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Taking on Testilying: The Prosecutor's Response to In-Court Police Deception

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Introduction

In this article, I examine the problem of "testilying"—perjury and other forms of in-court deception by police officers—from the prosecutor's point-of-view. What are the prosecutor's legal and ethical duties and obligations? What, if anything, should he or she do to combat the problem? These questions, and others, are important to ask, discuss, and answer because a judicial "system" that is supposed to adjudicate guilt and innocence yet permits lies—no matter how small or infrequent—is no system at all. Under our adversarial system of justice, competing, zealous advocates argue their causes before neutral and impartial arbiters.[1] Implicit in such a system is the belief that those zealous advocates should fight fairly. Using lies does not promote justice; it distorts it.[2]

In Section I of this article, I give a detailed overview of the problem of testilying. I demonstrate that it is a real, but by definition unmeasurable, problem. Precisely because the problem is so impervious to quantitative measurement, I spend a significant portion of this article explaining the problem. In Section II, I examine how prosecutors have and have not dealt with the problem. In Section III, I show what the federal subornation of perjury statute and the Model Rules of Professional Responsibility require prosecutors to do in response to testilying. In Section IV, I identify what steps, above and beyond laws and rules of ethics, prosecutors should take to combat the crime of police perjury. Finally, in Section V, I address criticisms of my approach.

I. The Testilying Problem

The term "testilying" was coined by police officers in New York City.[3] It usually refers to perjury committed by police officers. However, it has also been used to describe other forms of in-court deception.[4] As I demonstrate in the following review of the frequency, nature, and reasons for police perjury, testilying is an amorphous problem, not easily understood or fixed, but nevertheless a real one in our criminal justice system.

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(a) *What is testilying?*

The problem with defining "testilying" is that it is a new term to describe a concept that is not easily definable or understandable. The Mollen Commission was the first to report the use of the term by police officers in New York City. Officers coined the phrase most probably to persuade themselves that what they were doing was morally acceptable. When an officer is deceptive in court, the rationale goes, he is "not quite lying" but "not quite testifying truthfully and completely" either. Testilying is seen as a middle ground between pure honesty and pure dishonesty. Officers feel that they can tread ethically within this middle ground because they feel that they

have society's best interests at heart: the conviction of the guilty.

This alleged "ethical middle ground" is perhaps the best evidence of the ethical problems with testilying. Officers invented a word in part to avoid acknowledging that testilying sometimes involves committing perjury and other illegal acts. The fact that they do not call their actions perjury or deception or some other term with clearly unethical implications evinces their belief that testilying—whatever form, illegal or legal—is somehow justified. If they believed their actions were clearly wrong, there would be no need to create a new word. Lying, perjury, and deceit all characterize deception negatively. Testilying is seen as morally acceptable, however, because it is deception used against someone (the defendant) who is himself morally blameworthy. Testilying is viewed as a small moral compromise that can prevent a larger moral wrong, the non-conviction of a guilty defendant. The question of what is testilying, therefore, needs to be understood within its proffered Machiavellian justification.[5]

To address its legitimacy, it is appropriate that we start with considering what forms of in-court deception *police officers* consider to be ethically "questionable" yet ultimately justifiable. This inquiry is subjective because most lawyers and ethicists would probably agree that aside from pre-charge interrogations and investigations, all forms of police testimonial deception are unjustifiable. That does not help to define testilying. Testilying is unique to policing and deserves a police-oriented definition. Accordingly, testilying should not be limited to provable cases of perjury. Although most would probably agree that perjury—a material lie made under oath[6]—is always testilying because deceiving a court is virtually always wrong, officers themselves consider other forms of deception, such as false swearing to affidavits, to fall under the category of "testilying," even though those deceptive statements are not made on the witness stand. At the same time, most people—officers and lay persons alike—would agree that it is acceptable for a police officer to deceive a suspect in custody in order to secure a true and voluntary confession, for example, by telling the suspect that the police have his fingerprints on the murder weapon when in fact they do not.[7]

Testilying, I believe, has both a locus component and a deception component. I define 'testilying' in part as any *in-court* deception by a police officer, whether made at trial, at a hearing, or in written documentation (for example, affidavits in support of search warrants). The second part of this inquiry is: What amount of "deception" is serious enough to warrant moral condemnation? Not all wrongful acts of deception are necessarily outright lies. In fact, many observers believe that testilying usually involves "shading" testimony or failing to disclose material facts—not necessarily outright lies.[8] The question of definition is critical in examining this problem from the prosecutor's point of view because, as I will show, his ethical and legal duties depend in part on whether he knows or has good reason to know that the police officer will "lie."

What is a "lie"? In the recent impeachment of President Clinton, many legal observers stated that Mr. Clinton was "legally accurate" when he stated that he did not have "sexual relations" (as that term was defined by in the deposition) but was nonetheless deceptive.[9] Even some of the President's strongest supporters stated that he should have volunteered more information so as not to mislead the court. In the police context, "shading" can occur when, for example, officers draw conclusions about the reliability of informants. An officer may say that an informant is "reliable" even though he or she has information that the informant may not be 100 percent reliable. A lie? Perhaps not. Deceptive? Probably. Worthy of moral condemnation? I think so—and certainly so would the magistrate who approved the warrant based on the affidavit as well.

Testilying is viewed as a small moral compromise that can prevent a larger moral wrong, the non-conviction of a guilty defendant.

(b) *Circumstances*

Testilying may take many different forms. For example, during the O.J. Simpson murder trial, evidence surfaced that Mark Fuhrman had once stated:

> [If] you find a [needle] mark [on a drug suspect] that looks like three days old, pick the scab. Squeeze it. Looks like serum's coming out, as if it were hours old. . . . That's not falsifying a report. That's putting a criminal in jail. That's being a policeman.[10]

Testilying may involve the creation of a confidential informant to obtain a search warrant,[11] lying about the circumstances of a search to justify a warrantless arrest of a perpetrator,[12] planting evidence on a suspect ("flaking"),[13] increasing the quantity of drugs found on a sus-

pect ("padding"),[14] or even, as the above-quoted statement from Mark Fuhrman illustrates, manufacturing evidence of a crime.[15]

Most testilying occurs at the investigative and pretrial stages of the criminal justice system,[16] especially in suppression hearings.[17] "Because the government has the initial burden in hearings on warrantless searches, including *Terry* stops and frisks, the police officer's testimony serves as the beginning point for a trial court's consideration of the constitutionality of the police action."[18] Testilying occurs most often in cases involving drugs or guns[19] in high-crime areas.[20] Narcotics and weapons cases often rely exclusively on police testimony and involve little corroborative evidence.[21]

Judge Irving Younger, in *People v. McMurty*, described the problem of "dropsy" testimony, a prevalent form of testilying in suppression hearings.[22] The prototypical dropsy case usually involves the following boilerplate testimony:

> I observed defendant X acting suspiciously at the corner of Main and Spruce Streets. He appeared nervous. He had a small white package in his hands. When I crossed the street, he dropped the package and ran away from me. I apprehended him, picked up the package, and determined that the substance inside was cocaine. I arrested the defendant and read him his *Miranda* rights.

