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## Policing the Police: The Role of the Courts and the Prosecution

### Cover Page Footnote

This Essay is an addendum to the collection, "A Conference on New York City's Criminal Courts," which appeared in the Fordham Urban Law Journal, Vol. XXXI, No. 4. The Conference was held October 18, 2003 and was hosted by New York County Lawyers' Association and the Fordham University School of Law's Louis Stein Center on Law and Ethics. \* \* Associate Professor, CUNY School of Law; J.D., 1981, Duke University School of Law. For their encouragement, criticisms, and suggestions, I thank Mari Curbelo, Tom Klein, and Robert Mandelbaum. I gratefully acknowledge as well the support of the Professional Development Committee at CUNY School of Law.

## POLICING THE POLICE: THE ROLE OF THE COURTS AND THE PROSECUTION\*

Steven Zeidman\*\*

The New York City Criminal Courts Conference asked, “Are We Achieving Justice?”<sup>1</sup> Given that those courts contended with approximately 190,000 misdemeanor arrests in 2003, up from 130,000 in 1993, the question is increasingly relevant and important.<sup>2</sup>

This Essay focuses on how, and whether, the component parts of the courts—judges, court administrators, and prosecutors—promote justice by actively and critically monitoring or overseeing the police.<sup>3</sup> Police action triggers the courts’ and institutional players’ opportunities to influence justice. After an accused is deposited at the door of the court, all components of the criminal justice system must carefully and rigorously inspect the underlying police activity. It is time to ask whether anyone is carrying out this vital task.

This is an especially timely inquiry. While reported crime in New York

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\*\* Associate Professor, CUNY School of Law; J.D., 1981, Duke University School of Law. For their encouragement, criticisms, and suggestions, I thank Mari Curbelo, Tom Klein, and Robert Mandelbaum. I gratefully acknowledge as well the support of the Professional Development Committee at CUNY School of Law.

1. See generally Martha Rayner, *Conference Report: New York City’s Criminal Courts: Are We Achieving Justice?*, 31 FORDHAM URB. L.J. 1023 (discussing the issues raised at the Criminal Courts Conference).

2. THESE NUMBERS CAME FROM THE NYS DIVISION OF CRIMINAL JUSTICE SERVICES WEBSITE. DCJS IS THE OVERSEEING BODY FOR CRIM JUSTICE IN NYS. I CHECKED THEIR WEBSITE AND IT SEEMS AS IF IT HAS CHANGED. MISDEMEANOR INFO IS NO LONGER THERE. I HAVE EMAILED THEM FOR THIS INFO AND EXPECT THEY WILL GET BACK TO ME QUICKLY VIA EMAIL. IN FACT, JUST RECEIVED AN EMAIL FROM THEM CONFIRMING THOSE NUMBERS.

3. While defense attorneys are very much a piece of the puzzle, and are often a part of the problem, a detailed examination of the defense lawyer’s role is beyond the scope of this Essay.

City is at its lowest level in decades,<sup>4</sup> the number of misdemeanor arrests has risen dramatically.<sup>5</sup> As a result, criminal justice policy is increasingly revealed in the lower criminal court.<sup>6</sup>

Two factors are responsible for the explosion in misdemeanor arrests. First, during the term of Mayor David Dinkins, the “Safe Streets Safe City” initiative resulted in a marked expansion in the size of the New York City Police Department (“NYPD”).<sup>7</sup> More police officers created the potential for more arrests.<sup>8</sup> Second, the influence of the “Broken Windows” theory and the advent of “quality-of-life” policing under Mayor Rudolph Giuliani unleashed that massive police force in such a way that encouraged misdemeanor arrests for relatively minor misconduct.<sup>9</sup>

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4. See, e.g., Michele McPhee, *NYPD Crime-Crunching Patrol Hike is Back*, DAILY NEWS, Jan. 13, 2004, at 1 (“[W]e ended 2003 with the lowest crime rate in New York City in four decades,” quoting New York City Mayor Michael Bloomberg).

5. In 1983, there were 105,000 misdemeanor arrests in New York City, 85,000 less than in 2003. SEE N.2 ABOVE – AWAITING THIS INFO FROM DCJS VIA EMAIL. IN FACT, JUST RECEIVED AN EMAIL FROM THEM CONFIRMING THOSE NUMBERS.

6. In 1989, fifty percent of all New York City arrests were felonies. See Freda F. Solomon, N.Y. City Criminal Justice Agency, Inc., *The Impact of Quality-of-Life Policing*, Research Brief No. 3, Aug. 2003, [hereinafter CJA Research Brief], available at <http://cjareports.org/reports/brief2.pdf>. In 1998, that number dropped to one-third. *Id.*

7. In 1991, the New York City Council and the state legislature approved the “Safe Streets, Safe City” program. 1991 N.Y. LAWS ch. 6 (McKinney 1991). The centerpiece of “Safe Streets, Safe City” was the addition of several thousand police officers. See Steven L. Myers, *Mayor Says Crime Data Affirm Strategies*, N.Y. TIMES, Jan. 8, 1995, at 26 (stating that the program “raised taxes specifically to pay for the hiring of 6000 more police officers”).

8. Shortly after “Safe Streets, Safe City” was enacted, the Chief Administrator of the New York State Courts, Matthew T. Crosson, predicted an increase in court caseloads. See Gary Spencer, *Legislators Rule Out More Funds for Judiciary*, N.Y.L.J., Mar. 6, 1991, at 1; see also John J. Donohue, *Understanding the Time Path of Crime*, 88 J. CRIM. L. & CRIMINOLOGY 1423, 1432 (1998) (discussing the impact of the increase in the number of police officers on the drop in crime).

9. See, e.g., Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order—Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 292 (1998) (explaining how New York City’s quality-of-life policing, an order maintenance strategy that focused on minor misdemeanor offenses, was premised on the “Broken Windows” theory that “minor physical and social disorder, if left unattended in a neighborhood, causes serious crime”); George L. Kelling & William J. Bratton, *Declining Crime Rates: Insiders’ Views of the New York City Story*, 88 J. CRIM. L. & CRIMINOLOGY 1217, 1218-19 (1998) (the “Broken Windows” theory “argued that, just as a broken window left untended was a sign that nobody cares and leads to more and severe property damage, so disorderly conditions and behaviors left untended send a signal that nobody cares and results in citizen fear of crime, serious crime, and the ‘downward spiral of urban decay’” (quoting WESLEY SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF URBAN DECAY IN AMERICAN NEIGHBORHOODS 84 (1990))); Jeffrey Rosen, *Excessive Force*, NEW REPUBLIC, Apr. 10, 2000, at 24 (“Once the police began thinking of low-level public disorder not as a problem

The spike in misdemeanor arrests, especially for low-level offenses, is not the only warning sign that such cases demand careful examination. The proliferation of DNA exonerations of previously convicted individuals provides incontrovertible proof that many defendants are actually innocent and/or wrongly convicted.<sup>10</sup> The disparate impact of the present policing on people of color has also been well documented. In 1999, the shooting of Amadou Diallo by four police officers focused attention on the behavior of the NYPD's Street Crimes Unit ("SCU").<sup>11</sup> SCU was primarily concerned with finding illegal handguns. In 1998, the year before the Diallo shooting, SCU reported stopping and frisking 27,061 people, of whom only 4647 were arrested. Put another way, nearly 22,000 people were mistakenly searched.<sup>12</sup> After an exhaustive examination of the NYPD's "stop and frisk"<sup>13</sup> practices, the New York State Attorney General reported that blacks and Latinos disproportionately bore the brunt of this aggressive policing.<sup>14</sup> The New York City Civilian Complaint Review Board

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to be addressed but as an opportunity to investigate more serious crime, the incentive to arrest citizens for relatively minor offenses dramatically increased."); James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar., 1982.

10. See, e.g., JIM DWYER ET AL., ACTUAL INNOCENCE 262-67 (2000); Alan Berlow, *The wrong man*, ATLANTIC MONTHLY, Nov., 1999; Donald A. Dripps, *Miscarriages of Justice and the Constitution*, 2 BUFF. CRIM. L. REV. 635 (1999); Richard A. Rosen, *Innocence & Death*, 82 N.C. L. REV. 61, 65-78 (2003); Adam Liptak & Ralph Blumenthal, *New Doubt Cast on Crime Testing in Houston Cases*, N.Y. TIMES, Aug. 5, 2004, at A19 (DNA exoneration of man convicted of rape called into question the scientific evidence used to convict thousands). For a discussion of the distinction between actual innocence and convictions obtained due to significant legal error see Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1346 (1997).

11. See *Weekend of Progress in New York City*, N.Y. TIMES, Mar. 29, 1999, at A20.

12. Michael Cooper, *Raids and Complaints Rise as City Draws on Drug Tips*, N.Y. TIMES, May 26, 1998, at A1.

13. "Stop and frisk" refers to the practice condoned by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968). According to *Terry*, a police officer may stop someone if he reasonably suspects the person has committed or is about to commit a crime. *Id.* at 23. The officer can frisk or "pat down" the person if he reasonably suspects he is in danger of physical injury. *Id.* at 24.

14. Office of New York State Attorney General Elliot Spitzer, *The New York City Police Department's "Stop & Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General*, Dec. 1, 1999, at pt. 1, available at [http://www.oag.state.ny.us/press/reports/stop\\_frisk/stop\\_frisk.html](http://www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html). A draft report of the United States Commission on Civil Rights found that racial profiling accounted for much of the NYPD stop and frisk practices. See, e.g., Kevin Flynn, *Rights Panel Scolds Police on Race Issues*, N.Y. TIMES, Apr. 27, 2000, at B1 (citing data from 1998 that showed that while blacks make up nine percent of the Staten Island population, fifty-one percent of those stopped and searched were black); see Jim Yardley, *The Diallo Shooting: The Community In Two Minority Neighborhoods, Residents See a Pattern of Hostile Street Searches*, N.Y. TIMES, Mar. 29, 1999, at B3 ("The police consider the stop-and-frisk an essential tool in

(“CCRB”) examined NYPD “stop and frisk” activity by reviewing complaints filed by people who had been stopped on the street and frisked by a police officer.<sup>15</sup> The CCRB found that “African-Americans were over-represented in this sample of street-stop complaints, while whites were underrepresented.”<sup>16</sup>

In January 2000, the NYPD implemented a narcotics enforcement initiative called “Operation Condor.”<sup>17</sup> Two months later, Patrick Dorismond was approached by an undercover Condor officer who asked him where he could buy marijuana.<sup>18</sup> Somehow, after Mr. Dorismond “reacted angrily,” he was shot and killed. In much the same way that the killing of Amadou Diallo prompted an inquiry into the policy and behavior of the SCU, the killing of Patrick Dorismond led to questions concerning Operation Condor.<sup>19</sup> It soon became apparent that “75 percent of the arrests under [Condor] have been for misdemeanors or even lesser offenses, known as violations.”<sup>20</sup> The focus on relatively minor crimes and violations, and the concomitant disproportionate impact on people of color, in many ways characterize the NYPD’s criminal justice policy of the past decade.<sup>21</sup> In fact, one of the architects of the “Broken Windows” theory,

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reducing crime, arresting suspects and seizing illegal guns, but many residents in minority neighborhoods say it has become an indiscriminate method of harassment.”). More recently, an examination of data from January through June 2003 revealed that almost eighty-three percent of those stopped and frisked were black or Latino. Alice McQuillan, *Say Blacks Targeted for Frisking*, DAILY NEWS, June 18, 2003, at 6 (recognizing the depth of the problem of race-based searches and seizures, the United States Department of Justice issued Guidance Regarding the Use of Race by Federal Law Enforcement Agencies); see also U.S. Dep’t of Justice, Civil Rights Div., Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, June 2003, available at <http://pub.bna.com/cl/RacialProfiling.pdf>.

