Truth or Consequences: Police "Testilying"

by Jon Loevy

More lawyers are bringing more lawsuits against police officers than ever before. And more plaintiffs, it seems, are winning bigger verdicts—often far bigger. The result is driving the growth of a police misconduct civil rights bar, and this article examines the changes in public perceptions of police officers that have made that growth possible.

Who are they gonna believe—you or me? The year was 1982. The words were uttered by a now-infamous Chicago Police Commander named Jon Burge, who had brought back with him from the Vietnam War some controversial new interrogation techniques, including electric shock torture.

The man to whom the question was posed was Andrew Wilson, who had just been arrested for shooting and killing two Chicago police officers in cold blood. In a locked police interrogation room, Burge was trying to obtain a confession by attaching metal clips to Wilson's ears and other body parts, which were then charged with electricity. Wilson's bare skin was also pressed against a hot radiator, and he was smothered with a plastic bag.

At the time, Burge was a revered leader in the police department and a decorated war veteran. Wilson was a barely literate African American gang member with a lengthy criminal record. When Burge taunted Wilson with "Who are they gonna believe?" Burge assumed he knew the answer.

It turned out that Burge was wrong. Though it took more than a decade to do it, Wilson eventually won a civil lawsuit alleging police torture—despite having been convicted of the murders of the police officers. And now, some 28 years after the fact, Burge is himself under federal indictment. The statute of limitations has long since run on the torture itself, but prosecutors intend to prove that Burge lied in sworn discovery responses submitted in a civil case wherein he denied torturing Wilson and numerous other African American men accused of serious crimes. The Burge trial began in May 2010.

What changed? When I first started doing civil trials in police abuse cases in the mid-1990s, plaintiffs' lawyers would ask courts to give a jury instruction reminding jurors that all persons "stood equal before the law" and that jurors should thus not afford any more or any less credibility to statements made by witnesses or parties simply because they were police officers. In seeking that instruction, the plaintiffs' bar was looking for a way to counteract a prevailing assumption that the police were always right and should be believed.

Now, 15 years later, the lawyers for the police in Chicago sometimes seek the same sort of instruction—that is, to remind juries that the testimony of police officers deserves their fair consideration as well and that such testimony should not be automatically discounted just because they are police. Juror perception has seemingly reversed itself.

From exalted to suspicious. Back in the proverbial "old days," police officers in our society were set on a pedestal. Officers of the law could do no wrong. In old movies and our grandparents' memories, the police were by definition always the "good guys," regardless of the context.

To be sure, police officers are still respected and held in high esteem by most Americans, and rightfully so. They have a very difficult job, and most perform it honorably and well within the bounds of the law. In most communities, children are taught that police officers are heroes who, along with fire fighters and soldiers, are fighting a just fight on behalf of all of us.

But attitudes have changed, and unconditional deference no longer exists. What the police say happened is no longer accepted without question. This development has opened the door to lawsuits that would not have been brought in the past.

And all of that assumes "mainstream" opinions. In some minority communities, the rebuttable (or even irrebuttable) presumption is that police officers are always lying.

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"Testilying." Police officers themselves are not without blame for this change in attitudes. Many criminal law veterans firmly believe that the police profession has lost some of its respect for truth in the courtroom. Criminal defense attorneys insist that "testilying" by police officers, as it is sometimes referred to, has become so endemic in criminal cases that it has become the norm. The prosecutors know they are lying, the judges know they are lying, and yet the police lie anyway.

Judge Jack Weinstein, a 40-year veteran of the federal bench who has written for LITIGATION, drew media headlines last year for describing what he perceived as "repeated, widespread falsification" by some (but not all) arresting New York City police officers. He cited as evidence the "[i]nformal inquiry" he and other judges of the Southern District of New York conducted, "as well as knowledge of cases in other federal and state courts." Judge Weinstein was simply performing the now-required *Iqbal* "plausibility" determination regarding a claim of false arrest, but he was calling it as he saw it.

Massachusetts District Court Judge Mark Wolf kicked off a similar community soul-searching in Boston last spring by writing about the "long and recent history" of false testimony in court by Boston police officers. Judge Shira Scheindlin of the Southern District of New York, drawing on close to 20 years of judicial experience, basically laughed out of court an affidavit suggesting that the NYPD vigorously investigates every allegation of false testimony and perjury.

Several scholarly law review articles have studied and documented this trend, including a study published in the *University of Chicago Law Review* (54 *U. Chi. L. Rev.* 1016) that found that 76 percent of the narcotics officers responding to a survey shaded facts to establish probable cause. Last year, *Wall Street Journal* reporter Amir Efrati cited a survey of prosecutors, defense attorneys, and judges in Chicago that estimated that police officers commit perjury in 20 percent of the cases in which a defendant claims evidence was improperly seized. Amir Efrati, "Legal System Struggles with How to React When Police Officers Lie," *Wall St. J.*, Jan. 29, 2009, at A12.