Judge Younger noted, "Usually the very language of the testimony is identical from [one] case to another."[23] The problem with dropsy cases is that is impossible to tell who is lying in an individual case—the defendant who claims the officer conducted an illegal search, or the police officer who claims that the defendant dropped the incriminating evidence. "The difficulty arises," Judge Younger concluded, "when one stands back from the particular case and looks at a series of cases. It then becomes apparent that policemen are committing perjury at least in some of them, and perhaps in nearly all of them."[24] Because judges are relegated to deciding cases based on the testimony of individual officers and defendants, however, they usually have no choice but to find a police officer more credible than the accused.[25] Indeed, that was the result in *McMurty*: Judge Younger reluctantly denied the defendant's motion to suppress because he found no direct evidence that the police officer in that specific case was lying.[26] "Were this the first time a policeman had testified that a defendant dropped a packet of drugs to the grounds," Judge Younger stated, "the matter would be unremarkable."[27] The problem is that testilying becomes apparent only when one looks for patterns in police testimony.

(c) *Frequency*

Part of the problem with testilying is that we know very little about how often—if it all—police deceive the courts. Kevin Reitz, who argues that police perjury should be treated like any other crime, states, "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."[28] This lack of knowledge can be attributed, in part, to the fact that perjury is by definition perpetrated secretively. Like deception generally, it is something kept quiet.

It is even more difficult to study deception in the police context. Officers are not generally willing to break their *esprit de corps* to speak candidly with a researcher about corruption.[29] Also known as the "blue wall of silence" or the "code of silence," this *esprit de corps* prevents officers from being candid with researchers, even under conditions of anonymity.[30] Though similar to subcultures in other professions, the police subculture is more pronounced because police officers operate under distinctively high amounts of stress, discretion, and danger, often with low pay, benefits, and societal gratitude.[31]

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Even with these problems of studying police perjury, many observers have concluded that it is a widespread problem. At one extreme, Alan Dershowitz claims, "Almost all police lie."[32] Given that Mr. Dershowitz is a criminal defense attorney, his sweeping generalization can probably be understood as an exaggerated by-product of years of frustration with a few corrupt officers. It is quite possible that all of the police that Mr. Dershowitz has observed on the witness stand have testilied. But one cannot logically induce that because some police lie, all police must therefore lie.

This is not to say that I think police are always honest. Police are human, and I think it is reasonable to assume that *some* police lie *some* of the time. The question is where to draw the line: at the high, middle, or low end of the spectrum. Nicholas Zales concludes that testilying is a problem and is in fact growing. "The evidence is clear,"

he writes, "that police perjury is, if not pervasive, at least a serious cancer invading our criminal justice system."[33] If so, it would be helpful, as Kevin Reitz urges, to conduct a study measuring the long-term trends of testilying.[34]

There are a handful of researchers and judges who disagree with the assertion that testilying is widespread; they view it as rare and exceptional. As a rule, they say, the police are honest. In *People v. Berrios*, the New York Court of Appeals declined to adopt a rule that would have put the burden of proving the legality of a warrantless search on prosecutors.[35] In the process, the court concluded, "[T]here is no valid proof that all members of law enforcement or that all other citizens who testify are perjurers."[36] Similarly, a special commission of the American Bar Association, chaired by Samuel Dash, surveyed judges, prosecutors, and defense lawyers, and concluded that police perjury was an isolated occurrence.[37] Of the three groups the commission surveyed, only members of the defense bar believed that police perjury was widespread.[38] This may indicate either an anti-police bias by defense attorneys or a pro-police bias by judges and prosecutors.

The research in this area has been scant and largely anecdotal. One study, conducted by Myron Orfield, surveyed a few dozen judges, defense attorneys, and prosecutors in Chicago.[39] Its results are problematic because the small sample size in the study makes them statistically unreliable.[40] In an earlier study, Orfield interviewed roughly two dozen narcotics officers from the Chicago Police Department about their perceptions of the Exclusionary Rule.[41] Nearly all of the officers admitted that some of their colleagues commit perjury, although they disagreed on the frequency.[42] However, because the officers' statements were not self-serving, they are somewhat indicative of a serious problem. We simply do not know whether their responses are typical of all law enforcement officers, of all Chicago police officers, or even of all Chicago narcotics officers.

Anecdotally, several defense attorneys and judges have spoken about what they perceive to be a vast number of cases of police perjury. As noted above, Alan Dershowitz, who has practiced as a defense attorney for several decades (including as a member of the "Dream Team" for O.J. Simpson, a case which featured its own allegations of testilying by Detectives Philip Vanatter and Mark Fuhrman), has written many times that he believes virtually all police lie.[43] David Wolchover estimated that London police lie in approximately thirty percent of trials.[44] Irving Younger, as both a defense attorney[45] and later as a judge on the New York City Criminal Court,[46] concluded that testilying was a vast and underestimated problem. In 1970, he estimated that "hundreds, perhaps thousands, of cases" involved police perjury.[47]

In the early 1990s, Milton Mollen chaired a commission charged with investigating corruption in the New York City criminal justice system. The so-called Mollen Commission summarized the problem of testilying in the NYPD by stating that, "[a]s with other forms of corruption, it is impossible to gauge the full extent of police falsifications. Our investigation indicated, however, that this is probably the most common form of public corruption facing the criminal justice system."[48]

Police view perjury as a necessary means to achieve the ends of justice.

Given the problems of studying police perjury and the continuing reports of its existence, it is probably reasonable to conclude that testilying does occur in a significant number of cases. At the very least, many people believe it is a serious problem; that perception in and of itself is worthy of study. More scientific studies, robustly designed, need to be conducted to determine the frequency and trends of police perjury.

(d) *Why Does Testilying Occur?*

"Police, like people generally," Christopher Slobogin observes, "lie in all sorts of contexts for all sorts of reasons."[49] The most common reason cited is a Machiavellian one: Police view perjury as a necessary means to achieve the ends of justice.[50] Constitutional rules—particularly the Exclusionary Rule[51]—are viewed as technicalities that "[let] the criminal . . . go free because the constable has blundered."[52] A study by students at Columbia Law School found that immediately after *Mapp v. Ohio*[53] was handed down, when police officers told the truth, many cases were dismissed because judges found that key pieces of evidence were the products of illegal searches or seizures.[54] The study found that within a short time after cases had started to be dismissed, police began to lie in order to keep valuable evidence from being excluded.[55]

Ironically, police say they lie in order to serve the "truth."[56] Truth-seeking, to them, means making sure that a guilty person goes to jail at whatever cost. Police see only the day-to-day effects of the Exclusionary Rule: good cases against known criminals being dismissed be-

cause police erred.[57] Most do not recognize or value the broad purpose of the Exclusionary Rule which is to encourage lawful searches and seizures.[58] As Alan Dershowitz correctly states, "If the only goal of the adversary system were to find 'the truth' in every case, then it would be relatively simple to achieve. Suspects could be tortured, their families threatened, homes randomly searched, and lie detector tests routinely administered."[59] Machiavellian police ignore the fact that the criminal justice system is not designed just to find and convict the guilty, but to find and convict the guilty in a way that comports with fairness, justice, and equity. Testilying, in the long run, destroys citizens' trust in government,[60] particularly since citizens have the most contact with police officers, as compared to other government agents.[61]

Machiavellianism is also problematic because testilying often involves lying about matters that are "outcome determinative in . . . litigation."[62] They are not "little white lies." They go to the heart of a defendant's guilt or innocence. Guilt in drug- and gun-possession cases often hinges solely on the outcome of search-and-seizure suppression hearings.[63] An argument can be made in response that truth is not undermined by testilying in these instances because the guilty are punished. One small deception is made so a larger deception (a guilty person being let go) is not. This utilitarian argument fails to account for the policy behind the Exclusionary Rule. The purpose of our justice system is not just to convict, but to convict in a fair manner. When the Exclusionary Rule mandates that key evidence be suppressed because of a police officer's error, the very release of the possibly guilty defendant is meant to deter police from committing constitutional errors in future cases.

