TESTILYING AS A PROBLEM OF CRIME CONTROL: A REPLY TO PROFESSOR SLOBOGIN

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INTRODUCTION

There is no question that police perjury, "testilying," and other forms of police fraud in connection with search-and-seizure transactions should be subjects of great concern to criminal justice policymakers.[1] This was true long before the O.J. Simpson case, but the Simpson trial may serve as a catalyst for greater attention to such matters. Indeed, one of the few positive effects of the Simpson litigation could be its tendency to break down the mindset, existing among some people, that police perjury is not a problem worth worrying about. Just as the Rodney King case popularized the grim fact of police brutality, the O.J. Simpson case has given a new measure of public reality to police perjury.

This paper suggests that testilying and other forms of Fourth Amendment fraud should be thought of as "crimes" and that the legal steps taken to curtail such misconduct should be analyzed as "crime control" measures. Professor Slobogin's provocative article has assembled most of what we currently know about Fourth Amendment fraud and has offered a reform agenda. In light of our experience with crime prevention in other contexts, however, we ought to be cautious about investing confidence in ameliorative programs that sound good on paper yet tend to fail in application. In particular, we should not leap to major reform positions, such as Professor Slobogin's suggestion that we abolish the exclusionary rule, based on unrealistic expectations.[2]

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1. *See* Christopher Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037, 1042-44 (1996) (discussing a number of related types of police misconduct in connection with Fourth Amendment requirements, including police perjury at suppression hearings and at trial, misstatements in police reports, and fraudulent representations in sworn warrant applications). This article will refer to the cluster of police behaviors discussed in Professor Slobogin's article, collectively, as "Fourth Amendment fraud."

2. *Id.* at 1057-59.

I. WHAT WE DON'T KNOW

It is an understatement to say that our information base about testilying is primitive. We know almost nothing about the testilying "rate," its variations across and within police departments, its changes over time, or its etiology. We cannot say what percentage of testilies are serious (e.g., the invention of an informant, the wholesale manufacture of probable cause) and what proportion are minor (e.g., the exaggeration of a suspect's furtive gestures or the politeness of an officer's request for consent to search). Doubtless these important questions would bring different answers in major cities, smaller counties, and rural areas. We can guess about such patterns, but the truth is that no one knows. Compared with many other offenses, the crime of testilying has been poorly measured, and we should be suspicious of claims that its incidence is known or its causes understood.[3]

The reports and studies Professor Slobogin has collected are, without exception, methodologically suspect. Professor Slobogin writes that "[p]robably the most stunning evidence of prosecutorial and judicial nonchalance toward police perjury is Myron Orfield's study of the Chicago system."[4] The Orfield study is troubling and provocative, to be sure. It is also quite thin. Orfield's portrait of police prevarication in Cook County is based on the undocumented opinions of *only* twenty-seven to forty-one survey and interview subjects (the number of respondents varies question by question).[5] The small sample size becomes further embarrassing when one counts subgroups of respondents. For example, one key Orfield finding about the incidence of police

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3. For many crimes we possess at least rudimentary knowledge about their absolute numbers over the course of years and decades. *See, e.g.*, Press Release, *Victims Report Nine Percent Fewer Violent Crimes Last Year*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE (Sept. 17, 1996) (preliminary 1995 data from annual survey of crime victims used to calculate national offending rates for such crimes as robbery, assault, rape, burglary, and larceny); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS 1994 (1995) (annual reported crime statistics on national and state levels for such crimes as homicide, assault, robbery, burglary, and larceny).

4. Slobogin, *supra* note 1, at 1046 (footnote omitted) (citing Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 83 (1992)).