15. Civilian Complaint Review Bd., Street Stop Encounter Report: An Analysis of CCRB Complaints Resulting From the New York Police Department’s “Stop & Frisk” Practices, June 2001, available at <http://www.nyc.gov/html/ccrb/pdf/stop.pdf>.

16. *Id.*

17. Tina Kelley, *Police Shooting Victim is Remembered and Mourned in Tears and Song*, N.Y. TIMES, Mar. 25, 2000, at B4.

18. *Id.*

19. *Id.*

20. Kevin Flynn, *Shooting Raises Scrutiny of Police Antidrug Tactics*, N.Y. TIMES, Mar. 25, 2000, at A1.

21. See, e.g., Harcourt, *supra* note 9, at 299 (“[A] law enforcement strategy that emphasizes misdemeanor arrests has a disproportionate effect on minorities . . . .”); Joe Davidson, *Is Zero Tolerance a Solution or a Problem?*, WASH. POST, Mar. 21, 2004, at B1 (“The fatal NYPD shootings of Amadou Diallo and Patrick Dorismond . . . went hand-in-hand with a war on crime that seemed to legitimize police abuse and racism.”); William K. Rashbaum, *Falling Crime in New York Defies Trend*, N.Y. TIMES, Nov. 29, 2002, at B1 (noting that almost one million people were arrested for minor violations in the preceding eight years, and citing Professor Michael Jacobson of John Jay College of Criminal Justice

James Q. Wilson, observed presciently, and frighteningly, that the overwhelming desire to reduce crime might mean that “[y]oung black and Hispanic men will probably be stopped more often than older white Anglo males or women of any race.”<sup>22</sup>

The motivations for, and consequences of, the creation and implementation of these police strategies have been the subject of much analysis and debate. Yet, what happens to those arrested pursuant to these strategies has been glaringly bereft of critical review. What happens with these cases inside the walls of the criminal courts is a question that remains unanswered.

Over twenty years ago, the Association of the Bar of the City of New York issued a report bemoaning the lack of trials in the New York City Criminal Court.<sup>23</sup> The report noted that only one-half of one percent of all misdemeanor cases went to trial in the preceding year.<sup>24</sup> By all accounts, the situation is even more dire—there are tens of thousands more misdemeanor cases, yet the trial rate is actually plummeting.<sup>25</sup> In addition to the dearth of jury verdicts, there are also very few determinations of the constitutionality of the police officers’ probable cause to stop, search, and arrest. The court does not even appear to keep records of the number of suppression hearings held, let alone the outcomes of those hearings.<sup>26</sup> The

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regarding the “fraying effect” such zero tolerance approaches have on relationships between police and minority citizens).

22. James Q. Wilson, *Just Take Away Their Guns*, N.Y. TIMES, Mar. 20, 1994, at 47. For Wilson, that was a fair price to pay in order to try and remove illegal guns from the street. *Id.* A recent study by the New York Criminal Justice Agency revealed yet another by-product of ramped up quality-of-life policing—an increase in the arrests of older, chronic offenders with myriad social problems, and a similar upsurge with respect to minority youths, with no adult convictions, arrested for low-level drug offenses. CJA Research Brief, *supra* note 6.

23. Criminal Courts Comm. of the Ass’n of the Bar of the City of N.Y., *Saving the Criminal Court: A Report on the Caseload Crisis and Absence of Trial Capacity in the Criminal Court of the City of New York* 1983, at 18 [hereinafter *Caseload Crisis*].

24. *Id.* at 3. The report added bluntly: “If you tell people that several months went by recently in Brooklyn Criminal Court *without a single person being tried for anything* they will tell you, quite correctly, that you are talking about something which is not a court.” *Id.* at 19 (emphasis in original).

25. State of N.Y., Div. of Criminal Justice Servs., Bureau of Justice Research and Innovation, *Misdemeanor Arrests New York City* (on file with author). In fact, the New York City misdemeanor trial rate in 2003 was less than one third of one percent. *See id.* The lack of trials appears to be a widespread phenomenon. *See, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459-84 (2004); Gina Holland, *As Plea Deals Mount, Jury Trials Diminish*, SUNDAY REPUBLICAN, Aug. 8, 2004, at A3.

26. Telephone interviews with Alan J. Murphy, Chief Clerk, Manhattan Supreme Court, Criminal Branch (DATE), and Chester Mount, Director of Research and Technology, New York State Unified Court System, Office of Court Administration (DATE) [hereinafter

result is virtually unfettered, unchecked police activity and discretion. Once an officer makes an arrest, it is for all intents and purposes insulated from any meaningful challenge or review.<sup>27</sup>

The free reign given to the police is even more troubling when considered in light of the well-documented history of police misconduct and corruption in New York City. In 1992, then New York City Mayor David N. Dinkins assembled the Mollen Commission in response to numerous and spreading allegations of drug dealing and corruption in several police precincts.<sup>28</sup> The Commission's charge was "to investigate the nature and extent of corruption in the Department; to evaluate the Department's procedures for preventing and detecting corruption; and to recommend changes and improvements in those procedures."<sup>29</sup> The creation of a Commission to investigate the NYPD has become something of a ritual in New York City. One of the members of the Mollen Commission wrote about the "apparent twenty-year cycles of police corruption scandals."<sup>30</sup> The Commission itself observed that "[f]or the past century, police corruption scandals in New York City have run in a regular twenty-year cycle of scandal, reform, backslide, and fresh scandal."<sup>31</sup> Indeed, the recent arrest and indictment of an NYPD detective and his

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Telephone Interviews].

27. In addition, the accused can not realistically turn to the appellate courts for redress. As a study of the New York Court of Appeals concluded, "Criminal defendants have little hope of being heard by the Court on the merits of their claim, and those chosen few who do get heard lose their cases in overwhelming numbers." Norman A. Olch, *Soft on Crime? Not the New York Court of Appeals*, N.Y.L.J., May 6, 1996, at 1; see John Caher, *Court Grants Record Low Criminal Appeals; Convictions Affirmed in 1999 Reach 76 Percent*, N.Y.L.J., May 16, 2000, at 1 ("[T]he odds of a criminal convict getting his or her case before the Court of Appeals are low and declining, while the chances of getting before the Court and prevailing are reed-slim."); Gary Spencer, *Report Shows Court of Appeals Sheds Caseload, with 198 Decisions in 1998*, N.Y.L.J., June 2, 1999, at 1 (discussing the Court's "continuing reluctance in criminal cases to grant defendants leave to appeal"). The reversal rate in criminal appeals is also plummeting in the intermediate appellate courts. See, e.g., John Caher et al., *Appellate Panels See Their Influence Rise; Tribunals Take on Role of Court of Last Resort*, N.Y.L.J., Apr. 23, 2001, at 1.

28. See, e.g., James C. McKinley, Jr., *Dinkins Names Police Corruption Panel and Urges Civilian Police Review*, N.Y. TIMES, June 26, 1992, at A1 (reporting on Dinkins's appointment of a five member anti-corruption panel, headed by former Deputy Mayor for Public Safety, Milton Mollen).

29. Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Dep't, City of New York, Commission Report 1994, at 11 [hereinafter Mollen Report], available at <http://www.parc.info/reports/pdf/mollenreport.pdf>.

30. J. Harold Baer, Jr., *Symposium Speeches: The Mollen Commission and Beyond*, 40 N.Y.L. SCH. L. REV. 5, 5 (1995).

31. Mollen Report, *supra* note 29, at 148 (documenting 100 years of NYPD corruption scandals); see also Clifford Krauss, *Corruption in Uniform: The Long View; Bad Apple Shake-Ups: A 20-Year Police Cycle*, N.Y. TIMES, July 8, 1994, at B2.



retired partner has all the hallmarks of the behavior that precipitated the assembling of the Mollen Commission and other similar commissions.<sup>32</sup>

As one considers the myriad reasons why police misconduct so regularly reoccurs, it is necessary to consider the typical responses to it. As the story of corruption begins to unfold, the airwaves become replete with prosecutors vowing full and thorough investigations and promising to bring the full force of the law to bear.<sup>33</sup> In the scandal's wake comes the usual hand-wringing and calls for revamping the Police Department and creating independent police review boards.<sup>34</sup> Inevitably, the ensuing wrangling between those who favor and those who oppose such oversight deflects attention from the underlying issue—how best to police police corruption.<sup>35</sup> Surely there are a multitude of reasons why the problem persists, but it is time to look critically at the responses of the legal system's institutional players—particularly, the courts and the prosecutors.

My focus is on a particular type of corruption—what the Mollen Commission termed “falsifications.”<sup>36</sup> The Mollen Commission divided this type of corruption into three categories: “testimonial perjury, as when an officer testifies falsely under oath . . . ; documentary perjury, as when an officer swears falsely under oath in an affidavit or criminal complaint; and falsification of police records, as when an officer falsifies the facts and circumstances of an arrest in police reports.”<sup>37</sup> Not only do these “falsifications” directly impact the courts, but, according to the Commission, they are “probably the most common form of police

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32. See, e.g., William K. Rashbaum, *A Widening Inquiry Focuses on Officers Tied to Drug Money*, N.Y. TIMES, Mar. 11, 2004, at A1 (referring to the investigation as “the biggest police corruption case in a decade”). The prevalence of widespread and entrenched police corruption is by no means limited to New York City. See, e.g., Charles Rappleye, *Another Rupture in the LAPD's Thin Blue Line*, NEWSDAY, Oct. 10, 1999, at B4. The corruption uncovered a few years ago in the Los Angeles Police Department rivals what occurred in New York. *Id.* A police officer was arrested for stealing cocaine from an evidence locker, and in exchange for leniency he revealed rampant misconduct in the Department's Rampart Division. *Id.* One result was the formation of the Los Angeles Police Commission. *Id.* Coincidentally, Los Angeles had convened another police commission, the Christopher Commission, just a few years earlier in the aftermath of the brutal beating of Rodney King. See Joe Domanick, *Law Enforcement; Civilian Control of LAPD Is Elusive Despite Reforms*, L.A. TIMES, Nov. 14, 1999, at M1.

33. See, e.g., *Break the Police Corruption Cycle*, N.Y. TIMES, July 8, 1994, at A26 (“The city needs an outside force, whether an independent special prosecutor or the investigatory commission recommended by M. Mollen to take over in the fight against corruption.”).