Furthermore, the win-at-all-costs attitude assumes that police are more accurate at guilt-finding than other entities, such as prosecutors, judges, or juries.[64] Our justice system is not inquisitorial: We do not vest truth-finding in one person or group. Ours is an adversarial system, in which the truth is arrived at through zealous advocacy before an impartial and neutral arbiter.[65]

It is for these reasons that the Machiavellian justification for testilying is unpersuasive. There are, however, other reasons—not justifications, but explanations—for why police lie. Some lie to cover-up the corruption or incompetence of other officers, or themselves.[66] Others lie in order to get extra overtime processing arrests and testifying in court (what the Mollen Commission reported as "collars-for-dollars").[67] Some fabricate cases in order to appear busy and to increase conviction statistics.[68]

The problem also persists because police are allowed to get away with lying in other instances. For example, most ethicists accept that police may lie during the pretrial investigation stage of a case.[69] Lying, therefore, is not viewed as something that is *absolutely* wrong. Instead, lying's morality or immorality depends on the circumstance. Of course, the circumstances are very different when a police officer lies to a suspect and when he lies to a court.[70]

There is a final explanation for testilying: the "blue wall of silence."[71] Police view the criminal justice system with an "us versus them" attitude that develops from the extreme stress that they face everyday from many directions. Family members worry about their safety, complain about their low pay, and often fail to understand the on-the-job stresses that they undergo. Supervisors bombard them with useless paperwork. Defense attorneys undermine their credibility through insulting cross-examination. Judges dismiss cases seemingly because of "legal technicalities." When cases go wrong, prosecutors blame the police. And, of course, criminals try to thwart their every attempt to keep or restore law and order. Consequently, police believe that the odds are stacked against them. Society isolates them, so they turn inward to the only people who understand them: fellow officers. Camaraderie is a positive effect of stress. When camaraderie goes too far, however, it can lead to a distorted perception of morality. Police lie because they view themselves as guardians of right and wrong, the only people in the criminal justice system who have the best interests of society and victims at heart. Lying to serve a noble end (truth seeking) is thus a natural outgrowth of the police psychology of isolation and silence.[72]

II Prosecutors' (Non)response

Perhaps the most persuasive reason why police officers commit perjury is because other players in the criminal justice system—judges and prosecutors, in particular—let them get away with it. Alan Dershowitz recounted the following story:

> I once asked a policeman, "Why do cops lie so brazenly in search-and-seizure cases?" He responded with a rude macho joke: "Why do dogs lick their balls?" To which the answer is "Because they can." In short, police know they can get away with certain kinds of common lies.[73]

I start with the assumption that some prosecutors know about testilying and in fact tolerate it (some out of sympathy or subscription to the Machiavellian justification for testilying, and some out of an inability to do anything about the problem).[74] In a survey of a small sample of prosecutors, judges, and defense attorneys,[75] Myron Orfield found that prosecutors "frequently" tolerate testilying, and sometimes encourage it.[76] More than half of the survey respondents believed that at least half the time the prosecutor knows about evidence fabrication or perjury.[77] However, forty-eight percent believed that prosecutors discourage testilying.[78] Some prosecutors said they would refuse to prosecute a case they knew would be based on perjured police testimony.[79]

Prosecutors' tolerance and (at times) encouragement of testilying is explained by several factors. When prosecutors aggressively prepare police witnesses for their testimony, officers receive overt or subtle suggestions to lie.[80] While interviewing officers, some prosecutors will tell them what the law will require that he, the prosecutor, establish through his witnesses. The officer-witness will then parrot back those requirements, making his testimony fit the requirements of the law.[81]

Prosecutors' widespread acceptance of plea bargains subtly encourages testilying.[82] Because most cases end with guilty pleas,[83] there is a lesser chance of perjury being detected through pre-trial discovery and vigorous cross-examination in a public trial.[84] Prosecutors are also less zealous in their pursuit of police perjury because they are afraid that testiliars will "blow the whistle" on their accomplices in the district attorney's office.[85]

Prosecutors also experience the same obstacle that police whistleblowers face: the "blue wall of silence." It is difficult to prosecute testilying because there is no corroborative evidence. The dispute is limited to the defendant's word against the officer's.[86] The problem is complicated by the small investigative staffs in most prosecutors' offices.[87] Most prosecutors' offices are reactive, not proactive. Even if they are fortunate enough to have detectives to perform prosecutor-initiated investigations, those detectives are often on detail from the very police department that the prosecutor is investigating.[88]

For some prosecutors, the "blue wall of silence" may not be an obstacle at all. Some may be fully behind the wall itself: They may share the police officers' Machiavellian justification/excuse for testilying.[89] They may not like the fact that officers are testilying, but they tolerate it. Most draw a line, however, at planting evidence. Testilying is tolerable, framing an innocent person is not.[90]

That is not to say that prosecutors have taken no action against testilying. The Manhattan District Attorney's Office has been the most visible in prosecuting testiliars. In 1971, District Attorney Hogan argued that prosecutors should bear the burden of proof in suppression hearings.[91] Other area district attorneys took the opposite view. In 1992, the Mollen Commission reported that Manhattan District Attorney Robert Morgenthau had prosecuted several police officers for perjury.[92] This included Barry Brown, the principal informer for the Commission. Police Commissioner Bratton and District Attorney Morgenthau forced Brown to resign in order to send a "message that lying under oath is unacceptable no matter what the circumstances."[93] Some district attorneys have also implemented structural changes in their offices to combat the testilying problem. In Queens County, New York, assistant district attorneys receive training on how to prepare police officers properly for trial. The training includes mock trials with real officer-witnesses. One Queens County assistant reported, "People think the police and prosecutors are sleeping in the same bed, but we're not."[94] In Manhattan, grand jury prosecutors are urged to interview police officers separately if there is any possibility that they may be fabricating evidence or about to testilie.[95]

III Legal and Ethical Standards

Against this background of the extent and nature of the testilying problem, I now turn to the law of police perjury from the prosecutor's perspective. In this section, I do not articulate any particular strategy for how prosecutors could or should proactively reduce police perjury. Instead, I set forth the minimum requirements of prosecutors: what they *must* do, not what they *should* do. I consider first the criminal law. Prosecutors, like all other citizens, must obey the law. Second, I consider the special obligations of prosecutors, as lawyers, under the Model Rules of Professional Conduct.

(a) *Subornation of Perjury*

When a police officer—like any witness—lies under oath, he does not commit the crime in a vacuum. The attorney (here, prosecutor) who calls him to the stand could also be exposed to criminal liability. Under certain circumstances, a lawyer could be liable for putting a witness on

the stand who later commits perjury. Here I delineate the bounds of that criminal liability vis-à-vis prosecutors and deceptive police witnesses.

