

JUDGES, “TESTIFYING,” AND THE CONSTITUTION

MORGAN CLOUD*

I. INTRODUCTION

Because law enforcement officers must justify searches and seizures in response to motions to suppress evidence,¹ judges ruling upon these motions often must evaluate the credibility of the officers' testimony. This inquiry can involve one or more of three interrelated questions: Did the facts known to the officer justify the intrusion? Was the officer's purpose in conducting the search and seizure lawful? Is the officer's testimony about the predicate facts and his subjective purpose truthful?

As we would expect, the connections between these three issues have been expressed in different terms in different eras. At the beginning of the 1960's, the Supreme Court confirmed that otherwise lawful searches and seizures could be unconstitutional if they were the product of government officials' *improper purpose*. In *Abel v. United States*,² the defendant's motion to suppress evidence rested upon the claim that government agents had an improper motive for arresting him. The Supreme Court denied the motion because it found that both the factual predicate for the seizure and the officers' motives satisfied constitutional standards. Probable cause to arrest the defendant existed and the government agents had acted in good faith.³ The majority repeatedly stressed, however, that despite the existence of probable cause, if the defendant's argument about the agents' motives had

* Professor of Law, Emory University. David Krugler provided valuable research assistance, as did Holliday Osborne of the Emory University Law Library.

1. The Supreme Court imposed the exclusionary rule upon federal government actors implicitly in *Boyd v. United States*, 116 U.S. 616 (1886), and explicitly in *Weeks v. United States*, 232 U.S. 383 (1914). It incorporated the exclusionary rule into the Fourteenth Amendment Due Process Clause and imposed it upon state and local government actors in *Mapp v. Ohio*, 367 U.S. 643 (1961).

2. 362 U.S. 217 (1960).

3. *Id.* at 226-37.

been "justified by the record, it would indeed reveal a serious misconduct by law-enforcing officers,"⁴ and "our view of the matter would be totally different."⁵

One year later, the Warren Court's decision in *Mapp v. Ohio*⁶ imposed the Fourth Amendment exclusionary rule upon the states. By the middle of the decade, it appeared that some police officers had responded to *Mapp* by offering testimony that described constitutional searches and seizures regardless of the actual facts of the encounters between the police and civilians. The "dropsy" testimony that appeared in narcotics cases became the most publicized example. A prominent former prosecutor and criminal court judge described the dropsy testimony and its origins as follows:

Before *Mapp*, the policeman typically testified that he stopped the defendant for little or no reason, searched him, and found narcotics on his person. This had the ring of truth. It was an illegal search . . . but the evidence was admissible Since it made no difference, the policeman testified truthfully. After the decision in *Mapp*, it made a great deal of difference. For the first few months, New York policemen continued to tell the truth about the circumstances of their searches, with the result that the evidence was suppressed. Then the police made the great discovery that if the defendant drops the narcotics on the ground, after which the policeman arrests him, then the search is reasonable and the evidence is admissible. Spend a few hours in the New York City Criminal Court nowadays, and you will hear case after case in which a policeman testifies that the defendant dropped the narcotics on the ground, whereupon the policeman arrested him. Usually the very language of the testimony is identical from one case to another.⁷

This commentary raises an epistemological question—did the officers know facts justifying the intrusion?—that in turn raises the question of police perjury. If officers intentionally testify falsely

4. *Id.* at 226.

5. *Id.* at 230.

6. 367 U.S. 643 (1961). By the end of the 1940s, the Supreme Court had held that the right to be free from unreasonable searches and seizures was a fundamental right that the Due Process Clause of the Fourteenth Amendment imposed upon the states. Prior to *Mapp*, however, the Court had refused to similarly impose the exclusionary remedy. *Wolf v. Colorado*, 338 U.S. 25 (1949).

7. Irving Younger, *The Perjury Routine*, THE NATION, May 8, 1967, at 596-97. Younger was the most prominent critic of the "dropsy" testimony during the decade following the decision in *Mapp*. Yet when confronted with this testimony as a judge, even he felt constrained not to suppress probative evidence, although the defendant claimed the arresting officer lied about the facts. See Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1323 (1994).

under oath, even for the purpose of convicting criminals, they have done more than subvert constitutional rules. They have committed the crime of perjury.

In the 1980s and 1990s, the labels have changed, but the issues have not. Recent discussions of the relationship between the factual bases and official motives for searches and seizures, and the possibility that officers might commit perjury when they testify about these facts and motives, frequently have lumped the three issues together under the rubric of *pretext*. "A pretext search is one where the justification proffered by the State for the search is legally sufficient, but where the searching officer was in fact searching for another, legally insufficient, reason."⁸ Most academic discussions of pretext searches and seizures have focused upon the problems of fact and motive, and not the possibility of police perjury.⁹

In this Article, I revisit each of these interrelated questions and examine different tests used by judges to resolve them. Part II discusses the unpleasant topic of police perjury. It discusses the relationship between other forms of police misconduct and perjury, and explores some of the recent developments in the public debate about illegal police conduct and the suppression of evidence. Most police officers are honorable and honest. But we cannot avoid the unfortunate reality that police perjury exists, particularly in the context of search and seizure testimony. Recognizing that police perjury occurs in some cases, and probably most frequently in testimony about searches and seizures, is crucial information for those who would design and implement tests for evaluating this testimony.

Parts III and IV examine different tests the courts have used in two of the most common situations in which they must decide whether to accept police officers' explanations of why they conducted warrantless searches and seizures. Part III analyzes the first situation, which

8. John M. Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J.L. REF. 523, 523 (1984).

9. A number of thoughtful commentaries have debated how the courts should treat the problem of pretext searches. However, this debate generally has not focused on the related problem of how courts should deal with testimony offering pretextual justifications—that is, false testimony about the officers' motives. See, e.g., *id.*; John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70 (1982) [hereinafter Burkoff, *Bad Faith Searches*]; James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REF. 639 (1985); John M. Burkoff, *Rejoinder: Truth, Justice, and the American Way—Or Professor Haddad's "Hard Choices,"* 18 U. MICH. J.L. REF. 695 (1985) [hereinafter Burkoff, *Rejoinder*]; 1 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 1.4(e) (3d ed. 1996).

arises when officers claim they were confronted with an emergency—often in a home or other place of abode—and acted to protect the health or safety of members of the public. When confronted with this situation, a number of courts have developed tests that examine both the objective facts and the officers' subjective motives. These "dual" tests permit law enforcement officers to act to protect the public yet preserve fundamental Fourth Amendment values. The fact-sensitive analyses and decisions in these cases emphasize the inadequacies of the so-called "objective" tests commonly employed in the second category of cases.

Part IV discusses the second situation, which arises when officers stop a motorist and then find evidence—typically illegal drugs or weapons—of a serious crime unrelated to the traffic violation. In these cases defendants often assert that the traffic stop is a pretext because the officers' actual purpose was to search for evidence. In recent years most courts have adopted so-called "objective" tests to resolve these cases. Last term the Supreme Court sided with the majority of federal circuits and adopted a "could have" test for judging the constitutionality of traffic stops.¹⁰ The Court rejected the position taken by a minority of federal circuits and several states, which had adopted a "would have" test. The discussion explains that the "would have" test is the superior of the two common "objective" tests because it indirectly addresses the issue of subjective purpose. It also explains why both tests underestimate the significance of the investigating officers' subjective motives. Ultimately, the Article concludes that judges should abandon the recent attempt to rely upon purely objective tests when interpreting the Fourth Amendment.

II. POLICE PERJURY AND THE FOURTH AMENDMENT

A. PERJURY, THE PRESS AND THE SIMPSON CASE

Before Detective Fuhrman had testified in the Simpson trial, I wrote that "[p]olice perjury is the dirty little secret of our criminal justice system."¹¹ Obviously, perjury is a secret if the liar succeeds at keeping the lie hidden from public knowledge. But I described police perjury as a secret in another sense as well. It was a "little" secret in the sense that it was poorly kept within the justice system. Most participants in the criminal justice system know that in some cases some

10. *Whren v. United States*, 135 L. Ed. 2d 89 (1996).

11. *Cloud*, *supra* note 7, at 1311.

police officers lie under oath,¹² yet this misconduct rarely is punished. Before the Simpson trial, I could report accurately that even "mere discussion of the problem rarely escapes the confines of the criminal justice system."¹³ It was this lack of public awareness—coupled with the failure of important government actors to acknowledge, let alone try to systematically address, the problem—that was most troubling.

Well, the secret is out. Detective Fuhrman's testimony in the Simpson trial, followed by the release of the "Fuhrman tapes," demonstrated graphically that police perjury exists and is a serious problem for the criminal justice system.

One benefit the Simpson trial might produce is an increased awareness of the problem. Before the Fuhrman fiasco, judges and prosecutors of unimpeachable integrity and unquestionable commitment to the justice system could turn away from the problem of police perjury. Afterwards, no honest observer could flatly deny its existence or the seriousness of its implications for the criminal justice system. The Simpson trial thus provided the opportunity for judges, prosecutors, police departments, and others involved with the criminal justice system to confront the problem.

But this will be a fleeting opportunity—indeed, it may already have passed with the end of the international media circus that produced it. The idea that widespread public concern about police misconduct may have been ephemeral is supported by comparing press reports separated by just a few months. The increased public awareness of the dangers of police perjury was first triggered by Detective Fuhrman's taped statements proving that he had perjured himself

12. See *id.* at 1311-12. Legal scholars occasionally have addressed the problem in print, particularly in the years following the Court's decision in *Mapp v. Ohio*. See, e.g., Younger, *supra* note 7, at 596-97 (describing police perjury about drug arrests); Joseph D. Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury*, 1971 U. ILL. L. FORUM 405, 409 (1971) (based on personal conversations with police officers while working with the Philadelphia prosecutor's office, the author concluded that officers "often are not adverse to committing perjury to save a case," particularly at suppression hearings); Comment, *Police Perjury in Narcotics "Droopy" Cases: A New Credibility Gap*, 60 GEO. L.J. 507 (1971); Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1051 (1987) (virtually all of the narcotics officers in this study "admit that the police commit perjury, if infrequently, at suppression hearings," and concluding that due to the methodology of the study, the actual incidence of perjury was probably underreported by the respondents); Alan Dershowitz, *The Best Defense*, in RONALD J. ALLEN & RICHARD B. KUHN, CONSTITUTIONAL CRIMINAL PROCEDURE 28-29 (2d ed. 1991) (asserting that all police officers lie, and all judges know it).

13. Cloud, *supra* note 7, at 1314.

before the world, and in which he boasted of planting evidence, beating citizens, and other misconduct often motivated by racism. The short-term impact of these tapes cannot be overestimated,¹⁴ but that impact was magnified by an avalanche of contemporaneous press reports of perjury and other crimes committed by police officers.

Consider the following news reports of police misconduct—all published within the first two weeks of September, 1995—directly or indirectly raising the specter of police falsification. In Philadelphia, forty-two drug convictions were reversed “because of falsified police reports, illegal tactics and perjury”¹⁵ by officers in one police district, and federal prosecutors subpoenaed “the records of more than 100,000 arrests”¹⁶ in six other districts. In a situation unrelated to the Simpson case, Los Angeles prosecutors “dropped murder charges against two defendants and up to 100 other cases were jeopardized after a police officer admitted that he forged a key document,”¹⁷ although this officer had earlier testified at a preliminary hearing that the forged “report was genuine.”¹⁸ In Atlanta, a federal grand jury indicted several police officers on charges including extortion and providing protection for drug organizations; local prosecutors were considering dropping cases involving these officers;¹⁹ and another local police officer was convicted of murder.²⁰ In New Orleans, officers were convicted of murdering citizens, and federal officials estimated that ten to fifteen percent of the force was involved in criminal activities.²¹

News reports chronicled police corruption and misconduct not only in these cities, but also in Detroit, Minneapolis and elsewhere.²²

14. Lest we forget, the public outcry was so great that even publications devoted to business, corporate and economic affairs treated this as “front page” news. See, e.g., Jonathan Kaufman, Wade Lambert & Benjamin A. Holden, *Brutal Reality? Fuhrman's Comments Bolster Black Concerns About Police Conduct*, WALL ST. J., Aug. 31, 1995, at A1.

15. *U.S. Is Said to Seek Logs on Arrests*, N.Y. TIMES, Sept. 1, 1995, at A12.

16. *Id.*

17. *Cases Jeopardized by Police Forgery*, ATLANTA JOURNAL-CONSTITUTION, Sept. 2, 1995, at A8.

18. *Id.*

19. Bill Rankin & Peter Mantius, *2 Indicted in Cop Sting*, ATLANTA JOURNAL-CONSTITUTION, Sept. 8, 1995, at H1.

20. Maria E. Fernandez, *Convicted Cop to Plead for His Life Today*, ATLANTA JOURNAL-CONSTITUTION, Sept. 9, 1995, at C1.

21. Bob Herbert, *Killer Cops*, N.Y. TIMES, Sept. 15, 1995, at A19 (asserting that police officers, local government officials, and the people of New Orleans have known that the police department “has been a cesspool for decades”).

22. Elizabeth Gleick, *The Crooked Blue Line*, TIME, Sept. 11, 1995, at 38.

An FBI chemist even accused officials at the FBI's crime laboratory of pressuring scientists there to "commit perjury or skew tests to help secure convictions in hundreds of criminal cases."²³ Whatever else they tell us, this flood of stories dispels any notion that police misconduct, including perjury, is just a problem in New York or Los Angeles, or any other single location. This is a national problem and has been for decades.