Testifying before Congress in the midst of the Clinton impeachment scandal, Alan Dershowitz noted that "all objective reports" by various police commissions, such as the Mollen Commission in New York, "point to a pervasive problem of police lying, and tolerance of the lying by prosecutors and judges, all in the name of convicting the factually guilty whose rights may have been violated." Testimony before the House Judiciary Committee, Dec. 1, 1998. Dershowitz cited the comments of Judge Alex Kozinski, now the chief judge of the Ninth Circuit, who once told *The American Lawyer*, "It is an open secret long shared by prosecutors, defense lawyers and judges that perjury is widespread among law enforcement officers." Dershowitz also referred to the estimate by the former police chief of San Jose and Kansas City that "hundreds of thousands of law-enforcement officers commit felony perjury every year testifying about drug arrests."

What is going on here? Police officers, after all, are sworn to uphold the law. An important part of the job is to go to court and bear witness. How could police perjury become so commonplace that the word to describe it—testilying—can be found on Wikipedia?

A key corrupting motivation is the infamous War on Drugs, a battle of attrition now slogging into its fifth decade. For whatever reason, the judicial system has too often decided that the goal of securing drug convictions outweighs the integrity of the process.

It might help to take a step back: The Fourth Amendment protects the right of all Americans to be free from unreasonable searches. That this protection extends to drug dealers is an inconvenient reality. Most peddlers of illegal substances and their customers take pains to avoid transacting business in the plain view of police officers, many of whom wear distinctive uniforms and drive cars clearly identifying themselves as enforcers of the law. And the unmarked, boxy, four-door sedans with the distinctive license plates are not fooling anyone either.

Some police officers have become frustrated with the inefficiency of being required to wait to catch criminals actually engaged in crime. Cutting corners is surely human nature. It is no secret that in some neighborhoods, particularly those designated by the police as "high crime," vehicle stops and personal searches without probable cause are routine.

Once drugs or guns are discovered, police witnesses must come up with an explanation for why they had a right to search for them in the first place. Hence the "slippery drugs" epidemic afflicting drug dealers across America: Whenever they get near police officers, criminals seem to have a habit of dropping their drugs (and guns) on the ground and into plain view. Or perhaps there are no turn signals on any cars in poor neighborhoods, leading to the need for an inordinate number of traffic stops on that basis.

How many times can the judges and prosecutors read the same police reports describing butterfingers or suspicious bulges? Criminal defense attorneys complain that the police invariably get on the stand and describe furtive gestures or picture-perfect chains of custody (the suspect and the drugs

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"never left my sight" during foot chases), all bearing no relationship whatsoever to what actually happened. Meanwhile, the judges and the prosecutors know the score, yet they tolerate it. Drug trials can become a cynical parade of lying police officers.

Once this line is crossed, things get fuzzier in other ways as well. So many of my own clients, for example, describe being told by police officers that they could be released from custody if they provide the police with a gun to inventory, that I have to believe this is a real trend, at least in the city where I practice. And once a police officer accepts that it is permissible to lie to defeat the exclusionary rule, it is not such a big jump to telling other lies necessary to keep cases intact. Once an officer decides that the conviction is more important than the truth, a real problem emerges.

Many readers will be unwilling to accept that all police officers who participate in this system are "corrupt" in the traditional sense. But that is not what I am saying. The police officer who invents probable cause to have searched a person who was illegally carrying drugs is not stealing money or otherwise going rogue; he reaps no particular personal benefit,

except perhaps higher arrest statistics. Rather, the officer is simply participating in a system that, in some cases and in some cities, has come to expect him to read from an invented script so that drug defendants will not go free.

The charade is tolerated in criminal courts because the ends are seen as justifying the means: Drug convictions are obtained, often (it is to be hoped) in cases in which the accused actually had drugs. The only downside is that the truth is stretched a bit.

But there are consequences. Even if the police officer soothes his conscience with a good-faith basis to believe that the suspect is guilty—and if not this time, then some other time—those officers who basically are expected to lie at ridiculous drug trials inevitably become jaded about the process. When it is no longer about "the truth," the system takes a heavy body blow. As an appellate justice in Oklahoma recently put it, "How does a law enforcement officer accept a message that it is permissible to lie to obtain evidence, but not permissible to lie in a suppression hearing when the conviction or release of a murderer is in the balance?"