Consider the federal subornation of perjury statute; 18 U.S.C. §1622 provides: "Whoever procures another to commit any perjury is guilty of subornation of perjury..." The elements of the offense are thus (1) procurement (2) of another (3) to commit perjury. Mere knowledge that a witness is about to testify falsely is not subornation of perjury unless the suborner induces or procures the false testimony.[96] A subpoena *ad testificandum* would probably qualify as inducement or procurement since prosecutors, like all attorneys, willfully choose which witnesses they will call to the stand. Subornation includes situations in which the suborner "should have known or believed or have had good reason to believe that testimony given would be false."[97] This imposes a negligence standard. If a reasonable prosecutor *should have known* that the testimony would be false, then there is criminal liability. Subornation of perjury, of course, requires a perjurious statement to be made. Perjury under federal law is a false statement made under oath about a material matter.[98] If a witness tells the literal truth, he cannot be convicted of perjury[99] and, consequently, the attorney who calls him to the witness stand cannot be convicted of subornation of perjury.

Consider a situation, however, in which a prosecutor actively encourages a police officer to commit perjury. Under federal law, the prosecutor would clearly be guilty of subornation of perjury because he knew that the police-witness would lie, he was responsible for that perjury (by the encouragement and by his subpoena to the officer), and the police-witness himself knew that the testimony he was to give would not be the truth. However, if a prosecutor discovers that a police-witness lied after the witness's testimony, the prosecutor would not be guilty of a crime because subornation of perjury requires some *ex ante* procurement and knowledge. This does not mean, necessarily, that the prosecutor does not have an ethical obligation to make a disclosure to the court if he discovers *ex post* that a witness had lied.[100]

What if instead of the prosecutor actually telling the officer to lie, the prosecutor simply knows that the officer will lie yet calls him anyway? The prosecutor would still be guilty of subornation. This would include situations in which the prosecutor knows for sure that the police officer will lie (for example, he tells him to lie), knows he has a strong tendency to lie (for example, based on prior boilerplate testimony), or he has "good reason" to know that he might lie in the present case. In *Tedesco v. Mishkin*,[101] for example, an attorney was convicted of subornation of perjury after the witness practiced his testimony in front of the attorney, the attorney knew that the testimony was false, but yet he still called and examined the witness and elicited the false testimony. When in doubt, the subornation statute seems to require that the prosecutor confront the witness and find out for sure whether the police-witness will testify truthfully.

A particular police department's history of in-court deception may be relevant to the determination of whether the prosecutor had *good reason* to believe that the officer will lie. What is a "good reason": a 25 percent chance, 50 percent, 75 percent? That is a question of fact for a jury to decide. Even though the fact that an officer comes from a police department with a high testilying rate might not be enough to convict a prosecutor of subornation, it might be enough to impose a duty on the prosecutor to investigate the officer's credibility beforehand. In *Petite v. United States*,[102] the Fourth Circuit held that if a defendant "should have known" that the testimony he or she procured was false, he or she can be liable for subornation. Thus a prosecutor might not know for sure that an officer may give false testimony but may still be held criminally liable if he *should have known* that it would be false. When should a prosecutor know that an officer will give false testimony? It seems logical to conclude that an officer from a department with a great deal of testilying is more likely to be a testiliar himself, based on pure probability.

If a reasonable prosecutor should have known *that the testimony would be false, then there is criminal liability.*

All of this is not to say that I think we should start zealously prosecuting prosecutors for subornation of perjury. It is simply an illustration that testilying can have legal consequences not only for the officer-witness, but also for the prosecutor who subpoenas the officer knowing or having reason to believe that the officer will lie. The problem though—and this is true in most public integrity prosecutions—is that members of one group (prosecutors) are not going to be eager to go after one of their own. This is true in police corruption, securities fraud, or any type of internal corruption: People will simply not "rat out," let alone prosecute, one of their colleagues unless they have good reason to do so.

In a jurisdiction in which prosecutors are within the police blue wall of silence,[103] it may be necessary for a higher-ranking prosecutor's office (the U.S. Attorney, state attorney general, or a special prosecutor) to investigate and prosecute widespread subornation of perjury by local prosecutors.[104] The problem with independent, outside investigations is that they break the *esprit de corps*, they are perceived as witch-hunts, and they cause fewer, good, ethical people to join prosecutors' offices. There is an argument, however, that all of those consequences are good things. The *esprit de corps* is what undermined the system in the first place. By cleaning up a given locale's justice system, it will encourage good people to become prosecutors, not scare them away.

On balance, however, the sheer cost—in terms of money, resources, reputations, and confidence—of using special prosecutors to prosecute local prosecutors makes such a solution infeasible as a way to eliminate testilying across-the-board. It punishes a peripheral, yet important, player in the testilying scheme but does not get to the core of the problem. It should therefore be reserved for situations in which prosecutors and police are so involved in corrupt activities, such as testilying, that there is no hope for change from within. In those cases, independent investigations and prosecutions may be necessary.

(b) *Ethical Rules*

Prosecutors are also subject to rules of ethics, as promulgated by state bar associations, courts, legislatures, and their employers. Violations of these rules can lead to disciplinary sanctions, including termination or suspension from the practice of law.

The Model Rules of Professional Conduct, drafted by the American Bar Association, are in effect in a number of states, and therefore are a useful starting point. Model Rule 3.3 provides in pertinent part: "A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false."[105] If a lawyer does not *know* the evidence is false, but "*reasonably believes* [it] is false," he or she has the *option* whether or not to offer it.[106] Interestingly enough, the Model Rules are less strict than the subornation statute.[107] Under federal law, subornation occurs even when the suborner "should have known or believed or . . . had good reason to believe that the testimony given would be false."[108] The Model Rules impose an obligation not to offer evidence only when the attorney has *knowledge* that the witness will lie. Federal criminal law seems to go further and prohibit introduction of evidence that the attorney *should know* or *has good cause to know* will be perjurious. For jurisdictions with similar subornation statutes, the good cause standard applies, not the Model Rules' knowledge requirement.

Assume for the moment we are in a jurisdiction that requires knowledge under both the criminal law and the rules of ethics. When does one *know* that testimony will be false? Where a prosecutor is encouraging a police officer to lie, not only is the act illegal as subornation of perjury (under either the knowledge or good cause standard), it is also violative of Model Rule 3.3 because the prosecutor is introducing evidence which he knows is false. The same result occurs when the prosecutor does not encourage an officer to testilie (aside from the necessary subpoena *ad testificandum*), but knows that the officer will commit perjury. If, on the other hand, the prosecutor knows that an officer has a propensity to lie under oath, but does not know that *in this case* he or she will lie, Model Rule 3.3 would appear to allow the prosecutor to get away with calling the officer to the stand because the prosecutor does not "know" for sure that the testimony is false. He is *permitted*, however, not to call the officer because he could have a reasonable belief that the officer would lie based on the officer's past behavior.[109] A similar result occurs in cases in which the prosecutor's suspicions are based on the testilying rate in an officer's police department. Model Rule 3.3's knowledge requirement excludes only testimony a prosecutor knows *for sure* will be perjurious.

The Model Rules ignore the reality of police perjury. Testilying is not an overt, openly talked about phenomenon. It is by definition clandestine. Furthermore, there is rarely direct evidence that a particular officer will lie in a particular case because the dispute boils down to the word of a police officer versus the word of an accused. Testilying becomes apparent only when one takes a macro-level view of an officer's history or the institutional nature of his department's police subculture. Cases in which prosecutors suspect testilying—either based on inklings about a particular officer (that he *might* testilie in this case, but the prosecutor is not sure) or based on the rate of testilying in a particular department—represent the heartland of testilying cases. The Model

The Model Rules ignore the reality of police perjury.