This barrage of news stories was in part the product of the obsession with the Simpson trial shared by the public and the media, and appeared to create an unprecedented opportunity to address the problem of police misconduct. But the vociferous criticism directed at a federal judge for his decision suppressing evidence in a drug case suggests that the opportunity may have been more apparent than real. In January, 1996, Judge Harold Baer suppressed cocaine and heroin seized from the trunk of an automobile driven by defendant Carol Bayless, as well as her lengthy videotaped confession.²⁴ Judge Baer was quickly attacked, both in the press²⁵ and by prominent politicians including the President.²⁶ The torrent of criticism appeared to be triggered both by the decision to suppress evidence and by Judge Baer's sharply worded dicta criticizing the behavior of police officers. Within

23. David Johnston, *F.B.I. Chemist Says Experts Are Pressured To Skew Tests*, N.Y. TIMES, Sept. 15, 1995, at B8.

24. *United States v. Bayless*, 913 F. Supp. 232, 234 (S.D.N.Y. 1996).

25. See, e.g., A.M. Rosenthal, *Contempt in Court*, N.Y. TIMES, Jan. 30, 1996, at A11 (attacking judges "who license criminals to flee all cops and encourage the rest of the citizenry to despise them"); *Judge Baer's Tortured Reasoning*, N.Y. TIMES, Jan. 31, 1996, at A10 (accusing the judge of "judicial malpractice"); Raymond W. Kelly, *Handcuffing the Police*, N.Y. TIMES, Feb. 1, 1996, at A15 (asserting that the decision will hamper police efforts to control the drug trade so seriously that some officers "might even be tempted to fight crime with perjury, tailoring their testimony to meet the unrealistic expectations of the courts"); Susan Estrich, *Some Cases Go Too Far on Exclusionary Rule*, USA TODAY, Feb. 8, 1996, at 11A (asserting that the decision is "dangerously" wrong).

26. See, e.g., Alison Mitchell, *Clinton Presses Judge to Relent*, N.Y. TIMES, Mar. 22, 1996, at A1 (reporting that the White House had put Judge Baer "on public notice today that if he did not reverse a widely criticized decision throwing out drug evidence, the President might ask for his resignation"); *id.* at A12 (reporting attacks by Senator Hatch, chairman of the Senate Judiciary Committee, by Representative Gingrich, Speaker of the House of Representatives, and by Senator Dole, Senate Majority Leader). See also Alison Mitchell, *Clinton Defends His Criticism of a New York Judge's Ruling*, N.Y. TIMES, Apr. 3, 1996, at A12; Ian Fisher, *Gingrich Asks Judge's Ouster for Ruling Out Drug Evidence*, N.Y. TIMES, Mar. 7, 1996, at B4; Katharine Q. Seelye, *Dole, Citing "Crisis in the Courts," Attacks Appointments by Clinton*, N.Y. TIMES, Apr. 20, 1996 at A1; *Excerpts From Speech: On the Judiciary*, N.Y. TIMES, Apr. 20, 1996, at A10; Linda Greenhouse, *Judges as Political Issues*, N.Y. TIMES, Mar. 22, 1996, at A1; Don Van Natta, Jr., *Publicity Stuns Woman in Washington Hts. Drug Case*, N.Y. TIMES, Apr. 11, 1996, at B5 (reporting that the defendant Carol Bayless blamed President Clinton for pressuring Judge Baer to reverse his decision suppressing evidence of her drug crimes).

a few weeks, Judge Baer granted the government's motion for a re-hearing, conducted a second evidentiary hearing, vacated his earlier decision, and denied the defendant's motion to suppress evidence.²⁷

The resolution of the suppression motion in the *Bayless* case turned on two related questions: At the time of the initial seizure, did the arresting officer know facts sufficient to justify the intrusion? And was the officer's testimony about the events preceding the seizure credible? In his first opinion, Judge Baer found "that based on the defendant's videotaped admissions about the events leading up to the stop, the search and her arrest, including statements which unequivocally implicate her own son, I find her statement to be credible and reject the testimony proffered by Officer Carroll."²⁸ The facts the judge relied upon—those contained in the defendant's confession—did "not give rise to a reasonable suspicion that criminal activity was afoot."²⁹ Therefore, the initial seizure was illegal and the evidence it produced had to be suppressed.³⁰

If Judge Baer had stopped there, it is unlikely that his decision would have received much attention in the press. In the preceding weeks and months, other federal judges sitting in New York had suppressed evidence in drug conspiracy cases, and had written opinions that questioned the veracity of the testimony offered by police officers, but those opinions did not generate widespread public criticism.³¹ Judge Baer's opinion provoked controversy because it did not stop with the conclusion that the arresting officer's "testimony is at

27. *United States v. Bayless*, 921 F.Supp. 211 (S.D.N.Y. 1996).

28. *United States v. Bayless*, 913 F. Supp. 232, 234 (S.D.N.Y. 1996).

29. *Id.* at 237.

30. *Id.* at 243.

31. One opinion was issued less than three weeks earlier, by another federal judge sitting in the same district. *United States v. Reyes*, 922 F. Supp. 818 (S.D.N.Y. 1996). Another was written only a few months earlier by a judge sitting in the neighboring federal district. *United States v. Restrepo*, 890 F. Supp. 180 (E.D.N.Y. 1995). These two opinions differed from Judge Baer's *Bayless* opinion in one significant way. Neither opinion asserted that citizens might justifiably fear police officers. On the other hand, both opinions questioned the veracity of testimony by some law enforcers about their investigations. *See, e.g., Reyes*, 922 F. Supp. at 823 ("There is significant evidence in the record contradicting Agent Davis's account."); *id.* at 829 (concluding that affidavits for a search warrant "contained one false statement and one misleading statement"); *id.* at 830 ("[I]t is apparent that the agents 'knowingly or recklessly' misled the issuing Magistrate by placing tainted evidence in the affidavits."). *See also Restrepo*, 890 F. Supp. at 187-91 (reviewing testimony by a defendant and nonparty witnesses contradicting the testimony by law enforcers, finding that the "first and second officer at the scene of the stop lied," and crediting the defense version of the contradictory material facts).

best suspect.”³² Instead, he leveled a gratuitous broadside at the police officers who patrol the Washington Heights area of New York.

The arresting officer had testified that he suspected criminality in part because at least one of the men who loaded bags into the trunk of Bayless' vehicle ran away upon seeing police officers approaching in an unmarked vehicle. In his initial opinion, Judge Baer rejected this version of the facts and based his holding upon the defendant's conflicting description of the events. But he went further, writing that “even assuming that one or more of the males ran from the corner once they were aware of the officer's presence, it is hard to characterize this as evasive conduct.”³³ Because of the publicity accorded the investigation and prosecution of corrupt officers, as well as the “final report of the Mollen Commission, residents in this neighborhood tended to regard police officers as corrupt, abusive and violent. After the attendant publicity surrounding the above events, had the men not run when the cops began to stare at them, it would have been unusual.”³⁴

The New York press immediately reported the opinion, emphasizing the provocative suggestion that citizens in Morningside Heights not only feared police officers, but were correct in harboring that fear.³⁵ Commentaries attacking Judge Baer and his decision quickly followed, and the Bayless case became a national *cause celebre*.³⁶ Even the rare commentator who defended the decision noted that the ruling “has caused widespread consternation and driven some folks to the edge of hysteria. The uniformity of opinion is remarkable. Just about everyone thinks the judge is a bozo.”³⁷

32. *Bayless*, 913 F. Supp. at 239.

33. *Id.* at 242.

34. *Id.* Judge Baer's reference to the Mollen Commission, New York City's most recent public commission to investigate allegations of police corruption, was not accidental. Baer was a member of the Mollen Commission. 1 ALMANAC OF THE FEDERAL JUDICIARY 22 (1996). His earlier professional positions included serving as an Assistant United States Attorney, both as Chief of the Organized Crime and Racketeering Unit and as Chief of the Criminal Division. *Id.* For discussion of the Mollen Commission, see *infra* notes 50-61 and accompanying text.

35. See, e.g., Don Van Natta, Jr., *Not Suspicious to Flee Police, Judge Declares*, N.Y. TIMES, Jan. 25, 1996, at B1; *Cops Botched \$4M Drug Arrest, Judge Rules*, RECORD, Jan. 25, 1996, at B07 (relying upon Associated Press wire service reports).

36. See, e.g., Alison Mitchell, *Clinton Presses Judge to Relent*, N.Y. TIMES, Mar. 21, 1996, at A1 (noting that Judge Baer, whom President Clinton had appointed to the bench, “has become the Republicans' first cause celebre of the Presidential campaign”).

37. Bob Herbert, *Presumed to Be Guilty*, N.Y. TIMES, Feb. 2, 1996, at A11 (defending Judge Baer's decision, while lamenting his “gratuitous attack on the police in general and his bizarre contention that in Washington Heights . . . [i]t would not be unusual for men . . . to flee whenever a police officer looked at them.”).

At the rehearing in the *Bayless* case, Judge Baer received new evidence not offered during the earlier suppression hearing, including live testimony by another police officer and by the defendant.³⁸ Judge Baer then issued a second opinion, in which he asserted that this new evidence led him to reverse his earlier ruling. After noting that it is apparent that "this case turns, as many do, on the issue of credibility,"³⁹ he wrote that the new evidence had given him "a more complete and more accurate picture of the events."⁴⁰ In particular, the new evidence led him to conclude that the police officers' testimony about the disputed events was credible and the defendant's was not.⁴¹

We need not approve of Judge Baer's harsh attack on police officers to recognize the significance of the firestorm of protest his opinion produced. All this occurred only a few months after the Simpson trial and the national debate about police misconduct, including police perjury, that it triggered. The intensity of the public outcry Judge Baer provoked suggests that as a nation we are not ready to confront these problems.⁴²

This is not a new phenomenon. Concerns about the ways in which police officers conduct their investigations have been raised for more than a century—particularly by public commissions appointed to investigate police practices. Despite repeated efforts to expose and eradicate official misconduct, the interrelated problems of police violence, corruption, and perjury persist.

B. TESTIFYING

More than sixty years ago, the Presidential Wickersham Commission chronicled the use of violence—the "third degree"—to obtain confessions and concluded that it was a nationwide practice.⁴³ Nearly a quarter century ago, the Knapp Commission was at least the fifth in

38. *Bayless*, 921 F. Supp. at 215, (describing other new evidence, including the second officer's incident report and two affirmations describing drug activity in the locale).

39. *Id.* at 213.

40. *Id.* at 215.

41. *Id.* at 215-16.

42. In both opinions, Judge Baer justified his decisions by referring to the evidence and the credibility of the witnesses. Nonetheless, news reports and commentators linked his decision to reverse his suppression order to the intense public criticism directed at him. See, e.g., Don Van Natta, Jr., *Under Pressure, Federal Judge Reverses Decision in Drug Case*, N.Y. TIMES, Apr. 3, 1996, at A1; Anthony Lewis, *Abroad at Home; Where Would You Hide?*, N.Y. TIMES, Apr. 9, 1996, at A15.

43. U.S. NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931) [hereinafter WICKERSHAM COMMISSION].

a series of public committees appointed since 1844 to investigate corruption in the New York Police Department.⁴⁴ In addition to detailing various forms of police corruption, the Knapp Commission documented how corruption could induce officers to prepare false investigative reports and offer false testimony.⁴⁵

In the wake of the highly publicized Rodney King incident the Christopher Commission was appointed to study violence by Los Angeles police officers.⁴⁶ It documented the use of excessive force, concluded that this is a national problem,⁴⁷ and revealed how attempts to cover up the use of violence can lead officers to file false reports and testify untruthfully about their conduct.⁴⁸ The Christopher Commission explained that affirmative lies were only part of the problem. "Perhaps the greatest single barrier to the effective investigation and adjudication of complaints is the officers' unwritten code of silence. . . ." ⁴⁹

The most recent public commission to investigate a major urban police department was New York's Mollen Commission, which published its official report less than a month after O.J. Simpson was arrested for murder.⁵⁰ The Mollen Commission explicitly identified the link between police corruption, violence and perjury, and in the process described the harm police perjury works upon our institutions of justice:

Police perjury and falsification of official records is a serious problem facing the Department and the criminal justice system—largely because it is often a "tangled web" that officers weave to cover for other underlying acts of corruption or wrongdoing. One form of corruption thus breeds another that taints arrests on the streets and undermines the credibility of police in the courtroom. When the

44. COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE CITY'S ANTI-CORRUPTION PROCEDURES, THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION 61-64 (1972) [hereinafter KNAPP COMMISSION]; see also Honorable Harold Baer, Jr., *The Mollen Commission and Beyond*, 40 N.Y. L. SCH. L. REV. 5, 5-6 (1995) (discussing "twenty-year cycles of police corruption scandals" in New York City over the past century).

45. See KNAPP COMMISSION, *supra* note 44, at 83-84, 96-97.

46. See REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (1991) [hereinafter CHRISTOPHER COMMISSION]. Like New York, Los Angeles has had a history of incidents of police misconduct which have triggered investigations of the conduct of officers of the L.A.P.D. See *id.* at 25.

47. *Id.* at i.

48. *Id.* at 9-15.

49. *Id.* at xx.

50. THE CITY OF NEW YORK COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, COMMISSION REPORT: ANATOMY OF FAILURE: A PATH FOR SUCCESS (1994) [hereinafter MOLLEN COMMISSION].

police lose their credibility, they significantly hamper their own ability to fight crime and help convict the guilty. A police officer's word is a pillar of our criminal justice system. On the word of a police officer alone a grand jury may indict, a trial jury may convict, and a judge pass sentence. The challenge we face in combatting police falsifications, is not only to prevent the underlying wrongdoing that spawns police falsifications but to eliminate the tolerance the Department and the criminal justice system exhibit about police who fail to tell the truth.⁵¹

Like earlier academic studies, the Mollen Commission concluded that police perjury occurs most often when officers are testifying about searches and seizures.⁵² It found that police falsification in its various forms⁵³—including testimonial and documentary perjury—“is probably the most common form of police corruption facing the criminal justice system, particularly in connection with arrests for possession of narcotics and guns.”⁵⁴

The Mollen Commission repeatedly stressed what participants in the criminal justice system already know: Most police officers are honest, most have idealistic reasons for becoming police officers, and most abhor corruption within their ranks.⁵⁵ But the Commission also emphasized that even honest officers obey the code of silence that protects their dishonest colleagues. “Indeed, so powerful is this code of silence . . . police officers admitted that they would not openly report [a corrupt] officer—though almost all of them would silently hope that he would be arrested and removed from the Department.”⁵⁶

This unofficial tolerance of official misconduct is particularly entrenched when the misconduct consists of perjury about searches and seizures: “Several officers 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.’”⁵⁷

The Mollen Commission Report then offered page after page of examples of “testilying” about searches and seizures for drugs and

51. *Id.* at 36.

