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## Moderating Investigative Lies by Disclosure and Documentation

In *Deceit, Pretext and Trickery*, Professor Slobogin brings a new perspective to the debate on the place of official deception in criminal investigation.<sup>1</sup> Before moving to areas where I believe his approach has merit, I note some disagreements with the premises undergirding his analysis.

### I

#### THE CENTRALITY AND INAPPLICABILITY OF BOK'S DECLARED-ENEMIES CATEGORY

Professor Slobogin builds his analysis of the appropriate restrictions on investigative deception on the work of Sissela Bok. Although Bok only rarely touches on criminal cases, Slobogin relies on Bok's qualified approval of deception in some circumstances to develop his basic distinctions and limitations on investigative lies. I interpret Bok's approval of deception as further removed from authorizing the deceptive investigative practices considered by Professor Slobogin than he does. This is not to say that the extensions suggested are not provocative and useful, but they are not necessarily supported by Bok's theoretical framework.

Professor Slobogin's basic argument is that investigative procedures involving deception can be squared with Bok's teachings principally under her exception for dealings with those who have been officially labeled as enemies, and secondarily under her emergency situation justification.<sup>2</sup> In the criminal area, he contends that an enemies label can be attached to criminal suspects

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<sup>1</sup> Christopher Slobogin, *Deceit, Pretext and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775 (1997).

<sup>2</sup> *Id.* at 800.

through a judicial finding of probable cause.<sup>3</sup> I read Bok's work as requiring much more to affix the enemy label to a criminal suspect than a finding of probable cause.

Bok's core example of the enemies category is that of "lawful, declared hostilities," as when there is "a declaration of war."<sup>4</sup> Her examples in the criminal area are tax evaders, counterfeiters, and kidnappers.<sup>5</sup> While Bok's references are somewhat ambiguous, I suggest the most appropriate reading of her work is that the declared-enemies category applies only to a small subset of criminal defendants—outlaws and those involved in an ongoing criminal episode that authorities are combating during its operation—and not to the typical investigation of past individual criminal conduct. For instance, at the time of his fatal shooting by FBI agents, John Dillinger was the archetypal outlaw. He was committed to a life of crime; he had broken from society and was openly at war with it; *he was a publicly wanted man*.<sup>6</sup> Bok's use of the kidnapper example is also instructive. She does not appear to refer to someone believed to have committed a kidnapping in the past, such as Bruno Hauptmann who was arrested for having kidnapped Charles Lindbergh's son. Rather, she is considering "the hostage holder"<sup>7</sup>—someone who *at the moment that society is contemplating lying*, is holding the hostage, and is demanding ransom and/or terms from the hostage's family members or the authorities.

Perhaps, all those who have committed a serious crime in the past should be considered declared enemies of society in the same way that Bok uses the term. I suggest that nothing we know about recidivism, or for that matter character, justifies such a generally applied label, and if somewhat broadly attached, many individual exceptions would be necessary.<sup>8</sup> Moreover, Bok

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<sup>3</sup> *Id.* at 803-04.

<sup>4</sup> SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 144 (1978).

<sup>5</sup> *Id.* at 144. See also *id.* at 135 ("The tax evader, the hostage holder, the invading nation are enemies of a society . . .").

<sup>6</sup> Both before and after the murder of fashion designer Gianni Versace on July 15, 1997, Andrew P. Cunanan also fit this category and had made the FBI's most wanted list of *fugitives* in connection with a series of murders and a public nationwide manhunt. Martin Weil, "Party Boy" has been Hunted by FBI, WASH. POST, July 16, 1997, at A8. See also *Crime: Versace's Murder Revives the FBI's 10 Most Wanted List*, NEWSWEEK, July 28, 1997, at 6. The requirement of fugitive status and the public nature of both the previous searches for the suspect and this listing tend to guarantee that the wanted person has accepted the label as an enemy of society.

<sup>7</sup> BOK, *supra* note 4, at 135.

<sup>8</sup> In my seven years as a criminal defense attorney, I represented only one client I

would be unlikely to give her approval to Professor Slobogin's application of the enemies category upon a simple finding of probable cause against someone believed in the past to have committed a crime. Such a person is not a declared enemy of society with the rigorous limits that Bok would impose, given her concerns generally that those seeking to justify deception tend to manufacture justifications<sup>9</sup> and specifically that the label of "enemyhood" is often casually and broadly bestowed.<sup>10</sup>

## II

### THE PURPOSE OF CONSTITUTIONAL PROTECTIONS THROUGH PROCEDURAL RIGHTS

At several points, Professor Slobogin connects his work to that of scholars who have argued that our constitutional rights are designed primarily to protect the innocent.<sup>11</sup> An analysis of that scholarship is beyond the scope of this Response. However, I believe that this broad characterization of the intended purpose of existing rights cannot be generally supported and can lead to pernicious results.

Admittedly, the Fourth Amendment focuses on protecting rights of citizens generally, and its text gives no special protection to the use of evidence against criminals in contrast to the exclusionary sanction.<sup>12</sup> It is exceedingly difficult to argue that the

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believe fit the outlaw category. Before his final capture, this client knew that he and his two companions were being hunted by the police, and they were supporting themselves by daily armed robberies during which they made no attempt to disguise their identities. By contrast, most of my clients were arrested for, and charged with, individual past offenses. Whether they were guilty was at issue. Although a few were charged with being involved in continuing drug-selling operations and others appeared to have episodically committed violent offenses in the past and therefore were likely to commit others in the future, for most whether they would commit additional crimes was as uncertain as their guilt of the charged offenses. A few had apparently committed crimes of violence based on passion and circumstances that might never be replicated. Unlike outlaws or an invading army, most of these clients were not the enemies of society.

