutors, stated that prosecutors had such knowledge of perjury "at least some of the time."<sup>41</sup> Sixty-one percent, including 50% of the state's attorneys, believed that prosecutors know or have reason to know that police fabricate evidence in case reports, and 50% of the prosecutors believed the same with respect to warrants (despite the fact that many prosecutors refused to talk about this latter area).<sup>42</sup> While close to half of all respondents believed that prosecutors "discourage" such perjury and fabrication,<sup>43</sup> a greater percentage believed that they "toler-

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37. Alan Dershowitz, *Police Perjury Destroyed the Simpson Prosecution*, BUFF. NEWS, Oct. 7, 1995, at 3B.

38. Turow, *supra* note 18, at A21.

39. Orfield, *supra* note 13.

40. The first three observers cited in *supra* note 36 are defense attorneys.

41. Orfield, *supra* note 13, at 109.

42. *Id.* at 110.

43. *Id.* at 112.

ate" it,<sup>44</sup> and 15% believed that prosecutors actually "encourage" it.<sup>45</sup> One former prosecutor described what he called a "commonly used" technique of steering police testimony by telling officers "[i]f this happens, we win. If this happens, we lose."<sup>46</sup> Most amazingly, 29% of the respondents did not equate lying at a suppression hearing with the crime of perjury.<sup>47</sup> Although the respondents' views on judicial, as opposed to prosecutorial, attitudes toward testifying were not as directly plumbed in this survey, when asked whether Chicago's criminal justice system effectively controls policy perjury at suppression hearings, 69% of the respondents answered "no."<sup>48</sup>

Prosecutors put up with perjury because they need a good working relationship with the police to make their cases.<sup>49</sup> Additionally, at bottom, they probably agree with the police that the end justifies the means.<sup>50</sup> Judicial acquiescence to perjury can be explained to some extent by prosecutorial failure to make the case for it. But defense attorney arguments and the judge's own observations can provide plenty of evidence of testifying in at least some cases. To the extent judges ignore obvious perjury, it is probably for the same reasons attributable to the prosecutor: sympathy for the police officer's ultimate goal<sup>51</sup> and, as Professor

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44. As one state's attorney stated: "We view our role as neutral. We don't try to influence perjury one way or another." *Id.* at 111.

45. *Id.* at 110-11. In what seems to be a contradiction, Orfield reports that 61% believed prosecutors tolerate perjury, while 48% believe prosecutors discourage it.

46. *Id.* at 110.

47. *Id.* at 112. Interestingly, of the 11 respondents who answered this way, two were judges, three were state's attorneys, and six were public defenders. *Id.* at 112 n.172. Prosecutors explained their views in this regard by calling the perjury "fudging" rather than lying, or by defining perjury as lying about guilt or innocence. *Id.* at 112-13.

48. *Id.* at 114. In another part of the study, reported separately, Orfield found that 86% of police officers surveyed believed it "unusual but not rare" for judges to disbelieve police testimony. Orfield, *supra* note 22, at 1049.

49. Jay S. Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339, 358 n.75 (1994) ("The institutional tendency to tolerate police perjury likely stems from the prosecutor's interest in maintaining smooth working relations with police, who gather the government's evidence and are often its most important witnesses at trial, and from the prosecutor's own competitive drive to win and to advance professionally."); see also sources cited *supra* note 36.

50. Orfield, *supra* note 13, at 113 ("Many prosecutors believe that 'real' perjury only concerns questions of guilt or innocence, not questions of probable cause.").

51. *Id.* at 121 (finding that 70% of respondents believe that judges sometimes fail to suppress evidence when the law requires suppression "because [the judge] believes it is unjust to suppress the evidence given the circumstances of the case

Morgan Cloud put it, "tact"—the fact that "[j]udges simply do not like to call other government officials liars—especially those who appear regularly in court."<sup>52</sup>

## II. SOME PROPOSALS FOR REDUCING TESTIFYING

Several obvious ways of minimizing testifying suggest themselves. One such method is to sensitize the police, through training, to the immorality and dangers of perjury. Along the same lines, Skolnick has suggested that, as lawyers with the same crime control orientation as the police, prosecutors might have enough credibility to get across to the police the importance of truth telling.<sup>53</sup> Prosecutors can also be admonished to take their ethical duty to promote justice seriously,<sup>54</sup> including providing the defense with information about perjury when it comes to their attention.<sup>55</sup>

Less obvious solutions might involve changing the structure of the police force itself. For instance, if community and problem-solving policing lived up to its promise, law enforcement might consist more of prevention than apprehension.<sup>56</sup> This shift in

before him").

52. Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1323-24 (1994).

53. SKOLNICK, *supra* note 24, at 203.

The prosecutor need not be successful in making the policeman approve of the strictures of due process of law, which he typically does not admire himself. By accepting their legitimacy, however, he demonstrates to the policeman that it is at once possible to disagree with the rules of the game as they are laid down, and at the same time to carry out the enforcement of substantive criminal law . . . .

*Id.*

54. The American Bar Association's Model Rules of Professional Conduct state that the "prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(d) (1983). The ABA's Criminal Justice Standards on the Prosecution Function provide, *inter alia*, that "[t]he duty of the prosecutor is to seek justice, not merely to convict," STANDARDS FOR CRIMINAL JUSTICE § 3-1.1 (2d ed. 1979); that the prosecutor "has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies," *id.* § 3-3.1(a); that the prosecutor must not "knowingly . . . use illegal means to obtain evidence or to employ or instruct or encourage others to use such means," *id.* § 3-3.1(b); and that a prosecutor shall not "intentionally . . . avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused," *id.* § 3-3.1(c).

55. See MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 54, Rule 3.8(d).

56. See generally JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 237-66 (1993) (stating that problem-oriented policing and community-oriented policing "stand in opposition to incident-

emphasis might well lessen the need to testilie by reducing both the pressure to produce “activity” in the form of questionable stops and arrests, and the occasions when courtroom testimony is required. Alternatively, we could try to reconstruct our police forces on the European model. In theory at least, continental police are less adversarial in nature and thus more likely to report the facts simply as they occur.<sup>57</sup>

Theoretically, these and other “internal” changes could have a significant impact on testilying. However, institutional change in the past has been frustratingly unsuccessful.<sup>58</sup> In any event, describing in more detail how and whether these proposals would work is beyond the scope of this paper. Instead, I will focus primarily on the extent to which changes in traditional constitutional doctrine—particularly that having to do with the Fourth Amendment—can inhibit police lying. Here in Part II, I discuss a number of proposals that have been advanced or alluded to by others. In Part III, I will suggest a three-part proposal of my own.

#### A. *Expansion of the Warrant Requirement*

Professor Morgan Cloud has argued that perjury about Fourth Amendment issues can be curbed by expanding the warrant requirement to all nonexigent searches and seizures and by simultaneously defining the exigency exception very narrowly.<sup>59</sup> This proposal may well reduce perjury to some extent. Relative to a post-search suppression hearing, police at a warrant proceeding will find the manufacture of probable cause more difficult because they do not know what their search will find and thus will not be able to fabricate “suspicions” as effectively.

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driven policing,” *id.* at 257).

57. See generally John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: “Myth” and Reality*, 87 YALE L.J. 1549, 1552-54, 1562-63 & n.51 (German and French police are trained as “judicial officers” and required to report exculpatory as well as inculpatory information.).

58. See generally Symposium, *Police Corruption, Municipal Corruption: Cures at What Cost?*, 40 N.Y.L. SCH. L. REV. 1 (1995). Several of the commentators in this symposium issue remark on the fact that police corruption scandals erupt at 20-year intervals despite institutional reform. See, e.g., *id.* at 6, 45, 55 (three authors, a judge, an ex-police commissioner, and an administrator, making this point).

59. Cloud, *supra* note 52, at 1344-48.

Nonetheless, a warrant requirement can be eviscerated in several ways by police who have no qualms about lying. First, whatever the validity of the pre- versus post-search lying hypothesis, the fact remains that, as noted above,<sup>60</sup> police have quite frequently managed to lie successfully during the warrant application process. Second, police are not above conducting a surreptitious search *before* going to the magistrate to ensure their story will later float when they swear out a warrant affidavit.<sup>61</sup> Third, and most important, police contemplating a search may simply not bother to go to a magistrate, in the belief that they can later cook up facts supporting a claim of exigency. Although, despite its costs,<sup>62</sup> I too have argued in favor of expanding the warrant requirement,<sup>63</sup> this proposal by itself will probably inhibit perjury only minimally.