5. *See, e.g.*, Orfield, *supra* note 4, at 94 n.92 (27 total respondents), 91 n.81 (41 respondents).

perjury is based on the stated conjectures of only nine judges, thirteen public defenders, and eleven prosecutors.[6] Orfield's bombshell, that twenty-two percent of respondents reported that "police lie more than half of the time they testify in relation to Fourth Amendment issues" is derived from the estimates of one judge and seven public defenders out of thirty-seven subjects.[7]

Although lacking in rigor, the Orfield study raises a red flag that gives impetus to further study. For all we know, its crude method may have produced an *under*estimation of the incidence of Fourth Amendment fraud in Cook County. There are other reasons to suspect that, at least in some precincts of some big-city police departments, police perjury is widespread: One of the most powerful police-studies documents ever produced is the Mollen Commission Report, written in 1994 at the completion of an ambitious investigation of the New York City Police Department ("NYPD").[8] The Mollen Commission documented a number of ugly incidents of testilying and other Fourth Amendment frauds—but could not quantify them for the department as a whole.[9] Indeed, one notable finding of the Report was that, prior to 1994, the NYPD kept no record of the number of formal investigations of police perjury.[10] Even this elementary index of the problem has been lacking.

Added to the above, Professor Slobogin cites a number of impressionistic and anecdotal accounts of police behavior, heavily weighted by the shoutings of defense lawyers, who are usually the first to discern police fraud.[11] Legal academics are perhaps less

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6. *Id.* at 107 & n.144 (collected responses to question of how frequently judges disbelieve police testimony).

7. *Id.* at 107 & n.147. Defense counsel can be a jaded bunch. If you subtract them from Orfield's sample, only 4.3% of respondents believed that police perjury occurs at a rate of 50% or more in Fourth Amendment testimony.

8. COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, CITY OF NEW YORK, COMMISSION REPORT (1994) (Milton Mollen, Chair) [hereinafter MOLLEN COMMISSION REPORT]. Professor Slobogin relies on the Report more than once in his discussion. Slobogin *supra* note 1, at 1040 n.11, 1042-44 & nn.23 & 29.

9. MOLLEN COMMISSION REPORT, *supra* note 8, at 36-43. The Report states that, "[a]s with other forms of corruption, it is impossible to gauge the full extent of police falsifications." *Id.* at 36. As a general matter, the Report said "this Commission can confidently report that the vast majority of New York City police officers are honest and hard-working, and serve this City with skill and dedication each day." *Id.* at 1.

10. *Id.* at 41.

11. Professor Slobogin is aware of this problem. In praise of the Orfield study, Professor Slobogin writes that, "unlike many of the comments on this issue [of

slanted in their views (this depends on the academic),[12] and two law professors have written accounts of Fourth Amendment fraud based on ethnographic observations of police departments over the course of weeks and months.[13] This is important work, but unquantified, and the reliability of the findings depends ultimately on the perceptiveness and judgment of the on-the-scene observer. In the end we must choose whether to rely upon the "feel" of police behavior acquired by the investigator through limited firsthand exposure.[14]

Based on his review of the literature, Professor Slobogin writes: "Few knowledgeable persons are willing to say that police perjury about investigative matters is sporadic or rare."[15] This is not entirely correct. In 1988 the American Bar Association ("ABA") published a major study of the American criminal justice system undertaken by a special committee chaired by Professor Samuel Dash.[16] The committee held hearings and commissioned a telephone survey of over 800 defense lawyers, prosecutors, judges, and police officials.[17] With respect to testilying by police, the ABA concluded that the problem was "isolated" and observed that "no one has established the pervasiveness of the practice[]."[18]

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testilying], Orfield's findings are based on the views of prosecutors and judges as well as defense attorneys." Slobogin, *supra* note 1, at 1046 (footnote omitted).

12. Professor Dershowitz, for example, can generally be relied upon to assert a strong defense viewpoint. *See* ALAN M. DERSHOWITZ, THE BEST DEFENSE xxi (1983) (Without data, Dershowitz asserts: "Almost all police lie about whether they violated the Constitution in order to convict guilty defendants.").

13. *See* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 212-19 (1966); H. RICHARD UVILLER, TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR'S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE 111-18 (1988).