Rules leave cases of mere suspicion up to the discretion of the prosecutor.[110] Prosecutors will often fail to exercise their discretion not to call a police witness. They may not want to lose a case because "the constable has blundered."[111] They may share judges' concerns that it is unfair to disregard a police officer's testimony when it is only controverted by the self-serving statement of the accused. They may even share the officers' belief that it is acceptable to deceive the court in order to convict truly guilty defendants. Therefore, the Model Rules, as they are presently framed, do little to reduce testilying.

This epistemological dilemma—when does one know when one knows?—has been examined most prolifically in the hypothetical of a criminal defendant who tells his lawyer that he wants to testify falsely.[112] Little attention has been paid to prosecutors' obligations, though, because prosecutors are not in lawyer-client relationships with their police witnesses.[113] Even so, some of the same problems and issues arise as to the epistemological problem.

Monroe Freedman describes the ethical quandary of a defense attorney as a "trilemma."[114] A defense attorney is required to know everything about his client's case,[115] he must keep his client's communications in confidence,[116] but he must reveal those confidences to the court if the client insists on testifying falsely.[117] Some defense attorneys adopt an ostrich-head-in-the-sand approach. They simply ignore the first prong of the trilemma. They purposefully shield themselves from the Model Rule 3.3 prohibition against using perjured testimony by not asking their clients key questions about the alleged crime.[118]

I argue that in light of the prosecutor's heightened duty to seek justice, the good cause standard of the crime of subornation should be adopted by the ABA.

Can a prosecutor get away with such a tactic? It is doubtful, since the ostrich approach is usually shunned even for defense counsel.[119] Surely the standards are higher for prosecutors, since "[they are] the representative[s] not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."[120]

I argue that in light of the prosecutor's heightened duty to seek justice, the good cause standard of the crime of subornation should be adopted by the ABA. A prosecutor has the duty, in my opinion, to determine the veracity and truthfulness of all of his other witnesses, police officer or not. Specifically, I believe the ABA should adopt a new subsection to Model Rule 3.8, Special Responsibilities of a Prosecutor, as follows:

> The prosecutor in a criminal case shall: . . .
>
> (h) prior to an adjudicative proceeding in which the prosecutor will examine a witness under oath, investigate the truthfulness of the witness's intended testimony. If, upon discovering that the witness intends to lie, the prosecutor's duties shall be governed by Model Rule 3.3 and the requirements of justice. As to the testimony of a police officer, the prosecutor shall consider the frequency and nature of institutionalized perjury, if any, by the police officer in the past or in the officer's police department in determining whether the officer is likely to commit perjury.

This explicit approach essentially codifies the requirements of the federal subornation statute while taking into account the reasons and nature of police perjury. It is an expansion on Comment 5 to Model Rule 1.1: "Competent handling of a particular matter includes inquiry into and analysis of the factual . . . elements of the problem . . . ."[121]

If a prosecutor determines before a trial or hearing that his or her police witness intends to commit perjury, the prosecutor has several courses of action. He should first try to dissuade the officer from lying. If the officer still persists in testifying falsely, or if he or she refuses to acknowledge that his or her testimony will be false (but the prosecutor believes otherwise), the prosecutor should either not call the officer at all (if the necessary testimony can be established using another witness) or limit the questioning to areas in which the officer will not lie. If the necessary testimony can be obtained only by asking the police officer a question to which the prosecutor knows the officer will lie, the prosecutor should so warn the officer. If the officer does in fact lie, the prosecutor should notify the court and opposing counsel accordingly.[122]

IV Going Beyond the Minimums

In Section III, I established that prosecutors have a duty to investigate the purported testimony of their police witnesses and not to allow perjured testimony to enter into the record of judicial proceedings. In this section, I examine how prosecutors can go beyond these minimum requirements and take a proactive role in combating police perjury, like any other crime. I propose that prosecutors adopt a multi-tiered, graduated approach in dealing with testilying. The proper response will be dictated by the officers involved, the nature and frequency (if at all) of testilying in a given jurisdiction, and the resources of the prosecutor's office.

(a) *The Duty to Educate*

First and foremost, prosecutors should participate in the training of police officers. This is a preemptive step; it aims to stop testilying before it even begins. Because testilying occurs most often in search and seizure hearings,[123] prosecutors should be actively involved in educating officers about how to investigate crimes constitutionally.[124] This includes giving specific information about the various exceptions to the warrant and probable cause requirements of the Fourth Amendment. The instructions should be practical, not theoretical. As new developments in search and seizure law occur, prosecutors should be involved in the retraining of officers.

Part of the instruction should be how to testify properly. The Queens County District Attorney's Office accomplishes this through mock trials. While mock trials are a good starting point, they cannot be the be-all-and-end-all of the prosecutorial response to testilying. There should be frank, open discussion from prosecutors—and maybe even former jurors—about the professional, legal, and ethical consequences of perjury. Prosecutors must impress on officers that they will lose cases if they commit perjury. They should be warned that guilty defendants will go free. They should also be warned that prosecutors will not protect them. At the same time, police should be praised when they testify truthfully. Prosecutors should not place blame on police for losing a case unless it is in a constructive fashion. The point should be to educate, not to complain.

(b) *The Duty to Counsel*

When a prosecutor develops knowledge that a particular officer is a testiliar or is planning on testilying in one of the prosecutor's cases, the prosecutor's first response should be to dissuade the officer from committing perjury. This is the approach recommended by the Model Rules[125] and by the Supreme Court.[126] The prosecutor should calmly explain the consequences of perjury and other forms of in-court deception. The officer should know that the prosecutor will not protect him if he lies. He should be forcefully told that if he does commit perjury he will be prosecuted. The same no-tolerance stance that has been so effective in combating street crime should be used to address testilying.[127]

Conversely, if an officer testifies truthfully, the prosecutor should show appreciation, even if valuable evidence was excluded because of the officer's blunder. Such a case should be used as a learning tool. The officer should leave the courtroom or the prosecutor's office knowing what went wrong in the search and how to prevent a repeat occurrence. The prosecutor should not place blame on the officer or try to divert blame to the judge or on a "legal technicality." Above all else, the officer must leave the situation knowing that he or she did the right thing by testifying truthfully. Yes, it is somewhat perverse to say that we need to reward police officers for being honest. That should be a given. But given the reality today of police perjury, it is not. Prosecutors are in an excellent position to shape the outlook of individual officers through their role as quasi-judicial superiors.

(c) *The Duty Never to Subpoena a Particular Officer*

It is possible to imagine a situation in which a veteran prosecutor, having dealt with police officers from a particular jurisdiction for many years, knows that a particular officer has a habit of testilying. In those cases, it is possible that the prosecutor could conclude that he or she can never trust that particular officer, at least not without corroborative evidence. In cases that rest solely on the results of search and seizure suppression hearings, the prosecutor may have no choice but to dismiss the charges against the defendant. If a police officer's testimony can never be relied on because he testilies so often, the prosecutor will have no way of knowing whether or not a particular search was legal or not. If the legality of a search or seizure is in question, a defendant's actual guilt may be in question as well. Some testilying involves fabrication of evidence—"frame-ups."[128] Ethical standards forbid a prosecutor from "permit[ting] the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause."[129]

Such a significant step as losing *complete* confidence in an officer's honesty is a very serious one. It should be reserved for cases in which the prosecutor, after consultation with superiors and other attorneys who have worked with the officer, is convinced that the police officer in question is a chronic liar about dispositive issues in cases. The personal consequences of such an action for the officer may be strong. The prosecutor's ethical decision not to call a particular officer to the stand may be akin to an adverse personnel decision for the officer. He may be forced into desk duty by his superior officers because the prosecutor has said that his uncorroborated testimony cannot be trusted. The responsibility will be on the testiliar to earn the trust of the prosecutor back. Either that, or he might resign or be terminated.