34. *Id.*

35. *Id.*

36. Mollen Report, *supra* note 29, at 36.

37. *Id.*

corruption facing the criminal justice system.”<sup>38</sup> In fact, the Commission found that the police practice of falsification was so prevalent in some precincts that it generated its own term—“testilying.”<sup>39</sup> These findings are not revelations. The belief that police falsification is ubiquitous is widely held.<sup>40</sup>

What, then, have been the responses to this sweeping indictment? How has the judiciary responded to the revelation that some percentage of police officers were testifying falsely in their courts, swearing falsely to criminal complaints, and/or falsifying police reports?

Testimonial perjury—false testimony under oath—rears its head particularly in suppression hearings.<sup>41</sup> The Mollen Commission found that corrupt officers “manufactured facts” to justify unlawful searches and arrests.<sup>42</sup> According to the Commission, “a common tale was the person dropped a bag . . . as the officers approached.”<sup>43</sup> This so-called “dropsy” testimony, designed to overcome any constitutional objection to the police activity, is not new. In *People v. McMurty*,<sup>44</sup> Criminal Court Judge Irving Younger discussed the sudden emergence of “dropsy” testimony, and observed that it was only after the Supreme Court applied the exclusionary rule to the states in *Mapp v. Ohio*<sup>45</sup> that he heard police officers testify that

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38. *Id.* A recent study found that perjury by police officers was among the leading causes of wrongful convictions. See Adam Liptak, *Study Suspects Thousands of False Convictions*, N.Y. TIMES, Apr. 19, 2004, at A15.

39. Mollen Report, *supra* note 29, at 36. Some have similarly referred to the police practice of falsifying reports as “reportlying.” See, e.g., Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1039 (1996).

40. See, e.g., Carol A. Chase, *Policing the Criminal Justice System: Rampart: A Crying Need to Restore Police Accountability*, 34 LOY. L.A. L. REV. 767, 769 (2001) (commenting that “[i]t has long been apparent that police officers testify untruthfully to avoid detection of their misconduct”); Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1312 (1994) (explaining that “[t]he empirical studies on the subject suggest that perjured testimony is common, particularly in drug prosecutions”); Alan Dershowitz, *Is Legal Ethics Asking the Right Questions*, 1 J. INST. STUD. LEG. ETHICS 15, 16 (1996) (“The Mollen Commission, the Knapp Commission, every commission that has studied the problem of police perjury, has in my view seriously understated the problem and yet has come to the conclusion that police perjury is rampant.”); Jerome H. Skolnick, *Deception by Police*, CRIM. JUST. ETHICS, 42 (Summer/Fall 1982) (arguing that police perjury is “systemic”).

41. The Mollen Commission noted that police falsification was most prevalent in cases involving possessory offenses, especially narcotics and guns. Mollen Report, *supra* note 29, at 36; see also Gabriel J. Chin & Scott C. 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, 248 (1998); Slobogin, *supra* note 39, at 1043 (“[T]he most common venue for testilying is the suppression hearing . . .”).

42. Mollen Report, *supra* note 29, at 37.

43. *Id.*

44. 314 N.Y.S.2d 194 (Crim. Ct. 1970).

45. 367 U.S. 643 (1961); see also Lewis Katz, *Mapp After Forty Years: Its Impact on*

defendants dropped drugs as the police approached.<sup>46</sup> The logic behind “dropsy” testimony is simple—if the defendant dropped the evidence then there is no search to complain of. One study of pre- and post-*Mapp* cases raised similar issues of police perjury, and concluded that “police are lying about the circumstances of such arrests so that the contraband . . . will be admissible.”<sup>47</sup> Judge Younger urged over thirty years ago that “dropsy” testimony “should be scrutinized with especial caution.”<sup>48</sup>

So then, what happens at hearings when police officers espouse “dropsy” testimony or manufacture other facts to justify illegal searches?<sup>49</sup> Are lying police officers caught by judges presiding over suppression hearings? Although there is no hard data,<sup>50</sup> the anecdotal evidence indicates that police officers “testily” with relative impunity.

Searches reveal precious few cases where evidence was suppressed based on testimonial perjury. Given the Mollen Commission’s finding that it is part of the most common form of corruption facing the criminal justice system,<sup>51</sup> and the recognition that police perjury is indeed a widespread problem,<sup>52</sup> this is worrisome, to say the least. Ironically, rather than subjecting police testimony to some form of heightened scrutiny, especially regarding dropsy cases, it appears that courts imbue police testimony with heightened credence. As the Mollen Commission concluded, “In short, the tolerance the criminal justice system exhibits takes the form of a lesser level of scrutiny when it comes to police officers’ testimony. Fewer questions are asked; weaker explanations are accepted.”<sup>53</sup>

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*Race in America*, 52 CASE W. RES. 471, 482 (2001) (“The impact of *Mapp* was naturally greatest in the African-American community where Fourth Amendment violations were the most common. Whatever limited effect *Mapp* would have, it would be felt most where police conduct was the least restrained.”).

46. *McMurty*, 314 N.Y.S.2d at 196.

47. Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62*, 4 CRIM. L. BULL. 549, 549-50 (1968).

48. *McMurty*, 314 N.Y.S.2d at 197.

49. The Mollen Commission also noted many other “manufactured tales.” Mollen Report, *supra* note 29, at 38 (“To conceal an unlawful search of an individual who officers believe is carrying drugs or a gun, they will falsely assert that they saw a bulge in the person’s pocket or saw drugs and money changing hands.”).

50. See Telephone Interviews, *supra* note 26.

51. Mollen Report, *supra* note 29, at 38.

52. See Skolnick, *supra* note 40, at 42 (explaining that police perjury is systemic).

53. Mollen Report, *supra* note 29, at 42. This finding is especially troubling in the context of dropsy testimony. Not only did Judge Younger urge that such testimony be viewed with a jaundiced eye, but less than one year later, in *People v. Berrios*, 270 N.E.2d 709 (N.Y. 1971), the District Attorney of Manhattan expressed his concern regarding police perjury and “dropsy” cases. Remarkably, the District Attorney joined the defense in urging the court to hold that in dropsy cases the prosecution should shoulder the ultimate burden of proof to establish the reasonableness of the warrantless search. The District Attorney’s brief

The language used in the few opinions where evidence was suppressed based on apparent police falsification is also telling. The courts' choice of words seems to reflect deliberate efforts to avoid calling police officers "liars."<sup>54</sup> Typically, the opinion states that the officer's testimony was "tailored to nullify constitutional objection."<sup>55</sup> Even in those cases where the courts use harsher language, they steer clear from calling the officer a liar or perjurer.<sup>56</sup>

One might imagine, given the rarity with which police officers are deemed incredible, that those select few officers would be subject to dire consequences. The NYPD, however, has shown little interest in policing falsifications.<sup>57</sup> While disappointing, to say the least, it is not unexpected. Ever since there have been police departments, much has been written about the unwillingness and inability of the police to police itself.<sup>58</sup> Trial

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stated, "For the last ten years participants in the system of justice—judges, prosecutors, defense attorneys and police officials—have privately and publicly expressed the belief that in some substantial but indeterminable percentage of dropsy cases, the testimony . . . is tailored to meet the requirements of search-and-seizure rulings." *Id.* at 714 (Fuld, C.J., dissenting). The court, however, declined to switch the burden of proof. *Id.* at 713.

54. *See, e.g.*, Cloud, *supra* note 40, at 1323-24 ("Judges simply do not like to call other government officials liars—especially those who appear regularly in court."); David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 470-71 (1999) ("[A] scathing opinion impugning the motives, honesty, or competency of police is rarely found in trial court opinions.").

55. *See, e.g.*, *People v. Garofalo*, 353 N.Y.S.2d 500 (App. Div. 1974); *People v. Aquiar*, No. 51140(U), Slip Op. (N.Y. Co. Ct. Feb. 13, 2003); *People v. Brown*, N.Y.L.J., July 22, 2002 (Bx. Sup. Ct.) (Globerman, J.); *People v. Curanovic*, N.Y.L.J., May 2, 2003 (Bx. Sup. Ct.).

56. *See, e.g.*, *People v. Cassidy*, N.Y.L.J., Aug. 23, 1993 (Kings Sup. Ct.) ("The frequency of these farcical stories about how the arrest is made, can only lead to the conclusion that somewhere in the system, someone is telling young police officers what to say, irrespective of what actually happened in the street."); *People v. Martinez*, N.Y.L.J., Mar. 20, 1992 (Kings Sup. Ct.) (Meyerson, J.) ("The Court finds the testimony of the . . . Police witnesses to be factually unclear and unreliable."); *People v. Acosta*, N.Y.L.J., June 25, 1991 (Bx. Sup. Ct.) (referring to "obvious flaws in the officer's testimony and its inherent unbelievability," and stating that "obvious attempts by police to circumvent our basic fourth amendment freedoms . . . will not be tolerated"); *People v. Akwa*, 573 N.Y.S.2d 216, 217 (Sup. Ct. 1991) ("Based upon the glaring inconsistencies revealed in his testimony, and upon the manifestly false explanations he manufactured to account for them, I find his testimony unworthy of belief"); *People v. Fairley*, N.Y.L.J., July 17, 1990 (N.Y. Crim. Ct.) ("Particularly disturbing to this Court is the willingness of the enforcer of our laws to distort the truth to justify his ends.").

57. Mollen Report, *supra* note 29, at 41 (noting that "supervisors were rarely, if ever, held accountable for the falsifications of their subordinates" and that there was not "a single, self-initiated Internal Affairs Division investigation into patterns of police perjury"); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 416 (Burger, C.J., dissenting) ("[w]ith rare exceptions law enforcement agencies do not impose direct sanctions on the individual officer" when evidence is suppressed).

58. *See, e.g.*, *Don't Veto the Police Commission*, N.Y. TIMES, Dec. 22, 1994, at A18;

judges, who observe the witness swear to tell the truth and then willingly, brazenly, and publicly violate that oath, occupy another position entirely. And, no matter how gently and carefully it is labeled, a finding of police incredibility is another way of saying that the officer committed a crime—perjury.<sup>59</sup> Contrast a case where evidence is suppressed because of police perjury with one where evidence is suppressed because the officer, while testifying truthfully, did not have the requisite quantum of information to support his actions. While both result in “illegal” or “unlawful” searches, the one predicated on perjury is “illegal” in the truest sense of the word. Yet, judges by and large do not refer these cases to the appropriate law enforcement authorities.

Are judges aware of the problem of police testimonial perjury? One judge in New York City candidly admitted as much: “Few have not been troubled by police testimony obviously tailored or patently false.”<sup>60</sup> One commentator observed that the “regular participants in the criminal justice system”—judges included—all know that police officers commit perjury.<sup>61</sup> Perhaps, while judges may acknowledge the existence of police perjury generally, it is an altogether different proposition to discern and label it in a particular case. This may be especially true when dealing with a professional, experienced police officer witness.<sup>62</sup>

Yet, we are told that perjury exists, and so it must be discovered. Instead of accepting police testimony as truthful, judges should be skeptical and scrutinize the testimony in the way suggested by Judge Younger thirty-five years ago.<sup>63</sup> They should listen carefully for catch phrases designed to justify warrantless searches.<sup>64</sup> One judge has suggested that to overcome police fabrications judges must also take a more active role in determining the facts.<sup>65</sup> In that case, the judge ordered a crime scene visit to verify

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Mark H. Moore & David M. Kennedy, *N.Y.P.D. Clean*, N.Y. TIMES, Jan. 25, 1994, at A19; *Mr. Giuliani's Police Ploy*, N.Y. TIMES, Mar. 1, 1995, at 18; *The Case for a Police Monitor*, N.Y. TIMES, Apr. 30, 2000, at 18.

