January 23, 2010

Judging Police Lies -- An Empirical Perspective

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I. Introduction

Police officers sometimes lie on the witness stand and in sworn affidavits. Do judges foster police perjury?

Police perjury has been called “the dirty little secret of our criminal justice system.” Irving Younger, former federal judge and law professor, once described police perjury as “commonplace.” Since 1961, when the Supreme Court declared that the exclusionary rule applies to state as well as federal criminal prosecutions, several studies have concluded that police commit perjury to avoid the exclusion of evidence, and no studies or scholarly works appear to deny the prevalence of police perjury. In the

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1 For thoughtful feedback on this project, I thank Christopher R. Drahozal, Christopher Slobogin, Stephen J. Ware, and participants of workshops at William and Mary School of Law, the University of Oregon School of Law, and Atlanta’s John Marshall Law School. Likewise, I thank participants at the 2009 meeting of the Central States Law Schools Association Annual Conference for their insights and my able research assistants Kendra Oakes and Melissa Plunkett.


5 The exclusionary rule generally bars the prosecution from using evidence against a defendant in a criminal case when the evidence was gathered in violation of the defendant’s constitutional rights. Weeks v. United States, 232 U.S. 383, 398 (1914).


7 See, e.g., The Report of City of New York, Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department, (hereinafter “The Mollen Report”) (July 7, 1994), at 36 (finding that the most common form of police corruption in the New York City criminal justice system was probably “police falsification,” especially in connection with arrests for possession of “narcotics and guns” and that falsification was so common, it had spawned the name “testilying.”); Myron W. Orfield, Jr., Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts, (hereinafter “1992 Study”), 63 U. Colo. L. Rev. 75, 75-76 (1992) (discussing the results of a study of police perjury in the Chicago justice system), discussed infra in Part II.A.; Comment, Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases, 4 Colum. J. L. & Social Prob. 87 (1968) (in which Columbia law students discuss the results of a police perjury study they conducted), discussed infra, in Part II.A.; J. Skolnick, Justice Without Trial, at 215 (1967) (reporting the findings of a study finding police perjury based on observation evidence).
past few years, with progress in science and technology, police perjury has been confirmed through video and audio evidence\(^8\) and with DNA.\(^9\)

In 1992, after noting “very little empirically-grounded information on the [exclusionary] rule’s application and effects[,]” Myron W. Orfield, Jr., published the results of a study of the Chicago criminal justice system, which went well beyond an acknowledgment of police perjury. After interviewing a sampling of judges, prosecutors and defense lawyers, he announced that “judges in Chicago often knowingly credit police perjury and distort the meaning of the law to prevent the suppression of evidence and assure conviction.”\(^10\)

This article revisits Orfield’s findings, as well as the findings from other studies reporting that police lie more often in cases involving guns and drugs,\(^11\) and those announcing that even when judges detect police dishonesty, they rarely grant a defendant’s motion to suppress in serious cases.\(^12\) Unlike Orfield’s study, which hinged

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\(^9\) See Brandon L. Garrett, Judging Innocence, 108 Colum. L. Rev. 55 (2008) (analyzing the first 200 cases in which DNA evidence exonerated convicted defendants and finding evidence of police and other dishonesty); see also Melanie D. Wilson, An Exclusionary Rule for Police Lies, 47 Am. Crim. L. Rev. 1 (forthcoming 2010) (cataloguing evidence of police lies during investigations and providing multiple examples of video and DNA evidence of such lies).

\(^10\) Orfield, 1992 Study, supra note 7, at 75-76.


on the impressions of judges and lawyers in Chicago’s criminal system, and was confined to the suppression setting, this study rests on concrete data drawn from decisions of sitting judges and reaches beyond suppression hearings. The current article presents findings from an empirical study of judicial orders in one Midwestern federal district court over a twenty-four-month period to determine whether judges tend to side with the prosecution when a defendant claims that the police lied during the criminal investigation of her case.

Given that police dishonesty occurs, the criminal justice system depends on prosecutors, defense lawyers, and judges to identify police lies and to ensure that they do not lead to the incarceration of innocent defendants or compromise citizens’ constitutionally-guaranteed rights. Because prosecutors and defense lawyers are advocates for their own clients, judges play an especially important role in assuring this balance of justice. Despite judges’ key role, there is widespread innuendo about their failures to recognize, let alone curb, police lies. According to Morgan Cloud:

*“Judges and prosecutors will discuss the existence of police perjury candidly in relatively private settings, but rarely in public fora.”*