14. For example, Professor Uviller suspects that most police perjury is of a minor character: "the *instrumental adjustment*. A slight alteration in the facts to accommodate an unwieldy constitutional constraint and obtain a just result." UVILLER, *supra* note 13, at 115-16. Professor Uviller admits that he has no evidence to support this claim. *Id.* at 115.

15. Slobogin, *supra* note 1, at 1042.

16. CRIMINAL JUSTICE SECTION, AMERICAN BAR ASS'N, CRIMINAL JUSTICE IN CRISIS: A REPORT TO THE AMERICAN PEOPLE AND THE AMERICAN BAR ON CRIMINAL JUSTICE IN THE UNITED STATES: SOME MYTHS, SOME REALITIES, AND SOME QUESTIONS FOR THE FUTURE (1988) [hereinafter CRIMINAL JUSTICE IN CRISIS]. Professor Wayne R. LaFave, an eminent Fourth Amendment scholar, was one member of the committee that prepared this report. *Id.* at 1.

17. *Id.* at 2.

18. *Id.* at 21-22 ("The Committee's telephone survey indicated that neither prosecutors nor judges believe that police perjury and judicial nullification are widespread, but there was sharp disagreement on these points from the defense bar.

Obviously, this differs significantly from the accounts credited by Professor Slobogin.

I do not mean to endorse the ABA outlook on Fourth Amendment fraud, or to reject the portraits of police activity contained in other studies.[19] The point of importance is that we are largely in the dark when it comes to grappling with phenomena like testilying. In designing effective programs of redress, our long-term chances of success will be enhanced by the gathering of basic information. In the short term, any action we decide to take should be informed by an appropriate sense of caution. Conditions of information vacuum counsel in favor of incremental, trial-and-error reforms rather than blunderbuss initiatives.

Before speaking to specific proposals, it is worthwhile to catalogue some of the central facts we ought to be pursuing in the coming years to improve our understanding of the testilying problem. First, it would help enormously to know whether the overall rate of Fourth Amendment fraud by police has been increasing or decreasing. We have reason to believe that other forms of controversial police behavior, such as the use of deadly force and the "third degree," have been in steady decline.[20] Testilying may be a dwindling or localized phenomenon; it also may be an exploding national crisis. The outlines of a sensible response will be different depending on which is true.

Second, we should try to find out if some police departments have a more serious testilying problem than others. It could be that certain recruitment practices, training programs, and management structures are associated with low rates of Fourth Amendment fraud. If so, we can try to emulate such success

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Traditionally, these two problems were acknowledged to exist by both proponents and critics of the [exclusionary] rule, but no one has established the pervasiveness of the practices. The Committee believes that these divergent comments merely suggest isolated problems and do not call into question the validity of the [exclusionary] rule") (footnotes omitted).

19. For myself, I would posit that the ABA was far too uncritical when evaluating the reports it received that police in general comply with Fourth Amendment prescriptions and do not lie about it later. It is also possible, however, that the severe police fraud problems suggested by Orfield and the Mollen Commission are localized in certain large city departments, and that the ABA findings are accurate insofar as they purport to describe the general state of police practice for the nation as a whole.

20. *See* PAUL CHEVIGNY, EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS 132-38 (1995); James J. Fyfe, *Administrative Interventions on Police Shooting Discretion: An Empirical Examination*, 7 J. CRIM JUST. 309, 322 (1979).

stories elsewhere. Alternatively, some factors will be found to work in an opposite direction. For instance, I suspect that testilying rates in individual police departments are correlated with the relative share of drug enforcement each department engages in (as opposed to other forms of police work).[21] Again, if this is true, it is information that can assist the development of a global strategy for combating the testilying problem.