<sup>9</sup> Bok, *supra* note 4, at 86-87, 119-22.

<sup>10</sup> Bok, *supra* note 4, at 139.

<sup>11</sup> Slobogin, *supra* note 1, at 777 n.11 (citing AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997)); Slobogin, *supra* note 1, at 816 n.196, citing Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983); William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903 (1993).

<sup>12</sup> See Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 908-10 (1989). Also, the Fourth Amendment, unlike

benefits of the procedurally-oriented Fifth Amendment right against compulsory incrimination or the Sixth Amendment rights to counsel or jury trial were intended to be generally restricted to the innocent.<sup>13</sup> Surely, some further hint would have been given in the text of the amendments if that were their intent. Also, while the Framers were hardly all-knowing, they certainly should be given credit for the obvious insight that procedural rights are designed to help us separate the innocent from the guilty in a situation of uncertainty. With such a purpose, the availability of rights cannot generally be made contingent upon a prejudgment of who is innocent.

Without question, the central concern of the criminal trial process is protecting the innocent. It is the fear that the process will erroneously label the innocent as guilty that has provided the dominant justification for procedural protections that often free the guilty.<sup>14</sup> However, out of necessity, we extend the procedural rights across the board to all and do not allow a prediction or prejudgment of guilt to take rights ultimately designed to protect the innocent from those we suspect are guilty.

Based on a judicial finding of probable cause, which for interrogations would often follow the deception and some generic determination of necessity, Professor Slobogin's proposal would allow deceptive practices.<sup>15</sup> These predeception determinations are not even theoretically the equivalent of findings of guilt. They are often made in the first instance by the police acting alone, and even when judicial scrutiny is obtained, Professor Slobogin accepts that judges may well give rubber-stamp approval to police claims.<sup>16</sup>

Nevertheless, using such a relatively inaccurate and porous screen creates no major problems if satisfying its requirements

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the privilege against self-incrimination, is structured to allow evidence gathering to continue upon a requisite demonstration of likely guilt, known as "probable cause."

<sup>13</sup> Professor Stuntz does make interesting arguments that some of the specific rules developed by courts under the Fifth and Sixth Amendments fit a pattern of privileging the innocent. Stuntz, *supra* note 11, at 1940-54. However, his contention that the rules he cites benefit the innocent is revealed only through his subtle characterization of those rules. Moreover, those rules may reflect, not a neutral analysis of history, text, or Framers' intent, but rather the result-oriented judgments by courts that sometimes improperly reflect a "peek at the merits" approach and may for that reason alone favor those more likely to be innocent.

<sup>14</sup> "It is better that ten guilty persons escape than that one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES \*358.

<sup>15</sup> Slobogin, *supra* note 1, at 803.

<sup>16</sup> Slobogin, *supra* note 1, at 804.

does not authorize new types of investigative lies which would have previously been illegal. The danger, however, is that if Slobogin's system were adopted, its protections might replace those of other doctrines that might then be seen as superfluous. For example, Professor Slobogin suggests that the interrogation of officially charged defendants currently prohibited by the Sixth Amendment approaches acceptability because such suspects clearly fit the declared enemies category.<sup>17</sup> What Slobogin's system begins to resemble is the general warrant that was so hated by the Framers.<sup>18</sup> Under his system, the suspect becomes fair game for broad investigative deception if probable cause is found.

Nevertheless, a central useful core to Professor Slobogin's argument has particular salience in our current social and political climate. The idea of salvaging the life of a person who has committed a serious crime in the past is not at the top of our current agenda. For example, when our tendency to lengthen criminal sentences is criticized, such criticism is typically based on the monetary cost of incarcerating more prisoners rather than on the concern for the potential loss of liberty and economic capacity of those incarcerated unnecessarily.

The key insight on which I agree with Professor Slobogin is that a regime that makes claims about legal rights of criminal defendants is unlikely to succeed in expanding protections. On the other hand, changes in the law that increase procedural protections are practical possibilities if they have a greater probability of protecting the innocent.<sup>19</sup> This point dovetails with the reality of popular societal reaction and contemporary press coverage: Not surprisingly, it will be abuses of authority involving innocent people that will likely provoke restrictions on investigative deception, and restrictions that are more likely to prevent abuses affecting the innocent are, relatively speaking, more politically viable.

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<sup>17</sup> See further discussion *infra* Part IV.A.

<sup>18</sup> Slobogin, *supra* note 1, at 812.

<sup>19</sup> See Robert P. Mosteller, *Popular Justice*, 109 HARV. L. REV. 487, 514-15 (1995) (reviewing GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS* (1995)) (arguing that success in preventing retrenchment of procedural protections is most likely when the proposed change would make convicting the innocent relatively more probable).