59. N.Y. PENAL LAW § 210 (McKinney 2003).

60. *People v. Diaz*, 625 N.Y.S.2d 388, 397 (Bx. Sup. Ct. 1994).

61. Cloud, *supra* note 40, at 1311-12.

62. *Id.* at 1321-22 (noting that judges often accept perjury because it is difficult to determine if a police officer is lying, particularly if he is an experienced witness).

63. See, e.g., Laurie L. Levenson, *Unnerving the Judges: Judicial Responsibility for the Rampart Scandal*, 34 LOY. L.A. L. REV. 787, 790 (2001) (“[J]udges unwittingly participate in police perjury and misconduct by not critically examining police credibility . . .”).

64. Mollen Report, *supra* note 29, at 37-38. The Mollen Report refers to police fabricating probable cause by relying on legal language such as “hot pursuit” or “plain view.” *Id.*

65. *Diaz*, 625 N.Y.S.2d at 390.

independently the testimony's credibility and accuracy.<sup>66</sup> Perhaps above all, judges must be willing to find and state that a police officer has committed perjury.

What, then, about those exceptional cases where judges do find the police witness to be incredible? Given how rare it is for a judge to make such a finding, one imagines that the offending officer's testimony must have been beyond the pale. Surely in those cases the judges refer the perjurer to the appropriate NYPD and prosecutorial authorities. Apparently, even in cases finding testimonial falsification, judges are loath to report the "testilier" to the appropriate authorities.<sup>67</sup>

No doubt, part of the judicial reluctance is grounded in concerns of certainty—how sure should a judge be before referring a police officer for investigation? The standards that govern prosecutors are illuminating. Prosecutors are advised to file charges if there is probable cause to believe the defendant committed the crime.<sup>68</sup> One scholar suggests that prosecutors actually need only a "fair possibility" of guilt in order to commence a prosecution.<sup>69</sup> It stretches credulity to imagine that a judge finding that an officer had tailored his testimony to overcome constitutional requirements would not concomitantly have probable cause, or a fair possibility, to believe the officer committed perjury. Judges must strive to

66. *Id.* at 393.

67. *See, e.g.,* Levenson, *supra* note 63, at 794.

[T]here has been a failure by judges who have witnessed police perjury to take meaningful action to prevent such misconduct in the future. A judge's standard course of action when an officer has lied is to dismiss the case or grant a motion to suppress, and ask the prosecutors to report the misconduct to appropriate police internal affairs authorities. There is no follow-up by the court, no judicial reporting of the misconduct, no contempt orders, and no tracking of the problem officers.

*Id.* A judge in California recently spelled out her inner conflict as she declined to go after officers she suspected of having testified falsely in her courtroom. Katherine Mader, *Conundrum: How Should a Judge Act if She Suspects Two Police Officers Have Testified Falsely*, L.A. TIMES, Mar. 28, 2004, at 10.

68. MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2002).

69. Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1588 (2003). Green argues that Model Rule 3.8(a), dealing with the decision whether to prosecute, is a standard "that is both too low and incomplete." *Id.* In another article, Green observed that "most commentators would agree that a prosecutor should not bring charges unless she has some degree of confidence that the person charged is in fact guilty—although there is disagreement about how much confidence is needed." Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 843 n.25 (2004). Several commentators have argued that prosecutors should be personally convinced of the defendant's guilt. *See, e.g.,* Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 339-42 (2001); John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174, 178 (1965-66).

uncover perjury, and, when they do root it out, they must not let their findings go unnoticed.

For all the varieties of police falsification, perhaps the most revealing was the practice of “trading collars.”<sup>70</sup> Not content to exaggerate or lie about what they did or did not do during the arrest, in this recurring scenario police officers testified about events that occurred when they were not even present:

In one precinct we investigated, a cooperating officer told us of a regular pattern of “trading collars.” The purpose of this practice was to accumulate overtime pay for the officers involved. In the scheme, the police officer who actually arrested the defendant would pass off the arrest to a colleague who was not involved or even present at the time of the arrest. Trading collars was done to maximize the overtime pay because the regular day off of the officer taking the arrest coincided with the likeliest date for a required court appearance. The officer who took the arrest would get all the details from the actual arresting officer, fill out the arrest papers, interview with the District Attorney, and, if necessary, testify to the circumstances of the arrest.<sup>71</sup>

The critical question is what has the judiciary done post-Mollen Commission to make sure it is able to ferret out perjury, and that it never again becomes a complicit or unwitting participant in police falsifications. How have judges responded to the embarrassing and terrifying revelation that they were being duped in many cases? What has the Criminal Court done in response to the clarion call for judicial oversight of the Police Department? Can it be that all the judiciary is doing is relying on the NYPD to better police itself? How many more scandals must there be before the court changes the way it does business? The problem persists because police officers have learned since time immemorial that they can get away with it. It is time for the judiciary to look itself in the mirror and acknowledge its role, however unintentional, in the police falsifications unearthed by the Mollen Commission.<sup>72</sup> “Testiliers” correctly learned that

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70. Mollen Report, *supra* note 29, at 39.

71. *Id.* at 39-40; see also Joe Sexton, *Types of Perjury Common Among Police Officers Are Detailed*, N.Y. TIMES, Apr. 23, 1994, at 27.

They are called “turnover arrests.” A police officer arrests a suspect but has plans for the weekend and doesn’t want to spend the next day in court. So he asks his partner not only to take credit for the arrest, but to take the witness stand in front of the grand jury as well. As mundane as the motivation is, the resulting testimony nevertheless amounts to perjury.

72. See Dershowitz, *supra* note 40, at 23.

The time has come for the courts to understand that they are a serious part of the problem . . . . Judges at every level of every court. Judges who are the ones who say they believe [the perjury]. The appellate judges who say we believe the

their lies would be credited, or, even if not, that they would not suffer any ill consequences.<sup>73</sup>

There are other ways the judiciary can more effectively combat police falsifications. It is well past time for the judiciary to reconsider the use of the guilty plea, especially the guilty plea early in the proceedings, as the engine that drives the Criminal Court. For too long, police corruption has been buried under an avalanche of guilty pleas:

A large part of the problem is that once officers falsify the basis for an arrest, search, or other action in a Department record—such as an arrest report, complaint report, search warrant application, or evidence voucher—to avoid Departmental or criminal charges, they must stick to their story even under oath when swearing to a criminal complaint or giving testimony before a trial jury. But officers know that the operation of the criminal justice system itself usually protects them from having to commit testimonial perjury before a grand jury or at trial. The vast majority of charges for narcotics or weapons possession crimes result in pleas without the necessity of grand jury or trial testimony, thus obviating officers' concerns about the risk of detection and possible exposure to criminal charges of perjury.<sup>74</sup>

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judges who said they believe it.

*Id.*; Dorfman, *supra* note 54, at 465 (“One of the strongest reasons that police lie in court is the simple fact that judges allow them to get away with it.”); Levenson, *supra* note 63, at 788 (“[J]udges must accept some responsibility for the Rampart scandal . . .”).

73. Chase, *supra* note 40, at 769 (“In all but the most egregious of cases . . . a police officer faces no direct consequences of his or her violation.”); see Mollen Report, *supra* note 29, at 36 (“The challenge we face in combating police falsifications, is not only to prevent the underlying wrongdoing that spawns police falsifications but to eliminate the tolerance the Department and the criminal justice system exhibit about police who fail to tell the truth.”); Levenson, *supra* note 63, at 791 (“One can only assume that the officers who lied in the Rampart scandal felt emboldened to do so because they knew they could get away with it.”); Slobogin, *supra* note 39, at 1045 (arguing that police perjury persists because “police think they can get away with it”).

74. Mollen Report, *supra* note 29, at 36-37.

Trials put official behavior on public display; professionalism is reinforced and sloppy, dishonest or abusive conduct is exposed for correction. When it is extremely unlikely that a hearing or trial will ever examine the propriety of their conduct or the truthfulness of what they say, police officers inevitably become less concerned with how they make their arrests, conduct searches and treat defendants.

Caseload Crisis, *supra* note 23, at 15; see also Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2146 (1998) (“fully-adjudicated cases may be too rare to serve as a meaningful check on the executive authorities,” and there are “too few misdemeanor trials to serve as an effective appeals process to regulate prosecutorial decisions”). The lack of trials is endemic to criminal justice systems. See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2466 n.9 (2004) (noting that in 2000, about ninety-five percent of felony convictions in state courts were the result of guilty pleas).



The high volume of pleas at arraignments<sup>75</sup> is especially alarming given that the defense lawyer has just met the client and has not yet investigated and researched the facts and law of the case.<sup>76</sup> The threat of pretrial detention causes many defendants to strike a Faustian bargain—rather than contest the charges, they plead guilty in exchange for their freedom. In the words of one authority on the Criminal Court, “Judges may, especially in misdemeanor cases, set bail at a level they expect is too great for the defendant to make, and then indicate to the defendant that were he to plead guilty the sentence would be time served and he’d be released from custody.”<sup>77</sup>

To best perform their justice-seeking mission, judges should encourage meaningful examinations of the facts and circumstances of the arrest. Presently, it is commonplace for judges to revoke plea offers if the defendant insists on a pretrial suppression hearing. It is also typically the case that a conviction after trial results in a sentence substantially higher than that attached to a guilty plea offer.<sup>78</sup> The predictable result is a slew of guilty pleas that serve to insulate police practice from scrutiny.

It may well be the case that transformation of the judicial reliance on guilty pleas, especially at the accused’s initial court appearance, is also mandated by judicial ethics codes. According to the American Bar

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75. In July-December 2003, nearly half of all cases arraigned in New York City Criminal Court were disposed of at arraignment. Guilty pleas accounted for almost two-thirds of those dispositions. N.Y. City Criminal Justice Agency, Inc., Annual Report 2003, at 16.

76. Pleas at arraignments fly directly in the face of the lawyer’s constitutional and ethical duty to investigate. The American Bar Association Standards that govern defense attorneys provide that defense counsel should “conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case. . .,” and “[u]nder no circumstances should defense counsel recommend to a defendant acceptance of a plea unless a full investigation . . . has been completed.” ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION §§ 4-4.1, 4-6.1 (1980).

77. Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1382 (2004); see also Bibas, *supra* note 74, at 2491-93.

78. See, e.g., MALCOLM C. FEELEY, *THE PROCESS IS THE PUNISHMENT—HANDLING CASES IN A LOWER CRIMINAL COURT* 197 (1979); Levenson, *supra* note 63, at 792.

