ESSAY

THE DIRTY LITTLE SECRET

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INTRODUCTION

Police perjury is the dirty little secret of our criminal justice system. It is "dirty" in the way that any lie under oath is dishonest, unfair, and unethical. But it is a uniquely corrupt lie, because it is offered by government officials who are sworn to enforce and uphold the law.[1]

Police perjury is a "secret" in the obvious sense that the liar tries to keep the lie hidden from public knowledge.[2] It is a "little secret," but not because it is unimportant either morally or practically. Police perjury is always ethically wrong, and often these lies are told about issues that are outcome determinative in the litigation.[3] 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.

Despite its ethical and practical importance, police perjury is aptly labeled a "little" secret because it is so poorly kept by the regular participants in the criminal justice system. Judges, prosecutors, defense lawyers,

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[1] *See* THE AMERICAN HERITAGE DICTIONARY OF THE AMERICAN LANGUAGE, (3d ed. 1992) ("unethical" and "corrupt" as examples of "dirty"); WEBSTER'S NEW WORLD DICTIONARY (9th College ed. 1983) ("dishonest" and "unfair").

[2] *See* WEBSTER'S NEW WORLD DICTIONARY, (2d College ed. 1982) (definitions of "secret" include "something kept hidden . . . [or] from the knowledge of others . . . .").

[3] *See, e.g.*, Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1412 (1993) (plaintiff was wrongfully convicted on perjured testimony by police officers and served 19 years in prison).

and repeat offenders all know that police officers lie under oath.[4] The empirical studies on the subject suggest that perjured testimony is common, particularly in drug prosecutions.[5] These studies indicate that police officers commit perjury most often to avoid suppression of evidence[6] and to fabricate probable cause,[7] knowing that judges "may 'wink' at obvious police perjury in order to admit incriminating evidence."[8] We should expect legal decisionmakers to construct rules designed to discourage such official misconduct. One anomaly of contemporary Fourth Amendment case law is that judges have created interpretive rules permitting them to

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[4] Legal scholars occasionally have addressed the problem in print, particularly in the years following the Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961). *See, e.g.*, ALAN DERSHOWITZ, THE BEST DEFENSE xxi-xxii (1982), *cited in* RONALD J. ALLEN & RICHARD B. KUHNS, CONSTITUTIONAL CRIMINAL PROCEDURE 28-29 (2d ed. 1991) (asserting that all police officers lie, and all judges know it); Irving Younger, *The Perjury Routine*, THE NATION 596-97 (1967) ("Every lawyer who practices in the criminal courts knows that police perjury is commonplace."); WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 703-04 (2d ed. 1987) (quoting Younger about the existence of police perjury); Joseph D. Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury*, 1971 LAW F. 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 averse to committing perjury to save a case," particularly at suppression hearings); Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1051 (1987) (asserting that 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 under-reported by the respondents); Comment, *Police Perjury in Narcotics "Dropsy" Cases: A New Credibility Gap*, 60 GEO. L.J. 507 (1971).

[5] Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62*, 4 CRIM. L. BULL. 549, 549-50 (1968) (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 "dropsy 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"); Orfield, *supra* note 4, at 1049-51 (76 percent of responding police officers agreed that police officers do shade the facts to establish probable cause; 86 percent of respondents reported that it was unusual but not rare for judges to disbelieve police testimony; and only 9 percent thought this disbelief was common, yet 48 percent 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).

[6] STEVEN R. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE 57-58 (1977); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 739-42 (1970); Orfield, *supra* note 4, at 1023; James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary rule and Its Alternatives*, 2 J. LEGAL STUD. 243, 275-76 (1973).

[7] Oaks, *supra* note 6, at 730-32; Orfield, *supra* note 4, at 1023.

[8] DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 252 (1977); Orfield, *supra* note 4, at 1023.

avoid confronting the issue of police perjury when they rule on the constitutionality of searches and seizures. These rules create functional—if unintended—incentives for law enforcers to lie.[9]

Of course, this does not mean that all police officers lie under oath, or that most officers lie, or that even some officers lie all the time. But these empirical studies substantiate the subjective belief common among lawyers, judges, and police officers that police perjury occurs—and frequently enough to be a significant problem for the justice system. We know it exists, but it is impossible to determine with any precision how often it occurs, or how often officers "get away with it."[10] By their very nature, successful lies will remain undetected, and we would expect a perjurer to attempt to conceal his crime.

Occasionally police officers are prosecuted for perjury, and from time to time they are punished.[11] These cases are unusual, however, and undoubtedly represent only a fraction of the cases in which perjury has occurred. Reported cases involving claims of police perjury support this conclusion. Penalties rarely are imposed on the officer or the government, even where the perjury is clearly established.[12]

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[9] *See infra* Part III.

[10] *See, e.g.*, Irving Younger, *Constitutional Protection on Search and Seizure Dead?*, 3 TRIAL 41 (1967) (asserting that every lawyer practicing in the criminal courts knows "police perjury is commonplace . . . [but] judicial recognition of the fact is extremely rare").

[11] People v. Tallagua, 219 Cal. Rptr. 754 (1985) (deputy sheriff convicted of committing perjury at a preliminary hearing in his testimony about the arrest and search of a suspect).

[12] This is true in federal cases. *See, e.g.*, Briscoe v. LaHue, 460 U.S. 325 (1983) (police officers possess absolute witness immunity from civil damages for their testimony in court, even for perjury that leads to a criminal conviction); Kelly v. City of Chicago, 4 F.3d 509 (7th Cir. 1993) (plaintiffs alleged that their liquor license was revoked as result of police perjury; the court held that a civil action for damages was time barred); United States v. Sanchez, 969 F.2d 1409, 1413-15 (2d Cir. 1992) (district court order setting aside a jury verdict of guilty and ordering a new trial was reversed and the verdict reinstated; the trial judge apparently concluded that three officers committed perjury in their testimony about search and seizure activities, but the circuit court concluded that a new trial would be granted only if the jury probably would have acquitted without the false testimony, "[e]ven in a case where perjury clearly has been identified"); Bell v. Coughlin, 820 F. Supp. 780, 788-89 (S.D.N.Y. 1993) (the court concluded that a detective made false statements at trial but denied a motion for a new trial); Melmuka v. O'Brien, 574 F. Supp 163 (N.D. Ill. 1983) (motion to proceed in *forma pauperis* with suit under 42 U.S.C. § 1983 denied because of witness immunity, despite allegations that movant's conviction for burglary was the result of police perjury; in addition, claim that officers induced perjury was denied on the grounds that the issue was raised during the criminal trial, and defendant's conviction acted as collateral estoppel to raising of the issue in a civil case).

It is also true in state cases. *See, e.g.*, People v. Allen, 166 N.W.2d 664 (Mich. 1968) (police officers could not be charged with committing perjury before a grand jury when a waiver of the Fifth

Not only are penalties uncommon, but mere discussion of the problem rarely escapes the confines of the criminal justice system. Defendants and their lawyers often are willing to accuse officers of lying, but these claims typically receive little attention beyond the lawsuits in which the accusations are made. Judges and prosecutors will discuss the existence of police perjury candidly in relatively private settings; but rarely in public fora.[13]

The unusual—to put it mildly—publicity generated by the suppression motions filed in the O.J. Simpson murder case has dragged the issue of police perjury out of the secluded corners of the justice system and into the realm of public debate. Although this public attention is unique—and likely to persist only as long as does the Simpson case—the problem is old and certain to survive the current media frenzy.

This Essay examines some issues arising at the intersection of the Fourth Amendment exclusionary rule and the problem of police perjury. Part I explains how judicially imposed exclusionary rules are sources of false testimony about investigative methods employed by officers in individual cases. Part II discusses several reasons that judges accept police perjury about searches and seizures, and examines testimony from a suppression hearing in the Simpson murder case to demonstrate the problems that face judges who are required to evaluate the credibility of testimony by police officers about their investigative procedures. Part III explains how contemporary Fourth Amendment theory not only fails to discourage police perjury about searches and seizures, but actually provides incentives for police officers to fabricate testimony about this topic. Finally, the Essay describes an interpretive theory faithful to the text of the Amendment, as well as its background purposes and values. This theory supplies a principled basis for interpreting the Fourth Amendment, and provides judges with a means of resolving the dilemma presented by police perjury.

Amendment privilege against self-incrimination was coerced); King v. Ryan, 621 A.2d 68 (N.J. 1993) (police officer appealed a unanimous decision by a police review committee terminating his employment because he had committed perjury about a search and seizure; the state appellate court ordered him reinstated because of procedural errors); People v. Stiglin, 264 N.Y.S. 832 (1933) (appellate court reversed police officer's perjury conviction because of prejudicial comments made by trial judge). *See also* Richard Perez-Pena, *Ex-Panthers Lose Retrial Motion*, N.Y. TIMES, May 13, 1993, at B4 (story reporting that a federal district court judge had denied a motion for a new trial despite his conclusion that prosecutors withheld evidence from the defense and that a police detective lied during 1975 trial).

[13] This suggests another way in which police perjury is a "secret." A secret is "something . . . shared only confidentially with a few;" it is "the practices or knowledge making up the shared discipline or culture of an esoteric society." WEBSTER'S NEW WORLD DICTIONARY (2d College ed. 1982).