Irving Younger asserted that while police perjury is

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13 See Orfield, *1992 Study*, supra note 7, at 81 (describing his earlier study, on which he modeled the 1992 Study, as “present[ing] the impressions of police officers”).
14 In Orfield’s 1992 study, he reported that judges, public defenders and prosecutors estimated that “police commit perjury between 20 and 50% of the time they testify on Fourth Amendment issues.” See Orfield, *1992 Study*, supra note 7, at 83 (recounting results of interviews of judges, prosecutors and defense attorneys in the Chicago criminal system).
15 Prosecutors have the power and discretion to quash police lies before the lies reach court. This article should not be read to absolve prosecutors for their role in guarding against police perjury. The subject is simply beyond the reach of the article.
16 Juries also play an important role, but many defendants plead guilty after a judge denies their motion to suppress evidence. If judges are fostering police lies in the suppression context, they are helping the government avoid jury scrutiny of police dishonesty.
17 Morgan Cloud is the Charles Howard Candler Professor of Law at Emory University Law School in Atlanta, Georgia.
18 Cloud, *The Dirty Little Secret*, supra note 2, at 1314.
commonplace, “judicial recognition of the fact is extremely rare.” He explained further:

In a hearing on a motion to suppress evidence under *Mapp* [*v. Ohio*][20], for example, the policeman testifies to his version of the circumstances of the search and seizure, invariably reflecting perfect legality. The defendant testifies to his version, invariably reflecting egregiously illegal. The judge must choose between the two versions, and, not surprisingly, he habitually accepts the policeman’s word.

The difficulty arises when one stands back from the particular case and looks at a series of cases. It then becomes apparent that policemen are committing perjury at least in some of them, and perhaps in many of them.21

In his book, *The Best Defense*, Alan Dershowitz22 identified thirteen “key rules” of our justice system including: “Rule IV: Almost all police lie about whether they violated the Constitution in order to convict guilty defendants. Rule V: All prosecutors,

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19 Irving Younger, *Constitutional Protection on Search and Seizure Dead?*, 3 Trial 41 (Aug./Sept. 1967). 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* (hereinafter “the Blue Wall of Silence”), 59 U. Pitt. L. Rev. 233, 241 (1998) (noting that “[n]either prosecutors nor courts appear to have made elimination of police perjury a top priority”); Orfield, *1992 Study*, supra note 7, at 118 (recounting results of interviews of judges, prosecutors and defense attorneys in the Chicago criminal system revealing a belief that judges are unlikely to reject a police officer’s testimony, especially in a “big case” and that defendants must make a very strong showing before the judge will disbelieve the testimony of an officer).

20 367 U.S. 643 (1961) (applying the exclusionary rule to state prosecutions).

21 Younger, *Constitutional Protection*, supra note 4, at 41. Younger was referring to “dropsy testimony” in which a police officer testifies, typically during a suppression hearing, that a defendant dropped illegal drugs, “thus leaving them in plain view or abandoning them[,]” See Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 Am. Crim. L. Rev. 1, n. 110 (2001) (citing People v. McMurty, 314 N.Y.S.2d 194 (N.Y.Crim. Ct. 1970)). As Professor Morgan Cloud expressed in “The Dirty Little Secret,” his 1994 article on police perjury, such “dropsy testimony might not seem entirely implausible. After all, it is possible that an individual drug user or dealer might drop contraband . . . It is the repetition of this suspicious story in case after case that suggests fabrication.” Cloud, *The Dirty Little Secret*, supra note 2, at 1317-18. In his article, Professor Cloud also conveyed a personal experience during which he became suspicious of police testimony while serving as an alternate on the grand jury “in a metropolitan Atlanta county.” Id. at 1318. Professor Cloud explained that in case after case, the police offered the same type of testimony involving a group of black men standing on a street corner who inevitably threw a small package as police pulled up in a police car. In Professor Cloud’s experience, “The officers would then ‘exit the car, apprehend the suspect,’ and recover the package, which always contained drugs—usually crack cocaine.” Id. at 1318. And see Laurie L. Levenson, *Unnerving the Judges: Judicial Responsibility for the Rampart Scandal* (hereinafter “Unnerving the Judges”), 34 Loy. L.A. L. Rev. 787, 790-91 (2001) (asserting that judges sometimes “ignore[e] telltale signs that police officers fabricate testimony to obtain convictions” including “amazingly similar stories by officers regarding the conduct of unrelated defendants, inconsistencies in police officer reports, [and] dramatic recalls of memory . . . .”).

22 Dershowitz is the Felix Frankfurter Professor of Law at Harvard Law School.
judges, and defense attorneys are aware of Rule IV. . . . Rule VIII: Most trial judges pretend to believe police officers who they know are lying. Rule IX: All appellate judges are aware of Rule VIII, yet many pretend to believe the trial judges who pretend to believe the lying police officers. Rule X: Most judges disbelieve defendants about whether their constitutional rights have been violated, even if they are telling the truth.”