(d) *The Duty to Prosecute*

If despite extensive training, counseling, and lost cases, a particular officer persists in testilying in future cases, the prosecutor may have no choice but to prosecute the officer for perjury, obstruction of justice, or other crimes. Because prosecution of police officers will lower morale, increase police-prosecutor distrust,[130] and undermine public confidence in the justice system, this action should be taken only after discussion at the highest levels of the prosecutor's office. It should be reserved for particularly corrupt officers. For others who will not change, forced resignation may be more appropriate.

(d) *The Duty Never to Subpoena an Entire Police Department*

A similarly draconian measure is one that, to my knowledge, has never been undertaken. If testilying is systemic and ingrained in a particular police department or other law enforcement agency, the prosecutor's office may have no choice but never to offer the testimony of any officer in that department or agency. This is such a drastic step that it should be taken only after all of the other steps in this Section have been tried. Even then, fair warning should be given to the department so it can reform itself. The ultimate decision to implement such a policy should rest solely with the head of the prosecutor's office after extensive consultation with senior trial counsel, elected officials, judges, and police officials. This is the ultimate last resort. It signifies that testilying is so bad in a department that the prosecutor has lost all trust and confidence in anything the department produces. As a practical matter, cases will have to be investigated by the prosecutor's office's in-house detectives, if they exist. If not, state police or special deputies will need to be used.

This approach is so severe that it will probably never be used. It should not have to be. But it signifies the seriousness of police perjury. If police officers lie, their results cannot be trusted. If their results cannot be trusted, judges and juries will be making their decisions of guilt or innocence based on misinformation. Such arbitrary and capricious results cannot be used to send potentially innocent people to jail. In a society that values due process, they cannot be used to send the guilty to jail either.

V Criticisms of My Approach

Before concluding, I pause briefly to consider some potential problems with my argument. First, one could argue that testilying does not exist or at least is not as bad as I (or others) make it seem. That may be true. But assuming that is true—that testilying is not a real problem—is there any harm in what I propose? The first step in my graduated approach to testilying is education. It cannot hurt police to learn more about the Fourth Amendment. It does not hurt prosecutors or police to have the former investigate the latter's testifying record. Or does it? Surely my approach of using prosecutors as a way to reduce testilying will cause some antagonism if a prosecutor believes he or she has uncovered testilying. But what if the prosecutor does not find any wrongdoing? Where is the harm?

Prosecutors and police are usually on the same side of a criminal case: They want to send guilty people to jail. My approach argues that there are legal and ethical consequences for prosecutors who know or should reasonably know that their witnesses will lie. The result is that prosecutors may choose not to investigate police officers' histories, may not engage in sufficient trial preparation, and may sim-ply stick their proverbial ostrich heads in the proverbial sand. The result would be to push testilying further behind the blue wall of silence. Worse yet, prosecutors who are fearful of their own legal and ethical jeopardy may decline to prosecute cases where guilt hinges completely on police testimony. The result is that guilty defendants will go free.

My response to that argument is that it is acceptable to let a few guilty defendants go free in order to ensure that the process of determining guilt is fair. If we impose heightened ethical standards on prosecutors to be more cautious and not to believe *without question* the testimony

of police officers, society could be assured that its criminal justice system is fair and is convicting guilty people and acquitting the innocent.

Another criticism is that academic pontifications about how prosecutors should behave are useless in the "real world." After all, who will keep tabs on the prosecutors? Surely there are special prosecutors, state attorneys general, the Department of Justice, and others that can prosecute the prosecutors. But is that the answer I am proposing? Not necessarily. In our legal system, we tend to put our faith in laws, not necessarily the people who enforce them. If academia can set the bar or the moral compass for prosecutors—even knowing that it may be difficult for all prosecutors to always resist the temptations of accepting testilying—at least then we promote awareness of the problem.

Conclusion

My attempt here was not to argue that all police are perjurers or otherwise dishonest. Probably most are not. But the evidence is sufficiently strong to suggest that police officers, as a whole, commit perjury or other forms of testimonial deception more often than most of us are comfortable with. The question is what to do about it. In fashioning solutions to problems that involve people's livelihoods, it is critical that moderation guide our approach. Members of the defense bar, especially, have an understandable tendency to translate the misdeeds of a handful of police officers and prosecutors into an indictment of the entire system. A better approach is for each element of the criminal justice system—police, prosecutors, defense counsel, and judges—to work together to solve this problem. That is why the first step in my graduated approach is education. If search-and-seizure law is considered a "legal technicality" because it is too complicated to understand, prosecutors need to clarify it. Officers should learn from their mistakes and receive appropriate rewards for following the rules. The public prosecutor is in a perfect position to deal with testilying. In most jurisdictions, cases cannot be brought to court without a prosecutor initiating charges. Prosecutors can exercise their discretion in the charging stage to decline to prosecute cases that they feel were based on unconstitutional evidence. In preparing police witnesses for trial, they can insure that officers do not misunderstand their preparation as a go-ahead for perjury through boilerplate testimony. When a prosecution team loses a case because a police officer testified truthfully but key evidence was excluded, the prosecutor can make sure that the officer does not come away with the wrong message. The prosecutor is in a constant war against the win-at-any-cost attitude that often permeates the police subculture.

In the end, however, prosecutors should not and cannot tolerate testilying, no matter how small the lie or infrequent the occurrence. Perjury is a fraud perpetrated on the court. It deprives the accused of his right to a fair trial. It distorts results. It makes a mockery of our justice system.

The Mollen Commission, investigating police corruption in the New York City Police Department in the 1990s, began the section of its report on testilying with a quote from Sir Walter Scott: "Oh what a tangled web we weave when first we practice to deceive."[131] If anything, members of the criminal justice system need to bring this topic to the forefront, so we can all better understand the complexity of the dynamics of testilying.

NOTES

I would like to thank Leslie Griffin, Erin O'Hara, and John Kleinig for their helpful comments and suggestions.

1 *See* 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed. 1821) ("[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."); *see also* S. GILLERS, REGULATION OF LAWYERS 345-368 (5th ed. 1998) (outlining the debate about the adversary system).

2 Some police officers attempt (erroneously) to justify testilying by arguing that the use of lies to convict those they "know" are guilty promotes truth seeking because then the guilty are not set free. *See infra* notes 49-72 and accompanying text.

3 *See* COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PRACTICES OF THE POLICE DEPARTMENT, CITY OF NEW YORK, COMMISSION REPORT § 4, at 36-43 (1994) (Milton Mollen, Chair) [hereinafter cited as MOLLEN COMMISSION REPORT].

4 *See infra* notes 10-27.

5 *See infra* notes 49-72 and accompanying text for further discussion of how some officers justify testilying.

6 *See* BLACK'S LAW DICTIONARY 1139 (6th ed. 1990).

7 *See infra* note 69 and accompanying text.

8 *See* Barker & Carter, *"Fluffing Up the Evidence" and "Cover-*

ing Your Ass": Some Conceptual Notes on Police Lying, 11 DEVIANT BEHAVIOR 61 (1990).