Part of the problem is that there are no consequences for testilying. Try to think of a way in which a police officer would be taken to task for pushing the truth too far to try to secure a criminal conviction. In the real world, there is none. Quite the opposite, those who decline to do it can find themselves shunned or even penalized for poor productivity.

Some blame obviously lies with prosecutors. The problem would not exist if it was not tolerated. Yet, the idea that the prosecutor would call out a police officer for stretching the truth in a suppression hearing is almost inconceivable. In many jurisdictions, it simply does not happen. Not sometimes. Never. That is a problem.

But prosecutors do not bear the entire blame. One does not get very far in this profession by criticizing judges (especially in magazines that judges read), but I feel obliged to share my own view that judges, too, bear part of the responsibility. In criminal cases, particularly in state courts, some judges simply shield their eyes and deny virtually every suppression motion, no matter how counter-intuitive the police testimony.

But the judicial share of blame also extends to those judges who merely reject police testimony when it becomes too absurd to credit. Most judges will go no further than simply granting a suppression motion or acquitting a criminal defendant. All too rare is the judge who is willing to call out a lying police officer for lying in anything other than the most indirect way. Even when evidence unequivocally proves falsification (say in a videotape), judges are loath to brand an officer a falsifier.

This judicial reluctance to call out police perjury is motivated by pragmatic concerns. For one thing, it is not as if the witness is lying for personal gain; she is simply trying to do her job, the socially worthy goal of which is to put criminals behind bars. On a moral level, the lie seems less reprehensible.

Also, when a judge, particularly a federal judge, rips a police officer for lying, the criminal defense bar (which, like all lawyers, is increasingly networked) is going to use that conclusion to call into doubt every one of that officer's other cases, now and in the future. Some genuine criminals are going to catch an undeserved windfall. A sharply worded judicial rebuke also could derail an entire career, and plenty of judges are loath to be responsible for doing that.

Moreover, those in the judicial system rarely follow up with the police department (or anyone else) when a police officer has been deemed untruthful under oath. It is hard to blame them: It is not as though there is any system or mechanism in place to meaningfully review complaints of untruthful testimony by law enforcement, and the bodies that should be leading the charge—the police officers' employers, the nation's police departments—do not appear to have any interest whatsoever.

The *New York Times* published an article on that topic that has already been cited in several judicial opinions across the country. *See* Benjamin Weiser, "Police in Gun Searches Face Disbelief in Court," *N.Y. Times*, May 12, 2008. After examining more than 1,000 court dockets in gun cases, reporter Benjamin Weiser came to the conclusion that even when judges have rejected police officer testimony as disturbingly untruthful, nothing ever happens beyond a ruling adverse to the state in that particular case. The judge might find the sworn testimony of the police witnesses patently incredible or just plain false, but that is the end of it. Every prosecutor and judge who was interviewed seemed surprised when asked if perhaps something more should happen.

Fortunately, not everyone is willing to look the other way. Last year, for example, Boston Police Commissioner Ed Davis took a stand. As an antidote to the "Thin Blue Line," Davis proposed the "Bright-Line Rule"—any police officer who the department finds has lied is fired. In Boston, lying is no longer acceptable in court, in police reports, or in response to internal investigations. No warning, no suspensions, no matter how distinguished the career. As Davis explained, "Dishonesty is

inconsistent with the duties of a police officer. . . . We are paid to be witnesses, and when we are untruthful, the system breaks down." Dick Lehr, "A New 'Bright-Line Rule' Against Lying," *Boston Globe*, July 31, 2009.

To be sure, there are plenty of other police departments that rise above this temptation. My experience has been that particular police departments, like many organizations, tend to have distinctive personalities, usually reflecting the prevailing attitudes of the supervisors. Well-run departments with strong leadership do not tolerate police perjury, and the members of those institutions act accordingly. Nor is it strictly a big-department/small-department dichotomy; some departments in large municipalities do a much better job than others.

But the sad state of affairs is that a police department made the news by deciding that it was going to start taking seriously the problem of police perjury. Other municipalities (including the one where I practice, Chicago) have no such commitment to the truth.

Testilying slippage. Is it any surprise that police officers who are all but encouraged to lie in drug cases bring the practice of testilying to civil cases as well? The "justification" might not be as clear-cut as incarcerating drug criminals, but there is apparently not much of an intellectual jump to civil lawsuits brought by people with grievances viewed as unworthy. The fact is that once the oath doesn't mean anything, then it doesn't mean anything in any kind of case.

That is not good for all kinds of reasons. It necessarily carries over to how police officers act and are perceived in civil trials. The trials themselves often become "team sports," with the police witnesses lining up with one another in a unified front. The truth is sacrificed for the purpose of winning the case.