## III

THE DIRECT IMPACT OF PROFESSOR SLOBOGIN'S  
PROPOSALS IN THEORY AND IN LIKELY PRACTICEA. *The Reduction in Investigative Intrusions*

The most important and pervasive impact of Professor Slobogin's proposals would be the reduction in the number of people whose lives are intruded upon by police investigative tactics. This would result from enforcement of a general requirement that before deception can be practiced, the police must possess substantial suspicion of illegal activity.<sup>20</sup> Professor Slobogin ensures that the impact would be widespread by ignoring any difference between investigative deception that involves overt lying and deception involving a failure to be fully forthcoming.<sup>21</sup> Specifically, in the areas of interrogation and search or seizure, Slobogin's system requires some degree of justification before even minor or indirect deception can be used. The definition of deception is so broad that virtually no investigative contact can take place safely without justification unless absolute honesty and full disclosure are the norm.

Because his system would interfere with desired conduct, institutional adjustments to reduce the unwanted effects are likely, and several adjustments are possible. On the one hand, the police may change their conduct across the board and become scrupulously honest when they lack adequate suspicion. On the other hand, the finding of adequate suspicion could become so watered down as to be relatively meaningless.<sup>22</sup> My prediction is that between the two, the latter would be far more likely.

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<sup>20</sup> When minor crimes are involved, Professor Greenawalt has argued that substantial basis for suspicion should be required before interrogation is allowed, although he acknowledges that such restrictions would be difficult to fashion and unlikely to be enforced. See R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 41-42 (1981).

<sup>21</sup> Slobogin, *supra* note 1, at 778 n.12. While I question whether this broad definition of deception is justified in terms of Bok's analysis, societal expectations, or established constitutional and procedural doctrines, I focus on the adverse practical consequences that I see flowing from the definition.

<sup>22</sup> Indeed, Professor Slobogin generally favors a relatively relaxed probable cause standard. Extending the trend in this direction found in *Illinois v. Gates*, 462 U.S. 213 (1983) and the recognition that "reasonable good faith" reliance upon an invalid warrant will not result in suppression under *United States v. Leon*, 468 U.S. 897 (1984), he argues that probable cause should be "flexified" by depending in major part on the practical knowledge of the police. Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1055-56 (1996).

### B. *The Impact on Undercover Activity*

Professor Slobogin's system would also have an impact in the area of undercover activity. Here, he would prohibit undercover agents intruding generally into the normal activities of private citizens in search of criminal activity without a demonstrated basis to believe that a crime was being committed, but would not restrict activities that merely provide opportunities for crime commission, such as typical sting operations.<sup>23</sup> Courts have been reticent to try to exert such control over undercover operations<sup>24</sup> primarily, I believe, because of the perceived difficulty of developing meaningful controls without all but eliminating the usefulness of the investigative technique. For example, a requirement of probable cause becomes problematic when the agent encounters people who are not known targets but who must also be deceived if the ruse is to be maintained and who may ultimately also be implicated. Similar problems arise when the targeted individual undertakes entirely unforeseen activities that may be criminal.

To avoid hamstringing undercover activity, the requirement of rather specific probable cause may be modified to require only a core justification and to excuse extensions to other criminal activity unearthed in the process of investigation. Again, the effect is to create a concept that resembles the general warrant. Once probable cause has been found for anything, the suspect and associates are fair game regarding virtually everything. I predict that either the police will manipulate such a system or undercover operations will become bogged down in litigation over the acceptable extension of an authorized operation.

### C. *The Impact on Pretextual Traffic Stops*

The impact of Slobogin's system on the pretext activities under the Fourth Amendment, such as the stop of a vehicle ostensibly for a traffic infraction but in reality for an investigation of suspected illegal drug activity, would likely be substantial. Standard teaching, reaffirmed recently by the Supreme Court, is that if an intrusion is justified by probable cause, the subjective intent of

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<sup>23</sup> Slobogin, *supra* note 1, at 807.

<sup>24</sup> *See, e.g.*, *United States v. White*, 401 U.S. 745 (1971) (refusing to impose warrant requirement on use of deception by undercover agent equipped with electronic monitoring or recording device).

the officer is irrelevant to the Fourth Amendment.<sup>25</sup>

Would tangible benefits result from requiring justification for, and honest disclosure of, the true purpose of a search or seizure? I believe the answer is "yes." Such requirements would reduce the frequency of intrusions upon innocent individuals and, perhaps most importantly, would help eliminate targeting and harassment of racial minorities.<sup>26</sup> These would be valuable results from the perspective of protecting civil liberties. However, the results may be offset by some negative impact in terms of effective law enforcement and crime prevention,<sup>27</sup> and there are no real prospects that they will be accepted as constitutional doctrine. Probably more importantly, drawing lines between what is a prohibited pretext after a finding of probable cause and what is a permissible activity would be extremely difficult to develop and might encourage further evisceration of constitutional controls.

#### D. An Alternative Preference

My complaints are not simply that distinctions are difficult to draw and that the need to draw distinctions may engender excessive flexibility in the standards. Obviously, in any system, divid-

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<sup>25</sup> *Whren v. United States*, 116 S. Ct. 1769 (1996). See also *United States v. Holloman*, 113 F.3d 192, 194 (11th Cir. 1997) (upholding under *Whren* constitutionality of drug interdiction program conducted in connection with probable cause to believe that traffic violation has occurred).

The intent of the officer, by contrast, may matter if the justification for the search or seizure is other than based on probable cause—for example, when an inventory rationale is used to justify a search. *Whren*, 116 S. Ct. at 1773.