### *B. Informant Production*

A second proposal, designed specifically to stymie the practice of inventing snitches, is to require the police to produce their informants in front of the issuing magistrate.<sup>64</sup> Again, however, police who have no scruples about lying can wink at this rule. They can coach their informant, or even someone else acting as an informant, to lie about the information necessary for probable cause. They also might simply say the informant is unavailable, in the face of which a magistrate may feel helpless. The cost of the proposal would be longer warrant reviews, a curtailment of the worthwhile telephonic warrant system (unless informants

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60. See *supra* notes 26-28 and accompanying text.

61. See SKOLNICK, *supra* note 24, at 144 ("The practice of making an unlawful exploratory search of the room of a suspected criminal is, so far as I could tell on several occasions, accepted by both the Westville police and the state police.").

62. "The vast majority of searches are conducted without a warrant . . ." RICHARD VAN DUIZEND ET AL., *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES* 19 (1985). Any significant increase in that percentage could burden judges, with a concomitant greater potential for rubber-stamping of applications.

63. Christopher Slobogin, *The World Without a Fourth Amendment*, 39 *UCLA L. REV.* 1, 29-38 (1991).

64. Some courts have endorsed this approach. See, e.g., *United States v. Manley*, 632 F.2d 978 (2d Cir. 1980); *People v. Darden*, 313 N.E.2d 49 (1974).

could somehow be patched in),<sup>65</sup> and the risk that informants' identities will be exposed.

### C. *The Panch System*

A third idea is to follow the lead of foreign countries like France and India and require police conducting a house search to be accompanied by lay citizens who observe its execution.<sup>66</sup> Theoretically, this procedure, called the *panch* system in India,<sup>67</sup> would provide a neutral source of information about the search of the house. It could also be extended to other types of searches and seizures, as well as to interrogations.

One wonders, in the Indian and French systems, where the lay citizens come from (i.e., whether they are simply picked up off the street or can be informants or other police minions), and how often they actually testify in conflict with the police. Further, citizen overview would presumably not be feasible in emergency situations, which the police could manufacture. Nonetheless, the idea is worth considering. In theory, at least, such a system would confront lying officers with eyewitnesses who, unlike defendants, are untainted by criminal charges.

### D. *Videotaping*

If the *pancha* system has some merit, we could also institute its technological equivalent and require that all police actions be videotaped. This requirement would be relatively simple to implement in the interrogation context. Indeed, several American jurisdictions have already demonstrated that fact.<sup>68</sup> Video

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65. Telephonic warrants, which allow police to obtain a warrant while still on the street in a fraction of the time normally required to obtain a warrant, VAN DUIZEND ET AL., *supra* note 62, at 85-87, are a crucial aspect of most proposals for expanding the warrant requirement. See also Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1491-98 (1985); Cloud, *supra* note 52, at 1346; Slobogin, *supra* note 63, at 32.

66. For a description of the French procedure, see Richard S. Frase, *Comparative Criminal Justice As a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 580 (1990). For a description of the Indian system, see Susan C. Lushing, *Comparative Criminal Justice—Search and Seizure, Interrogation, and Identification of Suspects in India: A Research Note*, 10 J. CRIM. JUST. 239, 240-42 (1982).

67. See Lushing, *supra* note 66, at 242.

68. See WILLIAM A. GELLER ET AL., A REPORT TO THE NATIONAL INSTITUTE OF



taping searches, seizures, and undercover operations is more difficult technologically, but not impossible, as has been demonstrated in situations involving car stops, street searches, and stings.<sup>69</sup>

While this film vérité would go far toward inhibiting testifying, it is expensive, subject to tampering, and prone to practical devilments, like deciding when the tape must be turned on and off. It also might unnecessarily endanger undercover police. Furthermore, in the case of searches and seizures, and perhaps undercover operations as well, it could result in a more serious privacy invasion than is occasioned through mere police observation.