52. *See supra* note 12 and *infra* notes 67, 70 and accompanying text.

53. The Mollen Commission used the term “falsification” to encompass testimonial perjury, documentary perjury under oath in affidavits or other documents, and falsification of police records, like police reports. MOLLEN COMMISSION, *supra* note 50, at 36.

54. *Id.* at 36.

55. *Id.* at 1-9.

56. *Id.* at 4.

57. *Id.* at 36 (emphasis added).

weapons. It also explained why officers lie and why these lies are successful.⁵⁸ The most common motivation for these lies is the desire to disguise illegal conduct—conduct violating not only the Fourth Amendment, but also departmental regulations.⁵⁹

Identifying and eradicating police misconduct is primarily the responsibility of police departments.⁶⁰ When officers' crimes involve financial corruption or violence, ultimately we must rely upon police officers, from the top of police departments to the bottom, to eliminate the problem. This is what is perhaps most disturbing about the reports gathered by the Mollen Commission, which found that misconduct is tolerated at every level of a police department, from the top managers⁶¹ all the way down to officers on the street.⁶²

Others are responsible for dealing with the problem as well. Prosecutors are duty-bound to take steps to insure that their police witnesses obey the law, and not to sponsor witnesses who commit perjury. The Mollen Commission described reports that the same tolerance for police perjury exhibited at all levels of the New York Police Department "is sometimes exhibited among prosecutors. Indeed, several former and current prosecutors acknowledged—'off the record'—that perjury and falsifications are serious problems in law enforcement that, though not condoned, are ignored."⁶³ Unfortunately this problem is not limited to New York. The Simpson prosecutors' handling of police witnesses—particularly Detective Fuhrman—suggests a willingness to ignore the danger of police perjury in an effort to serve the "higher good" of convicting a man they believed had committed two vicious murders.⁶⁴

58. *Id.* at 36-43.

59. *Id.* at 38.

60. See, e.g., Baer, *supra* note 43, at 7-11; Honorable Harold Baer, Jr. & Joseph P. Armao, *The Commission Report: An Overview*, 40 N.Y. L. SCH. L. REV. 73, 79-84 (1985).

61. MOLLEN COMMISSION, *supra* note 50, at 38-43.

62. See *id.* at 4. ("Patrol officers, too, shut their eyes to corruption.")

63. *Id.* at 42.

64. The prosecutors in the Simpson case have been criticized for not merely offering, but for actively sponsoring, the testimony of Detective Fuhrman on the issue of his use of racial epithets. But another important prosecutorial error may have been the decision to sponsor the police officers' explanations of their reasons for the warrantless search and seizure at Simpson's home. On the day after Simpson was acquitted, a former prosecutor wrote that the government's case had been doomed from the start: "The problem was not only the way the police went about gathering evidence at Mr. Simpson's home the morning after the murders, but more important [sic] the way the Los Angeles District Attorney's office subsequently defended those arrogant blunders." Scott Turow, *Simpson Prosecutors Pay for their Blunders*, N.Y. TIMES, Oct. 4, 1995, at A21. In the article, Turow outlined rules and procedures employed by prosecutors in

Of course, it is no more helpful to exaggerate the problem of police perjury⁶⁵ than it is to deny its existence. But the nation now has more than 600,000 state and local police officers with arrest powers.⁶⁶ Simply as a matter of statistical probability, we know that some unknowable number of the hundreds of thousands of people who are police officers will engage in misconduct. This human reality can only be exacerbated by the contradictory and sometimes corrosive pressures inherent in the job of policing, particularly in our cities. We expect police officers to protect us from violent criminals, yet not use excessive force; to confront criminal behavior that can produce wealth far beyond anything offered by their government jobs, yet resist temptation; to catch criminals, yet play by rules that are applicable only to them and that make the job of crime detection more difficult.

We have to sympathize with police officers and should worry about the pressures they face. We ought to be grateful that people are willing to do this difficult, sometimes dangerous work. Yet our sympathy and gratitude should not be translated into some blind acceptance, some unthinking tolerance that eliminates meaningful scrutiny of their conduct.

As the only representatives of the criminal justice system that most citizens see in everyday life, police officers serve important symbolic functions, and the entire society suffers if their behavior violates the rule of law.⁶⁷ In a more concrete dimension, police officers are the agents of the state licensed to use force—deadly force if necessary—to

some offices to discourage unconstitutional searches and seizures by law enforcers and the perjured testimony often spawned by those acts. See also Albert J. Kreiger, *Reflections on O.J.: After Two Aspirins and a Good Night's Sleep*, 10 CRIM. JUST. 2, 46 (1996) ("The prosecution may have been deceived by Fuhrman, or permitted itself to be deceived by Fuhrman. It does not matter because the public perception, as reflected in the jury arguments, was that the prosecution should have known.").

65. For the best-known example, see Dershowitz, *supra* note 12, at 28-29 (asserting that all police officers lie, and all judges know it); see also Kreiger, *supra* note 64, at 46 (commenting that "Professor Alan Dershowitz may have overstated the matter in his national [sic] televised arguments that police are taught to lie in Fourth Amendment cases").

66. In 1992 state and local governments funded 17,358 police and sheriffs' departments employing approximately 604,000 full-time sworn officers with general arrest powers and 237,000 nonsworn civilian personnel. Brian A. Reaves, *Census of State and Local Law Enforcement Agencies, 1992*, in BUREAU OF JUSTICE STATISTICS 1, 2 (Dep't of Justice 1993).

67. See *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting) (expressing concern about the effects upon civil liberties, respect for law, and the "common man's sense of decency and fair play" that would follow from a decision allowing government to knowingly benefit from illegal acts); *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting) ("We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.").

implement the law's constraints upon our behavior. They are often the most important government actors in the process of deciding who will remain free and who will not. It is appropriate that we demand that the members of our democracy who possess this kind of power obey the system of laws that creates their power. It is also appropriate that we demand that the actors charged with the duty of operating the criminal justice system try to ensure that police officers work within the constraints imposed by the law.

Police departments and prosecutors have essential roles to play in this process. But when the problem is possible perjured testimony by police officers, judges have a special responsibility as well, and nowhere is that responsibility greater than when officers are testifying about searches and seizures. Judges have a special responsibility for scrutinizing this testimony for at least three reasons. The first two are not surprising and warrant no lengthy discussion here. First, interpreting and enforcing the Constitution's commands is a fundamental part of the judicial function in our constitutional system.⁶⁸ Second, controlling the flow of evidence is an inherent part of a judge's supervisory function over the judicial proceedings that occur in the courtroom.⁶⁹

The third reason is particularly relevant to the issues addressed in this Article. Judges have a special responsibility for dealing with perjured testimony about police investigations because this category of false testimony results in part from rules created and enforced by judges.

C. PERJURY AND THE SUPPRESSION OF EVIDENCE

A number of empirical studies on the subject suggest that perjured testimony by police officers is distressingly common, particularly in drug prosecutions.⁷⁰ These studies indicate that police officers

68. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

69. See, e.g., FED. R. EVID. 611.

70. Orfield, *supra* note 12, at 1049-50 (noting that 76% of responding police officers agreed that police officers do shade the facts to establish probable cause, 86% of respondents reported that it was unusual but not rare for judges to disbelieve police testimony, and only 9% thought this disbelief was common; yet 48% of the police respondents thought judges were frequently correct in disbelieving police testimony, and no officer would state that judges could never be correct with such disbelief); Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62*, 4 CRIM. L. BULL. 549, 549-50 (1968) (noting that a study of 3,971 arrests in Manhattan in the months preceding and following the decision in *Mapp* led to inferences that police search and seizure practices had not changed, but increases in

commit perjury most often to avoid suppression of evidence⁷¹ and to fabricate probable cause,⁷² knowing that judges "may 'wink' at obvious police perjury in order to admit incriminating evidence."⁷³ Perhaps it is not surprising that this problem arises in drug cases,⁷⁴ because the legality of the search for evidence will often be outcome determinative in the litigation.⁷⁵ In a prosecution for drug possession, for example, if the drugs seized from the defendant are suppressed because the police violated the Fourth Amendment, the case is likely to be dismissed. If officers lie about their search and seizure methods to avoid exclusion of this evidence and their lies are accepted by the court, this perjury has altered the outcome of the lawsuit. Obviously, this should be unacceptable, and judges should try to guard against it.

But how is a judge to know when perjury occurs?⁷⁶ We know that perjury occurs from time to time in judicial proceedings, and that sometimes it is police officers who lie. On the other hand, we also know that it is impossible to determine with any precision how often police officers or any other witnesses commit perjury, or how often the perjury is successful.⁷⁷ By their very nature, successful lies will

"drossy testimony" indicated 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").

71. STEVEN R. SCHLESINGER, *EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE* 57 (1977); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 739 (1970); Orfield, *supra* note 11, at 1023; *see also* James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUD. 243, 275-76 (1973) (police may lie to get a conviction).

72. Oaks, *supra* note 70, at 730-32; Orfield, *supra* note 12, at 1023.

73. Orfield, *supra* note 12, at 1023; *see* DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 253-54 (1977).

74. Joseph McNamara, who has been the police chief in both Kansas City and San Jose, has "come to believe that hundreds of thousands of Law enforcement officers commit felony perjury every year testifying about drug arrests." Joseph D. McNamara, *Has the Drug War Created an Officer Liars' Club?*, L.A. TIMES, Feb. 11, 1996, at M1. He attributes this phenomenon to pressures generated by the so-called "war on drugs." *Id.*

75. *See, e.g.*, Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992), *cert. denied*, 507 U.S. 972 (1993) (plaintiff was wrongfully convicted on perjured testimony by police officers and served 19 years in prison).

76. *See, e.g.*, Irving Younger, *Constitutional Protection on Search and Seizure Dead?*, TRIAL, Aug.-Sept. 1967, at 41 (noting that every lawyer practicing in the criminal courts knows "police perjury is commonplace . . . [but] judicial recognition of the fact is extremely rare").

77. For a more detailed analysis of why it is difficult to identify when someone is lying, and why judges may be more likely to accept falsehoods from police officers, *see* Cloud, *supra* note 7, at 1321-24, 1336-39.

remain undetected, and we would expect a perjurer to attempt to conceal the crime. In addition, most of us assume that most police officers will tell the truth, which reduces the likelihood that official falsehoods will be detected when they occur.

Precisely because official lies are so hard to detect, we should expect legal decisionmakers to construct rules designed to discourage such official misconduct. One anomaly of contemporary Fourth Amendment case law is that some judges have adopted interpretive tests permitting them to avoid the issue of police perjury when they rule on the constitutionality of searches and seizures. These kinds of rules create functional—if unintended—incentives for law enforcers to lie. So-called “objective” tests exemplify the problem, and they are discussed in Parts III and IV.

III. EMERGENCIES, PRETEXTS AND “OBJECTIVE” TESTS

A. THE WARRANTLESS SEARCH AT THE SIMPSON HOME

Detective Mark Fuhrman’s notorious testimony about his racial attitudes was not the detective’s only controversial testimony in the O.J. Simpson murder case. Months before the trial began, months before public disclosure of the vile “Fuhrman tapes,” he testified under oath at a preliminary hearing. In that pretrial testimony he described the initial investigation by the Los Angeles Police Department at the Simpson residence. That testimony embodied the issues that are the subject of this Article.

Early on the morning of June 13, 1994, Detective Fuhrman climbed the fence surrounding the residential property belonging to O.J. Simpson and unlatched a gate to allow other officers to enter and search the property. The officers entered without a warrant, although the property immediately inside the fence is the curtilage of the home, and the Fourth Amendment affords this area the same protections it provides for the home itself.⁷⁸ Because it is “a ‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable,”⁷⁹ the officers’ warrantless entry was unconstitutional, and the evidence they discovered in the ensuing search was subject to exclusion, unless the officers’

78. *Oliver v. United States*, 466 U.S. 170, 180 (1984) (“[T]he curtilage is the area which extends the intimate activity associated with the sanctity of a man’s home and the privacies of life.”) (citation omitted).

79. *Payton v. New York*, 445 U.S. 573, 586 (1980).

conduct was justified by an exception to the warrant requirement. Among the recognized exceptions are exigencies created by threats to the safety of the officers or other people.⁸⁰ While testifying on direct examination at the preliminary hearing, Detective Fuhrman attempted to justify the officers' warrantless entry by claiming that he believed just such an emergency existed:

A: I told Detective Vannatter "We've got an emergency here, we got a problem. We don't know if we got people inside who are in danger, dying, or bleeding to death. We have to do something. I don't care whose house this is, we have to do something. We don't know if we have a murder-suicide, a kidnapping, another victim," and Phil agreed and we took our opinions to Detective Lang and Phillips and we discussed the possibilities.

Q: So, what was it you wanted to do and why?

A: Well I believe that we had to find out if there's anybody in the residence that's injured, to save their life, to save other people's lives. We didn't know what the situation was, and from what we know and where we just came from, I think it was imperative that we contact someone and make sure everything was O.K.⁸¹

Defense lawyers argued that the officers actually were searching for evidence to link Simpson to the murders,⁸² a conclusion apparently widely shared by trial observers.⁸³ A number of facts substantiated the idea that the officers immediately considered Simpson to be the primary suspect. The police department had investigated earlier complaints that Simpson had physically abused his former wife, who was

80. See, e.g., *Minnesota v. Olson*, 495 U.S. 91, 100 (1990) (listing exigencies).

81. This testimony was presented during the preliminary hearing. Testimony from this hearing was transcribed from a videotape purchased from Court TV. Detective Fuhrman emphasized his claim that it was fear of an emergency that motivated him and the other officers to embark on the warrantless search when a prosecutor asked questions suggesting that the officers actually were motivated by a concern for the welfare of Simpson's young children, who were in police custody at the time:

A: Well I believe immensely we had to find out if anything was wrong inside the residence. We had children at the station, we had the possibility of somebody being injured. We had to go in, but I don't think that was the most, the paramount reason. It was preservation of life from what we knew at that point.