At this point in my own career, I have pursued several hundred cases involving allegations of police abuse, involving countless police defendants and witnesses. Yet the next police officer who admits to witnessing another police officer committing any abuse on the street will be the very first. Even in cases with independent witnesses and corroborative proof, the police witnesses *always* refuse to implicate another member of the fraternity. The persistence of this vow of silence is truly as impressive as it is disturbing.

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I suppose it remains possible that every one of my clients, along with every one of their supporting witnesses, was lying about police abuse. But I don't think so. Like most lawyers in this line of work, we must choose our cases very carefully and take on only those where we genuinely believe the police did something wrong. Purely from a statistical standpoint, some police officers in some of my cases must have witnessed some sort of abuse. Yet, they never, ever admit it. The most a police witness has ever done is claim to have turned his back or left to fill out a report or tied his shoe at the critical moment, thereby missing the action. And these are rare instances; most of the time, the police will toe the party line.

My belief is that jurors are increasingly aware of the problem, if not from their own experiences, then from pop culture. Movies such as *Training Day* (the story of rogue cops on a criminal rampage that drew an analogy to a gang of Chicago police officers in a recent Seventh Circuit opinion) and television shows like *The Wire* depict a morally fuzzy world in which officers dwell.

The outcomes in my cases have been consistent with a shift in juror attitudes along these lines. We recently tried a civil police shooting case that had some bad facts. At trial, the police defendants introduced into evidence two guns that supposedly belonged to our client, coupled with testimony from two police officers that our client supposedly punched one of them in the face before the officer shot him in self-defense.

However, long before there was ever any civil case, the officers wrote up a police report in which they had to justify why they confronted our client in the first place. Their contemporaneous explanation at the time of the arrest was that our 300-pound-plus client supposedly approached their police car, lifted his shirt to expose a gun in his waistband, and then took off running down the street, necessitating a chase.

The police account undoubtedly would have been sufficient to convince a judge not to suppress the gun evidence in a criminal case, but the jury in our civil case wasn't buying it. Our client's explanation that he was waiting outside his own home for a ride to a party when he was approached and frisked for no reason was far more plausible. When it came time for the jury to choose sides, they picked our guy and awarded almost $1 million.

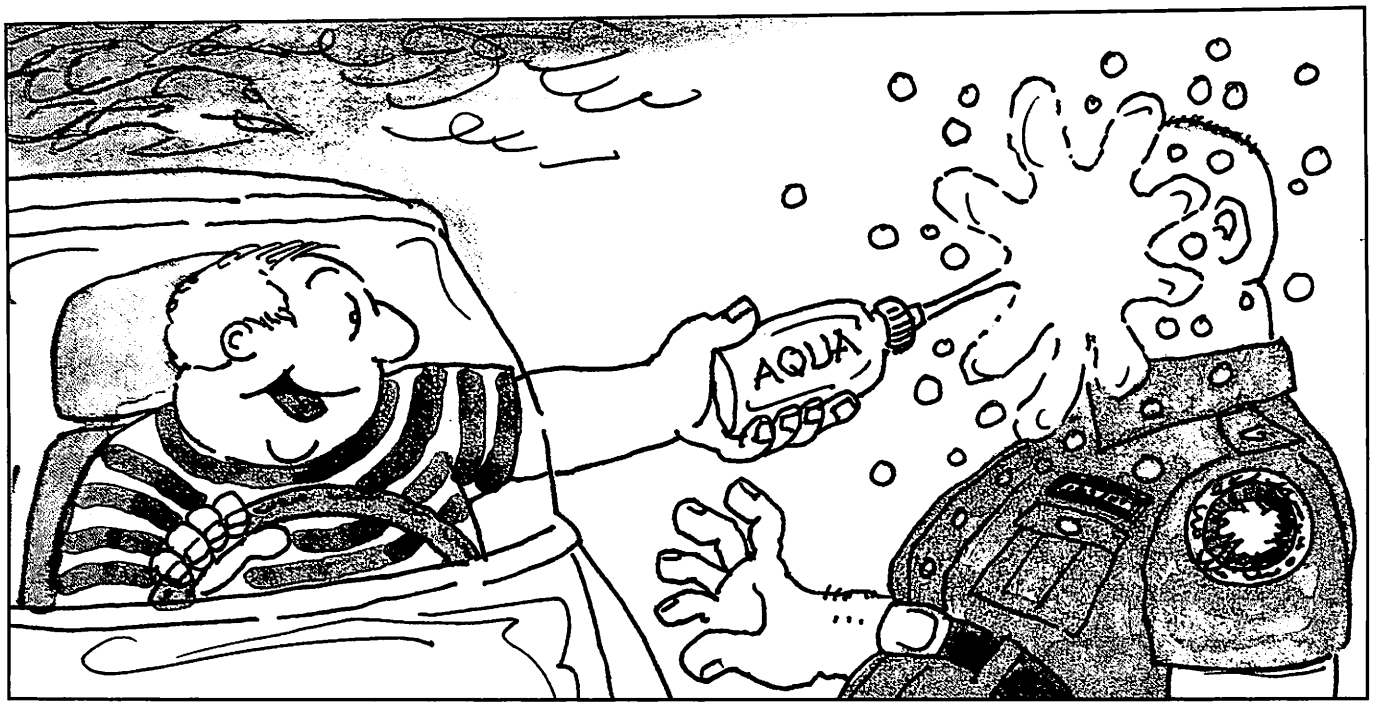
We had another case in which our client accused the police defendants of inserting a screwdriver in his rectum to search for drugs. The officers' original police report had stated that after they approached our client, he supposedly dropped a bag of drugs at their feet. Whatever else might have taken place during the encounter, that did not happen. When two police officers had to look the jury in the eye and claim that it did, their credibility evaporated, and the outcome reflected it.