[W]ittingly or not, judges provide the additional hammer prosecutors and police officers need to coerce defendants to forego trial and their right to challenge the evidence. When judges routinely impose maximum sentences on those who go to trial, and much more lenient sentences on those who do not, the message to defendants is that there is a devastating cost to exercise their Sixth Amendment right to a fair trial.

*Id.*; Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 886 n.285 (1998).

Association Standards, judges are charged with “safeguarding the rights of the accused.”<sup>79</sup> Surely, the accused’s right to a jury trial and to be free from unlawful searches and seizures falls within the ambit of that admonition.<sup>80</sup> Judges must actively “safeguard” the defendant’s rights. In other contexts, commentators have called on the judiciary to play a more active role to ensure that all litigants have access to justice.<sup>81</sup> The notion of judges as active participants is not far-fetched. The advent of problem-solving courts has spawned a new way of thinking about a judge’s role in court proceedings. Problem-solving judges are asked to take on a more participatory, active role in the resolution of the cases in their courts.<sup>82</sup>

In a related context, it is not uncommon these days for judges to make themselves heard regarding their critical views about existing laws.<sup>83</sup> Some have even suggested that organizations of judges should lobby against unfair laws, or, at a minimum, take a public stance.<sup>84</sup>

In a similar vein, judges should recognize and acknowledge the importance of suppression hearings when considering a defense motion to suppress evidence. If those hearings are the place where police falsification is most likely to rear its head,<sup>85</sup> then it behooves the court to hold more, not fewer, suppression hearings. One would think that the publicized recognition about the disproportionate impact of present policing policies on people of color, and the increasing acknowledgement that many are wrongly convicted, would compel the courts to examine the basis for the search and seizure in every case. Yet, in actuality the trend seems to be toward narrow and overly strict interpretations of case law as a

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79. ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE § 6-1.1 (3d ed. 2000).

80. Klein, *supra* note 77, at 1372.

81. See, e.g., Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969 (2004) (urging replacing “the paradigm of judge as passive umpire with the paradigm of judge as active umpire”).

82. See, e.g., James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1543 (2003). For more regarding problem-solving courts see *infra* notes 99-117 and accompanying text.

83. See, e.g., Deborah Pines, *Ten Years Later, Federal Sentencing Guidelines Go Down Easier; Seen as Allowing Judges More Flexibility than Anticipated*, N.Y.L.J., Nov. 3, 1997, at 1 (“Some of the loudest critics in the early years of the federal sentencing guidelines were federal district judges.”). In fact, some judges have resigned from the bench in a public display of their distaste for the federal sentencing guidelines. See Leonard Post, *Irked By Sentencing Law Two U.S. Judges Lash Out at “Feeney,”* RECORDER, Feb. 13, 2004, at 3.

84. See, e.g., John Caher, *Backer of Changes in Rockefeller Drug Law Says Judges Should Get Off the Sidelines*, N.Y.L.J., Oct. 7, 2004, at 1.

85. See generally Chin & Wells, *supra* note 41, 248-50 (noting the prevalence and tolerance of police perjury in suppression hearings).

means to deny defendants suppression hearings.<sup>86</sup>

Once a hearing is commenced, it must be viewed as an opportunity to discover the truth. Judges should refrain from sacrificing the truth seeking function of the hearing at the altar of judicial expediency and economy. If cross-examination<sup>87</sup> is indeed the best method to ascertain the truth,<sup>88</sup> then courts should refrain from unduly limiting the scope and nature of the cross.<sup>89</sup> Similarly, the court should demand that the prosecutor call as witnesses the police officers most directly involved in the arrest. Increasingly, prosecutors are using hearsay upon hearsay to make their case.<sup>90</sup> This provides another layer of insulation for a corrupt police officer. Finally, the court should be more willing to allow the defense to call its own witnesses, including any of the police officers involved with the arrest.<sup>91</sup> Undoubtedly, some of these changes might result in greater demands on police time. The key question is whether the court should be most concerned with causing the police officer some degree of inconvenience, or with critically examining what occurred. The Mollen

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86. See, e.g., *People v. Mendoza*, 624 N.E.2d 1017 (N.Y. 1993). The court in *Mendoza* addressed the requirements of N.Y. CRIM. PROC. LAW § 710.60 [hereinafter N.Y. CRIM. PROC. LAW] regarding what the defense must allege in a suppression motion in order to merit a hearing. The Court stated that the factual allegations should be evaluated by the face of the pleadings, and assessed in conjunction with the context of the motion and the defendant's access to information. *Mendoza*, 624 N.E.2d at 1021. Commentators have observed that trial courts are increasingly applying *Mendoza* to deny defense motions for suppression hearings. See, e.g., Brooks Holland, *Defendants in Possession Cases Face a Dilemma in Pleading Standing*, N.Y.L.J., June 30, 1999, at 1.

87. U.S. CONST. amend. VI.

88. See, e.g., FRANCIS L. WELLMAN, *THE ART OF CROSS-EXAMINATION* (4th ed. 1948); J. Alexander Tanford & Sarah Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N.C. L. REV. 741, 765 (1988) ("[C]ross-examination is said to be an excellent vehicle for discovering and exposing the falsehoods of mendacious witnesses.").

89. For a discussion of the defendant's right to fully cross-examine the prosecution's witnesses at a suppression hearing, see generally *People v. Edwards*, 741 N.E.2d 876 (N.Y. 2000), and *People v. Williamson*, 588 N.E.2d 68 (N.Y. 1991).

90. The prosecution has the burden of going forward with evidence that shows a constitutional basis for the arrest. See *People v. Parris*, 632 N.E.2d 870, 872 (N.Y. 1994). A police officer testifying at a suppression hearing can establish probable cause by personal knowledge or by information provided by others. See *People v. Washington*, 663 N.E.2d 1253, 1254 (N.Y. 1996); *Parris*, 632 N.E.2d at 873. It is not always the case, however, that hearsay will suffice. See, e.g., *People v. Ketcham*, 712 N.E.2d 1238, 1241-43 (N.Y. 1999); *People v. Gonzalez*, 600 N.E.2d 238, 238-39 (N.Y. 1992).

91. See *People v. Chipp*, 552 N.E.2d 608, 614 (N.Y. 1990) (finding that the right of compulsory process at a pretrial hearing regarding the admissibility of identification testimony is within the court's discretion); see also *People v. Skinner*, 632 N.Y.S.2d 283, 285 (App. Div. 1995);

*People v. Acquaah*, 562 N.Y.S.2d 62, 64 (App. Div. 1990) ("A defendant's right to call a witness at a suppression hearing is not absolute.").

Report and the New York City history of police scandals should answer that question easily.

By turning their focus to the underlying actions of the police, the courts will return to the lofty ideals of the exclusionary rule and the critical role of the judiciary. In *Weeks v. United States*, the Court established the rule excluding in a federal prosecution evidence obtained by federal agents in violation of the defendant's Fourth Amendment rights.<sup>92</sup> Subsequently, in *Mapp v. Ohio*, the Court extended the exclusionary rule to the states as a matter of constitutional law so that evidence obtained in violation of the Constitution was inadmissible in a criminal trial in state court.<sup>93</sup> Over time, the Court has made clear that the exclusionary rule's "primary purpose is to deter unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."<sup>94</sup> Put another way, "Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."<sup>95</sup> The logic is straightforward—evidence must be suppressed in order to deter the police from violating the Constitution.<sup>96</sup>

If, on the other hand, evidence is virtually never suppressed, illegal searches will thrive. No doubt the findings of the Mollen Commission and

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92. 232 U.S. 383 (1914).

93. 367 U.S. 643 (1961).

94. *United States v. Calandra*, 414 U.S. 338, 347 (1974); *see also* *Elkins v. United States*, 364 U.S. 206, 235 (1960) (Frankfurter, J., dissenting) (explaining that one justification for the exclusionary rule is its role in "exert[ing] general legal pressures to secure obedience to the Fourth Amendment on the part of federal law-enforcing officers"); Daniel S. Schneider, *The Future of the Exclusionary Rule and the Development of State Constitutional Law*, 1987 WIS. L. REV. 377, 384 (1987) (arguing that the exclusionary rule is designed to deter police misconduct).

95. *Elkins v. United States*, 364 U.S. 206, 217 (1960).

96. *See, e.g.*, Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 17-18 (2003) (noting that court oversight of police conduct is limited by the number and kind of issues considered by courts); *see also* *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which the courts do nothing, and about which we never hear. Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty.

the New York State Attorney General support that conclusion. Perhaps former Chief Justice Warren Burger put it best, “The rule has rested on a theory that suppression of evidence in these cases was *imperative* to deter law enforcement authorities from using improper methods to obtain evidence.”<sup>97</sup> Burger went on to observe that law enforcement would be deterred if the evidence is “suppressed *often enough*.”<sup>98</sup> Suffice it to say that the Criminal Court has long since abandoned this critical role, and we all pay the price with the outbreak of every police scandal and/or publication of reports detailing stop and frisk abuses on our streets.

What do the courts as a whole now do differently? How have the courts changed in the quality-of-life/zero tolerance policing, post-Mollen Commission world? In the past decade, so-called problem-solving courts have begun to dot the judicial landscape.<sup>99</sup> Drug treatment courts, domestic violence courts, community courts and even commercial courts, have evolved from interesting pilot projects to mainstream court administration.<sup>100</sup> Under the leadership of Chief Judge Judith Kaye, New York has assumed the position as the state judiciary most committed to reinventing the way its courts do business.<sup>101</sup> Problem-solving courts “use the coercive authority of the courts to achieve more meaningful case outcomes,”<sup>102</sup> and “broaden the focus of legal proceedings from fact-finding and narrow legal issues to changing the future behavior of litigants (and the future well-being of communities).”<sup>103</sup> Leading proponents of problem-solving courts revel in the prospects of “full-scale reform of [the]

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97. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 413 (1971) (Burger, C.J., dissenting) (emphasis added).

98. *Id.* at 415 (emphasis added).

99. For a further discussion on problem-solving courts see generally Greg Berman & John Feinblatt, *Problem-Solving Courts: A Primer*, 23 LAW & POL’Y 125 (2001); Judith Kaye, *Rethinking Traditional Approaches*, 62 ALB. L. REV. 1491 (1999); and Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055 (2003).

100. Even the Supreme Court is weighing in. In his speech at the American Bar Association’s annual meeting, Justice Stephen G. Breyer urged the development of problem-solving courts. See Molly McDonough, *ABA Notes: Breyer on Supreme Civility*, NAT’L L.J., Aug. 20, 2001, at A15.

101. Judge Kaye’s efforts in this regard have received national attention and recognition. She was awarded the National Center for State Courts’ 1999 William H. Rehnquist Award for Judicial Excellence based on her “innovative, problem-solving approach to justice.” See *Today’s News Update*, N.Y.L.J., Nov. 10, 1999, at 1. There are almost thirty problem-solving courts operating presently in New York City alone. See Rayner, *supra* note 1, at 1049 n.63.

102. John Feinblatt, et al., *Institutionalizing Innovation: The New York Drug Court Story*, 28 FORDHAM URB. L.J. 277, 282 (2000).