A separate question is how, assuming that technological (or human) observation is feasible, the police could be forced to use it. One argument, which I think plausible but which has been nascent since *United States v. Wade*,<sup>70</sup> is that the Confrontation Clause entitles a defendant to a taping of all critical investigative events. As Justice Brennan argued in *Wade* (in connection with lineup identifications),<sup>71</sup> unless the defense attorney, in person or via a meaningful substitute, is allowed to observe the police action in question, he is significantly hobbled in reconstructing what happened; usually his only resource is his client, and the judge and jury are unlikely to believe a criminal suspect in a swearing match with the police. However, the constitutional argument for videotaping is unlikely to be accepted by the courts

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JUSTICE, POLICE VIDEOTAPING OF SUSPECT INTERROGATIONS AND CONFESSIONS: A PRELIMINARY EXAMINATION OF ISSUES AND PRACTICES 54 tbl. 1 (1992) (As of 1991, approximately one-sixth of all police and sheriffs' departments videotaped confessions, although in many jurisdictions it was at the interrogating detective's discretion.)

69. See Jeff Collins, *New Technology Can Turn Officers into Walking Lenses, Recording Contacts for Their and the Public's Safety*, ORANGE COUNTY REG. May 8, 1995, at B1; Lan Nguyen, *Cameras Roll with Patrol Cars: Video Rides Shotgun on Arlington Streets*, WASH. POST, July 6, 1995, at B1 (describing video cameras that attach to the windshield and contain tape that cannot be erased). See generally GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 55-56 (1988) (describing use of videotape in undercover operations).

70. 388 U.S. 218 (1967).

71. *Id.* at 235 ("Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him.").

in light of developments since *Wade*.<sup>72</sup> Thus, any impetus for human or technological monitoring of the police will have to come from elsewhere.

*E. Subjecting Police Witnesses to Lie Detection*

Professor Donald Dripps has offered a proposal that he believes might provide just such an impetus, relying on another technological innovation—the polygraph.<sup>73</sup> Dripps proposes that if, at the conclusion of a suppression hearing, the court determines that its outcome depends upon a credibility assessment of the police and the defendant, it should be authorized to request that the parties supplement the record with a polygraph examination. The judge would not be bound by the results of these examinations, but in an appropriate case (i.e., where the tests indicate that one party was lying and the other telling the truth), he could give them dispositive weight.<sup>74</sup> To the argument that polygraph examinations are insufficiently reliable as indicators of veracity, Dripps points out the low likelihood that *two* polygraph examinations (i.e., the defendant's and the officer's) would be wrong.<sup>75</sup>

Dripps hopes that the possibility of such a polygraph battle will lead the police to adopt corroboration methods such as videotaping of interrogations.<sup>76</sup> Presumably they will do so, however, only if the polygraph tests could be wrong. If, as Dripps argues, polygraphs are accurate, then truthful officers have no incentive to provide such corroboration, and of course lying officers will try to manufacture it. Nonetheless, Dripps is

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72. In *United States v. Ash*, 413 U.S. 300 (1973), the Supreme Court appeared to reject the “critical stage” analysis of *Wade* and adopted a “trial-like confrontation” analysis, which contemplates application of the Sixth Amendment only to those stages of the criminal process in which the “intricacies of the law and the advocacy of the public prosecutor are involved.” *Id.* at 309; see also CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* § 31.03(a) (1993).

73. Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy* (in press, manuscript on file with author).

74. *Id.* at 1.

75. *Id.* at 27.

76. *Id.* at 35. (“[A] rule of admissibility [of polygraph results] would create incentives for the police to actively prevent, rather than actively encourage, swearing contests.”).

probably right that the threat of a polygraph exam will at least encourage police to "tell straighter stories to the prosecution."<sup>77</sup>

The primary problem with Dripps's proposal is not that it won't reduce police lying (I think it will), and not that it won't increase attempts at corroboration (I do not know whether it will or not), but that it undermines what this article has assumed to be the primary reason for fighting testilying: the belief that to have an effective police force and law enforcement system we need to trust the police. Hooking police men and women up to machines undermines that trust; it tells the public that the credibility of officers of the law needs to be tested like that of criminal suspects, suspected traitors, and job applicants. As with some of the other proposals discussed above, I think Dripps's idea may be worth trying, either alone or in combination with one or more of the others. But if there were an appropriate way to get police to tell the truth without such a trust-busting "techno-fix," I would prefer it.