Transcript of Preliminary Hearing Testimony of Detective Mark Fuhrman (videotape on file with law library of Emory University School of Law).

82. See, e.g., Kenneth B. Noble, *Ruling Aids Prosecution of Simpson*, N.Y. TIMES, Sept. 20, 1994, at A16 (noting that defense lawyer Gerald Uelmen argued at a suppression hearing that "[c]learly what was going on here was a search for evidence").

83. See, e.g., Kreiger, *supra* note 64, at 46 (describing the response to the officer's explanation as a "chorus of 'Give me a break' that was heard nationwide, except in the office of the district attorney").

one of the murder victims. Subsequent testimony revealed that Fuhrman himself had investigated one of these incidents. Even without that information, these experienced officers undoubtedly knew that most murder victims are killed by someone they know—and that a spouse or boyfriend is a likely suspect when a woman is killed.⁸⁴ Many observers also noted that Fuhrman was part of a group of experienced detectives who left the murder scene and traveled to Simpson's home. The inconsistency between the number of officers deployed and their ostensible purpose—to advise Mr. Simpson that his former wife had been murdered and his children were in police custody—only strengthened the inference that the officers actually considered Simpson a suspect and went to Simpson's home to look for evidence linking him to the murders.⁸⁵

In addition, the evidence that an exigency existed was flimsy at the time the officers made their warrantless entry. Indeed, the officers possessed no facts directly suggesting any threat to the safety of anyone at the Simpson residence. They knew that Simpson's former spouse had been murdered several hours earlier at a location about two miles away,⁸⁶ that no one in his home responded to telephone calls,⁸⁷ that a few unidentified dark stains were on the driver's door of

84. See, e.g., John M. Dawson & Patrick A. Langan, *Murder in Families*, in BUREAU OF JUSTICE STATISTICS 1, 2 (Dept. of Justice 1994) (reporting a Department of Justice study of murder cases disposed of by the courts in the nation's large counties in 1988, which produced the following data: 16% of murder victims were killed by family members; 64% were killed by friends or acquaintances; 20% were killed by strangers. Thus 80% of murder victims were killed by people they knew. The sample included more than 8,000 victims).

85. A well-known author and former prosecutor commented that “[i]f veteran police detectives did not arrive at the gate of Mr. Simpson's home thinking he might have committed these murders, then they should have been fired.” Turow, *supra* note 64, at A19.

86. The exact time of the victims' deaths was never established, but the officers knew it was several hours before the warrantless search at the Simpson home. Although not the first officer at the crime scene, Fuhrman learned of the murders at about 1:05 a.m. and arrived at the murder scene about an hour later. Fuhrman stayed at the murder scene for about three hours and then traveled to Simpson's home, which was about two miles from the site of the murder, arriving at approximately 5:05 to 5:10 a.m.

87. The defense eventually attacked the veracity of this testimony. Fuhrman testified that the officers attempted to contact people inside the Simpson residence for approximately 30 minutes before the warrantless entry. At a hearing, held on October 5, 1994, defense counsel argued that newly discovered evidence undermined Detective Fuhrman's claims that one of the reasons officers feared for the safety of people in the Simpson estate was that these attempts to contact the inhabitants by telephone had failed. The defense claimed that telephone logs from the security firm that protected the property and the call records for the cellular telephone used by police demonstrated that the police officers had already entered the Simpson property before they obtained the home's telephone number. Judge Ito refused, however, to reopen the evidentiary suppression hearing, and denied defense motions. See generally David Margolick, *Judge Rejects Barrage of Objections by Simpson's Lawyers*, N.Y. TIMES, Oct. 6, 1994, at A24.

a car that was associated with Simpson,⁸⁸ and that this vehicle was not parked perfectly parallel to the curb on the street outside Simpson's residence. These facts supply little basis for believing an emergency existed.

Despite the derisive public response to the officers' claim that they were motivated to search because they believed they faced an emergency situation, two judges denied the defendant's suppression motions. Unlike observers who had no responsibility for deciding the motions, the judge who conducted the preliminary hearing found that the officers' testimony was credible.⁸⁹ Months later, Judge Lance Ito, the trial judge, rejected renewed challenges to the warrantless search. Nonetheless, he issued a ruling questioning the credibility of an officer's sworn statements describing this warrantless search in a subsequent application for a search warrant.⁹⁰

The search at the Simpson home obviously raises issues relevant to this Article. It is important to understand that these issues differ from those raised by the "dropsy"; testimony discussed earlier.⁹¹ The dropsy testimony does not depend upon the interpretation of the significance of facts. The facts are self-explanatory. If the dropsy testimony is truthful, the officers had probable cause to arrest because they saw illegal drugs in plain view.⁹² We should be concerned about

88. Fuhrman testified that while another officer tried to telephone the home, he inspected a Ford Bronco parked on the street outside the estate and determined that it was Simpson's. He also testified that he observed several small stains on the driver's door that he thought were blood although it was dark, the stains were small, and he was using only a penlight to illuminate them.

89. See Michael Janofsky, *A Judge Withholds Evidence Seized at Simpson Home*, N.Y. TIMES, July 8, 1994, at A1.

90. A few hours after their initial warrantless search at the Simpson property, police officers submitted an application for a search warrant for that residence. The warrant was issued, a search followed, and evidence was seized. Judge Ito ruled that the affidavit contained a number of misstatements. He specifically rejected the prosecutors' argument that the errors were merely negligent and found that the errors were "at least reckless." See Kenneth B. Noble, *Simpson Move to Suppress Evidence is Turned Down*, N.Y. TIMES, Sept. 22, 1994, at A14. This phrase—"at least reckless"—suggests that the judge concluded that the officers actually lied in their application for a search warrant, although the judge was too circumspect to make quite so direct an accusation. However, the judge refused to suppress the evidence found in the search conducted pursuant to this warrant. He redacted the "reckless" misstatements from the warrant, but ruled that even without them probable cause existed for the issuance of the warrant. Despite the officer's "reckless disregard for the truth," the search and seizure were affirmed. *Id.* The judge conducted the hearing under guidelines established by the Supreme Court in *Franks v. Delaware*, 438 U.S. 154 (1978).

91. See *supra* note 7 and accompanying text.

92. "Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to

the dropsy testimony simply because it raises doubts about whether the events reported by the officer actually occurred.⁹³ If they did not, the officer is lying to cover up an illegal search and seizure and to avoid the suppression of evidence.

On the other hand, the fundamental question about Detective Fuhrman's testimony was not whether the events he described had occurred. Observers instead questioned his testimony describing his interpretation of those facts. Fuhrman and other officers said they interpreted the facts to mean that an emergency existed. Critics asserted that this was preposterous: No one could reasonably interpret the known facts in this way; Fuhrman and other officers really intended to search for evidence and he simply fabricated the idea of an emergency as a pretext, an excuse to search without trying to get a warrant. The officer's unbelievable testimony about his subjective purpose raised the specter of perjury designed to shield the fruits of an illegal search from suppression.

B. EMERGENCIES AND "DUAL" TESTS

Federal and state judges alike have recognized that the Fourth Amendment permits warrantless entries into homes and other private places when police officers are facing an emergency. "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency."⁹⁴ If the officers come across evidence of criminality during their search, it will be admissible if the warrantless entry and the discovery of the evidence⁹⁵ satisfy constitutional requirements. The threshold questions in these cases are: (1) Do the facts justify the belief that an emergency exists at the time of the entry? and (2) Is the entry necessary to abate the emergency?

warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (alterations in original) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

93. For a discussion of a contemporary version of the dropsy testimony, see Cloud, *supra* note 7, at 1317-20.

94. *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963).

95. In many cases the officers will rely upon the "plain view" doctrine to justify their observation and seizure of evidence. Two general constitutional requirements must be satisfied. First, the officers' presence in the place where they observe the item must be lawful. Second, if they seize the item it must be "immediately apparent"—that is, they must have probable cause to believe—that the item is connected to criminal conduct. See *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971); *Horton v. California*, 496 U.S. 128, 136-37 (1990).

A review of the case law confirms that almost any true emergency can justify warrantless entries. Common examples include fires, shootings, the presence of sick, injured or dead people, a person's recent mysterious disappearance, and any similar facts that suggest an immediate need to enter and provide aid.⁹⁶

But mere conjecture is not enough to permit the entry. In this setting the courts have often employed objective standards to limit warrantless intrusions. The belief that there is an exigency must be reasonable. The officers must possess facts supporting the conclusion that an exigency exists, and the government bears the burden of proving that the warrantless entry satisfies constitutional requirements. A recent Supreme Court decision appears to confirm that the facts upon which the officers rely must meet the traditional Fourth Amendment standard: They must supply probable cause to believe that an emergency exists.⁹⁷

Many state courts have incorporated the probable cause standard or something like it into common-sense tests that also examine the officers' *subjective* purpose in conducting the warrantless search. For example, in *Wisconsin v. Prober*⁹⁸ the Wisconsin Supreme Court concluded:

Thus the test for a valid warrantless search under the emergency doctrine requires a two-step analysis. First, the search is invalid unless the searching officer is actually motivated by a perceived need to render aid or assistance. Second, even though the requisite motivation is found to exist, until it can be found that a reasonable person under the circumstances would have thought an emergency existed, the search is invalid. Both the subjective and objective tests must be met.⁹⁹

The course of the *Prober* litigation demonstrates how including the officer's subjective motivation in the analysis can affect the evaluation of the facts upon which a claim of emergency is based. In *Prober*,

96. For brief descriptions of cases analyzing the range of emergencies justifying warrantless entries, see 3 LAFAYE, *supra* note 9, § 6.6.

97. See *Minnesota v. Olson*, 495 U.S. 91, 100 (1990) (after concluding that the Minnesota Supreme Court had applied "essentially the correct standard in determining whether exigent circumstances existed," the Court noted that the state court thought that for exigencies other than hot pursuit "there must be at least probable cause to believe" that one of these exigencies existed); see also 3 LAFAYE, *supra* note 9, § 6.6(a), at 391 (citing state and federal cases establishing "this probable cause requirement").

98. 297 N.W.2d 1 (Wis. 1980), *overruled on other grounds by Wisconsin v. Weide*, 455 N.W.2d 899 (Wis. 1990).

99. *Id.* at 12.

police officers driving a police ambulance responded to an eyewitness report of the defendant's possible drug overdose in a motel room. By the time the ambulance arrived, Prober had regained consciousness, placed his heroin and paraphernalia in a purse, left the motel and locked the purse in the trunk of his automobile, which was parked at the motel. The officers caught the defendant half a block away and arrested him for trespassing in the motel. The officer summoned a tow truck to impound Prober's automobile, called for assistance from the Vice Squad, and then searched the vehicle, including the trunk and the purse.¹⁰⁰ The investigating officer testified that he searched the automobile as part of the department's standard inventory procedures.¹⁰¹

Despite the officer's testimony that this was an inventory search, the state's intermediate appellate court held that the emergency exception justified the warrantless search of the purse because "a reasonable man *could believe* that the defendant had overdosed on a drug, and might be in danger of losing his life."¹⁰² The officer's actual motive for conducting the search was irrelevant to the lower court because it applied a so-called "objective" test¹⁰³ announced earlier that year by the United States Supreme Court in *Scott v. United States*.¹⁰⁴

In *Scott*, the Supreme Court was called upon to interpret a federal statute,¹⁰⁵ but dragged Fourth Amendment theory into its analysis. In an opinion written by Justice Rehnquist, the Court accepted the government's argument that the existence of a statutory or constitutional violation "turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time. Subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional."¹⁰⁶ The opinion then noted, with apparent approval, that federal courts of appeals have examined "challenged searches under a standard of objective reasonableness

100. *Id.* at 3-4.

101. *Id.* at 3. Proper inventory searches are a recognized exception to the warrant requirement. *See, e.g., Florida v. Wells*, 495 U.S. 1, 3-4 (1990); *Colorado v. Bertine*, 479 U.S. 367, 371 (1987); *South Dakota v. Opperman*, 428 U.S. 364, 369-72 (1976).

102. *Wisconsin v. Prober*, 297 N.W.2d 14 (Wis. 1980) (emphasis added by Wisconsin Supreme Court)).

103. *Prober*, 297 N.W.2d at 5.

104. 436 U.S. 128, 138 (1978).

105. *Scott* involved analysis of the reasonableness of officers' efforts at "minimization" under a federal statute authorizing electronic surveillance. *Id.* at 130-31.

106. *Id.* at 136; *see also id.* at 137 (expressing approval of the government's argument).

without regard to the underlying intent or motivation of the officers involved."¹⁰⁷

Applying this objective test, the Wisconsin intermediate appellate court concluded that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."¹⁰⁸ In other words, if the police officer, prosecutor, or judge can construct some theory that *could* justify the intrusion, the search is constitutional.

Actual motive is irrelevant, even if the officer intended to violate constitutional, statutory or administrative rules. If facts existed that *could have* served as the basis for a proper motive, the intrusion is objectively reasonable. In other words, the lower court used this kind of objective test not to limit the use of warrantless searches, but as a license to conduct them.

Apparently interpreting both the Fourth Amendment and the similar provision contained in the state constitution,¹⁰⁹ the Wisconsin Supreme Court rejected this so-called objective approach. It held that the search of Prober's purse was not valid under the inventory,¹¹⁰ automobile¹¹¹ or emergency exceptions to the warrant requirement. In defining the scope of the emergency exception, the state supreme court identified what I believe is the proper—and limited—function of objective tests in this context. It concluded that "the objective approach approved in *Scott* must be employed in determining the reasonableness of a law enforcement officer's belief that there is an emergency at hand and an immediate need for assistance"¹¹²

107. *Id.* at 138 (citing lower court opinions asserting this thesis).