103. *Id.*

state court system.”<sup>104</sup> The State’s Chief Administrative Judge speaks of “institutionalizing [the] problem-solving approach into the very fabric of what we do in the courts on a daily basis.”<sup>105</sup>

Court innovation is to be commended. Unquestionably, the age-old way of doing business in the Criminal Court was not working on any measure, and it is no small accomplishment to reform the culture of the courts.<sup>106</sup> Still, the problem-solving court movement must be carefully scrutinized. Although imbued with noble goals, it is imperative to ask whether these courts actually encourage or discourage a probing, critical examination of how the police came to bring the accused under the thumb of the criminal justice system in the first place.

Coincidentally, or ironically, the advent of these courts coincides with the massive influx of misdemeanor arrests. Just as misdemeanor cases came to dominate the court calendars, problem-solving approaches began to permeate judicial attitudes. As the net widened, and the police arrested more people—primarily people of color—for relatively minor transgressions, the courts began to change their focus. We cannot, and should not, uncouple the proliferation of problem-solving courts from the underlying police activity that brought the accused into court.

Problem-solving courts seek to promote a mindset of cooperation among all the institutional players. Defense lawyers are urged to shift from a litigation-based, adversarial approach to a team-based problem-solving ideal.<sup>107</sup> Typical of the descriptions of these courts are comments about the Red Hook Community Justice Center in Brooklyn, New York: “The prosecutor and defense lawyer are part of the same team, working on the long-term best interests of individual defendants and the community.”<sup>108</sup>

Proponents of problem-solving courts and its teamwork emphasis aver that the adversarial system is not working. It is more accurate, however, to note that the Criminal Court is not, and has never been, adversarial. Ever since *Gideon v. Wainwright*<sup>109</sup> spawned the development of public

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104. Feinblatt, *supra* note 102, at 279-80.

105. John Caher, *\$1.14 Billion Budget Proposed By Judiciary; 3.4% Increase Sought in Court Spending*, N.Y.L.J., Dec. 2, 1999, at 5 (quoting New York’s Chief Administrative Judge Jonathan Lippman).

106. See, e.g., MALCOLM C. FEELEY, *COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL* (1983) (evaluating various means of court reform).

107. See, e.g., Judith S. Kaye, *Lawyering for a New Age*, 67 FORDHAM L. REV. 1, 5 (1998); Nolan, *supra* note 82, at 1543; see generally Drug Courts Program Office, Office of Justice Programs, U.S. Dep’t of Justice, *Defining Drug Courts: The Key Components*, 1997, available at <http://www.ncjrs.org/html/bja/define/welcome.html>.

108. Terry Carter, *Red Hook Experiment*, 90 A.B.A. J. 36, 39 (June 2004).

109. 372 U.S. 335 (1963).

defender offices across the country, commentators have detailed the widespread deficiencies of many indigent defense providers.<sup>110</sup> Whether due to staggering caseloads, institutional pressures, organizational cooptation, or bureaucratic allegiances to other players in the court system, the proclivities of indigent defense attorneys to plead out their clients are well-documented.<sup>111</sup> Although the Criminal Court has been fraught with problems, an overabundance of adversarialness is not one of them. As one scholar observed, “the American system as it actually operates in most cases looks much more like what common lawyers would describe as a non-adversarial, administrative system of justice than like the adversarial model they idealize.”<sup>112</sup> In this day and age, what we actually need to develop is a true, full-scale adversarial system where hearings and trials are the norm.

Other commentators believe that by abandoning even the semblance of the adversarial system, and in so doing pushing aside concerns of probable cause and culpability, problem-solving courts inappropriately fast forward to sentencing.<sup>113</sup> Particularly troubling are those courts that encourage defendants, implicitly or explicitly, to plead guilty early in the proceedings.<sup>114</sup> The result is a system exactly the opposite of one that

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110. See, e.g., ROBERT HERMANN ET AL., COUNSEL FOR THE POOR: CRIMINAL DEFENSE IN URBAN AMERICA (1977); Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1986-87).

111. See, e.g., Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1182 (1975); Abraham Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, LAW & SOC'Y REV., June 1967, at 18; Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 656-75 (1986); David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255, 256, 258-59 (1965).

112. Lynch, *supra* note 74, at 2118.

113. See, e.g., Cait Clarke & James Neuhard, “From Day One”: Who’s in Control as Problem Solving and Client-Centered Sentencing Take Center Stage?, 29 N.Y.U. REV. L. & SOC. CHANGE 11, 28 (2004) (“These specialized courts are essentially extended sentencing courts designed to support ongoing relationships and monitoring of the offender by a judge and professional service providers who work for the court.”); Jane M. Spinak, *Why Defenders Feel Defensive: The Defender's Role in Problem-Solving Courts*, 40 AM. CRIM. L. REV. 1617, 1623 (2003) (“[T]here needs to be a more thorough analysis of when the clients’ due process rights are appropriately incorporated into the problem-solving court rather than assuming these rights get in the way of achieving good outcomes for clients.”).

114. See Clarke & Neuhard, *supra* note 113, at 30; Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1533 (2000) (“In their mad rush to dispose of cases, drug courts are risking the due process rights of defendants and turning all of us—judges, staff, prosecutors, and public defenders alike—into cogs in an out-of-control case-processing machine.”); Spinak, *supra* note 113, at 1620 (regarding the “current trend in drug court procedure of requiring a guilty plea or waiver of other due process rights as a condition of entering treatment, rather than permitting the defendant to begin treatment without entering

encourages a probing examination of the underlying arrest and the accused's culpability.<sup>115</sup> Instead, problem-solving courts focus on treatment, usually part of sentencing discussions. At best, you end up with a system of misplaced, though perhaps well-intentioned, social service programs grafted onto people, many of whom probably really did not need to be in the Criminal Court in the first place.<sup>116</sup>

Whose problems do these courts purport to solve? The courts'? The prosecution's? Law enforcement's? Society's? The defendants'? And, what is the problem they purport to solve? Recidivism? Public safety? Public perceptions about the courts and justice? Public perceptions about, and fear of, crime? Court efficiency in the face of huge caseloads? Alcohol and drug abuse? These are obvious and vital questions for any discussion about problem-solving courts.<sup>117</sup> If the courts are concerned primarily with the defendant and his "problems," then we must ask what sort of therapeutic value is added by the problem-solving court. Well before terms like problem-solving courts and therapeutic jurisprudence came into the vernacular, scholars found that defendants cared about more than the outcomes of their cases. To the surprise of some, it turned out that defendants also cared deeply about the process and whether they were treated fairly.<sup>118</sup> In fact, many suggested that treating defendants fairly increased the chances that they would avoid future misconduct.<sup>119</sup>

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a plea"). *But see* John Feinblatt et al., *The Future of Problem-Solving Courts*, 15 CT. MANAGER 28, 33 (2000) (suggesting that some problem-solving courts have procedures that "improve upon the current climate of coercion").

115. John Feinblatt & Derek Denckla, *What Does it Mean to be a Good Lawyer? Prosecutors, Defenders and Problem-Solving Courts*, 84 JUDICATURE 206, 209 (Jan./Feb. 2001) ("In problem-solving courts, the criminal justice system is consciously shifting resources out of the process of adjudicating legal guilt and innocence and into treatment services because we don't want to spend so much time playing adversarial games if defendants are going to end up pleading guilty anyway.").

116. *See* Nolan, *supra* note 82, at 1541 (supporters of problem-solving courts "argue that the need for legal change is heightened by the failure of traditional institutions to handle a growing number of social problems").

117. One commentator suggests that problem-solving courts seek to address "the underlying problems of individual litigants, the structural problems of the justice system, and the social problems of the communities." Greg Berman, *What is a Traditional Judge Anyway? Problem Solving in the State Courts*, 84 JUDICATURE 78, 78 (2000).

118. *See, e.g.,* JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); Jonathan D. Casper, *Having Their Day in Court: Defendant Evaluations of the Fairness of Their Treatment*, 12 LAW & SOC'Y REV. 237 (1978); Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51 (1984).

119. *See, e.g.,* Steven Zeidman, *Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on the Rights of the Accused*, 62 BROOK. L. REV. 853, 899 n.178 (1996); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 297 (2003) (stating that "procedural justice is a key antecedent of long-term



The defendants' feelings of unfairness did not have to do with whether they were treated therapeutically or whether their problems were solved. Rather, defendants clamored for what boils down to basic due process. They wanted an advocate to fight for their rights, and for a judge to give them their day in court. Defendants voiced particular concerns about their lawyers. So-called consumer perspective studies consistently reflect complaints that lawyers failed to provide advice or counsel.<sup>120</sup> Instead, countless defendants stated that their lawyers simply urged them, vociferously, to plead guilty.<sup>121</sup> Defendants wanted, not surprisingly, an advocate; a lawyer who would fight to enforce their rights. If we truly cared about therapeutic value to the accused of court proceedings, we would strive mightily to ensure that every defendant felt like he had his day in court and that all his rights were protected. Those do not seem to be high priority goals of the problem-solving courts.<sup>122</sup>

While problem-solving may well be therapeutic for the community, and even the accused, does it address concerns about innocence, racially motivated arrests, and police falsifications? Shouldn't courts be investigating more cases? Shouldn't courts be holding more suppression hearings and more trials? Instead, it seems that problem-solving courts, with their emphasis on sentencing and treatment, further imbed a culture of pleas and blind faith in police activity. By focusing on "helping" the accused, and often "demanding" guilty pleas in the process, these courts serve ironically to better insulate police falsifications from ever coming to the surface.

The Mollen Commission's second category of police falsification is

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compliance").

120. See, e.g., Zeidman, *supra* note 78, at 873 n.200.

121. See, e.g., JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE—THE DEFENDANT'S PERSPECTIVE 106 (1972) ("Most of the men reported that among the first words uttered by their public defender were: 'I can get you [X] if you plead guilty.'"); Alan F. Arcuri, *Lawyers, Judges, and Plea Bargaining: Some New Data on Inmates' Views*, 4 INT'L J. CRIMINOLOGY & PENOLOGY 177, 183 (1976) (defendants "reported that they were pressured into pleading guilty"); Glen Wilkerson, *Public Defenders as Their Clients See Them*, 1 AM. J. CRIM. L. 141, 143 (1972) ("[R]eal or imagined pressure to plead guilty is a frequent complaint of defender clients.").

122. See, e.g., Richard Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1255 (1998) (defendants who agree to participate in treatment court "effectively forego the presumption of innocence and the panoply of trial rights guaranteed by the Constitution"); Nolan, *supra* note 82, at 1559.

In fact, drug court clients typically sign forms waiving a host of constitutional rights in order to participate in a drug court, including the right to trial by jury, the right to a speedy trial, the right to a preliminary hearing, and the requirement of probable cause for a search and seizure.

called “documentary perjury”—where an officer swears falsely under oath in an affidavit or criminal complaint.<sup>123</sup> Once again, police engage in this form of corruption because they know they can, and do, get away with it. In 2004, more than 190,000 people were arrested on misdemeanor charges in New York City.<sup>124</sup> For sure, the overwhelming majority were people of color.<sup>125</sup> Factor in growing concerns about innocence and the ever present specter of police corruption and it becomes clear that judges must meaningfully review the pleadings as early as possible.