### III. REDUCING THE PRESSURE TO LIE AND TO IGNORE LYING

As this article has suggested, the pressure to lie comes at the police from all sides. Peers routinely engage in deceit, supervisors stress quotas, and the public wants criminals behind bars without having to hear too much about how they got there. The criminals themselves lie all the time, and the police naturally enough would prefer to see them incarcerated rather than out on the street two weeks after they are arrested. The impetus to lie is so great that the police will probably always find a counter to deterrence-driven solutions—whether it is more lying, tampering with videotape, or practicing how to beat a lie detector. A preferable way of dealing with testilying is to reduce the pressure to commit it. Simultaneously, one could increase incentives for prosecutors and judges to do something about the perjury that does occur, which should also have the effect of assuring greater compliance with substantive constitutional law as police realize they cannot cover up their illegal actions. Below I suggest three proposals designed to accomplish these goals.

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77. *Id.* at 28.

### A. *Punishments and Rewards*

Deterrence of testilying in the face of the intense pressure to lie requires stiff punishment: a perjury conviction and dismissal from the force.<sup>78</sup> For the reasons given above, however, punishment alone, even if routinely applied, will not change police behavior in this regard; indeed, it may well reinforce the “us-against-them” attitude that encourages further deceit. As Albert Quick has argued,<sup>79</sup> police need positive reinforcement for the type of conduct we think is appropriate.

Thus, officers who provide corroboration of their testimony, whether through *panchas*, videotape, or some other mechanism, should be commended and promoted for their efforts. Officers who expose police perjury should also be singled out for favorable treatment (although it cannot be denied that the rewards would have to be significant to break the code of silence followed by the police).<sup>80</sup> The essential point is that the sensitivity training alluded to earlier is not enough. A society concerned about testilying must put its money where its mouth is.

### B. *Flexifying Probable Cause*

Police lying is not always a calculated assault on our Fourth, Fifth, and Sixth Amendment rights. For instance, at the time they engage in a search or a seizure police usually believe, in good faith, that they have the goods on the suspect. But when they truthfully explain themselves to a judge, they often find that their suspicion, based on experience and gut feeling, was an unconstitutional “hunch.” Consider what an officer told Jerome Skolnick, after both he and Skolnick saw a person the cop knew to be an addict turn away from him with his left fist closed:

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78. One could add to these two punishments liability in damages but, at the federal level at least, this would require reversal of *Briscoe v. LaHue*, 460 U.S. 325 (1983).

79. Albert T. Quick, *Attitudinal Aspects of Police Compliance with Procedural Due Process*, 6 AM. J. CRIM. L. 25, 48-54 (1978) (describing various methods of reinforcing police conformance with due process norms (e.g., promotions, bonuses, praise), an approach that is claimed to change attitudes and thus help establish the desired patterns of behavior).

80. Cf. PUNCH, *supra* note 8, at 155 (describing how police “operate by a code of silence which dictates that you do not ‘rat on your mates’”).

It's awfully hard to explain to a judge what I mean when I testify that I saw a furtive movement. I'm glad you were along to see this because you can see what we're up against. . . . I can testify as to the character of the neighborhood, my knowledge that the man was an addict and all that stuff, but what I mean is that when I see a hype move the way that guy moved, I *know* he's trying to get rid of something.<sup>81</sup>

The officer felt that he had enough evidence to search the man's hand, but also believed, according to Skolnick rightly so, that he did not have probable cause as that term is defined by the courts. In such a situation, elaboration of the facts, perhaps adding that the person tried to run away, or that the drug was in plain view, is a natural reaction on the part of a police officer. Professor Uviller calls this type of perjury an "instrumental adjustment, [a] slight alteration in the facts to accommodate an unwieldy constitutional constraint and obtain a just result."<sup>82</sup>

At least one constitutional constraint—probable cause—should not be so unwieldy. We need to take seriously the Supreme Court's injunction that probable cause is a "common sense" concept which should incorporate the experience of the officer.<sup>83</sup> Contrary to what courts have said, for instance, observation of a stranger to the neighborhood trying to hitch a ride with his shirt draped over a TV and wool gloves in his back pocket, an hour after he was seen peering into two houses, should be sufficient to authorize a search;<sup>84</sup> so should possession of reliable information that a person sold drugs five months earlier, when combined with recent police observation of people routinely leaving his house with small packages.<sup>85</sup>

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81. SKOLNICK, *supra* note 24, at 216.