I. A PRIMARY SOURCE OF POLICE PERJURY

Police perjury occurs most frequently when officers are testifying about searches and seizures and witness interrogations. Police perjury about these topics is often the product of rules imposing penalties for illegal police practices, and the most important rules are those requiring the exclusion of evidence discovered by unconstitutional means. In times when even the most despicable conduct produced no sanctions, police officers felt little need to lie about their investigative tactics.

A dramatic example is the landmark case *Brown v. Mississippi*, decided almost sixty years ago.[14] Three black men were convicted of murdering a white man, and all three defendants were sentenced to death. The trial, conviction, and sentencing were completed within a week of the homicide. The defendants' confessions were the only evidence of their guilt. After the prosecution rested its case, the defendants repudiated their confessions and testified in great detail about the police-inflicted physical torture that produced each statement. The Supreme Court's narration of the events[15] began with the interrogation of a suspect named Ellington. The interrogation was conducted by a deputy sheriff named Dial, and by a group of white men,

> who began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and . . . finally released and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial.[16]

A day or two later Deputy Dial and another person arrested Ellington, took him to a remote location, "and again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the

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[14] 297 U.S. 278 (1936).

[15] Chief Justice Hughes actually repeated the fact statement contained in the opinion of the Mississippi Supreme Court Justice who had dissented from a decision affirming the convictions. *Id.* at 281-85.

[16] *Id.* at 281.

defendant then agreed to confess to such a statement as the deputy would dictate."[17] The other two defendants also were arrested and jailed, and the same deputy, along with other law enforcement officers and a group of white men, whipped them until they confessed:

> [T]he two . . . defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers.[18]

After the defense rested, the state offered the "rebuttal" testimony of several participants in the beatings. None of the government's witnesses disputed the defendants' descriptions of the torture, and deputy Dial's testimony included a statement that was particularly revolting. Not only did he affirm the defendants' stories, but he admitted he would have committed even more terrible acts: "[I]n his testimony with reference to the whipping of the defendant Ellington, and in response to the inquiry as to how severely he was whipped, the deputy stated, 'Not too much for a Negro; not as much as I would have done if it were left to me.' "[19]

The officer's candid admission that he tortured suspects may surprise a contemporary reader. The officers in the *Brown* case did not lie, however, in part because they had no fear that their conduct would lead to sanctions. Mississippi had no exclusionary rule, and in the context of the institutionalized racism existing in that time and place, they had no need to fear they would be prosecuted or threatened with civil damages.

The revolution in criminal procedure accomplished by the Warren Court included a uniform sanction—exclusion of evidence—to be imposed when federal, state or local law enforcers violated constitutional rules. Some police officers began to adapt their testimonial behavior in response.

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[17] *Id.* at 281-82.
[18] *Id.* at 282.
[19] *Id.* at 284.

One of the earliest examples was the "dropsy" testimony offered by police officers in cases involving street level narcotics arrests. During the 1960s, one of the most prominent critics of this testimony was Irving Younger, a former prosecutor turned Criminal Court judge and law professor, who identified the relationship between the exclusionary rule and this genre of perjury:

> 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.[20]

This dropsy testimony is critical because it describes the objective facts that a judge must evaluate in deciding whether a government intrusion upon a persons's liberty and privacy satisfies constitutional standards. If the dropsy testimony is truthful, the answer is easy because probable cause to arrest obviously existed when the officer saw the drugs in plain view.[21] Younger's critique of the dropsy testimony thus raises a fundamental issue. It questions whether the events reported by the officer ever occurred.

In an individual case, the dropsy testimony might not seem entirely implausible. After all, it is possible that an individual drug user or dealer

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[20] Younger, *supra* note 4.

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

might drop contraband at precisely the moment a police officer happened to pass by. It is the repetition of this suspicious story in case after case that suggests fabrication. And one need not be a lawyer, judge, or law professor to reach this conclusion, even about more contemporary versions of the dropsy testimony. Recently I was called to serve as an alternate on the grand jury in a metropolitan Atlanta county. In case after case, officers offered the following description of the reason they arrested the defendant: The officer and his partner were on car patrol in the evening or early morning hours. As they approached a group of black men standing on a corner, these men noticed the car and they all ran away. The officers "observed" the defendant reach into his pocket, remove a small package, and throw it away before running. The officers would then "exit the car, apprehend the suspect," and recover the package, which always contained drugs—usually crack cocaine.[22]

In the beginning I thought I was the only grand juror who noticed that all of these arrests were described in exactly the same terms. But after several officers had repeated this story, others began to notice, too. At first, grand jurors would whisper to one another while the story was narrated. Later, it was not uncommon for the testimony to provoke smiles and even laughter from some members of the grand jury. They had caught on to the game. It is interesting to note that despite this apparent awareness of the significance of this testimony, as best as I can recall the grand jury never failed to indict a defendant in these cases. The uncontroverted testimony established that the defendant had possessed drugs; how the officers had found the drugs, well that was someone else's problem to solve at another stage of the criminal justice process.

The change in police testimony about investigative practices can be traced to the Supreme Court's decisions constitutionalizing criminal proce-

[22] This version of the dropsy testimony is comparatively more credible than the earlier version reported by Younger. It is not improbable that a suspect confronted by police officers might abandon contraband in the hope that the police will not be able to recover it, and if they do, will be unable to link it to the suspect. The modern variant is still troubling, however, for at least two reasons. First, the officers' repetition of the same story, in the same language, suggests that it is a shared script, and not a description of the actual events. Second, we may be dubious about the linkage of a particular packet of drugs to a specific person. It was dark. Several people were gathered together, presumably to buy, sell, or use drugs. On these facts, is it reasonable to believe that only the defendant carried drugs? Or that only the defendant discarded them? In this circumstance, is the testimony linking one packet to one member of the group inherently believable? Should we doubt the accuracy of the officers' perceptions?

dure. These decisions have imposed the Fourth Amendment, the Fifth Amendment privilege against self-incrimination—along with other parts of the Bill of Rights—and exclusionary rules, not just upon the federal government, but also upon the states by incorporating them all into the Due Process clause of the Fourteenth Amendment. The Warren Court's opinions in a state case, *Mapp v. Ohio*,[23] and in a federal prosecution, *Spinelli v. United States*,[24] exemplify this process and are sensible only if we recognize that they are in part the product of a judicial mistrust of police officers and their methods. Each of these cases rests upon the implicit assumption that officers will lie about their investigative methods.

In *Mapp*, for example, the lead investigator testified at trial that the search of Mapp's home was authorized by a search warrant.[25] The United States Supreme Court pointedly noted that no warrant ever was produced in court,[26] and the facts strongly suggested that the officer's claim was a lie. When police officers broke into Mapp's apartment, they waved a piece of paper they claimed was a warrant. Mapp grabbed the paper and shoved it down the front of her sweater. The officers responded by forcibly reclaiming the paper from inside her clothing. Had the paper actually been a warrant, surely the officers would have let her keep it. The logical inference from these facts was that the officer lied when he claimed to have had a warrant, and the Supreme Court apparently drew that inference.[27] Twenty years later the testifying officer confirmed that no warrant in fact had existed. The police had obtained an affidavit for a warrant, but had not submitted it to a judge.[28] Although Ohio had no exclusionary rule in 1960, state law imposed other penalties that supplied

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[23] 367 U.S. 643 (1961).

[24] 393 U.S. 410 (1969).

[25] 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 imposed upon the states. Wolf v. Colorado, 338 U.S. 25 (1949).

[26] 367 U.S. at 645.

[27] The Ohio Supreme Court was even more skeptical. While refusing to suppress the evidence, it noted that "[t]here is . . . considerable doubt as to whether there ever was any warrant for the search of defendant's home. . . . Admittedly therefore there was no warrant authorizing a search of defendant's home . . . ." State v. Mapp, 166 N.E.2d 387, 389 (Ohio 1960).

[28] FRED W. FRIENDLY & MARTHA J.H. ELLIOT, THE CONSTITUTION: THAT DELICATE BALANCE 132 (1984).

incentives for the officer to lie.[29] The opinion in *Mapp* was designed to help control this kind of police misconduct.

The Court's opinion in *Spinelli* erected impediments to police perjury about the existence of confidential and anonymous informers. A warrant was issued in that case, and the existence of probable cause depended upon an alleged tip from a confidential informer.[30] The so-called informer may have been an illegal FBI wiretap, and members of the Supreme Court had reasons to suspect that this was the case.[31] The Court imposed a two-part test that made it harder for officers to fabricate tips from non-existent informers. If probable cause were to rest even partially upon an informer's tip, the officers had to supply facts sufficient to allow the judge to make an independent evaluation of both the informant's veracity and the basis of his alleged knowledge. After *Spinelli* it was not impossible to fabricate an informer or tip, but it was more difficult.[32]

One legacy of these opinions is that police officers may believe they are left with three options. They can conduct investigations "by the book" and be fairly certain that their evidence will be admissible. This means, of course, that they often must adhere to the time-consuming, boring, inefficient procedures imposed by the warrant requirement.[33] On the other

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[29] Almost a quarter century earlier, the Ohio Supreme Court had concluded that searches and seizures "are unreasonable and illegal in the absence of a valid warrant. Therefore, a law officer who proceeds to make a search and seizure without a warrant, or under a defective warrant, is a trespasser, amenable to civil and perhaps criminal action" State v. Lindway, 2 N.E.2d 490, 493 (Ohio 1936). This rule was mandatory for searches of private dwellings. *Id.* at 498 (Jones, J., concurring).