Third, we could use better information about the causes of testilying. For example, some Fourth Amendment fraud is surely perpetrated by corrupt cops in order to conceal or facilitate their acts of corruption.[22] We do not know how much of the problem answers this description. To the extent that "bad cops" are the root of the difficulty, future initiatives should focus on such things as improved recruitment practices and more effective deterrence of misconduct through punishments that hit police officers directly. In the alternative, some theories emphasize that "good cops" commit Fourth Amendment fraud out of disrespect for the offender-friendly hindrances the Constitution seems to impose.[23] It may be that judges and prosecutors, who are thought to acquiesce in police fraud,[24] are similarly motivated. [25] If deep philosophical rejection of substantive constitutional commands is at the root of the problem, our future course is difficult indeed: we may have to consider a "remedy" that brings search-and-seizure law into closer conformity with the ideologies of the criminal justice system actors who administer it.

II. PROPOSALS FOR ACTION

The claim that our knowledge base is imperfect should not disable efforts of police reform. We will always be in a position of wanting more and better information. Indeed, one invariant truth of criminal justice is that the system *must* operate (abolition is not an option) and must do so, at any moment in time, based on the best judgment and best guesses of the policy community.

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21. *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 284-85, 300 (1968).

22. *See* MOLLEN COMMISSION REPORT, *supra* note 8, at 37.

23. *See, e.g.*, UVILLER, *supra* note 13, at 116-18.

24. Slobogin, *supra* note 1, at 1045-48.

25. *See, e.g.*, Orfield, *supra* note 4, at 87 (prosecutor stating agreement with police view that "the Fourth Amendment is bullshit").

In that spirit, I applaud Professor Slobogin for offering concrete proposals for action in response to problems of Fourth Amendment fraud, to the extent we are able to understand those problems today. In the section that follows, I will compare my "best guesses" about ameliorative reforms with those of Professor Slobogin. As a general matter, the Slobogin agenda strikes me as unduly optimistic. With respect to his suggestion that the legal standard of probable cause should be changed (or "flexified," as he puts it), such a substantive adjustment of Fourth Amendment law is too insignificant to produce, somewhere down the line, large reductions in police falsifications. With respect to Professor Slobogin's suggestions that positive incentives and a liquidated damages sanction should be instituted as a carrot-and-stick approach to encourage Fourth Amendment compliance and cut down on episodes of testilying, I have no strong disagreement. Such measures may be tried on an experimental basis even if we have little confidence in their success. However, Professor Slobogin links these suggestions with abrogation of the exclusionary rule at criminal trials. Such a remedial "reform" of Fourth Amendment law is not well calculated to serve the twin objectives of (1) securing constitutional search-and-seizure guarantees and (2) reducing the incidence of police perjury.

In the discussion that follows, there is an important difference between the analytical frame used by Professor Slobogin and the one I will employ. Professor Slobogin focuses narrowly on the question: What actions can we take to attack the testilying problem?[26] In my view, this is a laudatory goal but one that must be paired with the separate objective of maintaining tolerable levels of police compliance with Fourth Amendment guarantees. It is self-evident that these two concerns will at times be in tension with one another. Because Professor Slobogin does not always keep both priorities in mind, he risks "throwing the baby out with the bath water" by chasing lowered testilying rates at the expense of constitutional enforcement.

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26. *See, e.g.*, Slobogin, *supra* note 1, at 1048-49, 1054.

A. Reforming the Fourth Amendment

A major component of Professor Slobogin's reform agenda is directed toward substantive change in current Fourth Amendment law. Specifically, he recommends that a new, "flexified" probable cause standard should be approved by the courts.[27] Under a relaxed standard, police would find it easier to comply with the probable cause caselaw and, as an important second order effect, would have less occasion to lie about their noncompliance.[28]

Professor Slobogin is onto something here, but I would broaden his point: Any alteration we can make in the substantive prescriptions of the Fourth Amendment so they are more congenial to large numbers of police officers will predictably enhance the baseline rate of Fourth Amendment compliance (as redefined) and will also cut down on the total episodes of police falsification necessary to cover up or effectuate their Fourth Amendment noncompliance. This proposition has so much logical force that it is worthwhile to explore its implications.