Increased expectations. Ironically, police witnesses in court might also be victims of a rising standard of professionalism that our society expects from law enforcement officers. In the past, I think jurors were far more likely to accept the premise that if you are dumb enough to commit a crime, you should expect to get knocked around a little bit. And maybe more than a little bit if the suspect was disrespectful to the police or demonstrated any amount of physical resistance.

Indeed, in searching for older case law governing excessive-force claims, one is most struck by how little there is. The idea that "too much" force can be used in an arrest appears to be a relatively modern phenomenon. In the past, judges disposed of such claims on grounds of "de minimis" injuries in a way that they would not do so readily today.

I think most of us would view it as progress that police are expected to adhere to the law and refrain from violence, even when confronted by lawlessness. I know I do.

We had a case a few years ago that involved a kid who got into an argument with a traffic cop and was dumb enough to spray him with water and drive away. It was reprehensible and inexcusable conduct, as we freely admitted at trial. The problem that led to the lawsuit was that a mob of the officers' friends showed up at our client's home the next day and took him back to an interview room, where they put paper over the little window and proceeded to knee him and slap him around a number of times, using gay slurs. They did not beat



him viciously, but they did use violence against his person without any provocation or justification.

I practice law with my father, who, obviously, is part of an older generation. His view was that this was not a case and that no one would ever find for someone who sprayed a police officer with a water bottle, even if he or she believed him. We went to trial anyway, arguing that we as Americans have a right to expect more from the police. The jury agreed, awarding $15,000 in compensatory damages, but $2 million in punitives. Though the latter was totally uncollectible, the jury made its point.

Similarly, we had a trial in which our client was caught leaving a bar in a stolen car, after which he led the police on a low-speed chase before abandoning the vehicle and attempting to flee on foot. A group of police officers finally caught up to him after he jumped over a fence into—unfortunately for him—a fully enclosed lot. He surrendered and was on the ground when one of the police officers kicked him and cracked his ribs and then dragged him back toward the car. At trial, we argued that police officers who go on foot chases experience heightened levels of adrenaline, which can lead to increased aggression. We even considered having an expert testify on that subject.

One can certainly imagine a defense where it would be the defendant police officers making the adrenaline argument—if not explicitly, then implicitly: If you are going to lead police on a chase into a dark lot, you should expect to get roughed up a bit after they catch you. The argument that we presented to (and won with) the jury was that the police are the enforcers of the law. After our client surrendered, they could not exact vigilante street justice. If we allow the police to become the judges, juries, and punishers, we are all the worse off for it. The jury agreed with us.

Sometimes I fear that these types of arguments about civil liberty issues are seen as a luxury in this country, a battle to be waged when things are going well. When everyone's belly is full, it is easier to engage in these sorts of debates. The conventional wisdom would have to be that jurors facing the bleakness of the present economic uncertainty are going to be less generous with drunk or law-breaking plaintiffs and more sympathetic to those who keep order. The paradox is that if the country's outlook continues to deteriorate, civil rights actually become more important, as do the efforts to protect them.

Racial variables. I had intended to steer away from this subject, which I discussed in greater length in my previous article about police cases for LITIGATION (Winter 2006). However, it is very difficult to write about police cases without acknowledging race and class, and how they have affected the playing field regarding public perception of police cases.

For starters, it has been barely a blink of an eye in historical terms since racial minorities were even allowed to serve on juries, much less bring cases of their own and get a fair hearing. A claim by an African American without any power or money, suing a white police officer for constitutional abuses, is a relatively new type of lawsuit.