[30] 393 U.S. 410, 414 (1969).

[31] Only three years earlier, Justice Marshall, then Solicitor General, had been forced to inform the Supreme Court that the FBI had conducted illegal electronic surveillance of the defendant in a case pending before the Court. Later, the FBI apparently leaked to the press copies of memoranda sent by the FBI to Justice White while he was an Assistant Attorney General in the Kennedy Administration in the early 1960s. These memoranda described widespread illegal bugging by the FBI in criminal investigations, and the purpose of the leaks apparently was to establish that White and his boss, Attorney General Robert Kennedy, knew of this FBI behavior, and approved it—at least tacitly. *See generally* VICTOR NAVASKY, KENNEDY JUSTICE (1977). *See also* Irving Younger, *Wiretapping, Electronic Eavesdropping and the Police: A Note on the Present State of the Law*, 42 N.Y.U. L. REV. 85 (1967) (lamenting the battle waged in the press by Robert Kennedy and J. Edgar Hoover over this issue and describing the litigation in which the FBI's electronic eavesdropping was revealed).

[32] *See generally* Grano, *supra* note 4. *See also* LAFAVE, *supra* note 4, § 3.3(g), at 702-11.

[33] The Supreme Court often has cited the following rule: The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."

hand, investigations often will be faster, simpler, and easier if officers can avoid those procedures. The desire to do things the quick and easy way is understandable, and experienced officers know that no matter what they do, judges often will look the other way, or bend over backwards to approve the officers' testimony and to avoid suppressing evidence.[34] Officers who have broken the rules can testify truthfully, and hope that judges will find their errors reasonable and still admit the evidence. But a third possibility remains for this latter situation. Why take the risk of suffering penalties if corners already have been cut? Often the most certain way to insulate evidence from suppression is to reconstruct events so that investigations—as described in court—conform to the requirements of the Constitution, regardless of how the investigations actually proceeded.

We all know this occurs, but that recognition should not end the inquiry, and does not resolve two questions raised by the existence of police perjury. First, why do judges let police officers get away with lying? Second, if judges can identify police perjury about searches and seizures, how should they respond?

II. WHY DO JUDGES ACCEPT POLICE PERJURY?

A. *Five Reasons*

Judges accept perjured testimony from police officers about the manner in which searches and seizures are conducted for at least five reasons. The first reason is the most important. Perjury is often accepted because it can be very difficult to determine whether a witness is lying, particularly if we start with the reasonable assumption that witnesses who are police officers

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United Stated v. Ross, 456 U.S. 798, 825 (1982) (footnotes omitted) (quoting Mincey v. Arizona, 437 U.S. 385, 390 (1978), and Katz v. United States, 389 U.S. 347, 357 (1967)). *See also* Camara v. Municipal Court, 387 U.S. 523, 528 (1967). This rule has been undercut by Supreme Court decisions issued over the past two decades. *See* Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985); Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199 (1993).

The Fourth Amendment provides that warrants must be based upon probable cause, must describe with particularity the place to be searched and the persons or things to be seized, and this information must be submitted under oath. U.S. CONST. amend. IV. A warrant must be issued by a neutral and detached magistrate, and not by a law enforcer engaged in the business of detecting and catching criminals. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971). The information supporting the application for a warrant, therefore, must be submitted to a judicial officer.

[34] *See infra* notes 61-69 and accompanying text.

usually tell the truth. If the substance of the testimony is at all plausible, and the witness's demeanor less than outrageous, it is difficult to conclude that any witness is lying.

The difficulty is increased when a police officer is the witness. Many officers become experienced witnesses. By virtue of their work they are likely to have testified many times, and to have refined and improved their techniques with practice. They are as comfortable in court as any witness who is likely to be subjected to vigorous cross-examination can be. As a result, their courtroom demeanor is likely to be good, and they are likely to tell stories bearing at least some indicia of substantive plausibility. Of course, an individual officer may earn such a tawdry reputation among local judges that he loses credibility with them. But this is unusual. The larger problem is not the blatant, preposterous falsehood from the known liar—judges are prepared to deal with that. The problem is that some officers have learned to describe investigations that conform to constitutional requirements—regardless of the reality of the investigation.[35] Identifying this form of perjury presents the most difficult problems.

A second reason arises at the intersection of constitutional rules and the possibility of false testimony. In many cases a judicial decision finding the existence of police perjury will impose upon the judge the unpleasant duty of suppressing evidence. Understandably, many judges dislike excluding probative evidence,[36] especially if it means that a guilty defendant will be set free.

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[35] *See generally* Orfield, *supra* note 4 (describing the various ways that Chicago narcotics officers have learned to adapt to the post-*Mapp* world).

[36] The trial judge's ruling on one of the suppression motions filed by Simpson's attorneys provides an instructive example. 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. Trial judge Lance A. 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. Nonetheless, 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," *id.*, the search and seizure were affirmed. The judge conducted the hearing under guidelines established by the Supreme Court in Franks v. Delaware, 438 U.S. 154 (1978).

Third, some judges and lawyers believe that most defendants in the criminal justice system are guilty, and their experience may support this assumption. Defendants as a class, according to this assumption, probably are guilty of committing the crimes with which they are charged. But even if they are innocent of these specific crimes, most defendants are guilty of something. Starting from this assumption, it is not too disturbing that evidence will not be suppressed, or that other relief will not be granted. After all, if the defendants are guilty of some crime, it is just that they should be punished.

Fourth, participants in the criminal justice system may assume that as a class criminal defendants will commit perjury. Whatever incentives police officers may have to lie, people charged with crimes have an even greater incentive: they want to avoid conviction and punishment. The assumption that defendants are untrustworthy is strengthened by the behavior of numerous individual defendants. Many are career consumers of the criminal justice system—recidivists with lengthy arrest and conviction records. When judges must decide whom to believe, it is not surprising that they usually opt to believe law enforcers rather than lawbreakers.

An interesting example of the power of this predisposition in favor of the police is the trial judge's decision in *People v. McMurty*.[37] The judge was the same Irving Younger who had severely criticized police officers' dropsy testimony in drug cases in the years following *Mapp*.[38] The arresting officer in *McMurty* claimed the defendant had dropped the drugs he was carrying prior to his arrest, but the defendant denied that this had happened. Despite his earlier public criticism of the dropsy genre of police testimony, Judge Younger refused to suppress the evidence because no independent corroboration of the defendant's allegations existed. As a result, the officer's and the defendant's competing stories were "poised in the balance,"[39] and following New York precedent, Younger denied the motion. When faced with a straightforward conflict between the testimony of a police officer and a criminal, even this strong critic of the officer's generic testimony would not suppress the evidence.

The fifth reason is tact. Judges simply do not like to call other govern-

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[37] 314 N.Y.S.2d 194 (1970).

[38] *See supra* notes 20-21 and accompanying text.

[39] 314 N.Y.S.2d at 198.

ment officials liars—especially those who appear regularly in court. It is distasteful; it is indelicate; it is bad manners. This motivation mirrors the belief common among trial lawyers that it is a tactical mistake to call any witness a liar—unless the lie is palpable and the witness unsavory.[40] To do so risks alienating judge and jury, who will be offended by the lawyer's rude behavior. According to this theory, the lawyer must establish the lie by introducing evidence, then let the decisionmakers reach their own conclusions. Whatever the validity of this theory as generally applied, judges as a group seem to have embraced its underlying etiquette for witnesses who are police officers. A classic statement of the deference paid to law enforcers was authored by Judge Warren Burger shortly before he was named Chief Justice of the United States 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 be viewed with suspicion."[41]

Nonetheless, judges regularly are forced to evaluate the veracity of police officers' testimony about searches and seizures. In particular, judges must consider the credibility of the officers' testimony about the facts they claim to have relied upon in conducting warrantless searches and seizures. Two dimensions of a witness's testimony are significant for judging credibility. They are the substantive plausibility of the testimony and witness demeanor. The testimony of Detective Marc Furhman during the initial suppression hearing in the Simpson murder case exemplifies the problems facing judges who must decide whether to believe a police officer attempting to justify a warrantless search and seizure.

B. The Warrantless Investigation at the Simpson Estate

Early on the morning of June 13, 1994, Detective Mark Furhman of the Los Angeles Police Department climbed the fence surrounding the residential property he knew belonged to O.J. Simpson, and unlatched the gate to allow other officers to enter and search the property. The officers did not obtain a warrant, although the property inside the fence is the curtilage of the home, and this area is entitled to the same protections as

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[40] For example, if the defendant's partner in crime is testifying as a prosecution witness in exchange for a "deal," the defense will often call him a liar. The motivation to lie is clear and the witness probably is no more believable than the defendant.

[41] Bush v. United States, 375 F.2d 602, 604 (D.C. Cir. 1967).

the home itself.[42] It long has been "a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable."[43]

The entry, therefore, violated the Fourth Amendment and the evidence uncovered on the residential property was subject to exclusion unless the officers' 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; the imminent destruction of evidence; a suspect's possible escape; and hot pursuit of a fleeing felon.[44] Mere conjecture is not enough to permit the entry. The belief that there is an exigency must be reasonable; the officer must possess facts supporting the conclusion that an exigency exists.[45]

In due course Simpson was charged with two murders, and his lawyers filed motions to suppress various items of evidence, including some found as a result of the warrantless entry into his property. On direct examination at an evidentiary suppression hearing, Detective Furhman attempted to justify the warrantless entry with the following testimony:

> 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 Lange 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 uh imperative that we contact someone and make sure everything was ok.[46]

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[42] Oliver v. United States, 466 U.S. 170 (1984).