108. *Wisconsin v. Prober*, 297 N.W.2d 1, 5 (Wis. 1980) (quoting *Wisconsin v. Prober*, 275 N.W.2d 123, 128 (Wis. Ct. App. 1978), *rev'd*, 297 N.W.2d 1 (Wis. 1980)).

109. WIS. CONST. art. I, § 11.

110. The court concluded that the opening of the vehicle's locked trunk was a valid inventory search, but the search of the defendant's purse was not. *Prober*, 297 N.W.2d at 5-7. A decade later the same court concluded that the United States Supreme Court's intervening decisions interpreting the scope of inventory searches contradicted this part of the *Prober* opinion and overruled the holding that the inventory search of a purse found in an automobile was unconstitutional. *Wisconsin v. Weide*, 455 N.W.2d 899, 902-06 (Wis. 1990).

111. *Id.* at 8-9. In light of the court's finding that probable cause existed to search the vehicle, its conclusion that the automobile exception did not authorize the search of the purse found in the trunk, while correct at the time, conflicts with the Supreme Court's subsequent decisions interpreting the Fourth Amendment. *See California v. Acevedo*, 500 U.S. 565, 573 (1991); *United States v. Ross*, 456 U.S. 798, 820-21 (1982).

112. *Prober*, 297 N.W.2d at 11.

However, the existence of these facts alone is insufficient to trigger the exception “[u]nless the search or intrusion is motivated by the perceived need to act in the face of an emergency”¹¹³

The facts of *Prober* reveal why this two-pronged test is appropriate for analyzing attempts to use the emergency exception to justify warrantless searches. The record established that the search of the purse was not motivated by any emergency. The officer testified repeatedly that he was conducting an inventory search, and confirmed that this was his “sole purpose” in searching the vehicle’s trunk and its contents.¹¹⁴ This explanation was consistent with the facts, while the government’s argument contradicted the known facts. If an emergency had ever existed, it was resolved before the officer searched the automobile or its contents.¹¹⁵ By examining the officer’s testimony about his motive in the context of the known facts, the state supreme court reached the unavoidable conclusion that the search was unrelated to any concerns about a medical emergency, and properly held that the emergency exception could not justify this warrantless search.

Under the emergency doctrine, entries and searches can be reasonable under the Fourth Amendment, despite the absence of a warrant, because “reasonableness is supplied by the compelling need to assist the victim—not the need to secure evidence.”¹¹⁶ The very rationale of the exception makes the officer’s state of mind relevant:

[C]onditioning the availability of the emergency doctrine exception on the searching officer’s motivation is mandated by the doctrine’s rationale that the preservation of human life is paramount to the right of privacy protected by the Fourth Amendment. Thus searches which are not motivated by this paramount interest, and which instead serve the state’s interest in apprehending the perpetrator of a crime that has already occurred, are not excused from compliance with the warrant requirement by the reasoning of the emergency doctrine exception.¹¹⁷

Prober is only one of a number of important state court decisions employing this sensible approach.¹¹⁸ In a later case in which it found

113. *Id.* at 10.

114. *Id.* at 12.

115. See *supra* notes 86-88 and accompanying text.

116. *Prober*, 297 N.W.2d at 10 (quoting *Wisconsin v. Pires*, 201 N.W.2d 153, 157 (Wis. 1972)).

117. *Id.* at 11.

118. In recent litigation, the Texas Court of Criminal Appeals first adopted a “dual” test requiring analysis of the searching officer’s subjective purpose, then reversed itself and adopted

that the emergency exception justified a warrantless search, the Wisconsin Supreme Court reaffirmed that both the subjective and objective tests "must be satisfied before a warrantless entry will be justified under the emergency rule exception."¹¹⁹ The New York Court of Appeals has established a comparable three-part test,¹²⁰ requiring that: (1) "The police must have reasonable grounds to believe" that an emergency exists; (2) "[t]he search must not be primarily motivated by intent to arrest and seize evidence;" and (3) "some reasonable basis, approximating probable cause," must link the place to be searched with the emergency.¹²¹ In a recent decision,¹²² the Michigan Supreme Court hinted strongly that when confronted with a case raising the issue, it would adopt a test including both subjective and objective elements, and that it might simply adopt the Wisconsin approach.¹²³

These opinions highlight the inadequacy of an objective test that only asks if a reasonable officer could have justified an intrusion on the known facts.¹²⁴ The Fourth Amendment and the exclusionary rule are not directed at some hypothetical government agent and what he might have thought or done. They exist to regulate the actual conduct of actual government agents in actual cases. The task of a judge reviewing government searches and seizures in a specific case is to analyze both the conduct of the officers and the motives that generated that conduct.

Identifying the officer's subjective motives is important for another reason relevant to this discussion. The constitutionality of the officer's conduct and the veracity of his testimony are issues that may dovetail. If the objective facts do not support the officer's claim that

an "objective" test. See *Brimage v. Texas*, 918 S.W.2d 466 (Tex. Crim. App. 1995), *rev'd en banc*, 918 S.W.2d 466 (Tex. Crim. App. 1996).

119. *Wisconsin v. Boggess*, 340 N.W.2d 516, 521 (Wis. 1983).

120. *New York v. Mitchell*, 347 N.E.2d 607 (N.Y.), *cert. denied*, 426 U.S. 953 (1976).

121. *Id.* at 609.

122. *Michigan v. Davis*, 497 N.W.2d 910 (Mich.), *cert. denied*, 508 U.S. 947 (1993).

123. The Michigan court commented favorably—and at length—upon the New York and Wisconsin tests. *Id.* at 917-18. It described these tests, particularly Wisconsin's, as "persuasive and instructive." *Id.* at 917. It later stated that it was drawing upon the Wisconsin test, but noted that "because it is not necessary to do so in order to resolve this case, we will not determine today whether we will adopt the subjective element of the test . . ." *Id.* at 921 n.12. The court then stressed the importance of placing strict limits on the emergency exception. *Id.* at 921. It is interesting to note that the Michigan court concluded that something less than probable cause was needed to satisfy the objective test that it did apply. *Id.* at 918.

124. This conclusion is at least implicit in the Supreme Court's leading opinion on the emergency exception. See *Mincey v. Arizona*, 437 U.S. 385, 392 (1978) (The emergency exception authorizes warrantless entries by police officers "when they reasonably believe that a person within is in need of immediate aid.").

his conduct was motivated by a desire to resolve an emergency, this inconsistency may raise concerns about the officer's veracity in describing the facts of the encounter.¹²⁵ Professor LaFave has described part of the dilemma by pointing out that "[a]ny conduct . . . by the officer which is in any way inconsistent with the purported reason for the entry is a just cause for healthy skepticism by the courts . . . [who must] be alert to the possibility of subterfuge, that is, a false claim of such a purpose where the true intent is to seek evidence of criminal conduct."¹²⁶

But the inquiry cannot end there. If a person lies about one thing, it is not illogical to fear that he has lied about other things. An officer who would lie about his motive for searching also might lie about the facts he observed during the incident. The officer's testimony about motive may be a critical guide for judging his testimony about the "objective" facts of the incident. Courts applying tests with subjective and objective components appear to recognize this unavoidable reality: The problem of police perjury is intertwined with the constitutional question.¹²⁷

The Simpson case again serves as a provocative example. Post-trial statements suggested that some jurors doubted the truthfulness of the claim that officers conducted the initial warrantless search of

125. Even as it embraced objective tests for determining whether government action is unlawful, the Supreme Court indirectly acknowledged this connection. *Scott v. United States*, 436 U.S. 128, 136 (1978) ("consideration of official motives may play some part in determining whether application of the exclusionary rule is appropriate *after* a statutory or constitutional violation has been established").

126. 3 LAFAVE, *supra* note 9, § 6.6(a), at 402.

127. Some judges applying an objective test to these issues erroneously consider the questions of police perjury and the reasons for a search and seizure to be unrelated. The opinion in *United States v. Hawkins*, 811 F.2d 210 (3d Cir. 1987) exemplifies this error. The arresting police officers testified that they stopped the defendants' vehicle for traffic violations. The district court treated this testimony as not credible, but the appellate court engaged in an "objective" evaluation of the facts known to the officers. It concluded that reasonable suspicion existed to investigate drug offenses, and therefore the officers were objectively reasonable in stopping the vehicle. *Id.* at 213. After reviewing several Supreme Court opinions employing objective tests, the court held that the exclusionary rule was designed to "deter unconstitutional conduct, not perjury. In the absence of a constitutional violation, there is no basis upon which to exclude relevant evidence." *Id.* at 215. The error here is two-fold. First, it fails to recognize that an officer's perjury about some aspect of an investigation may raise questions concerning the veracity of his testimony about the facts creating reasonable suspicion or probable cause. Second, it abandons the educational functions of constitutional law. The Fourth Amendment exists, in part, to prevent government agents from searching and seizing without proper justification. One appropriate function of judicial review in Fourth Amendment cases is to teach police officers what the Constitution permits and what it forbids, and how to conform their conduct to these requirements.

Simpson's home because they thought an emergency existed. These comments seemed to be only part of a more general distrust of the police department, its investigative methods, and the reliability of the evidence it presented. Questions about the veracity of the testimony describing the motive to search may have exacerbated, and perhaps even triggered, concerns about the believability of factual evidence relevant to the question of guilt. If Detective Fuhrman's explanation about why he climbed over the fence was unbelievable, could the jury believe his testimony about the physical evidence—a bloody glove—that he said he found on the Simpson property during the warrantless search?¹²⁸

Decisionmakers might worry that trying to define the proper test for unraveling the intertwined issues of the officer's subjective motive and the "objective" facts of the incident will sweep them into an epistemological vortex. An incredible explanation of the officer's motive could cast doubt on the veracity of the fact reporting. But a contrary possibility exists. If the facts of the incident are inconsistent with the officer's claimed purpose, could this inconsistency instead indicate that the officer is really being truthful? After all, why would the officer report facts and conclusions that were inconsistent? Why not simply tailor the facts to fit the conclusion?¹²⁹ Scott Turow's analysis of this issue as it arose in the Simpson case supplies one possible answer to the latter question. After reviewing the facts of the warrantless search, and observing that the detectives' explanation for their entry "was hard to believe," Turow commented pointedly that

[a]t the time of the preliminary hearing, before the DNA results had come in, the bloody glove . . . was the foremost evidence against Mr. Simpson. So the police were under tremendous pressure to explain their actions in a way that would legally excuse them for violating Mr. Simpson's rights and allow the glove to be introduced as evidence.¹³⁰

The complexity of the relationship between objective and subjective truth is one reason that the more sophisticated, more probing,

128. Applying a test with both objective and subjective components to the warrantless entry at the Simpson residence, it is obvious that the officers' reason for entering without first obtaining a warrant was a critical issue at the suppression hearing. If they entered to look for evidence and not because they actually believed an emergency existed, they violated the Fourth Amendment, and the court should have suppressed the evidence they located as a result of that search as fruits of the illegal entry. See *Wong Sun v. United States*, 371 U.S. 471 (1963).

129. For a more detailed discussion of this point, see *infra* notes 151-54 and accompanying text.

130. See Turow, *supra* note 64, at A21.

more comprehensive dual test is superior to a simplistic, truncated examination under a constricted objective test. Judges need to explore, with care and attention to detail, the objective facts and the subjective motives offered as justifications for warrantless intrusions upon constitutional rights.¹³¹ They should devote *at least* as much care to their scrutiny of warrantless intrusions as we hope they do in evaluating warrant applications. In short, judges should take the Fourth Amendment seriously. They should treat it not as a license for government intrusions, but as what it is—a limit on the exercise of government power.

Rather than accept this responsibility, some courts have adopted supposedly objective tests crafted to avoid it. Most notably, in recent years, the Supreme Court has favored the use of objective tests to define the constitutionality of various kinds of searches and seizures.¹³² Like the lower court in *Prober*, judges employing this approach disregard the officer's subjective beliefs and motivations, which eases the burden of decisionmaking. If judges ask only whether the officer's conduct was objectively reasonable, even the simultaneous existence of an improper motive will not require them to suppress probative evidence—because the judges have declared that the motive is irrelevant.¹³³

131. See Burkoff, *Rejoinder*, *supra* note 9, at 696-700 (citing cases in which courts, including the Supreme Court, have held that an officer's subjective motives can invalidate a search or seizure, particularly on pretext grounds). *But see*, *Whren v. United States*, 135 L. Ed. 89, 96-98 (1996) (narrowly construing the scope of earlier Supreme Court opinions addressing the pretext issue).

132. In recent decisions, the Supreme Court has approved searches and seizures even if the officers erred, as long as the officers' conduct satisfied some objective measure of reasonableness. See, e.g., *Florida v. Jimeno*, 500 U.S. 248 (1991) (scope of driver's consent to search automobile); *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (validity of consent to search residence by a person without actual authority to consent); *Maryland v. Buie*, 494 U.S. 325 (1990) (validity of protective sweep of home); *Illinois v. Krull*, 480 U.S. 340 (1987) (validity of search pursuant to a statute subsequently held to violate the Fourth Amendment); *Maryland v. Garrison*, 480 U.S. 79 (1987) (officers mistakenly searched an apartment not named in warrant); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) (officers searched pursuant to a warrant not satisfying the Fourth Amendment's requirements of particularity for the objects sought); *United States v. Leon*, 468 U.S. 897, 919-21 (1984) (officers searched in reasonable, good faith reliance upon a warrant not satisfying the Fourth Amendment's probable cause requirement).