9 *See, e.g.*, Rosen, *The Perjury Trap*, NEW YORKER, Aug. 10, 1998, at 28.

10 A.M. DERSHOWITZ, REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM 55 (1996) [hereinafter cited as A. DERSHOWITZ, REASONABLE DOUBTS].

11 *See* Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037, 1043 (1996); *see, e.g.*, Commonwealth v. Lewin, 542 N.E.2d 275 (Mass. 1989).

12 *See* Chin & Wells, *The "Blue Wall of Silence" As Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT.L. REV. 233 (1998); *see, e.g.*, People v. Berrios, 270 N.E.2d 709 (N.Y. 1971); People v. McMurty, 314 N.Y.S.2d 194 (N.Y.C. Crim. Ct. 1970).

13 *See* J. KLEINIG, THE ETHICS OF POLICING 146 (1996).

14 *See id.*

15 *See* A. DERSHOWITZ, REASONABLE DOUBTS, *supra* note 10, at 55.

16 *See* Slobogin, *supra* note 11, at 1042.

17 *See* Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 32 (1994).

18 *Id.*

19 *See* MOLLEN COMMISSION REPORT, *supra* note 3, at 38; Sexton, *Jurors Question Honesty of Police*, N.Y. TIMES, Sept. 25, 1995, at B3.

20 *See* MOLLEN COMMISSION REPORT, *supra* note 3, at 38.

21 *See* Sexton, *supra* note 19, at B3 (noting that "[i]n Brooklyn, nearly 40 percent of criminal prosecutions involve drug or gun cases, and the vast majority of those cases are built exclusively on the testimony of police").

22 314 N.Y.S.2d 194, 195 (N.Y.C. Crim. Ct. 1970) ("For several years now, lawyers concerned with the administration of criminal justice have been troubled by the problem of 'dropsy' testimony.").

23 *Id.* at 196.

24 *Id.*

25 *See id.*

26 *Id.* at 198.

27 *Id.* at 195.

28 Reitz, *Testilying as a Problem of Crime Control: A Reply to Professor Slobogin*, 67 U. COLO. L. REV. 1061 (1996); *see also* Wolchover, *Police Perjury in London*, 136 NEW L.J. 181 (1986).

29 *See* Wolchover, *supra* note 28, at 181.

30 *See id.*

31 *See generally* J. KLEINIG, *supra* note 13, at 67-80.

32 A.M. DERSHOWITZ, THE BEST DEFENSE, at xxi (1982) [hereinafter cited as A. DERSHOWITZ, THE BEST DEFENSE].

33 Zales, *Reasonable Doubts: The O.J. Simpson Case and the Criminal Justice System*, 69 WIS. LAW. 37 (Dec. 1996) (book review).

34 *See* Reitz, *supra* note 28, at 1065.

35 270 N.E.2d 709 (N.Y. 1971).

36 *Id.* at 713.

37 SPECIAL COMM'N ON CRIMINAL JUSTICE IN A FREE SOC'Y, 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 21 (1988) (Samuel Dash, Chair).

38 *See id.*

39 Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75 (1992).

40 *See* Reitz, *supra* note 28, at 1063.

41 *See* Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987).

42 *See id.* at 1051.

43 *See, e.g.*, A. DERSHOWITZ, REASONABLE DOUBTS, *supra* note 10; A. DERSHOWITZ, THE BEST DEFENSE, *supra* note 32; Dershowitz, *Is Legal Ethics Asking the Right Questions?*, 1 J. INST. STUDY LEGAL ETHICS 15 (1996) [hereinafter Dershowitz, *Right Questions*]; Dershowitz, *Controlling the Cops: Accomplices to Perjury*, N.Y. TIMES, May 2, 1994, at A17 [hereinafter Dershowitz, *Accomplices*].

44 *See* Wolchover, *supra* note 28.

45 *See, e.g.*, Younger, *The Perjury Routine*, THE NATION, May 8, 1967, at 596-97.

46 *See, e.g.*, People v. McMurty, 314 N.Y.S.2d 194 (N.Y.C. Crim. Ct.1970).

47 *Id.* at 195-96.

48 MOLLEN COMMISSION REPORT, *supra* note 3, at 36.

49 Slobogin, *supra* note 11, at1059.

50 *See* A. DERSHOWITZ, REASONABLE DOUBTS, *supra* note 10, at 42; A. DERSHOWITZ, THE BEST DEFENSE, *supra* note 32, at xxi; J. KLEINIG, *supra* note 13, at 146; MOLLEN COMMISSION REPORT, *supra* note 3, at 37; Slobogin, *supra* note 11, at 1044.

51 *See* Taylor, Jr., *For the Record*, AMERICAN LAWYER, Oct. 1995, at 72 ("[The Exclusionary Rule] sets up a great incentive for people to lie.") (quoting Judge Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit).

52 People v. Defore, 150 N.E. 585, 587 (1926) (Cardozo, J.).

53 367 U.S. 643 (1961). *Mapp* held that evidence illegally obtained by state law enforcement officers must be excluded from trial. It was an application of the Exclusionary Rule that had been in force in federal court since *Weeks v.United States*, 232 U.S. 383 (1914).

54 *See* Comment, *Effect of Mapp v. Ohio on Police Search and Seizure Practices in Narcotics Cases*, 4 COL. J. LAW & SOC. PROBS. 94 (1968).

55 *See id.*

56 *See* A. DERSHOWITZ, REASONABLE DOUBTS, *supra* note 10, at 42.

57 *See* Slobogin, *supra* note 11, at 1044.

58 *See* A. DERSHOWITZ, REASONABLE DOUBTS, *supra* note 10, at 42.

59 *Id.* One of the dangers of such draconian means of law enforcement is that innocent people will falsely confess.

60 *See* Slobogin, *supra* note 11, at 1038-39.

61 *See* Neuhard, *Foreward: The Right to Counsel: Shouldering the Burden*, 2 T.M. COOLEY J. PRAC. & CLINICAL LAW 169, 169 (1998).

62 Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311 (1994) [hereinafter cited as Cloud, *Dirty Little Secret*].

63 *See* Sexton, *supra* note 19, at B3.

64 *See* Slobogin, *supra* note 11, at 1038-39.

65 *See generally* S. GILLERS, *supra* note 1.

66 *See* MOLLEN COMMISSION REPORT, *supra* note 3, at 35.

67 *See id.* at 29.

68 *See* Chin & Wells, *supra* note 12, at 246-47.

69 *See* Green v. Scully, 850 F.2d 894 (2d Cir. 1988) (verbal deception in confessions is not unconstitutional). *But see* Florida v. Cayward, 552. So. 2d 971 (Fla. App. 1989) (creation of fake documentary evidence for use in confession unconstitutional).

70 *See* J. KLEINIG, *supra* note 13, at 149.

71 *See generally id.* at 68-70.

72 *See id.* at 147.