[43] Payton v. New York, 445 U.S. 573, 586 (1980).

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

[45] *See, e.g., id.* (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).

[46] This testimony was presented during the preliminary hearing. Testimony from this hearing was transcribed from a videotape purchased from Court TV. The videotape is on file in the library of

Defense attorneys in the case have attacked this justification for the warrantless entry, claiming that the officer lied under oath, and that the real motivation for the warrantless entry was to search for evidence.[47] State prosecutors have responded by arguing that the officers acted reasonably, and would have been criticized severely had they failed to act and someone had died as a result.[48] This testimony thus raises a central question facing a judge ruling on the constitutionality of the warrantless entry: How is he to evaluate the officer's credibility?

In answering this question, we must recognize that the warrantless intrusion at the Simpson home presents two separate issues. The first relates to a question frequently arising under the Fourth Amendment: Do the objective facts known to the officers justify a warrantless search and seizure? The question is not the veracity of the testimony about the existence of the objective facts observed by the witnesses. The focal issue is whether the objective facts that existed at the time satisfy constitutional requirements for a search and seizure, and not whether the witnesses are lying about their observations.

The question of police perjury initially raised in the Simpson case addressed a related, but more difficult issue. The defense initially argued that the officers lied about their interpretation of the significance of the objective facts and, therefore, about their subjective motivations. This claim apparently rests upon the argument that the officers actually did not think an emergency existed at the time of the search and seizure. Conceptually this raises an issue distinct from the question of the constitutional sufficiency of the observed facts.[49] Ultimately, resolution of each issue should depend on the officers' credibility.

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the Emory University School of Law.

[47] This argument was made, for example, by defense attorney Gerald Uelmen at a hearing held on September 19, 1994 *See* Kenneth B. Noble, *Ruling Aids Prosecution of Simpson*, N.Y. TIMES, Sept. 20, 1994, at A16.

[48] *See* B. Drummond Ayers, Jr., *Detectives in Simpson Case Defend Search*, N.Y. TIMES, July 7, 1994, at A17. *See also infra* notes 53-55 and accompanying text.

[49] In recent years scholars have debated how the courts should treat pretext searches. *See, e.g.*, John M. Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 MICH. J. L. REF. 523, 523 (1984) ("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."). This debate generally has not, however, focused on the related problem of how courts should deal with testimony offering the pretextual justification, that is, false testimony about the officers' motives. *See also* John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70 (1982)

C. *Substantive Plausibility and Hard Cases*

The most important measure of the officer's credibility should be the substance of his testimony. He should be able to point to facts leading to the conclusion that an emergency existed, and the officer's interpretation of these facts must be rational. In some cases, the exigency is obvious. For instance, when an apartment resident reports that a bullet has just been fired through his ceiling, officers surely are entitled to consider this a threat to public safety permitting a warrantless entry into the apartment above.[50] A shootout between police officers and a criminal in which people are wounded and killed creates the need for police officers to enter the residence in which the shots were fired immediately—without waiting for a warrant to be issued.[51]

In other cases, the absence of an exigency justifying a warrantless search and seizure is obvious. A warrant clearly is required if the crime occurred in the past; the government has possessed probable cause for some time; it has had opportunities to obtain a warrant; and the purpose of the entry into private property is to search for evidence or to arrest the suspect. No reasonable officer or judge could believe an exigency existed in these circumstances.[52]

The situation was more ambiguous, however, when police officers first entered Simpson's property on June 13, 1994.[53] According to Detective Furhman, he first learned of the double murder at 1:05 a.m. and arrived at the crime scene about an hour later. He stayed there for about three hours, then traveled to Simpson's home, which was about two miles from the site of the murder, at about 5:05-5:10 a.m. Furhman knew of Simpson's troubled former marriage to one of the murder victims, and one of the reasons asserted for traveling to Simpson's home was to inform Simp-

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[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*]; LAFAVE, *supra* note 4, § 1.4(e).

[50] *See* Arizona v. Hicks, 480 U.S. 321 (1987).

[51] *See* Mincey v. Arizona, 437 U.S. 385 (1978).

[52] *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971); Payton v. New York, 445 U.S. 573 (1980).

[53] The following fact summary is extracted from Detective Furhman's testimony at the suppression hearing. *See supra* note 46.

son that his children were in police custody so he could pick them up. Furhman testified that the officers attempted to contact people inside the Simpson residence for approximately thirty minutes. First, they rang a buzzer at the gate, then called the residence's telephone number, which had been obtained from the security company that protected the property.[54] None of these acts produced a response from inside the home. The security company representative also told the officers that Simpson had not advised the company that he would be away from the property. While another officer tried to telephone the home, Furhman inspected a Ford Bronco parked on the street outside the estate, and determined that it was Simpson's. He also 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.

Within the factual context in which the officers were operating, the possible existence of danger within the Simpson property was not entirely preposterous. A terrible crime of violence had been committed elsewhere in the city, and the owner of this property had a close connection to one of the victims. The resident's failure to respond could indicate that he had been injured or worse, and was in need of help. And if the officers failed to do anything, and later learned that they could have helped prevent injury or death, the public outcry would have been merciless.

On the other hand, the facts also suggest that the officers were intentionally violating the warrant rule, and their real motivation was to find evidence to use against Simpson.[55] It is plausible to believe that the of-

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[54] At a subsequent hearing, held on October 5, 1994, the defense questioned Furhman's testimony about the objective facts of the investigation. Defense counsel argued that Judge Ito should reconsider earlier rulings upholding the warrantless entry on the basis of newly discovered evidence. Police officers, including Detective Furhman, testified during the preliminary hearing that one of the reasons they feared for the safety of people in the Simpson estate was that their attempts to contact the inhabitants by telephone had failed. They also testified that they had obtained the telephone number from a private security firm. The defense argued at the October 5 hearing that the telephone logs from the security firm 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. If true, these allegations suggest that the officers had lied about the objective facts they learned during the investigation—and upon which they purportedly relied. These allegations relate to the analysis of the constitutional issues, as well as the veracity of the officers. Judge Ito refused, however, to reopen the evidentiary suppression hearing, and denied the defense motions. *See* David Margolick, *Judge Rejects Barrage of Objections by Simpson's Lawyers*, N.Y. TIMES, Oct. 6, 1994, at A24.

[55] *See, e.g.*, Noble, *supra* note 47 (defense lawyer Gerald Uelmen argued at a suppression hear-

ficers considered Simpson to be the primary suspect. The police department had investigated earlier complaints that Simpson had physically abused his former wife, who was one of the murder victims. 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.[56] This suggests they went to Simpson's home to look for evidence linking him to the murders.

In addition, the evidence of an exigency was flimsy. The murders had occurred hours before and at a different location. In the leading cases defining the emergencies sufficient to justify warrantless searches in homes, the exigencies were immediate—both temporally and spatially. In other words, the warrantless searches were close in time and place to the events creating obvious exigencies.[57] In the Simpson case, the officers possessed no facts directly suggesting any threat to Simpson's safety. All they knew at the time they made their warrantless entry was that Simpson's former spouse had been murdered hours earlier at another location, that no one in his home responded to telephone calls,[58] and that a few dark stains were on the driver's door of a car that was associated with Simpson.

The substance of Detective Furhman's testimony supports two conflicting interpretations, each raising both the constitutional issue and the credibility question. How is a judge to decide which version to accept?

First, the judge can compare the facts of this dispute to those of prece-

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ing that "clearly what was going on here was a search for evidence").

[56] *See, e.g.*, JOHN M. DAWSON & PATRICK A. LANGAN, MURDER IN FAMILIES 1 (U.S. Dep't Just., Bureau Just. Statistics 1994) (Department of Justice study of murder cases disposed of by the courts in the nation's large counties in 1988 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 the victims were killed by people they knew. The sample included more than 8,000 victims.).

[57] *See, e.g.*, Arizona v. Hicks, 480 U.S. 321 (1987) (police officers entered the apartment from which a bullet was fired through the floor injuring a man in the apartment below); Warden v. Hayden, 387 U.S. 294 (1967) (police officers were in pursuit of a fleeing armed robber who had committed his crime only minutes before the warrantless search of his home for the criminal and his weapons; threat to public safety was an exigency). *See also* Carroll v. United States, 267 U.S. 132 (1925) (government agents stopped an automobile in transit because they had probable cause to believe it contained contraband; an exigency was created by the mobility of the vehicle; if the agents were required to obtain a warrant, the criminals, the vehicle, and its contents would be lost).

[58] This assumes the calls actually were made prior to the entry, an assumption that the defense attorneys have challenged. *See supra* note 54.

dents in which courts ruled that exigencies did or did not exist. Although this is a basic task for common law judges, it is not very helpful here. This inquiry is extremely fact sensitive, and no two cases are ever exactly alike. Prior cases will provide some guidance, but the Simpson search seems to fall somewhere between cases in which an exigency undoubtedly exists and those in which the claim is palpably spurious. As is often the case, the judge must rely on some other decisionmaking criteria.