133. Some courts have attempted to devise a test for cases where officers have mixed motives: They believe an emergency exists, but they also want to enter to search for evidence. See, e.g., *New York v. Mitchell*, 347 N.E.2d 607, 610 (N.Y.), *cert. denied*, 426 U.S. 953 (1976) (emphasizing that although the officers may have been aware of the possibility that a crime may have been committed, this was not their "primary intent . . . primary concern . . . [or] primary motivation for the search"); *Michigan v. Davis*, 497 N.W.2d 910, 918 (Mich. 1993) (noting that "in many emergency situations there is a very strong possibility that criminal activities could account for

The most common judicial application of this kind of objective test probably arises in cases involving seizures of motor vehicles which lead to the discovery of tangible evidence of more serious crimes—typically possession of drugs or weapons. Absent probable cause or reasonable suspicion, an officer cannot stop a motor vehicle because he has a hunch that the driver possesses drugs. If the officer observes some violation of traffic laws, this violation can supply cause to stop the vehicle. Two different objective tests have been used to judge the constitutionality of these searches and seizures. Under the “could have” version of these objective tests, it is irrelevant that the traffic violation is trivial, or that the traffic stop is a pretext for the officer’s real purpose, which is to investigate a more serious crime.¹³⁴ If facts exist that could have justified a traffic stop, the seizure can be constitutional regardless of the officers’ underlying purpose. Recognizing this possibility, some courts have developed a more demanding test that asks whether a reasonable officer “would have” seized the defendant. These tests are the subject of Part IV.

IV. AUTOMOBILES AND “OBJECTIVE” TESTS

On the evening of June 10, 1993, District of Columbia vice officers Ephraim Soto and Homer Littlejohn were passengers in an automobile driven by a third investigator. They were on patrol looking for violations of drug laws. The officers were dressed in plainclothes and travelling in unmarked cars. Officer Soto testified that he noticed a Nissan Pathfinder that was stopped at a stop sign “for more than twenty seconds obstructing traffic,” and that he also saw the driver “looking down into the lap of the passenger.”¹³⁵ The officers made a U-turn to follow the vehicle, which Soto testified “turned without signalling” and “sped off quickly” . . . at an “unreasonable speed.”¹³⁶

Local police department rules limit the situations in which plainclothes vice officers in unmarked cars are permitted to make stops for traffic violations. They provide:

Only on-duty uniformed members driving marked departmental vehicles or members of the Public Vehicle Enforcement Unit, Traffic Enforcement Branch, shall take enforcement action; except in the

the emergency. Thus, the police are bound to be motivated in part by the desire to solve a crime . . .”).

134. *Whren v. United States*, 135 L. Ed. 2d 89 (1996).

135. *United States v. Whren*, 53 F.3d 371, 372 (D.C. Cir. 1995), *aff'd*, 135 L. Ed. 2d 89 (1996).

136. *Id.*

case of a violation that is so grave as to pose an immediate threat to the safety of others, in which case members who are off duty, not in uniform, or in unmarked cruisers, may take appropriate enforcement action.¹³⁷

Despite this regulation, the vice officers, who were dressed in plainclothes and driving an unmarked car, seized the Pathfinder by using their automobile to trap it in between other vehicles stopped at an intersection. Officer Soto immediately approached the Pathfinder, identified himself as a police officer, and ordered the driver to put the vehicle into park. As he was speaking, Soto noticed that the passenger "was holding a large clear plastic bag of what the officer suspected to be cocaine base in each hand."¹³⁸ Soto testified that after he yelled to the other officers that he had found a drug violation, the passenger attempted to hide a bag in a compartment in the passenger door. Soto seized the bag. A group of officers then arrested the defendants and searched their vehicle. They found marijuana and crack cocaine in the door compartment, and also seized plastic bags, a portable phone, and personal papers.¹³⁹

The defendants filed motions to suppress the physical evidence, arguing that the traffic stop was a mere pretext to permit officers who lacked probable cause to search for drugs. Therefore, the stop and subsequent search violated the Fourth Amendment. The District Court denied their suppression motions. The defendants were convicted, and their penalties included fourteen year prison sentences.

On appeal the defendants urged the court to adopt an "objective" test employed by a minority of federal circuits that establishes that "a stop is valid only if 'under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose,'"¹⁴⁰

137. District of Columbia Metropolitan Police Department General Order 303.1(I)(A)(2)(a) (effective July 29, 1986), *quoted in* *Wright v. District of Columbia*, Civ. No. 87-2157 (RCL), 1990 U.S. Dist. LEXIS 7487, at *6-7, (D.D.C. June 21, 1990).

138. *Whren*, 53 F.3d at 373.

139. *Id.*

140. *Id.* at 374 (citations omitted) (emphasis omitted). At the time of the circuit court's decision in *Whren*, three circuits had adopted the stricter "would have" test for evaluating claims that traffic stops were pretextual. *See* *United States v. Cannon*, 29 F.3d 472, 475-76 (9th Cir. 1994); *United States v. Guzman*, 864 F.2d 1512, 1517 (10th Cir. 1988), *overruled by* *United States v. Botero-Ospina*, 71 F.3d 783 (10th Cir. 1995); *United States v. Smith*, 799 F.2d 704, 709 (11th Cir. 1986). Since then, this split among the circuits has been resolved. First, the Tenth Circuit reversed its earlier opinions and adopted the "could have" test. *United States v. Botero-Ospina*, 71 F.3d 783 (10th Cir. 1995). Then the Supreme Court adopted the "could have" test. *Whren v. United States*, 135 L. Ed. 2d 89 (1996).

rather than the "could have" test adopted by a majority of circuits.¹⁴¹ The defendants argued that the latter test "fails to place any reasonable limitations on discretionary police conduct, thus 'cut[ting] at the heart of the Fourth Amendment.'"¹⁴²

The circuit court rejected these arguments and embraced the "could have" test for judging the constitutionality of traffic stops. Quoting extensively from earlier circuit court opinions,¹⁴³ the court concluded that "[t]he Fourth Amendment does not bar the police from stopping and questioning motorists when they witness or suspect" a traffic violation, even where it is "a relatively minor offense that would not of itself lead to an arrest," and regardless of whether the police officers were subjectively motivated by a desire to investigate a more serious crime.¹⁴⁴

The "would have" test has been adopted by some state courts, particularly in recent cases. See, e.g., *Alejandro v. Nevada*, 903 P.2d 794, 796 (Nev. 1995); *Florida v. Daniel*, 655 So. 2d 1040, 1042 (Fla. 1995) (affirming *Kehoe v. Florida*, 521 So. 2d 1094, 1096-97 (Fla. 1988)); *Maine v. Izzo*, 623 A.2d 1277, 1280 (Me. 1993). Prior to *Whren*, the Fifth and Eleventh Circuits produced interesting lines of cases applying this objective standard to traffic stops. In deciding whether a stop was legitimate or pretextual, the Eleventh Circuit test asked "whether a reasonable officer would have made the seizure in the absence of illegitimate motivation." *United States v. Hardy*, 855 F.2d 753, 756 (11th Cir. 1988) (quoting *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986)) (other citations omitted) (rejecting the government argument that the stop of a suspected drug courier was constitutional because the officer *could have* made a valid traffic stop). The *Smith* case in turn relied on a decision rendered by the old Fifth Circuit, *United States v. Cruz*, 581 F.2d 535 (5th Cir. 1978) (en banc), *overruled by United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987). In *Cruz* the Court considered the investigating officer's subjective motives. An en banc court concluded that the stop of a vehicle violated the Fourth Amendment, even though the officer had observed a traffic infraction, because his real purpose was to search for illegal aliens. *Cruz*, 581 F.2d at 541-42. The Fifth Circuit abandoned the "would have" test in *Causey*, 834 F.2d at 1182-84 (citing various Supreme Court decisions for the rule that "it is irrelevant what subjective intent moves an officer," and concluding that the Fourth Amendment inquiry is an "objective" one). However, *Cruz* remained binding in the Eleventh Circuit. See *Hardy*, 855 F.2d at 756 n.4.

141. Prior to *Whren*, ten federal circuits had adopted the "could have" test for judging pretextual traffic stop claims. See *United States v. Botero-Ospina*, 71 F.3d 783 (10th Cir. 1995); *United States v. Johnson*, 63 F.3d 242 (3d Cir. 1995); *United States v. Whren*, 53 F.3d 371 (D.C. Cir. 1995), *aff'd*, 135 L. Ed. 2d 89 (1996); *United States v. Scopo*, 19 F.3d 777, 782-84 (2d Cir.), *cert. denied*, 115 S. Ct. 207 (1994); *United States v. Ferguson*, 8 F.3d 385, 389-91 (6th Cir. 1993) (en banc), *cert. denied*, 115 S. Ct. 97 (1994); *United States v. Hassan El*, 5 F.3d 726, 730 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1374 (1994); *United States v. Cummins*, 920 F.2d 498, 500-01 (8th Cir. 1990), *cert. denied*, 502 U.S. 962 (1991); *United States v. Trigg*, 878 F.2d 1037, 1041 (7th Cir. 1989), *cert. denied*, 502 U.S. 962 (1991); *United States v. Causey*, 834 F.2d 1179, 1184-85 (5th Cir. 1987).

142. *Whren*, 53 F.3d at 374 (citation omitted).

143. The opinion affirmed earlier decisions in which the District of Columbia Circuit had "implicitly" adopted the "could have" test. *Id.* at 375.

144. *Id.* at 375 (quoting *United States v. Mitchell*, 951 F.2d 1291, 1295 (D.C. Cir. 1991)).

A unanimous Supreme Court agreed, and affirmed the lower court's decision. Justice Scalia's opinion rejected "any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."¹⁴⁵ The only constitutional limit imposed on officers is that they possess probable cause to believe that a violation of traffic laws has occurred. "For the run-of-the-mine case, which this surely is, we think there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure."¹⁴⁶ The Court explicitly rejected defense arguments that a traffic stop based upon probable cause could be invalidated on the grounds that the traffic stop was a pretext, and the officers actually were motivated by some improper purpose.¹⁴⁷ Both defendants were black. They contended that law enforcers "might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants."¹⁴⁸ The Court agreed that racially motivated selective law enforcement is unconstitutional, but concluded that relief is provided only by the Equal Protection Clause, because "[s]ubjective intentions play no role in ordinary probable-cause Fourth Amendment analysis."¹⁴⁹

I respectfully disagree. Not only do subjective intentions play a role in this analysis, they are central to it. I propose that the "would have" test is superior to the "could have" test as a device for resolving pretext questions precisely because it addresses, if only indirectly, the issue of subjective motivation. But the dual subjective-objective test many courts use to decide emergency exception cases is superior to both "objective" tests. The final sections of this Article explain these conclusions.

A. THE "COULD HAVE" TEST

The fundamental flaw in the "could have" test is precisely that it excludes the officer's subjective motivation from consideration. As Professor Burkoff has pointed out, the "search must be evaluated on the basis of the *facts upon which the officer actually acted*, not those

145. *Whren v. United States*, 135 L. Ed. 2d 89, 98 (1996).

146. *Id.*

147. Justice Scalia asserted that the Court's earlier opinions addressing the pretext issue only involved intrusions justified as administrative or inventory searches, and therefore did not apply to those intrusions justified by probable cause. 135 L. Ed. 2d 96-97.

148. 135 L. Ed. 2d 96.

149. 135 L. Ed. 2d 98.

that an imaginative prosecutor [sic] might argue the officer would have acted upon under some other hypothetical circumstance."¹⁵⁰

One example should suffice to demonstrate why a test that absolutely excludes motive is inadequate. Imagine that an individual police officer regularly stops all young black men he sees driving expensive, late model automobiles, then searches the automobiles. He stops them because he believes that there is a high statistical probability that young black men driving expensive automobiles are involved in criminal behavior. If he finds evidence of criminality, he arrests them and attempts to justify the initial seizure by identifying some real or imagined violation of the jurisdiction's traffic laws. Under a "could have" test, the seizure will be upheld if the officer testifies that the defendant was exceeding the speed limit, or made an illegal lane change, or turned without signalling. If the jurisdiction grants the officer *legal authority* for a seizure when he observes this conduct, analysis stops at this point. There will be no inquiry into the officer's motive, which is patently unconstitutional. There will be no attempt to subject the seizure to some test—either subjective or objective—to measure its reasonableness. Legal authority to intrude is all the "could have" test requires.

As a result, the "could have" test exposes all of us—and particularly members of some minority groups—to the kinds of arbitrary searches and seizures the Fourth Amendment was meant to prohibit, particularly when we travel in our automobiles. As the Florida Supreme Court explained when it rejected a "could have" test, "[a]llowing the police to make unlimited stops based upon the faintest suspicion would open the door to serious constitutional violations. It is difficult to operate a vehicle without committing some trivial violation—especially one discovered after the detention."¹⁵¹

The "could have" approach thus creates an unintended incentive for police officers to lie about their investigations. Let's return to the hypothetical police officer who stops an automobile on a hunch: The officer is suspicious because he sees a late model BMW driven by a young black man. The facts are insufficient to justify the intrusion under applicable constitutional standards. Nonetheless, he searches the vehicle and finds a large quantity of crack cocaine. If he testifies truthfully about his reasons for the stop, the cocaine will be suppressed and the defendant will go free. But if the officer testifies that

150. Burkoff, *Bad Faith Searches*, *supra* note 9, at 105 (emphasis added).

151. *Kehoe v. Florida*, 521 So. 2d 1094, 1097 (Fla. 1988).

he stopped the driver for violating some traffic rule, and then saw drugs in plain view, a judge applying the “could have” test will automatically deny the suppression motion. Of course, if officers he about the facts justifying searches and seizures and judges accept those lies, then the test applied is irrelevant. The task for judges is to deploy tests that will be most successful at deterring police officers from engaging in this form of misconduct.¹⁵²

Because a mechanical application of the “could have” test encourages law enforcers to ignore constitutional restraints on their conduct, this so-called “objective” test inevitably erodes the deterrent power of the exclusionary rule. This possibility alone is enough to raise concerns about the “could have” test because deterrence of police misconduct is the only justification for the Fourth Amendment exclusionary rule currently accepted by the Supreme Court.¹⁵³ If police officers learn that they can intentionally violate the Constitution—stop an automobile without proper justification, for example—yet expect that judges will approve the search if the officers eventually can identify, remember, or even make up facts that *could have* justified the intrusion, then the exclusionary rule loses much of its power to deter. The subjective motivations of the relevant actors—police officers in this context—are not merely relevant, they are central to the Fourth Amendment issues. The power of rules to deter ultimately depends upon the perceptions of individual actors about the nature and force of those rules.¹⁵⁴

Given its obvious deficiencies, we might wonder why many courts, including the Supreme Court, have adopted the “could have” test in the context of traffic stop cases, particularly when the emergency cases demonstrate the utility of the dual inquiry encompassing

152. Justice Scalia skirted this issue, and the related problem of police perjury, in his *Whren* opinion. Discussing an earlier opinion’s treatment of pretextual seizures, he wrote that “if by ‘pretext’ the Court meant that the officer really had not seen the car speeding, the statement would mean only that there was no reason to doubt probable cause for the traffic stop.” *Whren*, 135 L. Ed. 2d 97. Justice Scalia did not explore the implications of this statement. He did not explain how the “could have” test helped confirm that probable cause actually existed. He did not examine either how testimony about the existence of facts creating probable cause might be false or what judges should do if confronted with that possibility.