82. UVILLER, *supra* note 20, at 115-16.

83. *See, e.g.*, United States v. Cortez, 449 U.S. 411, 418 (1981) (Probable cause "does not deal with hard certainties, but with probabilities [and] common-sense conclusions about human behavior . . . [T]he evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."); Illinois v. Gates, 462 U.S. 213, 232 (1983) (after quoting the above passage in *Cortez*, stating that "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules").

84. *People v. Quintero*, 657 P.2d 948 (Colo. 1983) (no probable cause on these facts).

85. These are essentially the facts of *United States v. Leon*, 468 U.S. 897 (1984), in which the suppression hearing judge ruled that probable cause did not exist. *Id.* at 903 n.2.

Further, as I have argued elsewhere,<sup>86</sup> probable cause to search should not be conceptualized as a fixed quantity of certainty but rather, as is already the case with suspicion requirements associated with seizures,<sup>87</sup> should be varied according to the level of intrusion involved. This “proportionality” approach, which can be reconciled with both the language and the history of the Fourth Amendment,<sup>88</sup> has several advantages.<sup>89</sup> The most important advantage for present purposes is the flexibility it gives the police. For instance, under this approach and the definition of probable cause urged above, the heavily criticized entry of Simpson’s compound would be viewed in a different light: based on their knowledge of Simpson’s history and the inability to reach him at his home, the police may well have had enough cause to search his curtilage—if not his house—even if the Bronco had had no blood stains on it.<sup>90</sup>

The danger in “flexifying” probable cause, of course, is the extra discretion it gives police. But if this flexibility is coupled with a stringent warrant requirement,<sup>91</sup> police discretion may not be appreciably expanded. In the meantime, this flexibility will reduce the occasions in which police need to make “instrumental adjustments” while under oath, whether in a warrant proceeding, a suppression hearing or, as discussed below, a damages suit.

### C. *Changing the Remedy*

The final and most controversial suggestion for minimizing testilying is to abolish the exclusionary rule. While the first two proposals attempt to accommodate the police by trying to siphon

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86. Slobogin, *supra* note 63, at 68-75.

87. *Cf. Michigan v. Sitz*, 496 U.S. 444 (1990) (minimal intrusion of state sobriety checkpoint program held reasonable when balanced against substantial state interest in highway safety); *Terry v. Ohio*, 392 U.S. 1 (1968) (pat-down of outer clothing to search for weapons justified by circumstances).

88. Slobogin, *supra* note 63, at 75-78 (noting that the term “probable cause” had no clear meaning as an historical matter and thus can constitutionally be defined as “that cause which makes probable the reasonableness of the intrusion occasioned by a given search or seizure”).

89. For example, it allows the amendment greater scope than current law because it avoids imposing a “more-likely-than-not” certainty requirement every time a police action is labeled a search. *Id.* at 77.

90. However, I would have required a warrant in this situation given the time elapsed between the initial investigation of the murder scene and the entry of the compound. *See id.* at 32; *Cloud, supra* note 52, at 1346-47.

91. *See Slobogin, supra* note 63, at 29-33, 75.

off the pressure to lie, this proposal is meant to change the behavior of prosecutors and judges by reducing the urge to wink at such lying. As Orfield and others have observed firsthand, for people in the latter positions, "instrumental adjustments" by police hoping to convict guilty people are very hard to fault, much less prosecute and punish, when the result is the dismissal of worthy charges. If the rule were abolished, on the other hand, prosecutors would be more willing to expose and prosecute such perjury, and judges more willing to conclude that it occurred, especially if, as suggested above, a successful perjury prosecution meant the prosecutor and judge would never have to work with the officer again.