Second, the judge can try to evaluate the substantive plausibility of the officer's explanation in light of the known facts. In the Simpson case, for example, he might question whether the officers actually believed an emergency existed for several reasons. No direct evidence indicated that Simpson might be a target of the murderers. The only link was that Simpson had formerly been married to one of the murder victims. No evidence at the crime scene suggested that Simpson also was a possible target of the killer or killers. The police did not have an informant. The murders had occurred several hours—perhaps more than six hours—prior to the warrantless entry, and no substantial evidence existed to indicate a continuing emergency. In addition, since the officers testified they were at the Simpson residence for at least half an hour before they entered it, they had sufficient time to attempt to obtain a telephonic warrant under California law.[59] If a judge were to adopt this analysis, he likely would conclude that the officer's explanation is so implausible as to be unbelievable.

But this method employs no objective criteria or interpretive principles. It is the kind of fact intensive analysis best characterized by Justice Stewart's famous observation about obscenity: "I know it when I see it . . . ."[60] A method so subjective in form and substance is inherently unsatisfactory if one believes in the rule of law rather than in standardless, ad hoc decisionmaking. An interpretive rule or principle to guide the decision is needed. Unfortunately, the means recently adopted by the Supreme Court to guide decisionmaking in this area of constitutional law are inadequate.

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[59] *See* CAL. PENAL CODE § 1526 (West Supp. 1994) (establishing the procedures for obtaining a telephonic search warrant).

[60] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

III. Objective Reasonableness and the Fourth Amendment

In recent years, the Supreme Court has favored "objective tests" for determining whether warrantless searches and seizures comport with the Fourth Amendment.[61] This approach disregards the officers' subjective beliefs and motivations. The relevant inquiry asks whether the officer's conduct was reasonable, given the facts of the case.[62] If the officer's conduct can be characterized as objectively reasonable, even the simultaneous existence of an improper motive will not require suppression. For instance, 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, however, he can stop the vehicle. Under the objective test, 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 enforce drug laws. If an objectively reasonable justification exists, the stop is constitutional regardless of the officers' underlying purpose.[63]

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[61] In recent decisions, the Supreme Court frequently 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); Illinois v. Rodriguez, 487 U.S. 177 (1990); Maryland v. Buie, 494 U.S. 325 (1990); Illinois v. Krull, 480 U.S. 340 (1987); Maryland v. Garrison, 480 U.S. 79 (1987); Massachusetts v. Sheppard, 468 U.S. 981 (1984); United States v. Leon, 468 U.S. 897, 919-21 (1984).

[62] A leading example is Scott v. United States, 436 U.S. 128 (1978). The case involved statutory interpretation, but its reasoning incorporated Fourth Amendment theory as well. In an opinion written by Justice Rehnquist, the Court accepted the government's argument that the existence of a statutory 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*." *Id.* at 436 U.S. 136 (emphasis added). The opinion then turned to Fourth Amendment case law to justify its adoption of this objective approach for interpreting the lawfulness of searches and seizures. The Supreme Court cited lower court opinions asserting that Fourth Amendment analysis depends upon "a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." *Id.* at 138.

[63] *See, e.g.*, United States v. Robinson, 414 U.S. 218 (1973). The Fifth and Eleventh Circuits have 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 asks "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 suspected drug couriers 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 con-

One byproduct of this approach is a presumption favoring the government in close cases. If the government conduct is legitimated whenever the facts permit the conclusion that a proper motivation *could* or *would* 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.[64] 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. The officer's subjective fault is irrelevant.

Objective tests are appealing because they restrict the post hoc judicial inquiry to observable facts, some of which are historically verifiable. Judges are relatively well-trained to employ hindsight to critique the significance of some kinds of objective facts. They are less comfortable trying to determine an officer's subjective thoughts and motivations, which are both more speculative and more easily manipulated by the officer on the witness stand.[65] An objective approach thus frees judges from being forced to probe an officer's subjective mental state at a particular time in the past.[66] Instead, they need only evaluate the quality of the facts available to the officer at the time of the search or seizure.

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cluded 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. 581 F.2d at 541-42. The judicial aversion to this kind of inquiry is reflected in the subsequent abandonment of *Cruz* by the Fifth Circuit 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* apparently remains binding, at least in theory, in the Eleventh Circuit. *See Hardy*, 855 F.2d at 756 n.4.

[64] Some judicial opinions suggest that in some contexts warrantless searches can satisfy the general standard of reasonableness if a reasonable officer *could* have taken this course of action. This seems to be an even more permissive standard than the "would have" test. *See, e.g.*, Florida v. Wells, 495 U.S. 1 (1990) (discretionary inventory searches permitted if standardized procedures exist); Colorado v. Bertine, 479 U.S. 367 (1987) (permitting standardized procedures to grant police officers discretion in deciding whether to conduct inventory searches); United States v. Gallo, 927 F.2d 815, 818 (5th Cir. 1991) (court appears to adopt "could" test in upholding stop and search as reasonable).

[65] *Compare* OLIVER WENDELL HOLMES, 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, 562 (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").

[66] Striking examples of the aversion of some judges to this inquiry appear in cases in which judges disregard an officer's testimony about his subjective purpose or state of mind during an investigation, and instead rely upon an objective test to uphold the investigation. *See, e.g.*, United States v. Mendenhall, 446 U.S. 544 (1980). At the suppression hearing, the arresting officer testified that al-

The fundamental flaw in this kind of objective test is that it excludes from consideration the officer's subjective motivation, particularly concerning those facts. 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 that an imaginative prosecuter [sic] might argue the officer would have acted upon under some other hypothetical circumstance."[67] A contrary interpretive approach eventually must erode the deterrent power of the exclusionary rule. A mechanical application of objective tests that upholds any warrantless search for which a post hoc justification can be constructed encourages law enforcers to ignore constitutional restraints on their conduct.

That possibility alone is enough to raise concerns about these objective tests, because the only justification for the Fourth Amendment exclusionary rule currently accepted by the Court is that the sanction deters police misconduct.[68] If police officers learn that they can intentionally violate the Constitution—enter a home without a warrant to search for evidence, for example—yet expect that judges will approve the search if the officers eventually can identify facts that would have justified the intrusion had the officers actually relied upon those facts, then the exclusionary rule loses much of its power to deter. This means in turn that the subjective motivations of the relevant actors—police officers in this context—are germane. After all, the power of rules to deter ultimately depends upon the perceptions of individual actors about the nature and force of those rules.[69]

The proper inquiry, therefore, has both objective and subjective ele-

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though the suspect agreed to accompany the officer to the DEA office for questioning, the officer would have stopped the suspect from leaving had the suspect tried. *Id.* at 575 n.12 (White, J., dissenting). Justices Stewart and Rehnquist concluded that "the subjective intention of the DEA agent in this case to detain the respondent, had she attempted to leave, is irrelevant" in determining whether the suspect was seized at that point in time, because that subjective intention was not communicated to the suspect. *Id.* at 554 n.6, 555.

[67] Burkoff, *Bad Faith Searches*, *supra* note 49, at 105 (emphasis added).

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

[69] *See, e.g.*, Burkoff, *Rejoinder*, *supra* note 49, 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 . . . .").

ments. Some aspects of Fourth Amendment analysis are always objective. Probable cause to arrest only exists, for example, 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.

Similarly, when the government claims that exigent circumstances justify a warrantless search of a home, the investigative officer's subjective belief is relevant, but must satisfy objective standards. The defect in contemporary Fourth Amendment theory is not that it applies objective standards to this kind of issue. The defect is that judges often apply the concept of objectivity mechanically, ignoring the constitutional significance of the officer's state of mind. Sometimes, however, judges identify the necessary relationship between the objective and subjective inquiries. Consider, for example, the following passage from the recent opinion in *Brimage v. State*:[70]

> The dissent then chides us for 'not completely understanding the difference between an objective and subjective inquiry'. . . . The dissent does so because we note that the officers themselves were under no delusion that their search was in response to an emergency. This, the dissent contends, 'fails to give effect to our prior case law, which clearly mandated an inquiry based on objective reasonableness.'. . . In doing so, the dissent ignores [the fact that] every . . . case we can find on the subject, premises the emergency doctrine on the idea that an officer reasonably believed that an emergency existed. The objective inquiry . . . is into the reasonableness of the officer's belief. *For an officer's belief to be reasonable, the officer first must have that belief.* An objective inquiry is required because we will not condone a warrantless search based on an officer's belief that an emergency existed when the belief is unreasonable given the objective facts and circumstances known to the officer. Here, there was no such belief at all.[71]

The *Brimage* court properly recognized that an objective test that only

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[70] No. 70,105, 1994 Tex. Crim. App. LEXIS 96 (Sept. 21, 1994).

[71] *Id.* at *46 (citations omitted) (emphasis added).

asks if a reasonable officer could or would have acted on these facts is inadequate. The Fourth Amendment and the exclusionary rule are not directed at some hypothetical government agent and what he might or would have 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. Until recently this dual analysis seems to have been accepted as part of Fourth Amendment doctrine. A search or seizure motivated by official *bad faith* was unconstitutional, even if probable cause existed.[72] From this perspective a critical issue at the first suppression hearing in the Simpson case was the officers' reason for entering without first obtaining a warrant. If they entered to look for evidence and not because they actually believed an emergency existed, the Constitution commands that they were required to obtain a

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[72] The opinion in Abel v. United States, 362 U.S. 217 (1959) is a leading example. The defendant sought exclusion of evidence by arguing that the government had an improper motive for arresting him. The Court ruled in favor of the government because it found that the government's good faith in conducting the investigation was established by the record. Both the district and circuit courts had specifically found that the government agents had acted in good faith, and the facts of the investigation supported those findings. *Id.* at 226-27. The majority specifically and repeatedly stated, however, that although the government had probable cause to arrest for two distinct crimes, the arrest would have been unconstitutional if conducted for an improper purpose. The Court reasoned that if the defendant's argument had been "justified by the record, it would indeed reveal a serious misconduct by law-enforcing officers." *Id.* at 226. The Court concluded its analysis of this issue by emphasizing that if the evidence had established that the government had employed an administrative warrant for an improper purpose, "our view of the matter would be totally different." *Id.* at 230.