In order to remodel the Fourth Amendment to win police approval, a number of changes beyond Professor Slobogin's flexified probable cause adjustment spring to mind. For example, I suspect the police would like to see the warrant requirement shrunken to cover only a tiny category of cases;[29] and police would want a more lenient interpretation of the "exigent circumstances" exception where warrants are still required.[30] The probable cause standard should be diluted, certainly, but much more so than Professor Slobogin suggests: A generalized "reasonableness" approach might be wanted, allowing sufficient cause to be calculated based on a balancing of all circumstances, including the seriousness of the crime, the intrusiveness of the police activity, and the time available to make a decision.[31]

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27. *Id.* at 1055-57.

28. *Id.* at 1057.

29. *E.g.*, the majority opinion in Payton v. New York, 445 U.S. 573 (1980), could be overruled in favor of the dissenters' view, allowing warrantless arrests within suspects' residences.

30. This would require expanding the conception of exigency articulated in Vale v. Louisiana, 399 U.S. 30 (1970).

31. Professor Slobogin does not propose that the required quantum of probable cause should decrease as the seriousness of the offense increases. *See* Slobogin, *supra* note 1, at 1055-56. Under a generalized "reasonableness" doctrine, however, such a sliding scale could be instituted expressly.

For all search-and-seizure issues, the police would surely welcome a highly deferential standard of review in the courthouse. Perhaps all on-the-spot police judgments about probable cause, reasonable suspicion, exigent circumstances, etc. could be upheld in the absence of a "clear abuse of discretion" by the police officer—restricting adverse findings to circumstances of "egregious violations" of suspects' rights.[32] Added to this, an extension of the good-faith exception to include warrantless searches would be popular with police forces, but it would be more congenial still to recast the exception as a wholly subjective standard.[33]

These ideas and others could be spun out at length. The most reliable way to pursue such a consent-of-the-governed strategy, however, would be to ask police departments around the country what sort of Fourth Amendment law they would like to have. Armed with such information, a reform program would stand on firmer ground than one built on a law professor's conjectures about police preferences.

This is not to say that a law enforcement "wish list" should, or could easily, be adopted into our constitutional jurisprudence. For one thing, any proposed change in Fourth Amendment doctrine must gain the imprimatur of the courts. Second, and a related point, material relaxations of search-and-seizure guarantees are bound to be controversial on both policy and legal grounds. We might want to consider such changes on the theory that they are concessions to reality, but there are large competing concerns in the equation. Indeed, all Fourth Amendment safeguards exist in the face of the assumption that they are unwanted hindrances to law enforcement.

For now, however, the narrow issue at hand is the likely efficaciousness of Professor Slobogin's proposal to "flexify" the probable cause standard as a means of addressing the testilying

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32. The current caselaw allows police to make "reasonable" mistakes of fact in search-and-seizure activities. *See* Illinois v. Rodriguez, 497 U.S. 177 (1990) (holding that officers' reasonable mistake as to authority of third person to give consent to search did not invalidate search). In the absence of a warrant, however, the "reasonableness" of police determinations is reviewed de novo by the courts, not under a deferential standard of review. *See* Ornelas v. United States, 116 S. Ct. 1657 (1996).

33. *Cf.* United States v. Leon, 468 U.S. 897 (1984) (creating objective good-faith exception to exclusionary rule in cases where police obtained search warrant). *See id.* at 919 n.20 ("We emphasize that the standard of reasonableness we adopt is an objective one.").

problem. Compared to the substantive suggestions explored above, Professor Slobogin's recommendation is so mild that it will hardly be noticed by police. Indeed, part of his program is that we should "take seriously" the idea, already announced by the Supreme Court, that probable cause should be applied as a common-sense concept in light of the experience of police officers.[34] That is no doctrinal change at all. He also advocates that the standard of certainty should rise and fall with the level of the intrusion, but this again is already a feature of existing caselaw.[35]

It may be that Professor Slobogin's reformulation of the probable cause standard is distinguishable from current law in ways I have failed to appreciate, but it is at most a "tweak" and not a revolution in Fourth Amendment jurisprudence. Far more would be necessary to bring about meaningful alterations in police behavior and a discernible drop-off in Fourth Amendment fraud.