153. See, e.g., *United States v. Leon*, 468 U.S. 897 (1984).

154. Burkoff, *Rejoinder*, *supra* note 9, at 702 (“The use of a subjective pretext analysis carries with it a simple and understandable, if not classic, general deterrent message: to search, you must act for the reasons that justify the search. . . . The general deterrent message remains the same, that police officers must have lawful reasons to engage in search and seizure activity.”); *id.* (asserting the need “to instruct police officers that they must not *pretend* to act within the boundaries of the law . . .”) (emphasis in original).

both objective and subjective questions. The District of Columbia Circuit's recent opinion in the *Whren* case is instructive.

The circuit court offered two justifications for adopting the less rigorous "could have" test instead of the "would have" test. The first justification rested upon an inappropriately restrictive view of the role played by judges in evaluating Fourth Amendment issues—a view that is traceable to some recent Supreme Court decisions. The *Whren* court opined that the "could have" test is sufficient because it

eliminates the necessity for the court's inquiring into an officer's subjective state of mind, in keeping with the Supreme Court's admonitions that Fourth Amendment inquiries depend "on an objective assessment of the officers' actions in light of the facts and circumstances confronting him at the time . . . and not on the officer's actual state of mind at the time the challenged action was taken."¹⁵⁵

We should be skeptical of this explanation. From an evidentiary perspective, it is inexplicable. The court surely cannot mean that it is incapable of ruling upon state of mind issues.¹⁵⁶ In our legal system, courts evaluate and decide state of mind issues all the time, in civil and criminal trials alike. Since the reader undoubtedly can identify many examples, I will offer only a few from the criminal law context.

In a criminal bench trial, the judge replaces the jury as fact-finder. The vast majority of crimes have a *mens rea* element. In a bench trial, therefore, the judge sitting as factfinder must evaluate the evidence concerning the defendant's state of mind. Often—perhaps in most cases—the judge will have to infer state of mind from the defendant's conduct in the circumstances of the case. In other words, the judge will have to perform the same tasks that are necessary to examine the state of mind of the officers making a traffic stop. Similar analysis is required in resolving motions to dismiss and motions for a directed verdict based on *mens rea* issues, which can be filed in bench and jury trials alike. From an evidentiary perspective, judges are as capable of evaluating the state of mind of an arresting officer as they are of interpreting the state of mind of a criminal defendant, a defendant in a tort

155. *United States v. Whren*, 53 F.3d 371, 375 (D.C. Cir. 1995), *aff'd* 135 L. Ed. 2d 89 (1996) (quoting *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985)).

156. *Compare* OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 48 (1881) ("If justice requires [a] fact to be ascertained, the difficulty of doing so is no ground for refusing to try.") *with* *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting) (arguing against a subjective test because "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources").

case, or any other party or witness whose subjective purpose is relevant in litigation. In other words, the aversion to evaluating a police officer's state of mind cannot be justified by claims that judges are somehow incompetent to perform this task.¹⁵⁷

The judicial aversion to examining and ruling upon an officer's subjective mental state,¹⁵⁸ particularly in traffic cases, might instead be the product of concerns that careful scrutiny of subjective issues might lead to two unpleasant results. First, the judge may feel constrained to suppress physical evidence probative of the defendant's guilt. Most of us recognize that the exclusionary remedy is the only effective means of implementing the Fourth Amendment in most cases, but nonetheless cringe when evidence is suppressed. It is not difficult to imagine that judges share these feelings, nor is it difficult to imagine that judges simply become numb to the constitutional claims raised by a seemingly endless stream of defendants who do not protest their innocence, but only that the police broke the rules when they discovered the evidence proving the defendants' guilt. Judges averse to the exclusionary remedy may adopt tests that minimize its impact.¹⁵⁹

Second, if a judge scrutinizes an officer's state of mind carefully, the judge might be forced to conclude that the officer's testimony under oath is untrue. If evidence is suppressed for this reason, the judge is in effect calling the police officer a perjurer. I suggest that, for understandable reasons, many judges prefer not to be placed in that position.¹⁶⁰ Judge Warren Burger expressed this concern shortly before he was named Chief Justice of the Supreme Court: "[I]t would be a dismal reflection on society to say that when the guardians of its security are called to testify in court under oath, their testimony must

157. The Supreme Court's opinion rejecting the "would have" test in traffic stop cases offers backhanded support for this analysis. See *Whren*, 135 L. Ed. 2d at 99 ("it seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a 'reasonable officer' would have been moved to act").

158. For examples of the aversion to this inquiry expressed by some judges, see *supra* notes 102-08 and accompanying text.

159. It is perhaps no accident that in 1978 Justice Rehnquist authored both the opinion in *Scott v. United States*, 436 U.S. 128 (1978) (rejecting subjective tests) and the Court's opinion in *Rakas v. Illinois*, 439 U.S. 128, 139 (1978) (justifying a more restrictive concept of Fourth Amendment standing in part because it would "produce no additional situations in which evidence must be excluded").

160. For a more detailed examination of these and related issues, see Cloud, *supra* note 7, at 1321-24, 1339-48.

be viewed with suspicion."¹⁶¹ Judges, like the rest of us, want to trust our law enforcers.

I must admit to some discomfort in even offering the preceding explanations, because they could be misconstrued. Let me emphasize what I am *not* suggesting. I am *not* suggesting that judges are lazy, or afraid of addressing hard issues, or consciously shirking their constitutional duties. I *am* suggesting that the decision to implement the "could have" test is consistent with a personal aversion to scrutinizing too closely the motives of law enforcers. In our postlegal realist (not to mention post-Freudian) world, the idea that judges might be influenced by unconscious motives is not too radical an idea. While we can sympathize with judges who might have these concerns, our sympathy does not cure the flaws in the "could have" version of the objective tests.

By reducing the level of scrutiny applied to the police-citizen encounter, the "could have" test inevitably reduces the level of care that will be used to scrutinize the accuracy of fact reporting. This reduction of fact scrutiny is particularly significant in the context of traffic stops, where it is unlikely that independent third party witnesses will be available as sources of evidence about what happened. Third party witnesses provide an important test for the veracity of testimony by police officers and defendants alike. Yet in traffic stop cases, third parties are unlikely to appear. If the defendants testify about the search and seizure, the judge likely will be faced with a swearing match between the officers and the defendants, who will have a palpable incentive to lie.¹⁶² The absence of extrinsic evidence increases the need for careful judicial scrutiny of testimony by police officers and defendants about these warrantless intrusions.

In contrast, the physical and social contexts in which many emergency exception cases arise often provide third party witnesses possessing information relevant to evaluating the constitutionality of the entry into a home, motel room, office or other physical structure. In *Prober*, for example, the third party witnesses who could provide information about the encounter included the motel guests who discovered Prober unconscious in their room, as well as the manager and other employees of the motel. Rarely are such third party witnesses

161. *Bush v. United States*, 375 F.2d 602, 604 (D.C. Cir. 1967).

162. *See* Cloud, *supra* note 7, at 1321-24.

present to testify in traffic stop cases. The Rodney King case was unusual because witnesses other than the defendant and the arresting officers were available to provide evidence about the traffic stop and its aftermath.

This brings us back to the initial question: If careful scrutiny of the facts is important in traffic stop cases, why has the Supreme Court adopted the "could have" test? Recent Fourth Amendment doctrine supplies another possible explanation. The Supreme Court has held repeatedly that citizens have a lesser expectation of privacy in automobiles than in many of the settings, like the home, where emergency exception cases arise.¹⁶³ The lessened privacy expectation is technically relevant only to the question of whether officers must obtain a warrant to search automobiles, but perhaps this concept has influenced some judges simply to relax their scrutiny of other issues involving seizures and searches of motor vehicles as well.

Ultimately, the most important explanation for the appearance of the "could have" test may rest upon judgments about the proper allocation of power among the institutional actors within the criminal justice system. The "could have" test is consistent with other decisions increasing the relative power of members of the executive and legislative branches, and reducing the practical authority of the judiciary over executive branch decisionmaking in the Fourth Amendment context. Elsewhere I have explained in detail how the interpretive approach employed by the Supreme Court in recent Fourth Amendment cases "distribute[s] more power to the executive branch; it empowers the police, and as a practical matter reduces the impact of post-conduct judicial review."¹⁶⁴

This provides the most coherent explanation of the judicial acceptance of the "could have" test in traffic cases. Judges, either explicitly or implicitly, are simply deferring to executive branch actors in this area of constitutional decisionmaking. Rather than developing and enforcing rules that permit meaningful judicial review of searches and seizures, judges adopting the "could have" test are functionally "punting," except perhaps in the most outrageous and highly publicized cases. Only government conduct so egregious that it meets the

163. *United States v. Ross*, 456 U.S. 798 (1982); *United States v. Johns*, 469 U.S. 478 (1985).

164. Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 *UCLA L. REV.* 199, 283 (1993); see also *id.* at 275-86.

“shocks the conscience” test of due process is likely to trigger judicial intervention.¹⁶⁵

If this description is accurate—and I am afraid that it is—two questions remain: First, why should we care? Second, if the “could have” test is inadequate, what test should judges use to replace it?

We should care because this is one of those places where constitutional theory and the gritty realities of everyday life intersect. For some constitutional issues, judicial deference to executive branch decisionmaking not only is appropriate, it is required. The political question doctrine is an obvious example.¹⁶⁶ But the Fourth Amendment embodies a very different presumption. It exists for the very purpose of limiting the power of executive branch actors to intrude upon the privacy, liberty, and property of the people. “The Fourth Amendment is a restraint on Executive power. The Amendment constitutes the Framers’ direct constitutional response to the unreasonable law enforcement practices employed by agents of the British Crown.”¹⁶⁷ As the Supreme Court noted nearly twenty years ago in its seminal decision forbidding suspicionless traffic stops of individual vehicles by roving patrol cars, the “essential purpose of the proscriptions in the Fourth Amendment is to . . . safeguard the privacy and security of individuals against arbitrary invasions.”¹⁶⁸

165. *Rochin v. California*, 342 U.S. 165, 172 (1952). Professor Dripps has demonstrated why this due process model is inadequate to resolve Fourth Amendment issues. See Donald A. Dripps, *At the Borders of the Fourth Amendment: Why a Real Due Process Test Should Replace the Outrageous Government Conduct Defense*, 1993 U. ILL. L. REV. 261.

166. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Powell v. McCormack*, 395 U.S. 486 (1969).

167. *California v. Acevedo*, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting). History teaches that the framers of the amendment intended, at the very least, “to eliminate two evils: suspicionless searches and seizures of the sort authorized by general warrants and writs of assistance; and the exercise of arbitrary discretion (usually by members of the executive branch) to decide where to search and what and whom to seize. These particular lessons of history are uncontroversial as general maxims, and permit us to conclude that whatever else the fourth amendment means, at a minimum it exists to prevent these types of abusive government behavior.” Cloud, *supra* note 140, at 296-97 (citations omitted). For general histories of the Fourth Amendment, see NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937) (tracing the roots of the amendment from Biblical references and Roman law, through the adoption of the Bill of Rights, to the Supreme Court’s opinions up to the 1930s); JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* (1966) (beginning coverage with English law in the 15th century and ending with the Supreme Court’s decisions in the early 1960s).

168. *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (quoting *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 312 (1978), quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)).

Yet, on a practical level, the “could have” test permits just the kind of arbitrary police conduct the Amendment seeks to prevent.¹⁶⁹ Professor LaFave observes, for example, that the judicial decisions adopting the “could have” test have “conferred upon the police virtual carte blanche to stop people because of the color of their skin or for any other arbitrary reason.”¹⁷⁰ Unfortunately, the case law supports his concern. Sometimes the cases suggest that officers employ improper racial criteria.¹⁷¹ In others, the alleged violation is trivial, and perhaps non-existent.

As some courts have recognized in cases involving the emergency exception, the proper Fourth Amendment inquiry has both objective and subjective elements. Some aspects of Fourth Amendment analysis are always objective. Probable cause to arrest exists only if the government can identify facts sufficient to lead a reasonable person to conclude that a crime has been committed and that this suspect committed it. The standard is an objective one. The arresting officer’s subjective belief that probable cause exists is not controlling if the objective facts fail to support that conclusion. In this context, the objective test restricts government power by limiting the significance of the officer’s subjective beliefs. A narrow application of this principle appears in cases in which courts have adopted a “would have” test for determining whether traffic stops are impermissible pretexts for searches and seizures.