73 A. DERSHOWITZ, REASONABLE DOUBTS, *supra* note 10, at 50

74 *See id.* at 48; J. KLEINIG, *supra* note 13, at 148 ("Although the courtroom may be an alien environment for the police officer, it can be made easier by a friendly prosecutor. Police and prosecutors are often on the same side, and it can sometimes be as important to the prosecutor as it is to the police that a conviction is secured. . . . [P]ressure or encouragement to engage in some form of testimonial deception may come from the prosecutor's office."); MOLLEN COMMISSION REPORT, *supra* note 3, at 42 ("Members of the law enforcement community, and particularly defense attorneys, told us that the same tolerance is sometimes exhibited among prosecutors. Indeed, several former and current prosecutors acknowledged—'off the record'—that perjury and falsifications are serious problems in law enforcement that, though not condoned, are ignored."); Chin & Wells, *supra* note 12, at 261 ("Police criminality, including police perjury, even where guilt is clear, has not traditionally been dealt with aggressively by prosecutors."); Cloud, *Dirty Little Secret, supra* note 62, at 1311-12 ("[P]rosecutors . . . know that police officers lie under oath."); Cloud, *Judges, "Testilying," and the Constitution*, 69 S. CAL. L. REV. 1341, 1353 (1996) ("Others are responsible for dealing with the problem as well. Prosecutors are duty-bound to take steps to insure that their police witnesses obey the law, and not to sponsor witnesses who commit perjury.") [hereinafter cited as Cloud, *Judges*]; Dershowitz, *Right Questions*, *supra* note 43, at 23 ("The time has come to shift the focus back to prosecutors. The time has come for the courts to understand that they are a serious part of the problem."); Hentoff, *When Police Commit Perjury*, WASH. POST, Sept. 5, 1985, at A21; Rudovsky, *Why It Was Hands Off on the Police*, PHILA. INQ., Aug. 28, 1995, at A7.

This is also the case in London. *See* Wolchover, *supra* note 28, at 183 ("... the casual and matter of fact way in which the Bar tends to refer to police perjury. It was regarded as a commonplace. Indeed, it is almost as if this state of affairs is not in the least regretted since it provides so much of their bread and butter.").

75 *See* Orfield, *supra* note 39. His results, although criticized scientifically by other authors, remain alarming.

76 *Id.* at 109.

77 *See id.*

78 *See id.* at 112.

79 *See id.*

80 *See* Dershowitz, *Police testilying must not be tolerated*, BOSTON GLOBE, Nov. 15, 1995, at A27 (paraphrasing NYPD Commissioner William F. Bratton, "When a prosecutor is really determined to win, the trial prep procedure may skirt along the edge of coercing or leading the police witness. In this way, some impressionable young cops learn to tailor their testimony to the requirements of the law."). *But see* Krauss, *Bratton Announces Plan to Train Officers to Testify*, N.Y. TIMES, Nov. 15, 1995, at B3 (comparing comment by Staten Island Assistant District Attorney David W. Lehr that police learn to testilie from aggressive trial preparation by prosecutors who will win at any cost with response by Queens District Attorney Brown, "I don't believe that happens in Queens County, and I would not tolerate it from any assistant working for me.").

81 *See* Orfield, *supra* note 39, at 111; *see also infra* note 23 and accompanying text for discussion of use of boilerplate testimony.

82 *See* MOLLEN COMMISSION REPORT, *supra* note 3, at 37.

83 *See* AMERICAN BAR ASS'N, STANDARDS RELATING TO PLEAS OF GUILTY 1-2 (1st ed. 1968).

84 *See* MOLLEN COMMISSION REPORT, *supra* note 3, at 37.

85 A. DERSHOWITZ, REASONABLE DOUBTS, *supra* note 10, at 57 (police perjurers have an "ace in the hole"—"[t]hey can testify against the very prosecutor's office that is empowered to arrest them. That is why so few cops are ever indicted for perjury.").

86 *See* Chin & Wells, *supra* note 12, at 261-62.

87 *See id.* at 263.

88 *See id.*

89 *See id.*

90 *See* Dershowitz, *Right Questions*, *supra* note 43, at 17.

91 *See Berrios*, 270 N.E.2d at 709. The New York Court of Appeals disagreed and put the burden on the defendant.

92 *See* MOLLEN COMMISSION REPORT, *supra* note 3, at 42.

93 Krauss, *supra* note 80, at B3.

94 Sexton, *supra* note 19, at B3.

95 *See id.*

96 *See* Petite v. United States, 262 F.2d 788 (4th Cir. 1959), *remanded on other grounds*, 361 U.S. 529 (1960).

97 *See id.*

98 18 U.S.C. § 1621 (1994).

99 *See* Bronston v. U.S.,409 U.S. 352 (1973).

100 *See infra* Section IV(b).

101 629 F. Supp. 1474 (S.D.N.Y. 1986).

102 262 F.2d 788 (4th Cir. 1959), *remanded on other grounds*, 361 U.S. 529 (1960).

103 *See* discussion *supra* note 89 and accompanying text, describing instances in which prosecutors may be so close to the police that they too share the Machia-vellian justification for testilying.

104 This is the solution that Richard Hemley, of the New York Civil Liberties Union, advocated. *See* Hentoff, *supra* note 74, at A21.

105 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a) (1983); *accord* AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE, Standard 3-5.6(a) (1992) ("A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of falsity.").

106 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(c) (1983) (emphasis added).

107 *See* 18 U.S.C. 1622 (1994).

108 *Petite*, 262 F.2d at 794.

109 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(c) (1983).

110 *See id.*

111 *Defore*, 150 N.E. at 587.

112 *See* S. GILLERS, *supra* note 1, at 376 ("[T]he paradigmatic example has been the perjury of a criminal defendant.").

113 *See* Dershowitz, *Right Questions*, *supra* note 43, at 20.

114 *See* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975). He concludes that a defendant's right to counsel trumps the prohibition against using perjured testimony and that defense counsel should be allowed to put a criminal defendant on the stand, examine him in a normal fashion, and permit the introduction of perjury before the court. *See id.* Some states are in agreement as a matter of state constitutional law. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt.12 (1983). As a matter of federal constitutional law, a defendant does not have the right to testify falsely. *See* Nix v. Whiteside, 475 U.S. 157 (1986).

115 *See* AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE, Standard 4-3.26(a) (1992).

116 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

117 *See id.* Rule 3.3(a)(4).

118 The ABA does not support the use of this tactic. *See* AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE, Standard 4-3.2(b) ("Defense counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by counsel's knowing of such facts."). There is no corresponding duty for prosecutors.

119 *See, e.g., id.*

120 Berger v. United States, 295 U.S. 78, 88 (1935).

121 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 cmt. 5 (1983).

122 *See id.* Rule 3.3, cmts. 4-6.

123 *See supra* note 63 and accompanying text.

124 The ABA Standards for Criminal Justice are in accord: Standard 3-3.4 requires prosecutors to take "reasonable care" that their investigators are "adequately trained" in Fourth Amendment law. The Standard recommends that investigators should consult with prosecutors in "close or difficult cases." *See* AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE, Standard 3-3.4(a) (1992).

125 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3, cmt.11 (1983).

126 *See Nix*, 475 U.S. at 171.

127 Ironically, however, zero-tolerance policies themselves may be partially to blame for an increase in perjury and other in-court deception. The pressure from superiors to make arrests may be translating into pressure to lie and fabricate evidence.

128 *See supra* note 15, and accompanying text.

129 AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE, Standard 3-3.9(a) (1992).

130 Prosecutors and police are often in an uneasy working relationship; neither quite trusts the other. My impression in talking to police officers is that they consider many prosecutors to be naive kids with little world experience, their only "qualification" being a J.D. degree. Perhaps that stereotype is true in some cases. Regardless, the fact that these "kids" could be prosecuting police officers—the "good guys"—could only worsen whatever feelings of resentment prosecutors and police feel for each other.

131 MOLLEN COMMISSION REPORT, *supra* note 3, at 36.