B. Reforming Fourth Amendment Remedies

Professor Slobogin's most eye-catching suggestion for addressing the testilying problem is that the exclusionary rule should be abolished, in connection with a larger reordering of the incentive-remedy structure that promotes Fourth Amendment compliance. Specifically, Professor Slobogin counsels police departments to create a system of rewards for officers who comply with the Constitution and who take the trouble to corroborate their good behavior through mechanisms like video- or audio-taping.[36] Second, he advocates replacement of the exclusionary rule with a liquidated damages remedy such as that proposed by Professor Robert Davidow.[37] The logic of the remedial switch goes like this: Judges and prosecutors, if freed from the antisocial

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34. Slobogin, *supra* note 1, at 1056 n.83.

35. *Compare* Terry v. Ohio, 392 U.S. 1 (1968) (holding that reasonable suspicion, a lesser standard than probable cause, may support a "frisk," which is a limited form of a Fourth Amendment search) *with* Winston v. Lee, 470 U.S. 753, 760-61 (1985) (holding that something more than ordinary probable cause and warrant requirements applies in cases of highly intrusive "surgical search and seizure").

36. Slobogin, *supra* note 1, at 1055.

37. *Id.* at 1058; *see* Robert P. Davidow, *Criminal Procedure Ombudsman As a Substitute for the Exclusionary Rule: A Proposal*, 4 TEX. TECH. L. REV. 317 (1973); Robert P. Davidow, *Criminal Procedure Ombudsman Revisited*, 73 J. CRIM. L. & CRIMINOLOGY 939 (1982).

consequences of the suppression remedy, will be more willing to take action against police perjury. Thus, we will eventually have less of it.[38]

My "best guess" reaction to these remedial recommendations is that they will do little to secure constitutional compliance or cut down on testilying. The whole of our exclusionary rule jurisprudence since 1964 is based on the factual premise, rooted in experience, that internal police procedures and external civil damages remedies are ineffectual safeguards of constitutional search-and-seizure guarantees.[39] It makes sense that this would be so: Police are notoriously poor at policing themselves, prosecutors are little better, and criminal suspects tend to be unattractive civil claimants. Moreover, as Professor Slobogin concedes, a liquidated damages regime will do little to reduce temptations felt by police officers to lie about Fourth Amendment transgressions.[40] If anything, the police will be more invested in avoiding their own monetary exposure than in circumventing the exclusionary rule.[41] The hope that prosecutors and judges will suddenly become more vigilant, however, is a matter of high speculation.

Having said this, I would not want to give up entirely on such an approach. Perhaps the best program for the immediate future would be to *combine* the exclusionary rule, more or less as it exists now, with the newer remedial ideas offered by Professor Slobogin. Such parallel enforcement mechanisms are not unprecedented. Indeed, the established strategy for combating occupational crime in the private sector is a twin-barreled approach of organizational sanctions alongside individual sanctions.[42] It is thought necessary to punish the organization,

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38. Slobogin, *supra* note 1, at 1058.

39. Mapp v. Ohio, 367 U.S. 643, 651-53 (1961).

40. Slobogin, *supra* note 1, at 1058.

41. Police officers consistently state that they would not prefer a damages remedy to the exclusionary rule. *See* Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1053 (1987) (all police officers interviewed by Orfield said they would not want to replace exclusionary rule with a civil damages remedy); CRIMINAL JUSTICE IN CRISIS, *supra* note 16, at 20 ("[Police officers] are not eager to replace [the exclusionary rule] with different sanctions such as expanded civil remedies against the police officer or the department.").