<sup>26</sup> See, e.g., Roger Roy & Henry Pierson Curtis, *When Cops Stop Blacks, Drug Search Often Follows: Orange County Deputies Deny Race Plays a Role in Stops on the Turnpike, But Some Police Officials Agree Blacks have a Right to Be Unhappy*, ORLANDO SENTINEL, June 8, 1997, at A1.

<sup>27</sup> Although the final assessment of effectiveness has not been made, New York City officials have claimed that enforcement of minor violations has produced major benefits in reducing serious violent crime. Compare Jackson Toby, *Reducing Crime: New York's Example*, WASH. POST, July 23, 1996, at A17 with Richard Moran, *New York Story: More Luck Than Policing*, WASH. POST, Feb. 9, 1997, at C3. Two theories are advanced by those who believe this technique is effective: first, the "broken window" effect through which society signals its intolerance of disorder and minor law violations, which has the effect of discouraging all violations, see Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 369-70 (1997), and second, the tendency of people who commit major crimes to commit minor ones as well so that arrests or searches regarding minor crimes can help capture those wanted for other crimes, produce information about those other crimes, or prevent those crimes from happening when weapons are seized. See Toby, *supra*. The latter justification depends upon activities that Professor Slobogin would label pretextual and would prohibit.



ing lines must be drawn to determine: (1) when the system's requirement that conduct must be justified is triggered; and (2) if triggered, how investigative deception can be justified. The problems arise because there will be a tendency to impose only minimal scrutiny if the system both applies broadly and if the official misconduct leads to substantial consequences, such as suppression of evidence.

I prefer a focus on fewer cases with a more exacting examination and with substantial penalties for violations.<sup>28</sup> Professor Slobogin apparently favors a system that affects a broader range of activity but imposes lesser sanctions for violations,<sup>29</sup> preferences that square with his suggestions that constitutional rights should be viewed as primarily protecting the innocent. Despite my misgivings, imposing his restrictions only in limited situations, such as by legislation that regulates searches during routine traffic stops, could have a valuable impact. Indeed, this type of limited control may be all that can be realistically expected when the clamor to be tough on crime is so great.

#### IV

##### THE BROADER CONSEQUENCES OF A FOCUS ON INVESTIGATIVE INTERROGATIONS

###### A. *Reduction and Increases in Lying During Custodial Interrogations*

Lying during custodial interrogation is the most commonly encountered deceptive investigative practice that Professor Slobogin would largely approve in its current form. His proposal would modestly limit current deception as to suspects who had not been arrested,<sup>30</sup> which again would reduce the impact on those more likely innocent. On the other hand, if the enemies concept were taken to its logical conclusion, deception could be extended beyond currently accepted limits to situations when the suspect had been formally accused. Professor Slobogin suggests

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<sup>28</sup> See 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 4.1(b), at 403 (3d ed. 1996) (“[I]t may well be that, as practical matter, the warrant process can serve as a meaningful device for the protection of Fourth Amendment rights only if used selectively to prevent those police practices which would be most destructive of Fourth Amendment values.”)

<sup>29</sup> Slobogin, *supra* note 22, at 1057-58 (arguing to change the exclusionary rule to one of modest civil damages).

<sup>30</sup> Slobogin, *supra* note 1, at 811-12.

that the necessity would prevent this extension.<sup>31</sup> Perhaps he is correct, but if the rationale of declared enemies is given central status, the necessity limitation may prove to be malleable and ineffective.

Professor Slobogin argues that when the suspect has been formally charged, the prosecution has already developed a prima facie case, meaning that deceptive practices would not be necessary to win a conviction.<sup>32</sup> We need look no further than *Brewer v. Williams*<sup>33</sup> for a case where the necessity limitation would likely have proved insufficient under that argument. Defendant Robert Williams gained the protection of the Sixth Amendment when he became formally the accused by being "arraigned . . . on an outstanding arrest warrant."<sup>34</sup> His first appearance in court triggered a new set of constitutional protections, but the need for quick recovery of the victim's body to develop and preserve evidence to convict him remained just as great.<sup>35</sup> The State of Iowa was no more able to prove his guilt because of his court appearance than it would have been had he been arrested without a warrant or had he not appeared in court. Perhaps Professor Slobogin's suggestion is correct that once a person is formally accused, the necessity argument is automatically negated. However, given that the "declared enemies" element of the rationale has been formally satisfied, the necessity restraint may not hold fast when the evidence is critical to obtaining a conviction in a heinous or notorious case.<sup>36</sup>

*B. Police Deception Under a "Just Deserts" Rationale and the partial Antidote Through Recording of Encounters With the Police*

My intuition is that lies during interrogation are justified in the

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<sup>31</sup> *Id.* at 812.

<sup>32</sup> *Id.*

<sup>33</sup> 430 U.S. 387 (1977) (*Williams I*).

<sup>34</sup> *Id.* at 391.

<sup>35</sup> *Nix v. Williams*, 467 U.S. 431, 437-38 (1984) (*Williams II*).