In dissent, Justice Douglas argued that the record below supported the defendant's claim that the law enforcers had employed an administrative warrant, issued by an administrative officer and not a judge, for the improper purpose of making an arrest for a criminal violation. *Id.* at 244-45 (Douglas, J., dissenting). Douglas rejected the argument that government agents had acted in "bad faith," but failed to define that term and inferred from their conduct that the FBI agents had intended to avoid the burdens of complying with the Fourth Amendment's warrant requirements. *Id.* at 244-48.

Justice Brennan's dissent argued that to explore the subjective motives of investigating officers would produce "the elaborate, if somewhat pointless, inquiry the Court makes into the 'good faith' of the arrest." *Id.* at 253 (Brennan, J., dissenting). His point was not that the Court should approve improperly motivated searches and seizures, but rather that the effort to detect such motives would "invite fruitless litigation into the purity of official motives." *Id.* at 254. Because of the practical difficulties attending this inquiry, Brennan argued that the better approach was to use the requirements of the Fourth Amendment, and particularly the Warrant Clause, as a source of external controls over executive branch behaviors. *See also* Burkoff, *Bad Faith Searches*, *supra* note 49, at 75-81 (reviewing various Supreme Court opinions emphasizing the importance of the officer's subjective purposes); Burkoff, *Rejoinder*, *supra* note 49, 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).

warrant—and the evidence they located as a result of that search should be suppressed as fruits of the illegal entry.[73] The officers' subjectively held motives are a fundamental part of the inquiry. Here we find again that the constitutionality of the officers' conduct and the veracity of their testimony are issues that may dovetail.[74] If the objective facts do not support the claim of exigency, the officers' veracity is more easily questioned.

The judge should consider, therefore, not merely the substantive content of the officers' explanation of the objective facts, but also their subjective motives. Ultimately, the judge must try to decide whether the officers acted for the reasons stated under oath, or actually were motivated by an illegal purpose.[75] The officers' demeanor is one logical subject of this inquiry.

A. Detective Furhman's Demeanor

During most of his testimony at the suppression hearing, Detective Furhman's demeanor included behaviors that we might logically associate with trustworthiness. After some initial behaviors indicating a general level of nervousness—licking his lips, and blinking his eyes, for example—the detective soon appeared to be more comfortable. He sat in a neutral position, his posture was straight and his shoulders squared. For most of the direct examination he sat still in his chair, unless movement was appropriate, as when he pointed to an enlarged exhibit. He appeared to

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[73] *See* Wong Sun v. United States, 371 U.S. 471 (1963).

[74] *See supra* notes 69-72 and accompanying text.

[75] Some judges applying the objective test to these issues erroneously treat the question of police perjury as distinct from the constitutional issue when the officer's testimony is about the reasons for a search and seizure. A clear example can be found in *United States v. Hawkins*, 811 F.2d 210 (3d Cir. 1987). 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 trial and appellate courts both concluded that reasonable suspicion existed to investigate drug offenses, and therefore the officers were objectively reasonable in stopping the vehicle. *Id.* at 212-13. 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 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 about the veracity of his testimony about the facts creating reasonable suspicion or probable cause. Second, the Fourth Amendment exists to prevent government agents from searching and seizing without proper justification. *See infra* notes 87-94 and accompanying text. Police officers who act for improper motives need to be deterred. All officers need to be taught what the Constitution permits and what it forbids; they need to learn to conform their conduct to these requirements.

look directly at the examiner. His answers were delivered in a calm, steady voice. In short, for a witness his demeanor was positive.

However, his physical manner changed briefly and subtly when asked directly about his reasons for entering the Simpson property without a warrant. When the prosecuting attorney asked, "So what was it you wanted to do and why?"[76] Furhman performed a series of behaviors before answering. For the first time, he shifted his position in the witness chair, moving his entire body from one position to another. He then scratched his ear, and finally began to answer the question. His physical activity was particularly noticeable because it was so unusual—when answering most questions the officer remained physically still. Furhman appeared to be uncomfortable about answering this specific question, and appeared to be taking a moment for physical and mental preparation before delivering his statement.

Life experience teaches most of us that these behaviors can serve as physical clues relevant to our evaluation of a person's veracity. Simply put, by indicating that he was uncomfortable or nervous about his answer, Furhman's behavior could serve as a cue that he was going to lie.[77] This supposition is strengthened by a subsequent colloquy with the prosecutor. The next time that Furhman exhibited the same kinds of nervous behaviors was when asked whether the decision to enter the property was affected by the fact that Simpson's two young children were being held at the police station. Before answering, Furhman again shifted position, moving his entire body around in the chair; he shrugged his shoulders, and moved his head and neck from the normal position he maintained throughout his testimony. He then answered, and as he spoke his voice rose in pitch:[78]

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[76] *See supra* note 46 and accompanying text.

[77] *See, e.g.*, Ronald E. Riggio & Howard S. Friedman, *Individual Differences and Cues to Deception*, 45 J. PERSONALITY & SOC. PSYCH. 899, 899 (1983) ("In everyday social interaction, situations arise in which the wary interactant will carefully observe the behavior of another individual in search of clues that may signal deception."). The underlying assumption is that liars will exhibit a "greater degree of affective arousal . . . while being deceitful. . . . This arousal may stem from guilt that accompanies the commission of an immoral, deceitful act, or it may be an emotional response to the possibility of being detected and punished." *Id.* (citations omitted). These researchers reported that "[n]ervous movements were not a valid indicator of deception. Yet we found earlier that judges of this condition *do* detect deception at levels significantly above chance." *Id.* at 909 (emphasis in original).

[78] Empirical research by social scientists indicates that a higher vocal pitch is associated with lying, but that listeners may be ineffective at recognizing the significance of such vocal cues. *See, e.g.*,

> 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.[79]

As soon as the topic changed, Furhman reverted to his normal demeanor. A judge observing the detective's fluctuating mannerisms could well conclude that the witness was not credible when discussing his motives for entering the property, because the witness's demeanor indicated untruthfulness. One need not be a trained psychologist to make this kind of evaluation. Each of us does this in our social interactions all the time.

Yet even if a judge were to conclude that these behaviors connote a lie, we must question whether this conduct really is a satisfactory basis for excluding evidence. If demeanor is considered alone, the answer must be no. The proof is in the written opinion. No judge is likely to write an opinion explaining that he had suppressed evidence because the officer shifted nervously in his chair before answering certain questions. Demeanor of this sort, without more, will not suffice to justify exclusion of probative evidence.[80]

But it can play a role. If questionable demeanor tends to confirm doubts about the substance of the officer's testimony, the judge can be influenced by this demeanor, yet still write an opinion in which the public justification for the decision rests upon the absence of an exigency—that is, upon the sufficiency of the substance of the testimony.

Once again, however, the judge grapples with uncertainty. Detective Furhman's physical discomfort may have had more than one explanation.

Miron Zuckerman et al., *Facial and Vocal Cues of Deception and Honesty*, 15 J. EXPERIMENTAL SOC. PSYCH. 378, 392-93 (1979).

[79] This testimony was presented during the preliminary hearing. *See supra* note 46.

[80] Social science research suggests that such modesty about our abilities to detect honesty and dishonesty is warranted. The data are not uniform, but many studies suggest that some deceivers are effective at masking any physical cues of deception, and even where nonverbal cues can be associated with honesty or dishonesty, observers may not accurately perceive or interpret those cues. *See, e.g.*, Bella M. DePaulo et al, *Detecting Deceit of the Motivated Liar*, 45 J. PERSONALITY & SOC. PSYCH. 1096 (1983); Paul Ekman, *Lying and Nonverbal Behavior: Theoretical Issues and New Findings*, 12 J. NONVERBAL BEHAV. 163 (1988); Paul Ekman & Wallace V. Friesen, *Detecting Deception From the Body or Face*, 29 J. PERSONALITY & SOC. PSYCH. 288 (1974); Riggio & Friedman, *supra* note 77; Zuckerman et al., *supra* note 78.

He may have been nervous because he was lying, but he may have been fidgety simply because the whole world was watching.

This motion to suppress evidence presented the judge with a hard case because both the substance of the testimony and the officer's demeanor permitted conflicting interpretations and outcomes. The result in such a hard case is likely to be dictated by the presumptions the judge brings to the task. Different presumptions can serve to encourage both violations of the Fourth Amendment and police perjury, or they can discourage that conduct.

B. Principled Positivism and Police Perjury

If results in difficult cases turn on the presumptions that judges bring to them, it becomes important to define the presumptions that control interpretation of the Fourth Amendment. This is ultimately a value-driven endeavor requiring that we identify the appropriate constitutional values, then devise interpretive methods for implementing them.