In *People v. Dumas*,<sup>126</sup> the Court of Appeals of New York stressed that a misdemeanor complaint must allege “facts of an evidentiary character”<sup>127</sup> demonstrating “reasonable cause” to believe the accused committed the crime charged.<sup>128</sup> The complaints at issue contained merely conclusory statements and were dismissed as facially insufficient. The court emphasized the critical nature of the reasonable cause determination by pointing out that a misdemeanor complaint can serve as the basis for an arrest warrant, and is designed to provide the court with sufficient facts to decide whether the accused should be held for further proceedings.<sup>129</sup> Given the consequences that can flow from a misdemeanor complaint, it is entirely appropriate that it be comprised of evidentiary facts instead of conclusory statements.

Just one year later, the court applied the logic of *Dumas* to “informations.”<sup>130</sup> The court held that an information must demonstrate both “reasonable cause” and a legally sufficient or prima facie case.<sup>131</sup> As revealed by Judge Bellacosa in his concurring opinion, the court was well aware of the impact of its holding and the “practicalities encountered in prosecuting the relatively greater numbers of these relatively less serious crimes,”<sup>132</sup> but the need for specific factual allegations was seen as necessary “so that such prosecutions do not become routinized or treated by anyone as insignificant or unimportant.”<sup>133</sup> Amazingly, the call for

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123. Mollen Report, *supra* note 29, at 36.

124. CITE – I RECEIVED THIS NUMBER VIA EMAIL TO AUTHOR FROM NYS DIVISION OF CRIMINAL JUSTICE SERVICES (DCJS)

125. *See, e.g.*, CJA Research Brief, *supra* note 6, at 4 (eighty-four percent of those arrested for non-felonies in 1998 were African-American or Latino).

126. 497 N.E.2d 686 (N.Y. 1986).

127. N.Y. CRIM. PROC. LAW § 100.15(3) (McKinney 2005).

128. N.Y. CRIM. PROC. LAW § 100.40(4)(b).

129. *Dumas*, 497 N.E.2d at 687.

130. N.Y. CRIM. PROC. LAW § 100.15.

131. *People v. Alejandro*, 511 N.E.2d 71, 73 (N.Y. 1987).

132. *Id.* at 75.

133. *Id.*

accusatory instruments with evidentiary facts has simply spawned a slew of accusatory instruments containing remarkably similar, canned language. This is evidenced by complaints charging misdemeanor drug possession in New York City courts,<sup>134</sup> often with similar concluding paragraphs extolling the officer's experience and training regarding narcotics, regardless of whether it is the officer's first or one-hundredth drug case. Judges must avoid lapsing into perfunctory review of sufficiency and reasonable cause, and their critical scrutiny of the accusatory instrument should take place at the arraignment.<sup>135</sup>

Falsifying records, primarily police reports, is the third category of police falsification.<sup>136</sup> The judiciary can best police this form of corruption by monitoring discovery practice.<sup>137</sup> The criminal discovery procedure embodied in Article 240 was enacted almost twenty-five years ago, and was intended to promote the greater, freer, and earlier exchange of information between the parties.<sup>138</sup> As the court stated in *People v. Copicotto*,<sup>139</sup> the discovery statute

evinces a legislative determination that the trial of a criminal charge

134. N.Y. PENAL LAW § 220.03 (McKinney 2003).

135. While many judges decline to hear oral sufficiency challenges at arraignments, it seems apparent that, not only should they entertain such motions, they are in fact obligated to do so. See N.Y. CRIM. PROC. LAW § 140.45; *People v. Hernandez*, 770 N.E.2d 566, 566 (N.Y. 2002); *People v. Machado*, 698 N.Y.S.2d 416, 419 (Crim. Ct. 1999). The Constitution mandates that a reasonable cause determination be made by a judge "promptly" after a defendant has been arrested without a warrant. *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975); see also N.Y. CRIM. PROC. LAW § 140.20 (persons arrested must be arraigned without unnecessary delay); *County of Riverside v. McLaughlin*, 500 U.S. 44, 55-57 (1991) (a probable cause determination coupled with arraignment must generally take place within forty-eight hours of arrest); *People ex rel. Maxian v. Brown*, 568 N.Y.S.2d 575, 577 (App. Div. 1990), *aff'd*, 77 N.Y.2d 422 (1991) (a delay of more than twenty-four hours between arrest and arraignment is presumptively unreasonable).

136. Mollen Report, *supra* note 29, at 36.

137. N.Y. CRIM. PROC. LAW § 240.20. Since there is no constitutional right to pretrial discovery, *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), public policy considerations figure prominently. New York also statutorily prescribes a practice for bills of particulars. N.Y. CRIM. PROC. LAW § 200.95. According to the practice commentaries,

[t]he function of a bill of particulars is to "define more specifically the crime or crimes charged . . . or, in other words, to provide clarification" by furnishing information as to the substance of the factual allegations. Thus its office is to give the defendant information regarding the circumstances underlying the accusation, or its context, so that the defendant understands precisely what it is he or she is to defend against.

Peter Preiser, N.Y. CRIM. PROC. LAW § 200.95, Practice Commentaries.

138. See, e.g., James A. Yates, *Discovery Provision is Misunderstood*, N.Y.L.J., Oct. 14, 2003, at 2 ("As one of the principals involved in the drafting of Article 240, I feel compelled to point out that Article 240 was intended to advance, not restrict, discovery.").

139. 406 N.E.2d 465, 468 (N.Y. 1980).

should not be a sporting event where each side remains ignorant of facts in the hands of the adversary until events unfold at trial. Broader pretrial discovery enables the defendant to make a more informed plea decision, minimizes the tactical and often unfair advantage to one side, and increases to some degree the opportunity for an accurate determination of guilt or innocence.<sup>140</sup>

Discovery has evolved into a series of form filings, responses, and decisions. Judges should invest in discovery so that it meets its lofty ideals as to what must be turned over,<sup>141</sup> when it must be turned over,<sup>142</sup> and sanctions against the prosecutor for failing to turn it over.<sup>143</sup>

The judiciary has at its disposal several other mechanisms to help detect falsifications in police reports. In *Brady v. Maryland*, the Supreme Court held that a criminal defendant has a due process right to disclosure of evidence favorable to him and material to guilt or punishment.<sup>144</sup> New York courts have often found greater protection for defendants on *Brady*-related claims than that granted by the federal courts.<sup>145</sup> Subpoenas provide another avenue for prying loose police reports that might contain lies.<sup>146</sup> While there is no constitutional right to subpoena government documents,<sup>147</sup> trial judges do indeed have the discretionary authority to issue subpoenas duces tecum.<sup>148</sup> New York's Freedom of Information Law ("FOIL") was enacted to provide the public with access to government

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140. *Id.*

141. *See, e.g.,* Yates, *supra* note 138 (discussing the court's discretionary authority to order discovery).

142. *See, e.g.,* Levenson, *supra* note 63, at 792 ("[J]udges often allow prosecutors to skirt their responsibility to turn over timely discovery . . .").

143. N.Y. CRIM. PROC. LAW § 240.40. *See* BRAD MIDDLEKAUFF, CRIMINAL DISCOVERY IN NEW YORK STATE: A REPORT TO THE NEW YORK STATE ASSEMBLY CODES COMMITTEE 58 (1992) (discussing, inter alia, the use of sanctions for discovery violations). Inadequate pretrial discovery has many other adverse consequences. *See e.g.,* Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097 (2004) (discussing how insufficient discovery, and the corresponding inability to fully investigate, leads to ineffective assistance of counsel).

144. 373 U.S. 83, 87 (1963); *see* Giglio v. United States, 405 U.S. 150, 153-54 (1972).

145. *See* Abraham Abramovsky, *Pretrial 'Brady' Disclosure in N.Y.*, N.Y.L.J., Nov. 30, 2001, at 3 (regarding New York courts finding greater rights for defendants with respect to the timing and scope of *Brady* disclosures); *see also* People v. Vilardi, 555 N.E.2d 915, 919 (N.Y. 1990); People v. Novoa, 517 N.E.2d 219, 223 (N.Y. 1987).

146. N.Y. CRIM. PROC. LAW art. 610.

147. *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987).

148. *See, e.g.,* People v. Bagley, 720 N.Y.S.2d 454, 455 (App. Div. 2001) (finding that the defendant must provide a factual predicate that the documents sought would bear relevant and exculpatory evidence); Yates, *supra* note 138.

records.<sup>149</sup> While the applicability of FOIL to pending criminal cases has generated much debate and litigation, the time is ripe for judges to reconsider FOIL requests as appropriate in particular cases.<sup>150</sup>

The usual objection to expanded discovery devices is administrative. The police department, in particular, objects that it cannot function under the weight of too many subpoenas and FOIL requests.<sup>151</sup> Should the courts be more concerned with police department complaints about a plethora of paperwork, or with making sure that every litigated case is free from corruption? Again, the Mollen Commission and the history of police scandals speak directly to that question. How better to track down falsifications in police reports than by making them available to the defense and the subject of thorough and probing cross-examination?

The prosecutor's special role is supposedly to seek justice, not merely convictions.<sup>152</sup> Where was, and is, the prosecutor in this tale of rampant police falsification? How do prosecutors identify police perjury? What do they do when a police officer is found to be incredible? The fact is, a subsequent prosecution for perjury is altogether rare.<sup>153</sup> The anecdotal evidence suggests that prosecutors often ignore manifestations of police corruption.<sup>154</sup> In the course of ascribing blame and fault for flourishing police falsifications, the Mollen Commission added,

Officers and their immediate supervisors are not the only culprits in tolerating falsifications . . . the Department's top commanders must share

149. N.Y. PUB. OFF. LAW § 84 *et seq.* (McKinney 1988). For illustrative purposes see Freedom of Information Act, 5 U.S.C. § 552 (1994).

150. *See, e.g.,* Legal Aid Soc'y v. N.Y. City Police Dep't, 713 N.Y.S.2d 3, 4 (App. Div. 2000); Gould v. N.Y. City Police Dep't, 675 N.E.2d 808, 812 (N.Y. 1996) (finding that the police department's "complaint follow-up report" was not entitled to blanket protection under one of FOIL's enumerated exemptions).

151. *See* Jeremy Travis & Thomas P. Doepfner, *Using Subpoenas to Obtain Police Records*, N.Y.L.J., May 21, 1993, at 1 (discussing the costs to the police department of judicial subpoenas *duces tecum*).

152. *See, e.g.,* Bennett L. Gershman, *Mental Culpability and Prosecutorial Misconduct*, 26 AM. J. CRIM. L. 121, 129 n.17 (1998); Bruce A. Green, *Why Should Prosecutors "Seek Justice,"* 26 FORDHAM URB. L.J. 607, 643 (1999).