And judges are no longer all older, white males. By no means do I suggest that white male judges are less fair or just than anyone else. They are not. But it is equally true that some minority or female judges see issues differently, owing to their own life experiences. I think that most people view the judicial system as better served by this diversity.

The net result is that things change. In contrast with the times our parents were born into, we now live in a country where a gang member with a criminal record who has been wronged can legitimately aspire to obtain justice in our courts, even against respected police officers. No one claims the system is perfect, but I think our country has every reason to be proud of this development, which distinguishes us from much of the world.

That said, we're hardly in a position to be resting on our laurels. Imperfections in our judicial system abound, many of which are only now being discovered through recent developments in scientific testing.

DNA exonerations. This article has discussed various ways in which changing perceptions of police officers have affected cases in which they are involved. On that subject, no single

factor has been more important than DNA. In very fundamental ways, the technological advances in scientific testing have shaken up the criminal justice system and public perceptions toward it. Put simply, the prior sense of infallibility is gone.

While there have always been critics, I think the common perception used to be that most people who are convicted are in fact guilty. If a person was singled out by the police for arrest, and if there was evidence against him, and if he stood trial with the assistance of a defense attorney to put on his defense, and if he was nonetheless convicted beyond a reasonable doubt by 12 unanimous jurors, then the person was almost certainly guilty.

The advent of DNA testing has forced a re-examination of that "truth." In rape case after rape case, people against whom the state presented a rock-solid case turned out to be totally innocent. And not just innocent, but innocent to a scientific certainty, a definitiveness that had heretofore eluded the justice system.

This technology has thus confronted all of the participants in the criminal justice system with some awkward questions. If DNA testing proved that a particular rape was committed by Mr. Jones rather than Mr. Smith, then how in the world had the state presented such unequivocal eyewitness testimony from the victim, plus a detailed confession procured by the police, all implicating innocent Mr. Smith? Back at the time that Mr. Smith's case went to trial, his conviction was considered cut and dried, an illustration of a smooth and efficient justice system. Yet everything about this sort of case turned out to be completely and totally false, from start to finish, top to bottom. Even defendants who pled guilty are now being exonerated.

These exonerations force everyone to recognize that maybe the system doesn't work as well as everyone would like to believe. Not surprisingly, the system strongly resists that re-examination. In my own cases and others, for example, there has been a stunningly consistent refusal on the part of prosecutors and criminal judges to grant motions to conduct DNA testing for the purpose of post-conviction relief. We defense attorneys offer to pay for the testing ourselves. We argue that the real rapist and murderer could very well remain at large to rape and kill again. We point out that there is no downside to permitting us to conduct the testing, which could answer definitively the question of guilt or innocence. Yet the prosecutors and the judges (all too many of whom are former prosecutors) act like we are asking them to vacate the sentence on the spot. Virtually without exception, they are uniformly and reflexively opposed to any attempt to conduct such DNA testing.

Indeed, state statutes and an entire new body of case law have developed, raising hurdles to securing DNA testing, including, for example, a required showing that the proposed testing was "technologically unavailable" at the time of the original trial. And last year, a 5–4 majority of the Supreme Court (divided along the expected ideological lines, with Justice Anthony Kennedy providing the swing vote) rejected a convicted rapist's argument that he had a constitutional right to test DNA evidence, even where it could conclusively prove his innocence.

How could that be? It is almost impossible to fashion a coherent argument for why a criminal defendant should not be permitted to pay for testing that could prove his innocence—and possibly lead to the apprehension of the truly guilty. Judges and prosecutors couch their objections in terms of the value of "finality" in criminal convictions, but that doesn't make much sense. Why should we value the "finality" of a dubious conviction over definitive proof that it is wrongful? Judges and prosecutors are part of a system that supposedly searches for the truth. Every wrongful conviction is just as tragic in their world, too. Leaving aside the immeasurable human cost of unjustified incarceration, wrongful convictions erode respect for the system, to say nothing of the injustice of allowing the guilty to remain unpunished and free to strike again.

I submit that the real reason judges and prosecutors oppose DNA testing at every turn is because there is real insecurity about just how imprecise the criminal justice system really is. DNA has the capacity to prove that at least some of the cases developed by the police are completely false.

For instance, if a jailhouse snitch was dead wrong about who did the crime and if that snitch did not have genuine personal knowledge after all, then the police have to explain how that snitch obtained corroborative details that were only in the police reports. If the police obtained a disputed confession from the suspect, then why is it that the DNA proves the confessor did not commit the crime?