Further, abolition of the exclusionary rule does not have to mean the Constitution will become a dead letter. A liquidated damages remedy, such as the one proposed by Professor Robert Davidow,<sup>92</sup> may well provide a more than adequate substitute. Davidow would authorize a government ombudsman to receive and investigate complaints against the police and to assign private counsel to sue the individual officer and the government in front of a judge. The officer found in bad-faith violation of the Constitution would be liable for a certain percentage of his salary, while the government would pay an equivalent sum for good-faith violations. Because such a system makes the officer liable for unreasonable mistakes, it is clearly a better *individual* deterrent than the rule, which is not very effective in this regard.<sup>93</sup> Because it holds the department liable for reasonable mistakes of law made by its officers, this type of damages action also provides a strong incentive for training programs, and thus would probably not diminish the institutional compliance that is the one proven effect of the exclusionary rule.<sup>94</sup>

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92. Robert P. Davidow, *Criminal Procedure Ombudsman Revisited*, 73 J. CRIM. L. & CRIMINOLOGY 939 (1982).

93. See, e.g., Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 720-31 (1970) (pointing out, *inter alia*, that the primary effect of the rule is visited on the prosecutor rather than the police officer). Indeed, a damages remedy could over-deter. See Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24, 31-32 (1980). The good-faith exception in the Davidow proposal should minimize that problem. Furthermore, of course, the latter remedy avoids the damage to the credibility of the criminal justice system caused when exclusion allows a criminal to be released on a "technicality."

94. See Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV.

Of course, the fact that a damages action directly affects the officer's wallet might produce even more incentive than the exclusionary rule to dissemble about illegal investigative actions. The three-part proposal described above should nonetheless reduce testilying because it will reduce the illegal activity that spawns such fabrication. Positive reinforcement of truth-telling should produce more witnesses willing to contradict a lying officer, who will thus have greater incentive to avoid any action that necessitates a cover-up. Construing probable cause in a flexible manner will of course *directly* diminish the number of "illegal" police actions. Finally, the more realistic threat of perjury charges, brought by prosecutors who no longer fear losing their case as a result, should work to reduce violations of the Constitution as officers become less certain their malfeasance and subsequent lies about it will remain unchallenged.

## CONCLUSION

Police, like people generally, lie in all sorts of contexts for all sorts of reasons.<sup>95</sup> This article has focused on police lying designed to convict individuals the police think are guilty. Strong measures are needed to reduce the powerful incentives to practice such testilying and the reluctance of prosecutors and judges to do anything about it. Among them might be the adoption of rewards for truth telling, the redefinition of probable cause, and the elimination of the exclusionary rule and its insidious effect on the resolve of legal actors to implement the commands of the Constitution.

Ultimately, however, the various proposals set forth in this article are merely suggestive, meant to stimulate debate about how to curtail testilying at suppression hearings.<sup>96</sup> There is

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565, 590-91 (1983). An ombudsman system could also facilitate detection of patterns of misbehavior and particular miscreant officers, something which is not easily accomplished under an exclusionary rule regime relying on individual attorneys.

95. For a treatment of other types of police lies, see Christopher Slobogin, *Investigative Lies by the Police* (in preparation). See also Tom Barker & David Carter, *Fluffing Up the Evidence and Covering Your Ass: Some Conceptual Notes on Police Lying*, 11 *DEVIANT BEHAV.* 61, 62-67 (1990).

96. Cf. Kevin R. Reitz, *Testilying As a Problem of Crime Control: A Reply to Professor Slobogin*, 67 *U. COLO. L. REV.* 1061 (1996). My only quibble with Professor Reitz's criticisms of my proposals is that I think he underestimates the impact of flexifying probable cause and overestimates the impact of substituting a damages remedy for the exclusionary rule.



strong evidence to suggest that police in many jurisdictions routinely engage in this kind of deceit, and that prosecutors and judges are sometimes accomplices to it. Even if it turns out that this evidence exaggerates the problem,<sup>97</sup> the fact remains that, because of the O.J. Simpson trial and similar events, more people than ever before believe it exists. To restore trust in the police and the criminal justice system, we need to take meaningful steps against testilying now.

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97. *See id.* at 1062-65.