153. *See, e.g.,* Cloud, *supra* note 40, at 1313 ("Occasionally police officers are prosecuted for perjury, and from time to time they are punished. These cases are unusual, however, and undoubtedly represent only a fraction of the cases in which perjury has occurred."); Irving Younger, *The Perjury Routine*, NATION, May 8, 1967, at 596 ("The policeman is as likely to be indicted for perjury by his co-worker, the prosecutor, as he is to be struck down by thunderbolts from an avenging heaven.").

154. The Mollen Commission reported about a practice referred to as "collars-for-dollars." Mollen Report, *supra* note 29, at 39. This scheme involved officers making unlawful arrests timed conveniently to generate overtime pay for the arresting officer. *Id.* According to the Commission, this practice was "widely known to officers, police supervisors, and prosecutors alike." *Id.*

the blame. Members of the law enforcement community, and particularly defense attorneys, told us that this 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.<sup>155</sup>

How did the District Attorneys respond to the knowledge that they were apparently regularly played like fools, or worse, exposed? When the nature and extent of police falsifications began to surface, the District Attorney of Brooklyn called the problem "significant," and his counterpart in Queens termed it "terribly troublesome."<sup>156</sup> What sort of post-hoc grand rounds did they engage in to see how they missed all the testilying, reportilying, and related falsifications? What do they now do differently as a result?<sup>157</sup> How have they incorporated the lessons of the Mollen Commission into their training about police credibility and the need for prosecutors to critically, and even skeptically, evaluate police officers' accounts of arrests?

These are critical questions. The prosecutor, after all, serves as the frontline or the gatekeeper to the criminal court. It is the prosecutor who interviews the arresting officer and decides whether to initiate criminal proceedings.<sup>158</sup> The prosecutor's decision to file a criminal court accusatory instrument represents some form of vouching for the arresting officer. Their ability, and willingness,<sup>159</sup> to carefully and accurately discern truth and ferret out lies is of paramount concern.<sup>160</sup> Yet, administrative changes over the years have served to distance prosecutors from arresting officers, thereby making it that much harder to assess credibility. It was once standard practice for the arresting officer to be interviewed by a prosecutor in-person shortly after the arrest. Today, more and more, the interview is conducted over the phone or through videoconferencing.<sup>161</sup> As a result, the possibility of being trained to look

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155. *Id.* at 41-42.

156. Sexton, *supra* note 71.

157. See, e.g., Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L. 305, 308 (2001) (discussing what the prosecutors could have done to better prevent the police scandal in Los Angeles, and what they should do in the future to prevent such abuses).

158. *Id.* at 305 ("Prosecutors are thus in a unique role to oversee and monitor the conduct of the police.").

159. *Id.* at 310 (addressing the reluctance of some prosecutors to challenge police officers' accounts of the arrest).

160. *Id.* at 316 (arguing that prosecutors have a responsibility to "question and evaluate" police officers' credibility, especially since so many cases are resolved without a trial).

161. See, e.g., Bill Farrell, *A New Arrest Process*, DAILY NEWS, Dec. 7, 1995, at 2;

for so-called telltale signs of lying (i.e., shifting in the seat; averting one's eyes; etc.) is rendered meaningless.<sup>162</sup>

Other actions by prosecutors have the effect of making it harder, rather than easier, to detect police falsification. The New York State District Attorney's Association, in conjunction with the New York State Law Enforcement Council ("LEC"), has labored mightily to restrict the flow of information to the defense. As discussed above, New York's Freedom of Information Law provides public access to government records.<sup>163</sup> The LEC has supported legislation that exempts law enforcement agency records relating to pending criminal cases from FOIL.<sup>164</sup> If passed, this legislation would close a potential path to the discovery of police falsification. In *People v. Ranghelle*, the Court of Appeals held that reversal was the appropriate remedy whenever the prosecution failed to disclose any prior statements of a witness who testified at trial.<sup>165</sup> The LEC steadfastly and aggressively advocated for the legislation that overruled *Ranghelle* by removing the automatic reversal remedy and substituting a harmless error analysis.<sup>166</sup>

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Joseph P. Fried, *TV Speeds Cases From Police to Prosecutor*, N.Y. TIMES, Mar. 28, 1995, at B4 ("[v]ideo teleconferencing is about efficiency, processing arrests and returning police officers to the street as quickly as possible," quoting then Police Commissioner William J. Bratton); Bob Kappstatter, *BLAP! Bronx Cops Fight Time*, DAILY NEWS, July 21, 1995, at 2; Leonard Rubin, *PC-Based Video Provides More Bang for the Buck*, N.Y.L.J., Jan. 23, 1995, at S2; Chuck Sudetic, *Plan Streamlines Booking in 14 Brooklyn Precincts*, N.Y. TIMES, Aug. 14, 1995, at B2 ("[w]e all used to think you had to see a police officer and a victim sitting across a table," quoting an assistant district attorney).

162. This is but another example of the ways the Criminal Court emphasizes efficiency at the expense of truthseeking. Not that long ago, the arresting officer had to speak with a prosecutor face-to-face, and also had to appear in court at the arraignment. See, e.g., E.R. Shipp, *Prearrest System to be Used by Morgenthau*, N.Y. TIMES, June 6, 1982, at 32. In both situations, the officer was subject to being questioned about the circumstances surrounding the arrest. *Id.* As we move closer to a form of virtual justice, the arresting officer becomes increasingly insulated from any meaningful questioning about his or her behavior. In similar fashion, "[m]ost assistant district attorneys do not appear in court to 'cover' their cases; rather the day's docket is handled by ADAs assigned to a courtroom part who rely on written instructions provided by the ADA assigned to each respective part." Rayner, *supra* note 1, at 1063 n.81. This practice of prosecution by note often deprives the court and defense counsel of vital information during case conferences, and also distances the prosecutor from the accused; it is not uncommon for a prosecutor to never actually see the person she is prosecuting.

163. See *supra* notes 149-50 and accompanying text.

164. N.Y. State Law Enforcement Council, 1998 Legislative Priorities 37 (1998).

165. N.Y. CRIM. PROC. LAW §§ 240.44, 240.45 (McKinney 2005); 503 N.E.2d 1011 (N.Y. 1986); see Mark M. Baker, *The 'Rosario' Per Se Rule: Rest in Peace*, N.Y.L.J., Mar. 14, 2001, at 1 (automatic reversal was the remedy if the prosecutor failed to disclose prior statements, memoranda, or other materials in their possession relating to the subject matter of the witness's testimony).

166. See, e.g., Charles J. Hynes, *Open Discovery Law Seen as Separate Issue*, N.Y.L.J.,

Putting aside the question of whether the *Ranghelle* rule did in fact result in many reversals, it is important to examine the impact of the rule. Given the fear of an automatic reversal, one would imagine that prosecutors were more diligent than ever before to track down and disclose every document connected to the case. What better way to uncover the existence of falsified reports? The prosecutors took a similar tack with respect to subpoenas, and joined with the police department in a concerted effort to reduce the numbers of judicial subpoenas duces tecum.<sup>167</sup> As a result of these policies, police reports remain buried, far away from the light of day.

Prosecutors must also reconsider the role of the guilty plea. Policies or practices that effectively punish defendants for litigating suppression issues, and/or culpability, result in overwhelming numbers of guilty pleas.<sup>168</sup> These pleas, in turn, result in unchecked, unmonitored police activity. As part of their justice-seeking function, prosecutors should endeavor to expose police actions to scrutiny from judges and juries.

One commentator argues that the ethical lens has been pointed at the defense bar for too long, and he advocates turning it in the direction of the prosecution.<sup>169</sup> Others suggest, similarly, that it is appropriate to demand greater ethical conduct from prosecutors.<sup>170</sup> As one leading authority stated, as “a minister of justice to protect innocent persons from wrongful convictions,” the prosecutor has “a duty to make an independent evaluation of the credibility of his witnesses, the reliability of forensic evidence, and the truth of the defendant’s guilt” beyond that mandated by the ethical rules.<sup>171</sup> To date, prosecutors have been relatively free from oversight or critical review.<sup>172</sup> There are very few cases where disciplinary authorities have sanctioned prosecutors.<sup>173</sup> It is also rare for appellate courts to

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Apr. 16, 1996, at 2 (“For the past eight years the District Attorneys’ Association has sought legislation to overrule the decision[s] in *People v. Ranghelle* . . . failure to turn over any prior written or recorded statement of a witness at trial is per se reversible error.”). In 2000, the legislature eliminated the so-called *Ranghelle* rule. N.Y. CRIM. PROC. LAW § 240.75 (effective 2/1/01).

167. See Travis & Doepfner, *supra* note 151 (“Over the past few years, the [police] department has pursued an aggressive litigation program, in cooperation with the District Attorney’s offices, in an attempt to reduce the number of inappropriately issued subpoenas.”).

168. See *supra* note 78 and accompanying text. Judges also use the threat of a higher sentence to disincline defendants from litigating their cases. *Id.*

169. Dershowitz, *supra* note 40.

170. Green, *supra* note 69.

171. Gershman, *supra* note 69, at 337.

172. Gary C. Williams, *The Rampart Scandal: Policing the Criminal Justice System; Incubating Monsters?: Prosecutorial Responsibility for the Rampart Scandal*, 34 LOY. L.A. L. REV. 829, 837 n.44 (2001).

173. See Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 454



reverse convictions based on prosecutorial misconduct.<sup>174</sup> Apparently, prosecutors are also rarely disciplined within their own offices, even when an appellate court has found that they withheld exculpatory evidence.<sup>175</sup>

It seems to be the case that prosecutors, as well as judges, are not simply oblivious to police falsifications. Rather, they are also too willing to turn a blind eye in that direction. As one commentator asked rhetorically, “Is it possible that hundreds of thousands of transparent cases of police perjury are occurring every year in the courts of this country without prosecutors and judges knowing about it, and even encouraging it? I don’t think so.”<sup>176</sup> If indeed those who do not learn from history are doomed to repeat it,<sup>177</sup> then the Criminal Court must address the recurring, systemic problem of police falsification quickly. After all, we are already ten years into the next cycle.

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(1992); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 722 (2001).

174. See, e.g., Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 862 (1995) (“The prosecutor’s [exercise of discretion] is effectively unreviewable by courts.”).

175. See, e.g., Andrea Elliott, *Prosecutors Not Penalized, Lawyer Says*, N.Y. TIMES, Dec. 17, 2003, at B1; Andrea Elliott & Benjamin Weiser, *When Prosecutors Err, Others Pay the Price; Disciplinary Action is Rare After Misconduct or Mistakes*, N.Y. TIMES, Mar. 21, 2004, at 25.

176. Dershowitz, *supra* note 40, at 17; see Slobogin, *supra* note 39, at 1046 (referring to a study finding “stunning evidence of prosecutorial and judicial nonchalance”); Chase, *supra* note 40, at 775 (stating need to “encourage prosecutors and judges to be more critical in their evaluation of police officer accounts of their criminal investigations”).

177. GEORGE SANTAYANA, *THE LIFE OF REASON: INTRODUCTION AND REASON IN COMMON SENSE* 284 (Charles Scribner’s Sons 2d ed. 1936) (1905) (“Those who cannot remember the past are condemned to repeat it.”).