<sup>36</sup> Professor Slobogin does not include the seriousness of the crime as a factor in satisfying the necessity requirement. However, I fear that if necessity is explicitly recognized as a justification for avoiding limitations on effective investigative procedures, the seriousness of the crime will likely become a part of that necessity determination. Indeed, an important theme of this Response is that as to serious crime, it is unlikely that limitations on deceptive investigative procedures will be imposed either as proposed by Professor Slobogin or as I suggest could flow from greater publicity and disclosure of abuses, *see infra* Parts B & D.

minds of most Americans when serious crime is involved under a “just deserts” rationale.<sup>37</sup> In my criminal procedure class, I show the class a videotaped interrogation of Anthony Beasley conducted in Washington, D.C. in February of 1983 regarding the kidnapping, sexual assault, and murder of a young woman.<sup>38</sup> Detective David Forbes, the “mutt” of the team, lies repeatedly, blatantly, and effectively to the suspect about the strength of the evidence against him. Students report that in the beginning of the interrogation they are offended by the interrogation techniques in part because they believe the suspect’s protests of innocence. Then, as the interrogation continues and the investigator’s lies and other techniques produce inconsistencies in Beasley’s story, information about his other criminal activities, and finally a confession, they are much less bothered. The crime involved was horribly gruesome, and my sense is that the students begin to feel that, at least when crime of this seriousness is involved, the ends do justify the means.<sup>39</sup>

In contrast, it appears that the public was relatively bothered by the less offensive treatment of Olympic Park bombing suspect Richard Jewell during his interrogation by FBI agents.<sup>40</sup> The explanation for the difference is obvious. We are uneasy when authorities lie to an innocent person.

Reactions to this pair of interrogations shed light on Bok’s

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<sup>37</sup> Slobogin, *supra* note 1, at 793. See also Bok, *supra* note 5, at 123-29. Both note the rationale is highly questionable.

<sup>38</sup> The appellate opinion in this case describes some of this deception. *Beasley v. United States*, 512 A.2d 1007, 1009-11 (D.C. 1986). The case is also discussed in an article by Professor Charles Ogletree. Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1829 n.11 (1987).

<sup>39</sup> Many of the current group of TV network shows depicting contemporary detective work, such as *NYPD Blue* and in particular the conduct of Detective Andy Sipowicz (Dennis Franz), appear to depend upon a similar audience reaction. Sipowicz meets suspects on what he believes is their own level, frequently tricking them into self-incrimination, and apparently continues to receive public approval for doing what needs to be done.

Lying during interrogation is supposed to be limited to lies that would not induce an innocent person to confess. See, e.g., *Beasley v. United States*, 512 A.2d 1007, 1015-16 (D.C. 1986). However, the results of using the above test are, in my judgment, frequently unsatisfactory because the standard is extremely imprecise and is applied after a confession has been obtained. See, e.g., *Miller v. Fenton*, 796 F.2d 598 (3d Cir. 1986) (approval of confession of brutal crime despite significant deception by police and obvious psychological trauma suffered by suspect).

<sup>40</sup> The improper questioning techniques resulted in disciplinary action against three agents. Kathy Scruggs, *FBI Agent Suspended for Jewell Interview*, ATLANTA J. & ATLANTA CONST., May 21, 1997, at A14.

contention that rules authorizing official deception should be approved by a group that includes those who will feel their impact.<sup>41</sup> With regard to rules that affect criminals, Professor Donald Dripps has argued that popularly elected political bodies will rarely provide effective representation to such individuals.<sup>42</sup> Members of the general public simply do not fear *ex ante* that they will suffer from actions focused on apparent criminals, taking instead the perspective of potential victims of crime.<sup>43</sup> Those most likely to be erroneously targeted (young males, particularly minority group members) are a relatively small group that is either politically powerless or largely disinterested.<sup>44</sup>

These observations suggest two conclusions. First, a system covering a broad range of activity and operating on the premise that rights are designed to protect the innocent is ineffective; it fails to protect those least sympathetic to the public and suspected (and most likely guilty) of the most serious offenses from deceptive interrogative techniques.<sup>45</sup> If correct, this observation means that popularly based reforms will rarely, if ever, provide a substitute for constitutional restraints on police conduct. Second, reforms will most likely occur when the impact of interrogation

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<sup>41</sup> Bok, *supra* note 4, at 98, 100.

<sup>42</sup> See Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused*, 44 SYRACUSE L. REV. 1079, 1089 (1993).

<sup>43</sup> *Id.* at 1092.

<sup>44</sup> *Id.* at 1089-93.

<sup>45</sup> Professor Margaret Paris has taken a very different tack from Professor Slobogin and suggested that rather than develop standards that will justify deception, authorities should be encouraged and indeed required to behave honestly. See Margaret L. Paris, *Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3 (1995). She argues that official deception may encourage violation of the law, and honest dealing by the police may help train suspects and society to conform to the requirements of law. *Id.* at 27-32, 65. I am attracted to aspects of Professor Paris' proposal, but I fear that it anticipates benefits that are likely only available when dealing with minor and/or first-time offenders. *Id.* at 31-32 (describing author's experience with neophyte offenders who were enraged by government deception). By contrast, in the case of Anthony Beasley, a seasoned offender who had committed a terribly serious crime, Beasley spoke with the police rather than invoking his *Miranda* rights because in his earlier transactions with the police with respect to more minor crimes, which likely included deception by both sides, he had been successful in talking his way out of problems. Cf. Ogletree, *supra* note 398, at 1828-29 (discussing the numerous practical pressures on defendants to talk with police rather than remain silent). I believe that as to the most serious offenses, the expectations of police, public, and even suspects change. Deception is believed acceptable by the police and the public under a means-justifies-the-ends analysis, and even suspects are probably not terribly outraged, recognizing that they are engaged in the most high stakes enterprise where ruthlessness should be expected.