And if an eyewitness was "100 percent certain" that the wrong person was guilty, then what does that say about eyewitness testimony in general and, by extension, other cases that

are built exclusively on it? The social sciences have recently caught up to the judicial system in that respect, and there is an abundance of new empirical research calling into question the value of eyewitness testimony, period. While our system has a long tradition of reliance on witness identifications, it turns out that people are not nearly as good at picking out other people as they think they are. Even without variables such as cross-racial identifications (which are far more difficult) or delay or suggestive influences, eyewitness testimony is far less reliable than the court system had given it credit for. There are thousands and thousands of people sitting in jail based on little more than a finger pointed by someone who may or may not have seen what she thinks she saw. In many cases, DNA is proving just how wrong people can be.

And it does not end there. The critical point of DNA exonerations is that we have to extrapolate. There are only certain types of crimes for which DNA can provide a definitive exoneration. But for every rapist or murderer who is lucky enough to have been in a position to prove that his conviction was bogus, what does that say about the average armed robber who was convicted based on police testimony at a bench trial that took a single afternoon, despite the best efforts of a public defender burdened with hundreds of other cases. Because of the nature of the crime, that armed robber is not going to be able to avail himself of DNA testing, but the same sorts of flaws that lead to wrongful convictions in rape cases apply equally to other crimes as well.

In my own state of Illinois, appellate courts have thrown out 13 convictions that drew the death penalty since 1977, compared with only 12 people who actually were executed. That is not a good batting average by any accounting, especially when one considers that elected judges are not eager to overturn death sentences. Meanwhile, capital cases involve the most resources and the most scrutiny, so one would have thought they would have the highest likelihood of obtaining a just result. Yet, more than half the time in Illinois over the past 30 years, courts have found that the convictions behind these death sentences were simply wrongful (a sizeable number of those individuals secured exonerations and pardons) or else were so fatally tainted by error that they just could not stand. The numbers were so bad that the then-governor commuted all death sentences until the courts could get their act together.

Again, what does all of that say about the more typical conviction, say, of a gang member identified by the police in a shooting? Every day, these sorts of suspects are convicted largely on the basis of nothing but police work, be it gathering witnesses, confessions, or snitches. This system, however, is far less perfect than many people believe it to be. And as people come to realize that fact, their scrutiny turns to the police.

In many communities, it already has. Not a day goes by without my law firm getting multiple letters from people claiming to be wrongfully convicted, seeking our help in investigating their cases. Needless to say, we cannot help the vast majority of them. We have a hard enough time just keeping up with the flood of correspondence, and the sad reality is that most innocence projects have huge file drawers full of unopened letters and packages of materials from desperate prisoners.

As already noted, all of these people were convicted based on police work: The police found the "witnesses," obtained the "confessions," or both. Some of these people are innocent. Thanks to DNA, we now know that the proportion is higher than people used to think it was. One can hope that practitioners and judges—especially the large number of criminal court judges who used to be prosecutors themselves—will take heed of that knowledge and begin accepting less of what confronts them at face value.

No one should be able to complain as much as I have in this article without at least offering some solutions. To me, there is one elegantly simple idea that would go a long way toward attacking the problems I have identified: Make available to the public the working files of the independent review authorities that are charged with investigating and disciplining police misconduct. The remainder of this article is devoted to explaining why this solution would work.

Institutional secrecy. In my line of work as a plaintiffs' civil rights lawyer, I am not confronted with a random sample of police work. For the most part, we see cases in which police officers have done something wrong. That skewed perspective notwithstanding, it remains my belief that the vast majority of our nation's police officers take seriously their obligation to uphold the law and to serve and protect the rest of us. Indeed, most police officers are likely drawn to the job out of a sense of service and respect for the law.

That said, a small minority of police officers seem to be attracted by the power and freedom to act like a bully. Human nature being what it is, some guys simply like to brawl, and what better opportunity than with a badge and a gun? The "few bad apples" theory is a cliché in our field.

But that is an explanation, not an excuse. The problem is that for those few police officers disposed to violence and abuse, too many police departments do too poor of a job of reining them in. Again, this criticism is not fairly applied to all police forces. Many police departments in this country have a very low tolerance for abusive officers. Some, however, do not seem to notice or care.

So that leaves a minority of officers on a minority of police forces as the primary perpetrators of police abuse. For those officers, there are disturbingly inadequate checks and balances in the system to stop their abuse and weed them out.

One perhaps unlikely variable is the rise in unionization. Until relatively recently, police organizations were more akin to fraternal organizations, hence the name Fraternal Order of Police, for example. The idea of police organizing and collective bargaining did not begin in earnest in this country until the 1970s.

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I happen to be a great supporter of the union movement in general. My view is that unions empower workers in a socially positive way. But it would be naive to believe that the newfound political muscle associated with the rise of police unions does not come with some undesirable side effects. In particular, police unions have been able to secure procedural protections that effectively shield problem officers who do not belong on a police force. In most jurisdictions, it is

extremely difficult to suspend officers for abuses, much less fire them.