In its recent Fourth Amendment case law, the Supreme Court has employed interpretive methods, theories, and presumptions that rest upon a value choice favoring government power at the expense of individual liberty.[81] In judging claims of police perjury, we could consciously adopt a similar presumption. We could presume that the officer is telling the truth, and cast aside that presumption only when the defendant presents unequivocal, overwhelming proof that the officer is lying. Functionally, such a presumption already exists. The five reasons judges accept police perjury[82] and the use of objective tests to determine the constitutionality of warrantless searches and seizures[83] operate alone and in combination to create such a presumption in this particular constitutional arena.

Once again, the Simpson case supplies useful examples. Despite the flimsy evidence supporting the existence of an exigency, Judge Lance Ito denied defense motions to suppress the evidence obtained as a result of the warrantless search at the Simpson residence.[84] To so rule, he must have

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[81] For a more comprehensive analysis of these cases, see Cloud, *supra* note 33.

[82] *See supra* Part II.A.

[83] *See supra* notes 61-69 and accompanying text.

[84] *See, e.g.*, Noble, *supra* note 47. Similar motions had been denied at the preliminary hearing by a different judicial officer.

accepted the testimony given by police officers, including Detectives Furhman and Vannatter, that they searched without a warrant to save lives, and not to secure evidence. The judge apparently presumed that even on weak facts, this explanation must be accepted.

The strength of this presumption favoring the officers (and the government) is confirmed by another set of decisions rendered by Judge Ito during the week he rejected defense motions attacking the warrantless search of the Simpson residential property. Judge Ito ruled that Detective Vannatter had been "at least reckless" when he included factual misrepresentations in a warrant application for another search of the property. It is noteworthy that this warrant application was prepared on June 13, 1994, only a few hours after the original warrantless entry. Judge Ito apparently accepted the veracity of this detective's testimony about the warrantless entry, yet later in the same week the same judge obviously concluded that the same officer could not be trusted when he described the same warrantless search under oath in a warrant application.[85]

The fact that someone makes misrepresentations about some facts does not, of course, mean that all of his statements are misrepresentations. But if the judge's task is to weigh the credibility of the officer's description of an investigation, the fact that the officer has made misrepresentations under oath about the same investigation to another judge would seem to weigh heavily on those scales. If this is our starting point, the judge's rulings seem inherently contradictory. They are sensible, however, if we recognize that they are the product of an underlying presumption favoring the exercise of government power.

The only problem with such a presumption in this context is that it stands the Fourth Amendment on its head.[86] The Fourth Amendment was adopted to protect individual liberty and privacy. To accomplish this broad purpose, it prohibits at least two kinds of abusive government conduct. The amendment prohibits searches and seizures conducted without an adequate factual justification for the intrusion. It also prohibits

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[85] Yet even then, the judge refused to suppress evidence. *See supra* note 36 and accompanying text.

[86] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

searches and seizures conducted by government agents in an arbitrary and capricious manner.[87] The archetypal examples of both evils were the general warrants and writs of assistance employed by the King's agents in England and the colonies prior to the Revolution.[88]

The Fourth Amendment enhances individual liberty by restraining government power—especially the power of the executive branch.[89] The amendment does not embody a value choice favoring government power. To the contrary, it enacts a value choice favoring personal autonomy, and the text of the amendment provides the outlines of an interpretive theory that implements this fundamental value choice.

The first clause of the Fourth Amendment prohibits unreasonable searches and seizures. Traditionally, our judges have relied upon the text of the amendment's second clause, the Warrant Clause, to define which intrusions are reasonable.[90] According to this theory, the "Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardi-

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[87] *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, 527 (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).

[88] For general histories of the Fourth Amendment, see 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); NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE 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 in the 1930s).

[89] *See, e.g.*, California v. Acevedo, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting) ("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.") (citations omitted).

[90] Justice Frankfurter presented this argument in one of his influential dissents:

> One cannot wrench "unreasonable searches" from the text and context and historic content of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed "unreasonable." . . . When the Fourth Amendment outlawed "unreasonable searches" and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity.

United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting).

nal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[91]

The emergence of the warrant model as the centerpiece of Fourth Amendment theory often has been traced to a series of influential dissents by Justice Frankfurter in the years following World War II.[92] In fact, the theory is traceable to much earlier decisions by state as well as federal courts.[93] Whatever its origins, by the mid-1960s it was clear that to be reasonable a search or seizure—whether authorized by a warrant or an exception—had to be justified by the probable cause standard enunciated in the Warrant Clause.[94]

This interpretive theory has the virtue of using the amendment's own text to provide an "internally coherent reading" to the amendment's two clauses as "expressions of repudiation of the general warrant."[95] The Warrant Clause directly confronts the two evils addressed by the core meaning of the amendment. By requiring probable cause, the Warrant Clause eliminates the evil of suspicionless searches. By requiring antecedent approval of all warrants by a neutral, independent judge, it attempts to prevent general searches conducted at the whim of government agents. The judge must determine not only whether a sufficient quantum of information exists to justify the intrusion, but also must define the location, object, and scope of the search. The warrant model simply supplies the most logical textual source of meaning for the amendment.

The warrant model also provides a system of rules for interpreting the Fourth Amendment, and rules are necessary if the amendment is to serve

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[91] Mincey v. Arizona, 437 U.S. 385, 390 (1978) (quoting Katz v. United States, 389 U.S. 347, 357 (1967) (footnotes omitted)). This principle has been reiterated by the Supreme Court many times. *See, e.g.*, California v. Acevedo, 500 U.S. 565 (1991); United States v. Ross, 456 U.S. 798, 825 (1982) (quoting *Mincey*, 437 U.S. at 390, and *Katz*, 389 U.S. at 357).

[92] *See* Davis v. United States, 328 U.S. 582, 605 (1946) (dissenting opinion); Harris v. United States, 331 U.S. 145. 157-64 (1947) (dissenting opinion), *overruled by* Chimel v. California, 395 U.S. 752 (1969); United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (dissenting opinion), *overruled by Chimel*, 395 U.S. 752. *See also*, Amsterdam, *supra* note 87, at 466-67 nn.426, 437-40, 444-54.

[93] *See, e.g.*, United States v. Lefkowitz, 285 U.S. 452, 464 (1932) (citations omitted). *See also* State v. Lindway, 2 N.E.2d 490, 498-501 (Ohio 1936) (Jones, J., concurring) (reviewing federal and Ohio state court decisions implementing the warrant rule).

[94] For a definition of probable cause, see *supra* note 21.

[95] Amsterdam, *supra* note 87, at 410.

its core purpose of regulating government power. Over the past quarter century the Supreme Court frequently has jettisoned the rule-based interpretive theory of the Fourth Amendment derived from the Warrant Clause. In its place it has substituted a malleable notion of reasonableness extracted from the amendment's first clause. The concept of reasonableness has been applied as a standardless device for ad hoc decisionmaking, often resting upon pragmatist theories about law and its functions.[96]

Whatever the theoretical virtues of legal pragmatism, its application in this context has tended to defeat the core purpose of the Fourth Amendment. The Court's reliance on its standardless notions of what is "reasonable" has increased government power to search and seize, while shrinking the liberty of individuals to be secure from government intrusions.[97] One result of these decisions has been that police officers and other members of the executive branches of state and federal governments have greater authority to intrude upon the privacy and liberty of citizens without fear of judicial censure. These decisions demonstrate that if the Fourth Amendment is to function as a device that protects individual liberty by limiting government power, its interpretation must rest upon a theory that emphasizes strong rules, yet is sufficiently flexible to resolve the diverse problems arising under the amendment.

The need for strong rules is exemplified by the Court's decisions in which it decides whether government conduct was reasonable by allegedly balancing the interests of the government and the citizen subjected to a search or seizure. In these cases, the government almost always prevails. One reason is that the Supreme Court typically "weighs" an individual's claims of liberty or privacy against the collective interest shared by all other members of society in achieving some social goal. It is not surprising that judges might find that the collective weight of an important social interest—efficient law enforcement, for example—"outweighs" the inter-

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[96] The best-known of these methods is interest balancing. *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173 (1988) (criticizing Fourth Amendment balancing because it dilutes liberty). Other devices include the adoption of the "reasonable expectation of privacy" test to define searches, and the adoption of a general test of "reasonableness" to evaluate the constitutionality of police searches and seizures. *See* Cloud, *supra* note 33, at 247-68.

[97] *See* Cloud, *supra* note 33, at 275-86 (explaining how the demise of rules in Fourth Amendment theory has produced this result); Strossen, *supra* note 96.

est of a single person, who is often a criminal, in being free from government pressure. Of course, the Fourth Amendment was adopted to protect individuals from the exercise of some kinds of government power, even power representing the will of political majorities. For example, the amendment was adopted specifically to do away with searches and seizures that were not based upon particularized suspicion that an individual had committed a crime.[98] Suspicionless intrusions violate this underlying purpose even if favored by political majorities. Yet in recent balancing decisions the Court has held that some suspicionless searches are "reasonable," and do not violate the Fourth Amendment.[99] By rejecting both the background justifications for the amendment and the very rules announced in the text, the Court's contemporary interpretive methods and theories have produced decisions that defeat the primary purposes for which the amendment was adopted and reject the values upon which it rests.