practices are on the innocent, although, according to Professor Dripps' argument, effective legislative action protecting suspects is unlikely even here.<sup>46</sup>

However, the tendency of popular politics to discount the problem of police abuse appears inoperable in some situations, like that involving Richard Jewell. The precise factors that cause the public to take risk of abuse seriously is not clear. However, I suspect factors include the apparent innocence of the suspect, the degree of media attention generally devoted to the incident, the certainty that abuse occurred,<sup>47</sup> and the medium through which the abuse is captured. The last of these factors is the most capable of explicit control through policy changes. When abuse is captured in a medium that can be widely and effectively transmitted, such as videotape, it can be a powerful motivator of public sentiment for control of abuse. Substantial media attention certainly appears to enhance the salience of an individual incident of police misconduct.<sup>48</sup>

Three videotaped episodes of police beating of suspects during the mid-90s caught the public's attention. These involved Rodney King being clubbed by Los Angeles Police Department officers, a female motorist in South Carolina being roughed up and verbally abused by a state highway patrolman,<sup>49</sup> and two sus-

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<sup>46</sup> Dripps, *supra* note 42, at 1081.

<sup>47</sup> The sodomy of Abner Louima in August 1997 by Brooklyn police officers caused national outrage because of its incredible brutality, but I suspect Louima's claim would have been no story at all without the virtually irrefutable physical evidence of punctured intestines and a damaged bladder that doctors said were caused by a blunt instrument. See Blaine Harden, *Angry Giuliani Orders Shake-up at Police Station; Alleged Assault on Immigrant "Reprehensible," Mayor Says*, WASH. POST, Aug. 15, 1997, at A3. The physical evidence allowed no reasonable alternative explanation.

<sup>48</sup> I have argued elsewhere that excessive attention to the *trial* of individual cases tends to distort reality and focuses on aberrant situations. See Mosteller, *supra* note 19, at 510-11. The distorting impact of the glare of publicity when focused on *police conduct* is likely just as great. See Howard Rosenberg, *Slow Down the Rush to Judgment; Because Violence Sells, TV Jumps to Conclusions on Videotaped Police Actions Before All the Facts are In*, L.A. TIMES, Apr. 3, 1996, at F1. At its base, my support for greater disclosure of investigative practices is explicitly result oriented. I believe the public has an erroneous natural tendency to believe that the courts coddle criminals and an equally strong inclination to support police practices (even abusive ones) that promise to catch and punish criminals. My position is that the admitted distorting impact of publicity serves a positive good when it overcomes erroneous stereotypes—when, for example, it causes the public to imagine the impact of police abuse on innocent individuals like themselves and thereby treat such potential abuse as important to a general public with political clout.

<sup>49</sup> *No Civil Rights Case in S.C.*, WASH. POST, Mar. 24, 1996, at A23.

pected illegal aliens being beaten by Riverside County, California sheriff's deputies.<sup>50</sup> Those three episodes were surely not the only citizen-police encounters during that period that involved excessive police violence. Because they were caught on videotape and available for mass dissemination, these incidences received national publicity and at least for a time appeared to affect public attitudes.<sup>51</sup>

Possibly, the starkness of the police wrongdoing in each incident was more than the public expected. Even though many in our society believe officials abuse their authority and intellectually accept that it occurs with some frequency, seeing the event is more powerful than assuming it. Moreover, to members of the majority in our society, seeing police violence is more persuasive than reports by those who suffered it, probably because we cannot fully accept the stories told when we have not personally experienced such treatment.<sup>52</sup>

One important consequence of Professor Slobogin's focus on

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<sup>50</sup> Eric Malnic & Edward J. Boyer, *Deputies' Clubbing of 2 Suspects Taped; Immigration: Incident with Riverside Officers Occurs after Chase of Truck*, L.A. TIMES, Apr. 2, 1996, at A1.

<sup>51</sup> In August 1997, abuse of prisoners at a Texas prison recorded on videotape momentarily captured national attention and led Missouri to discontinue placing prisoners at that out-of-state institution. See *Texas Prison Abuse Video Sparks FBI Investigation*, WASH. POST, Aug. 20, 1997, at A6. However, subsequent events demonstrate how fleeting the impact of publicity may be. Shortly after the videotaped beatings were aired nationally, television commentators stated that prisoners from a number of states were likely to be withdrawn as a result of the revelation. NBC NIGHTLY NEWS, (NBC television broadcast, Aug. 19, 1997) (Tom Brokaw stating that "[s]o far, Missouri and Oklahoma have begun taking back their prisoners [and] [o]ther states are expected to do the same."). However, a month later, the picture had changed with no broad exodus of other states' prisoners from Texas prisons, and in fact the number from one state increased. DATELINE NBC, (NBC television broadcast, Sept. 23, 1997) (Jane Pauley stating that "[i]nterestingly, ten other states continue to rent cells from Texas [and] [o]ne of them, Wisconsin, has even increased the number of inmates it's shipping there.").