The city where I practice (Chicago) is notorious for having an incompetent and ineffective independent police review authority. It is not independent, it does not review anything, and it has no authority. For whatever reason, the people with political power in this city have refused to spend the political chips it would take to push back against the union.

The problem is hardly limited to Chicago. While it is probably dangerous to get one's information from like-minded people, I can say, based on the experiences of my colleagues across the country who practice in this area, that the same sorts of problems arise with too many of the organizations that are charged with policing the police: dysfunctional bureaucracies addicted to undue secrecy.

If someone makes a complaint that a police officer whacked her on the head with a baton or shot her with a taser without justification, the department's investigators will undertake an investigation, but no one will ever see it. If someone is savvy enough to make a Freedom of Information Act request, towns will either refuse to turn documents over or redact them beyond recognition. Many state statutes exempt these documents expressly. And if a civil lawsuit is filed, municipal lawyers will consume substantial legal resources fighting in court to keep the documents under a strict protective order, sharply limiting who can review them.

What all of that means is that the investigators who conduct these investigations do so confident in the knowledge that no one will ever review their work, other than members of the police department, all of whom exert enormous pressure to find no wrongdoing. It should surprise no one that

The path of least resistance for investigators is to reject every citizen complaint.

the easiest path of least resistance for an investigator is to reject every citizen complaint. Any other result provokes an angry backlash from police officers who insist they did nothing wrong. Finding no merit in the overwhelming majority of these complaints eliminates the need to have to defend the results to anyone.

The Chicago Police Department, for example, has historically rejected 95 percent of the claims of police misconduct, a result that is not too far off the national average. This means that for every 100 people who feel sufficiently aggrieved to take the trouble to pursue a formal complaint of misconduct, the independent review authority is going reject the complaints of at least 95 of them. And even for those few complaints that are not dismissed out of hand, discipline is still rarely imposed, and any that is imposed often gets reversed. In either event, the process literally takes years to run its course.

The net result is that for those (few) officers who are inclined toward abuse, there is no effective deterrence. Indeed, the Chicago Police Department recently experienced a new scandal in which a number of Special Operations officers were indicted for federal crimes. These officers had been robbing drug dealers and otherwise acting like criminals with disturbing frequency, yet the city's investigative body had rejected literally hundreds of complaints against this same core of officers.

It turned out that the city's investigators had managed to go through each of these complaints, one by one, without finding any merit in any of them. As much as I would like to be able to share the details about the nature of the accusations and how these investigations were conducted, I cannot: All of the attorneys working on civil cases involving this subject are prohibited by judicial protective orders from discussing the specifics of any investigations.

I don't believe it violates any protective order to state that all of these investigations are, virtually without exception, a total joke. However, you are going to have take my word for it because there is no way for you to learn more. The files themselves are sealed from public view at the city's insistence.

I presently represent a journalist who challenged successfully (at least initially) the propriety of this sort of protective order. Judge Joan Lefkow of the Northern District of Illinois held that the city had failed to meet the "good cause" burden imposed by Federal Rule of Civil Procedure 26(c) for maintaining a judicial seal on a slew of the city's investigative files. *Bond v. Utreras*, Case No. 04 C 2617, 2007 WL 2003085 (N.D. Ill. July 2, 2007). The district court summarized its decision as follows:

> [The] information, though personal, has a distinct public character, as it relates to the defendant officers' performance of their official duties. Without such information, the public would be unable to supervise the individuals and institutions it has entrusted with the extraordinary authority to arrest and detain persons against their will. With so much at stake, defendants simply cannot be permitted to operate in secrecy.

Id. at *3.

This decision was stayed pending appeal, and the Seventh Circuit ultimately reversed on other grounds, finding, inter alia, that journalists do not have standing to challenge protective orders after cases have been resolved. *Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009). The petition for rehearing en banc was denied in February.

This might seem like a lot of energy expended over a dispute about protective orders. There is nothing financial at stake, including any attorneys' fees. Instead, the battle was fought solely based on the principle that documents bearing on the investigations of allegations of police misconduct should be public, not secret.

Put simply, if these files were open to public scrutiny, police departments would no longer be able to sweep abuses under the rug with such ease. What really is the danger of allowing the public to see how allegations of misconduct and corruption by public servants are actually handled by their governmental representatives?

The irony in the city's reflexive desire to suppress these files is that police departments themselves would be better served by a truly functioning investigatory body, a development that would necessarily accompany greater transparency. The only sure bet is that nothing is going to change as long as police departments continue to be allowed to operate their review authorities in the shadows.