169. It is generally accepted that the Fourth Amendment prohibits searches and seizures conducted by government agents in an arbitrary and capricious manner. *See, e.g.*, Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 411 (1974); Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 449 (1990); *see also* *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); *Schmerber v. California*, 384 U.S. 757, 767 (1966); *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961); *Boyd v. United States*, 116 U.S. 616, 630 (1886).

170. 1 LAFAVE, *supra* note 9, § 1.4(e), at 121-22 (citations omitted).

171. *See, e.g.*, *United States v. Harvey*, 16 F.3d 109, 114 (6th Cir.) (Keith, J., dissenting) (officer relied in part on personal drug trafficker profile to justify seizure of vehicle; facts relevant to this “profile” included the presence of “three young black male occupants in an old vehicle”), *cert. denied*, 115 S. Ct. 258 (1994); *United States v. Roberson*, 6 F.3d 1088, 1089 (5th Cir. 1993) (state trooper’s stop of minivan with four black occupants), *cert. denied*, 114 S. Ct. 1322 (1994); *Utah v. Arroyo*, 796 P.2d 684, 688 n.3 (Utah 1990) (trooper testified about training that led him to want to stop Hispanic drivers).

B. THE "WOULD HAVE" TEST

The facts surrounding the traffic stop in *United States v. Smith*¹⁷² help explain why, prior to the Supreme Court's decision in *Whren*, some courts, including the Eleventh Circuit Court of Appeals and the Florida Supreme Court¹⁷³ rejected the "could have" test, and adopted the "would have" test for judging the constitutionality of traffic stops. State Trooper Robert Vogel testified that he stopped a late model sedan because it matched a "drug courier profile." The factors he relied upon included: The car was travelling fifty miles per hour on an interstate highway; its occupants were two individuals who were about thirty years old; the car had out-of-state license plates and was travelling at 3:00 a.m.; "[t]he driver appeared to be driving overly cautious"; and the occupants did not look in the direction of the trooper's car although he shone his headlights at them.¹⁷⁴

Trooper Vogel followed the vehicle for about a mile and a half before he pulled it over because it was "weaving." The "weaving" consisted of *three* incidents in which the car's right side tires crossed about *six inches* over the white line painted at the edge of the lane. The vehicle never crossed the center line.¹⁷⁵ In *Smith*, the district court concluded that the traffic stop was a pretext, and no traffic violation actually occurred, but denied the suppression motions because it concluded that the "drug courier profile" supplied adequate grounds for the stop.¹⁷⁶ The Eleventh Circuit reversed, finding that the stop was the result of one "of those 'inarticulate hunches' that are insufficient to justify a seizure under the Fourth Amendment."¹⁷⁷ The circuit court rejected the government's request that it apply the "could have" test and adopted instead the "would have" test. In *Smith*, the decision to suppress was made easier by the court's finding that no traffic violation had ever occurred. Of course, if no violation occurred the stop should have been improper even under the "could have" test.¹⁷⁸

172. 799 F.2d 704 (11th Cir. 1986).

173. The Florida Supreme Court reaffirmed its rejection of the "could have" test recently in *Florida v. Daniel*, 665 So. 2d 1040 (Fla. 1995).

174. *Smith*, 799 F.2d at 706.

175. *Id.*

176. *Id.* at 706-07 (citations omitted).

177. *Id.* at 707.

178. *Id.* at 709.

But like other cases,¹⁷⁹ the facts in the *Smith* case emphasize how vulnerable we all are to arbitrary intrusions when we travel in motor vehicles under a regime that asks only whether an officer observed some technical violation. These cases demonstrate that we should care that some courts have ceded excessive authority to law enforcement officers, because

[g]iven the pervasiveness of such minor offenses and the ease with which law enforcement agents may uncover them in the conduct of virtually everyone . . . there exists “a power that places the liberty of every man in the hands of every petty officer,” precisely the kind of arbitrary authority which gave rise to the Fourth Amendment.¹⁸⁰

The “would have” test permits better scrutiny of traffic stops than does the “could have” test. Under a “could have” test, Trooper Vogel’s seizure of Smith’s automobile comported with the Fourth Amendment if Florida law gave him legal authority to stop a driver whose wheels crossed the white lane marker by six inches because the test asks only whether there was some possible lawful basis for the intrusions.¹⁸¹ Improper motives, like racial bias, never receive scrutiny because they are irrelevant after legal authority is established.

The “would have” test is superior to the “could have” test because it imposes an additional layer of analysis. Although different courts have produced various formulations, all ask whether a reasonable officer in this circumstance “would have” seized the motorist. Professor LaFave has been perhaps the most ardent academic advocate of a “would have” approach that relies primarily upon standard police procedures to judge the reasonableness of intrusions including traffic stops. He argues vigorously against inquiring directly into officers’ motivations because he believes that standard practices and departmental regulations provide a better test.¹⁸²

179. See, e.g., *Alejandro v. Nevada*, 903 P.2d 794, 795 (Nev. 1995) (state trooper, who admitted he was looking for a reason to stop a truck, followed the truck for four miles and justified the seizure by testifying that the truck crossed about a tire width over the white line on the right-hand side of the road “on two occasions”); *Kehoe v. Florida*, 521 So. 2d 1094, 1095 (Fla. 1988) (stop of a truck justified by officers because license tag on boat trailer, although readable, was “bent”); *United States v. Guzman*, 864 F.2d 1512, 1513-14 (10th Cir. 1988) (officer seized a rental car with out-of-state plates although it was traveling at a lawful speed because the driver was not wearing a seat belt), *overruled by United States v. Botero-Ospina*, 71 F.3d 783 (10th Cir. 1995).

180. 1 LAFAVE, *supra* note 9, § 1.4(e), at 123 (citations omitted).

181. See, e.g., *Florida v. Daniel*, 665 So. 2d 1040 (Fla. 1995) (Under the “could have” test, “[i]f any lawful reason exists to say ‘yes,’ then courts following this test inquire no further.”).

182. 1 LAFAVE, *supra* note 9, § 1.4(e).

The *Whren* case provides a useful example of the difference between the “could have” test and this kind of “would have” approach. Three courts employing the “could have” test found that the initial seizure was lawful because police officers testified that they observed violations of local traffic regulations. Inquiry functionally ended with identification of legal authority for a seizure. The LaFave version of the “would have” test produces the opposite result because a reasonable officer in these circumstances would not have seized these people. The arresting officers’ testimony confirmed that if a violation occurred, the officers considered it to be a minor infraction.¹⁸³ Departmental regulations only permitted plainclothes vice officers traveling in unmarked cars to make stops for traffic violations that were serious enough to create an immediate threat to the safety of others.¹⁸⁴ Thus, the seizure in *Whren* flunked the LaFave version of the “would have” test because it violated departmental regulations.

This version of the “would have” test produced a different outcome because, despite Professor LaFave’s claims to the contrary, this test actually incorporates the officer’s subjective purpose into the analysis. The LaFave test simply uses standard practices and official procedures as a surrogate for a direct examination of the officer’s subjective purpose. The answer to a simple question confirms this analysis. If we ask, “Why does deviation from standard practices and procedures matter?,” the most sensible answer is that it suggests an improper motive for the conduct.¹⁸⁵ This ostensibly objective test is useful precisely because it identifies one means of measuring proper and improper subjective purposes. As a result, it provides more effective checks upon arbitrary government conduct than does the “could have” test.

Some courts have defined the “would have” test in ways that provide even more protection because they address—at least implicitly—the issue of subjective purpose more directly. The Florida Supreme

183. See Petition for Certiorari, *Whren v. United States*, No. 95-5841, 1996 U.S. LEXIS 3720, at *15 n.8 (1996) (arresting officer’s testimony confirmed that the violations were neither reckless nor dangerous and warranted only a warning).

184. See *supra* note 137 and accompanying text.

185. Justice Scalia reached the same conclusion in his *Whren* opinion. The defendants’ lawyers argued that the Court should adopt a “would have” test that measured police officers’ actual conduct against the hypothetical actions of a reasonable officer, and labeled this an objective test. Scalia concluded that this supposedly objective test “is plainly and indisputably driven by subjective considerations. . . . Instead of asking whether the individual officer had the proper state of mind, the petitioners would have us ask . . . whether (based on general police practices) it is plausible to believe that the officer had the proper state of mind.” *Whren*, 135 L. Ed. 2d 98.

Court, for example, concluded that the "state must show that under the facts and circumstances a reasonable officer would have stopped the vehicle absent an additional invalid purpose."¹⁸⁶

It seems that a judge applying the Florida version of the "would have" test inevitably must consider whether the facts suggest an improper motive for the officer's conduct in deciding if the state has met its burden.¹⁸⁷ The court must consider whether any such motive has been precluded by the state's evidence about how a reasonable officer would have behaved. This test is both more sophisticated and more useful than the "could have" test because it combines both objective and subjective analysis.

Professor LaFare has argued that "would have" tests rest upon objective, not subjective analyses. While advocating a test that examines whether the officer's conduct was consistent with standard practices and regulations, he nonetheless acknowledged:

To the extent that lower court cases of the kind now under consideration have tended, in the course of suppressing evidence on Fourth Amendment grounds, to stress the ulterior motives of the police, they may appear to run contrary to the *Scott* principle. But the inquiry in these cases into "the underlying intent or motivation of the officers involved," it would seem, has ordinarily been prompted by an inability of the courts to ascertain in a more direct fashion whether the police in the particular case had departed from their

186. *Kehoe v. Florida*, 521 So. 2d 1094, 1097 (Fla. 1988). In numerous cases, including some involving stops made by Trooper Vogel, defendants and their attorneys have argued that the intrusions were triggered by improper motives, including the race of the automobiles' occupants. See, e.g., Jennie Hess, *Florida Trooper Catches Drug Suspects, But Are Tactics Fair?*, ATLANTA JOURNAL-CONSTITUTION, Oct. 26, 1986, at 55A (quoting defense lawyer raising concerns about racial characteristics of drug courier profile and noting that in 30 cases "in which Vogel stopped vehicles and confiscated drugs, 34 men arrested were black and 17 white").

187. The Supreme Court's decision in *Whren* adopted a "could have" standard for judging the constitutionality of traffic stops. After *Whren*, courts that have used the "would have" test to evaluate traffic stops under the Fourth Amendment, including the Ninth and Eleventh Circuits, should employ the "could have" test. In addition, courts interpreting some state constitutions will apparently have to abandon the "would have" test as well. This includes Florida. The provision of that state's constitution analogous to the Fourth Amendment provides: "This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." FLA. CONST., Art. I, § 12. See also *Wisconsin v. Weide*, 455 N.W. 2d 899, 903-04 (Wis. 1990) (The court commented that although it can interpret the state constitutional provision governing searches differently from the Supreme Court's interpretation of the Fourth Amendment, for policy reasons it "has consistently and routinely conformed" state constitutional search and seizure rules to those articulated by the Supreme Court.).

usual practice. This is not to suggest, however, that inquiry into motivation is either a desirable or an accurate means of resolving that issue.¹⁸⁸

I hesitate to disagree with Professor LaFave about Fourth Amendment questions, but here I think he is wrong and the courts he criticizes are right. No simplistic formula or method can hope to capture the complexity of life's experience in the context of police-citizen encounters. A simple traffic stop can force judges to evaluate the veracity of witnesses and try to reconstruct the objective reality of the encounter. A test that denies them the power to examine important elements of the encounter—like the subjective motives of the actors—is misguided.

Ultimately, even Professor LaFave seems to accept that analysis of the officers' subjective purpose may be necessary in some cases.¹⁸⁹ I would go further and extend the approach taken by some lower courts in emergency exception cases to all Fourth Amendment settings. Judges should always examine both the objective facts and the officers' subjective motives in assessing the constitutionality of a search or seizure. As one state supreme court concluded:

While there are inherent difficulties in assessing the purpose of a search, these do not prevent the determination from being made. In some cases, the searching officer's motivation or purpose may be revealed by the officer's testimony The purpose of the search may also be discerned from its scope and the manner conducted. Conduct by the searching officer which is inconsistent with the purported reason for the entry is cause for skepticism.¹⁹⁰

Our courts are capable of applying a test that examines both the objective facts and the officer's subjective purposes. Such an approach would be true to the meaning of the Fourth Amendment and consistent with the deterrent rationale underlying the exclusionary rule.

188. 1 LAFAVE, *supra* note 9, § 1.4(e), at 123-24 (citations omitted).

189. See *id.* at 96 ("What this means, then, is that the *Scott* approach of disregarding 'the underlying intent or motivation of the officers involved' is correct . . . *provided* there are more reliable and feasible means of determining in a particular case whether or not the challenged arrest or search was arbitrary.") (emphasis in original).

190. *Wisconsin v. Prober*, 297 N.W.2d 1, 12 (Wis. 1980), *overruled on other grounds by Wisconsin v. Weide*, 455 N.W.2d 899 (Wis. 1990). The New York Court of Appeals has noted that "trial courts are familiar with police practices and should be able to determine when an entry is in truth only for investigative purposes." *New York v. Gallmon*, 227 N.E.2d 284, 288 (N.Y. 1967), *cert. denied*, 390 U.S. 911 (1968).

V. CONCLUSION

The courts have turned increasingly to so-called objective tests to resolve many Fourth Amendment issues. One of the most flawed of these tests is the "could have" test used to judge the constitutionality of traffic stops. This test is defective precisely because it forecloses consideration of the motivations for searches and seizures. As a result, it offers inadequate protection for the privacy and liberty rights preserved by the Fourth Amendment. This "could have" test even can provide police officers with incentives to lie about their reasons for conducting searches and seizures. If government conduct is legitimated whenever the facts permit a judge to conclude that a proper motivation could have existed, then in some number of cases acts generated by improper motives will be approved despite the officer's subjective intention to circumvent legal rules. Even if the officer intended to violate the Fourth Amendment, his conduct will receive judicial approval if any plausible justification can be constructed, after the fact, and regardless of the officer's actual subjective fault.

The courts should abandon the flawed "could have" test. In its place courts should employ a two-part test that examines both the officer's subjective motive and the objective reasonableness of the search and seizure.