<sup>52</sup> In addition to the massive publicity that surrounded these acts of police violence, I suspect that another reason they had a powerful impact on the public related to race. Each involved police violence against racial minorities. As a nation, we are strongly drawn to the hope of racial justice, and graphic instances of injustice directed against minorities will motivate particularly vigorous demands for change. On the other hand, perceptions of what constitutes an injustice—what constitutes improper use of force by the police—and the strength and longevity of the negative impact that such perceived improper conduct has on attitudes toward the police are related to the race of the observer. Eric S. Jefferis, et al., *The Effect of a Videotaped Arrest on Public Perceptions of Police Use of Force*, 25 J. CRIM. JUST. 381, 382, 391 (1997). Thus, unfortunately it is likely that the demands for change engendered by acts of police violence will only gather majority support in the clearest instances of abuse, and broad-scale impact will be of relatively fleeting duration.

investigative lies is that greater attention and scrutiny is directed toward this area. The process of reform will be further aided by increased recordings of police conduct, a percentage of which will likely capture abusive behavior. Videotaping and/or voice recording of as many interrogations and investigative encounters between police and citizens as possible should be encouraged.<sup>53</sup> Under an analogy to Bok's suggestion, reform will result from the public passing judgments on which of the deceptive and/or abusive police practices should be permitted against ordinary citizens. For example, equipping all law enforcement patrol vehicles with recording systems could reduce abuse involved in pretext traffic stops. Lies are less likely to be told if those lies are recorded word-for-word and are available for *all* to see when the police guess wrongly that a "suspicious looking" motorist possesses drugs.<sup>54</sup>

### C. Notice to the Suspect of the Possibility of Police Deception

An interesting by-product of Professor Slobogin's analysis is the light it sheds upon the decision in *Miranda v. Arizona*<sup>55</sup> as a means to control police deception in interrogation and the likely practical limits on any legislative control system. Slobogin argues that no distinction should be drawn between various types of deception—between, for example, overt lies and failures to correct the misimpressions of the suspect. He would condemn them all absent justification. That set of arguments is consistent with one view of the original purpose of the *Miranda* opinion and provides support for it.

In *Miranda*, the Court required, *inter alia*, that:

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court . . . . [T]his warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the

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<sup>53</sup> See Donald A. Dripps, *Police, Plus Perjury, Equals Polygraph*, 86 J. CRIM. L. & CRIMINOLOGY 693, 715-16 (1996) (arguing there are good reasons and frequently available technology to record the conversation between police and citizens when searches and seizures occur).

<sup>54</sup> Similarly, angry officers are less likely to brutalize suspects like Abner Louima in squad cars so equipped or in a station house where videotaping equipment operates in all public areas. See *supra* note 47. Of course, areas without a recording system will always exist, but taking a suspect to such an area would produce suspicion.

<sup>55</sup> 384 U.S. 436 (1966).

presence of persons acting solely in his interest.<sup>56</sup>

By overstating the dangers of conversation—anything you say “can and will” be used against you—the Court apparently was attempting to eliminate the possibility that the police would suggest to the suspect that talking to them might be beneficial.<sup>57</sup> However, strictly restricting deception, if intended by the Court, was unsuccessful. Lower court decisions have been unwilling to impose this particular warning,<sup>58</sup> and later decisions of the Court have rejected both a rigid (arguably more effective) and an expansive interpretation of the warnings.<sup>59</sup>

The pattern in subsequent decisions interpreting *Miranda* will be apparent in any legislative scheme that attempts to strictly restrict deception. The lines will be eroded under the pressure to convict those guilty of very serious crimes.

*D. A Further Justification for Neutral Determination of Probable Cause Before Arrest*

Most importantly, justifying deception under the “declared enemies” rationale encourages a neutral determination of probable cause before deception occurs and, at a minimum, a recording of the basis of enemy status when that status will be subsequently determined by a magistrate’s finding of probable cause. If the central theoretical justification for authorizing deception is that the person is a fair target because he or she has been *publicly labeled an enemy*, then, when possible, the formal probable cause declaration should precede the use of investigative deception. Data has suggested that the vast majority of arrests are not made

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<sup>56</sup> *Id.* at 469.

<sup>57</sup> Professor Paris makes a very different argument that, rather than putting the suspect on notice that the police were likely to be deceptive, *Miranda* established a regime consistent with trust of the police. See Paris, *supra* note 45, at 58 n.179, 63. I believe that, although surely not encouraging deception, *Miranda* anticipated that sharp investigative practices would continue and accordingly tried both to warn the suspect of the dangers and to arm him or her with protection through a right to demand the assistance of counsel.

<sup>58</sup> See 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 6.8, at 516 (1984) (noting some uncertainty as to whether the Court intended such a rigid formulation, using “may” instead of “can and will” at another point in the opinion).

<sup>59</sup> See, e.g., *Colorado v. Spring*, 479 U.S. 564 (1987) (concluding that *Miranda* does not require that suspects be aware of all intended subjects of interrogation, only that the prescribed warnings be given); *California v. Prysock*, 453 U.S. 355 (1981) (per curiam) (finding no requirement for following words of *Miranda* warning with absolute precision).



in a hot pursuit situation.<sup>60</sup> Therefore, obtaining a warrant before arrest would be feasible in most cases. Although the Fourth Amendment has been held (probably for practical reasons) not to require a warrant for arrests in a public place, if the probable cause determination is used to justify deception, the need for an explicit and official *advanced* determination is clear. Indeed, if Bok's work is taken as the basis for analysis, the requirement of a warrant before deception is not an arguable point, and Professor Slobogin makes the *declared* enemies exception his centerpiece.