42. *See, e.g.*, United States v. Park, 421 U.S. 658 (1975) (prosecution of both Acme Markets, Inc., and its corporate president); United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972) (influential decision imposing respondeat superior criminal liability on corporation for actions of corporate agent). A classic academic treatment of the problems of criminal enforcement in the organizational

such as a corporation convicted of white-collar crime, in order to give it an incentive to secure legal compliance by its minions. The corporation in theory has much more control over its internal operations than any outside law enforcement agency and can mold employee behavior through its recruitment, training, promotion, and disciplinary processes.[43] In addition, however, prosecutors still believe it useful to target individuals who work for organizations through a reinforcing system of personal liability. "Bad apples" can slip through the most carefully designed institutional compliance programs.[44]

It should not be strange to think in terms of a remedial structure for Fourth Amendment fraud that borrows from the white-collar setting. Fourth Amendment fraud is itself a form of organizational crime. Police officers commit testilying and other offenses in the course of their official duties and on behalf of their employer, the government. Much of the harm of such offenses derives from the officers' position of power and trust as governmental agents. Borrowing from the experience in other organizational contexts, an incentive structure to address Fourth Amendment fraud should be targeted both governmentally and individually.

Thinking along these lines, it would be a mistake to cast aside the exclusionary rule lightly. In its own setting it is a paradigm organizational sanction: It imposes a cost directly on the government that the government cares greatly to avoid. The historical evidence, over thirty years of experience with the exclusionary rule, is that it has operated as organizational sanctions are intended to. Police departments have responded with training, monitoring, and internal compliance programs of various kinds.[45] These efforts have not been wholly adequate, but

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context is John Coffee, *"No Soul to Damn, No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981). *See id.* at 410 ("a dual focus on the firm and the individual is necessary"); *see also* KATHLEEN BRICKEY, CORPORATE CRIMINAL LIABILITY: A TREATISE ON THE CRIMINAL LIABILITY OF CORPORATIONS, THEIR OFFICERS AND AGENTS (2d ed. 1992).

43. *See, e.g.*, Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141 (1983); Harvey Pitt & Karl Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559 (1990).

44. *See* Coffee, *supra* note 42, at 407-11.

45. *See* Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition?"*, 16 CREIGHTON L. REV. 565, 590-91 (1983); CRIMINAL JUSTICE IN CRISIS, *supra* note 16, at 12-13, 23.

even Professor Slobogin concedes that they are documented benefits of the exclusionary rule.[46] We are fairly certain to lose something in organizational incentives if we neglect to punish the government itself for Fourth Amendment fraud, or if we substitute sanctions less adverse to governmental interests.

Here, then, is my proposal: For the next ten years or so we should move forward with the exclusionary rule *and* internal police department reforms *and* an experimental liquidated damages process for Fourth Amendment violations (at least in selected jurisdictions). At the same time, we should improve our routine tracking and research base concerning testilying and related frauds. A decade from now we will be in a position to reassess the situation. Indeed, a successful track record of departmental reforms and damages judgments might move us toward a conclusion that we no longer need the exclusionary rule. With better information, I for one would be willing to consider that alternative. At present, however, such a decision is counter-intuitive, contrary to our practice in related settings, and requires a long leap of faith.

CONCLUSION

The single most resounding message of all criminal justice experience is that it is hugely difficult, through deliberate governmental action, to reduce crimes of any kind.[47] Testilying and other types of Fourth Amendment fraud by police officers are likely to prove just as resistant to crime control efforts as other offenses. Indeed, given the rudimentary quality of our information about testilying, it will be especially difficult to combat. Against this backdrop, incremental experiments make more sense than sweeping measures such as abolition of the exclusionary rule. Professor Slobogin has pointed us in the direction of useful remedies; we should think carefully, however, before endorsing the specifics of his program.

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46. Slobogin, *supra* note 1, at 1058 (noting that "institutional compliance . . . is the one proven effect of the exclusionary rule").

47. *See, e.g.*, UNDERSTANDING AND PREVENTING VIOLENCE 21 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1993); James Q. Wilson, *Crime and Public Policy*, *in* CRIME 489, 493-95 (James Q. Wilson & Joan Petersilia eds., 1995).