I use the phrase *principled positivism* to describe an interpretive theory of the Fourth Amendment that employs legal rules to implement those values. This theory rests upon the idea that the Fourth Amendment embodies a value choice favoring individual liberty, and implements that choice by restricting the power of government. In more general terms, it adopts a normative position about the relationship between individual autonomy and government power. This normative position, which is derived from both the history and text of the amendment,[100] supplies a principled basis for defining a set of core interpretive rules, and for identifying situations in which it is appropriate to escape the limits imposed by those rules.[101] I use the term *principled* to indicate that the rules are the product of this normative position. I use the term *positivism* to emphasize that this interpretive theory rests upon rules that are defined by an appropriate source, either the text of the Fourth Amendment or government actors—judges, in particular—whose institutional roles include the power to make constitutional rules.

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[98] *See supra* note 87 and accompanying text.

[99] *See, e.g.*, Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

[100] This use of the term signals an intentional divergence from the classic positivist attempt to separate law and morality.

[101] The constituent terms of the label, of course, carry substantial baggage. My purpose here is to use each word in a much more limited way. It is beyond the scope of this Essay to review the many uses to which the words principle and positivism have been put in legal theory.

The emphasis upon values is particularly important in the context of the Fourth Amendment, where the act of interpretation shapes the very fabric of the democracy. The authority we grant to government to intrude directly into our lives creates the most tangible definition of the nature and scope of personal liberty, because searches and seizures are usually the most physical of intrusions. The Fourth Amendment operates most of the time not in the rarefied world of legal theory, but in the gritty reality of the thousands of encounters each day between citizens and the armed representatives of government. Many of these encounters are benign, but many are not. Defining the relationship of physical power existing between the people and their government ultimately must rest upon a choice among competing values, and the Fourth Amendment is intended to guide us in the direction of liberty when we make that choice.[102]

Of course, the citizen's claim to autonomy is not absolute. The Fourth Amendment authorizes government intrusions when the tests established by the core warrant rule—a warrant, probable cause, particularity, and the oath—are satisfied. But some additional mechanism is needed to accommodate the pressing needs of police officers. These law enforcers also must confront—physically and directly—the messy and often violent complexity of life. Every day police officers become enmeshed in diverse and unpredictable encounters with the citizenry as they attempt to enforce the laws in a population in which many disobey them.[103] The diversity of these encounters ensures that a general theory of the Fourth Amendment cannot rest upon a single rigid rule. To function adequately, the core rules must allow for some play in the joints. If a principled positivism of the Fourth Amendment is to work, it must identify when and how to create that flexibility, and do so in a way consistent with the underlying normative principle favoring liberty.

The Warrant Clause provides the functional model for applying this

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[102] *See, e.g.*, United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) (arguing that "[o]ur expectations . . . are in large part reflections of laws that translate into rules the customs and values of the past and present." In particular, questions arising under the Fourth Amendment—like the use of technology permitting electronic surveillance—inevitably require judges to decide "whether under our system of government, as reflected in the Constitution, we should impose on our citizens [these] risks . . . .").

[103] Those grappling with the difficult task of interpreting the Fourth Amendment have often noted this reality. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 13 (1968) ("[E]ncounters between citizens and police officers are incredibly rich in diversity.").

theory, and the warrantless search at the Simpson home provides an example of how it functions. The amendment requires, as a starting point, that police officers were required to get a search warrant before they could search the home and its curtilage. Because no warrant was obtained, they violated the requirements of the Constitution, and the evidence they discovered should be suppressed unless we can identify some escape route from the rule that is consistent with the principles upon which the amendment is based.

A principled positivism of the amendment would create a warrant exception for situations in which a threat to safety is present, but would patrol its borders stringently with the amendment's presumption favoring liberty. The commands of the core warrant rule must give way when they conflict with a sufficiently powerful substantive concern, and a threat to a person's life or safety is surely such a situation.[104] But the normative principle favoring liberty dictates that the exception should be crafted as narrowly as possible, and the warrantless entry into the Simpson home demonstrates how this would work. At the outset, the judge should subject the officer's reasons for claiming the existence of an exigency to heightened scrutiny. The facts must clearly establish probable cause to believe that the exigency existed. In the Simpson case the facts were weak, so the judge should presume that no emergency justifying an escape from the core warrant rule existed.

That presumption is strengthened by the investigating officers' own acts and omissions. The officers had been investigating the crime for hours, and were at the Simpson residence for at least half an hour before their warrantless entry. Had the officers observed powerful evidence of an emergency, surely they would have acted more quickly. In addition, under California law they could have applied for a search warrant by telephone from the site of the investigation.[105] Given the passage of time before their

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[104] The Supreme Court has created many exceptions to the warrant rule that serve this function. But in those opinions it often has used the practical needs of law enforcers to define the scope of these exceptions, rather than constraining them with the liberty principle. A good example of this phenomenon is the Court's extension of the automobile exception to situations in which the exigency created by a vehicle's inherent mobility no longer exists. *See* United States v. Johns, 469 U.S. 478 (1985); Chambers v. Maroney, 399 U.S. 42 (1970). The result that follows is that the exception expands until it swallows the rule.

[105] *See supra* note 59.

entry, no excuse appears for the officers' failure to seek a telephonic warrant.

In summary, the constitutional principle favoring liberty produces the core Fourth Amendment rule requiring that the officers had to get a warrant before searching Simpson's residential property. The theory also identifies the circumstances in which escape from that rule is permitted, and defines the scope of the escape route. If the officers could produce strong evidence that an emergency existed, their failure to obtain a warrant would be justified.[106] The theory permits flexibility, but constrains the operation of the exceptions by its fealty to the underlying principle and to the core Fourth Amendment rule.

The primary difference between this approach and current Fourth Amendment theory is revealed by the contrasting results they produce. Judge Ito's decision affirming the validity of the warrantless search of the Simpson home is consistent with the presumption favoring government power that drives the Supreme Court's recent decisions. Principled positivism produces the opposite result because it rests upon the presumption favoring personal autonomy that is embodied in the Fourth Amendment.

Another benefit of a principled positivism of the Fourth Amendment is particularly relevant here. This theory encourages judges to evaluate the testimony of police officers candidly, while permitting judges to enforce the commands of the Fourth Amendment rigorously without being forced to label law enforcers as perjurers. It is unrealistic to expect that judges will no longer believe that some defendants lie, or to expect them to embrace a theory requiring them to call law enforcers liars in open court. A principled positivism of the Fourth Amendment, however, permits judges to vigorously enforce the Constitution by applying the rules that implement the amendment's core values.

But enforcing the Fourth Amendment has costs, and they are not trivial. A theory like principled positivism allows judges to enforce the Constitution without directly confronting four of the five reasons for accepting

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[106] If a warrantless entry is justified, the scope of the search is limited by the nature of the exigency. The initial entry, although constitutional, should not become a license for a general search. A warrant is necessary before the officers can conduct any additional intrusion. Arizona v. Hicks, 480 U.S. 321 (1987); Michigan v. Clifford, 464 U.S. 287 (1984); Mincey v. Arizona, 437 U.S. 385 (1978); Michigan v. Tyler, 436 U.S. 499 (1978).

police perjury that were discussed earlier. The fifth reason, the understandable desire to avoid excluding evidence, remains. If judges are to enforce the amendment with any rigor, they must be willing to perform that unpleasant task.

CONCLUSION

Police perjury occurs. No one can know with certainty the extent of the problem, but no one familiar with the criminal justice system would deny its existence. The problem persists for a number of reasons. Most notably, it can be hard to detect a lie, especially when the testimony is offered by an experienced witness like a veteran police detective. The problem persists, as well, because of attitudes shared by many participants in the justice system about the veracity and guilt of defendants, the undesirability of calling police officers liars, and the costs of the exclusionary rule. When combined with so-called objective tests used for determining whether police officers have violated the Fourth Amendment, these five reasons implement a functional presumption favoring the government. One result is that judges need not confront the issue of police perjury in individual cases; by deciding the relevant constitutional issues in favor of the government they effectively avoid troubling issues about testimonial honesty.

The testimony by police officers in the O.J. Simpson murder case raises these overlapping but distinct issues. Two judges have denied motions to exclude evidence seized during a warrantless search of Simpson's residence. The investigating officers claimed that the warrantless intrusion was justified by their concern for the safety of the residents in the home. Yet the objective facts supporting this testimony were flimsy, and reasons existed to doubt the veracity of the officers' explanations, which were given under oath. In these kinds of situations—which arise frequently even in less celebrated cases--judges can avoid the unpleasant issue of police perjury by basing their opinions upon the objective facts known to the officers. In contemporary Fourth Amendment case law judges do just that, and the rulings in the Simpson case are consistent with a presumption apparently underlying many of those cases. It is a presumption favoring expansive government power to conduct searches and seizures free from the requirements of the Fourth Amendment's Warrant Clause.

The primary problem with this contemporary presumption is that it stands the Fourth Amendment on its head. The amendment exists to pro-

tect individual privacy from intrusive government conduct. The Fourth Amendment supplies both the principle of liberty and the core rules, based upon the Warrant Clause, upon which judges should base their decisions. By employing the principles, rules, and presumptions embodied in the amendment, judges can still decide search and seizure issues like those presented in the Simpson case without directly confronting the question of whether police officers lied about their investigations. They can still focus upon the objective facts and make their decisions rest upon constitutional grounds, and functionally disregard the question of the truthfulness of the police testimony about searches and seizures. But judges will not enforce the Fourth Amendment unless they base their decisions upon the values upon which it rests, and the rules announced in its text.