Professor Slobogin argues that an after-the-fact determination of probable cause is sufficient to permit deception during interrogations. He correctly notes that for purposes of suppressing a confession obtained from a suspect who had been arrested under the Fourth Amendment, the information obtained after the arrest cannot be used to validate the initial seizure.<sup>61</sup> However, the review of the arrest decision excluding the fruits of the interrogation is made only if a motion to suppress is litigated, and because most defendants plead guilty, this review is rarely conducted. The only test applied to a major portion of defendants, those denied release, is that of *Gerstein v. Pugh*.<sup>62</sup> The *Gerstein* determination, which focuses on "whether there is probable cause for detaining the arrested person pending further proceedings,"<sup>63</sup> is an extremely poor vehicle for scrutinizing prearrest probable cause. Its assessment is made in a nonadversarial proceeding where the defendant lacks a right to counsel,<sup>64</sup> and the assessment may even be conducted *ex parte*.<sup>65</sup> In addition, because the review may be conducted as much as forty-eight hours after arrest<sup>66</sup> and can be based on police reports supplemented by oral statements of investigating officers,<sup>67</sup> separating the probable cause for arrest from that acquired during interrogation and other immediate postarrest investigation will be exceedingly

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<sup>60</sup> 3 LAFAYE, *supra* note 28, at § 5.1(b), at 18.

<sup>61</sup> Slobogin, *supra* note 1, at 811 (citing *Dunaway v. New York*, 442 U.S. 200 (1979)).

<sup>62</sup> 420 U.S. 103 (1975).

<sup>63</sup> *Id.* at 120.

<sup>64</sup> *Id.* at 120-23.

<sup>65</sup> *Jenkins v. Chief Justice of the Dist. Court Dep't*, 619 N.E.2d 324, 338 (Mass. 1993).

<sup>66</sup> *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

<sup>67</sup> *In re Walters*, 543 P.2d 607, 617-18 (Cal. 1975).

difficult.<sup>68</sup>

In the public labeling of enemies process, it is important to record what information was known to authorities *before* they employed deceptive procedures. Information obtained through the interrogation process can intentionally become part of the facts presented for all subsequent probable cause determination—"testilying" in Slobogin's terminology. More importantly, the facts learned or confirmed in the interrogation process can unintentionally become part of the after-the-fact construction of probable cause whereby the facts known at the time of presentation to a judicial officer are conformed to the requirements of the law, which itself focuses on what was known at an earlier time.<sup>69</sup> All but the most naive and honest among us must understand that incriminating words from suspects may constitute a superlative example of the 20-20 hindsight of what police feel they must have known at the time of the interrogation. In the minds of the investigating officers, the facts provided in the confession may become part of the basis for probable cause that existed before the interrogation.

Although experienced officers who are firmly committed to deception will often be successful in avoiding detection, that capacity is not unlimited. Paper records and, in time, the contemporaneous recording of voice and video will increasingly become a threat to the liar. Effective control of deception will require adept adversaries, but the more information that is "locked in,"

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<sup>68</sup> The Supreme Court has stated that a practice of arrest without probable cause followed by interrogation to determine whom to charge is inconsistent with *Gerstein*, 420 U.S. at 120 n.21, and that delays in the post arrest probable cause determination for the purpose of gathering additional information to justify the arrest renders the delay unreasonable, *McLaughlin*, 500 U.S. at 56. However, in *McLaughlin*, it rejected a rigid timeliness requirement for determining probable cause established by the Ninth Circuit that would have required "determination to be made as soon as the administrative steps incident to arrest were completed." *McLaughlin*, 500 U.S. at 54 (quoting *McLaughlin v. County of Riverside*, 888 F.2d 1276, 1278 (9th Cir. 1989)) (italics omitted). One version of that Ninth Circuit approach would have declared all post arrest interviews with the defendant impermissible. *Kanekoa v. City and County of Honolulu*, 879 F.2d 607, 614-19 (9th Cir. 1989) (Nelson, J., dissenting), *cert. denied*, 500 U.S. 933 (1991). In the absence of such an explicit prohibition against interrogation prior to the probable cause determination, the theoretical prohibition against use of the fruits of a brief interrogation conducted immediately after arrest will be very difficult to enforce.

<sup>69</sup> JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 214-15 (1966) (describing the after-the-fact process whereby police officers, often self-consciously, reconstitute the facts known at the time of arrest to satisfy legal requirements).

the more likely that lies will be unearthed. As with requiring the formal finding of probable cause before deceptive practices may be used, Slobogin's focus on investigative lies encourages the recording of police-citizen encounters so that both truth and lies can be ascertained. As a consequence, official deception will be discouraged.

Unfortunately, I do not believe either recording of police conduct or formal documentation of the basis and advanced findings of probable cause will substantially curtail abusive practices.<sup>70</sup> However, these changes have some promise to ameliorate the most visible problems and curb abuses that individually are relatively minor but affect large numbers of the public. Also, disclosure and documentation are more likely to encourage limited legislative reforms than the argument that investigative deception is ethically unjustified. In the end, control of abuses by the police, including investigative deception, rests, albeit tenuously, on enforcement of constitutionally based protections.

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<sup>70</sup> One reason for my pessimism is that I believe the attention to the problem resulting from publicity is typically short lived and will frequently bring only modest changes. *See supra* note 51 (describing momentary furor caused by videotaped beatings of prisoners in Texas facility).