A number of scholars have studied the prevalence of police dishonesty and have tried to determine whether the police lie more often during suppression hearings than in other court proceedings, like trials. Judges’ rulings in response to alleged police perjury have received significantly less attention than police perjury itself. This research project takes a step toward filling that gap in the research by studying judges’ orders in cases in which criminal defendants assert that the police have lied. Specifically, the project undertakes a systematic study of a single federal judicial district – the District of Kansas -- to determine whether, as it has been oft claimed, trial judges “habitually accept[] the policeman’s word”; ignore police lies “to prevent the suppression of evidence and assure conviction”; and rarely recognize police perjury. The project also provides recent data from the District of Kansas to compare with scholars’ claims that police

23 Alan M. Dershowitz, The Best Defense xxi-xxii (1982). As a caveat, Dershowitz said of his rules, “Like all rules, they are necessarily stated in oversimplified terms. But they tell an important part of how the system operates in practice.” Id. at xxi.
25 I chose the District of Kansas over other districts because the Court’s website provides extensive, publically-available information about rulings in the district. Comparable information is difficult to find in other trial courts, federal or state.
26 Dershowitz, supra note 23, at xxi-xxii.
27 Orfield, 1992 Study, supra, note 7, at 76. See also David N. Dorfman, Proving the Lie: Litigating Police Credibility, 26 Am. J. Crim. L. 455, 470-71 (1999) (indicating that “a scathing opinion impugning the motives, honesty, or competency of police is rarely found in trial court opinions.”); Levenson, Unnerving the Judges, supra note 21, at 790 (describing how judicial conduct can contribute to police dishonesty and stating that “judges unwittingly participate in police perjury and misconduct by not critically examining police credibility”).
28 Younger, supra note 4, at 41; Levenson, Unnerving the Judges, supra note 21, at 790.
dishonesty occurs most often “when officers are testifying about searches and seizures and witness interrogations” as opposed to when they testify at trial regarding a defendant’s substantive guilt or innocence; and findings from older studies that police dishonesty arises most in the context of suppression motions and in gun and drug cases. For instance, Professor Christopher Slobogin has asserted that “the most common venue for testifying is the suppression hearing[.]” and Dallin Oaks conducted a study of Chicago and the District of Columbia over three decades ago, concluding that illegal searches and seizures were “concentrated in a few types of crimes, notably weapons and narcotics offenses” because of the importance of the drug and gun evidence to a successful prosecution of such crimes. This project considers whether Slobogin is correct and whether Oaks’ conclusions remain true today.

In evaluating trial judges’ rulings, this study asks seven questions: 1) How often does the defense accuse the police of lying? 2) Are defendants’ claims of police perjury asserted overtly, using words like perjury and lie, or are they couched in legal arguments or other, subtle ways? 3) How often do trial judges agree that the police lied during an investigation? 4) In what types of cases are defendants most likely to claim that the police have lied? 5) In what types of cases are judges most likely to rule that police

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29 See, e.g., Cloud, The Dirty Little Secret, supra note 2, at 1315; see also The Mollen Report, supra note 7, at 36 (indicating that police falsification is greatest in cases involving charges of possession, especially narcotics and guns); Christopher Slobogin, Testifying and What to Do About It, (hereinafter “Testifying”), 67 U. Colo. L. Rev. 1037, 1043 (1996) (“the most common venue for testifying is the suppression hearing” but “lying about events in the interrogation room may be routine as well.”); Chin & Wells, The “Blue Wall of Silence,” supra note 19, at 246, 248 (indicating that “[m]any commentators” believe police frequently lie during suppression hearings).

30 Slobogin, Testifying, supra note 29, at 1043.

31 Oaks, Studying the Exclusionary Rule, supra note 11, at 681 (citing court statistics showing that in Chicago and the District of Columbia in 1969-70, “search and seizure issues account for an overwhelming proportion” of motions to suppress – “over 50 per cent” even though the two types of crimes accounted for “a comparatively small proportion of the total number of persons held for prosecution.”).

32 Oaks, Studying the Exclusionary Rule, supra note 11, at 682 n.70 (asserting that narcotics, weapons and gambling crimes are crimes “where one piece of physical evidence – generally obtained from the person or premises of the accused – is vital to the prosecution.”).
engaged in dishonesty? 6) What types of evidence do judges suppress when they find police perjury? Finally, 7) What indicators are present when trial judges find police perjury?

As explained below, this article finds that criminal defendants rarely assert in pleadings and court proceedings that the police have lied. When defendants do make these claims, they typically include them in motions to suppress evidence. Most of these motions to suppress are filed in cases charging drug crimes, gun crimes, or both. Yet, drug and gun crimes constitute a minority of federal crimes charged. When defendants claim that the police are lying, they often support their assertions with evidence, such as documents or eye witness testimony. Although defendants rarely assert police dishonesty in federal court, and when they do, often buttress their arguments with corroborative evidence, trial judges are highly unlikely to rule that the police have lied. In other words, trial judges “habitually accept[] the policeman’s word.”

Because the study is restricted to one, Midwestern district and assesses judicial orders, not entire criminal cases, it does not capture judges’ rulings during the life of a criminal case. It also evaluates only the rulings of federal judges, providing limited insight into state court judges’ decisions on police dishonesty. Likewise, the study is not necessarily a dependable predictor of how judges in other federal districts react to police dishonesty arguments. Nevertheless, the study offers objective information about

33 See infra notes 112, 131 and 132.
35 Dallin Oaks who studied suppression motions filed in Chicago and the District of Columbia in the 1960s noted “important differences in the criminal justice systems of the two cities.” Oaks, Studying the Exclusionary Rule, supra note 11, at 687; see also Jerome H. Skolnick, Justice Without Trial (1966), at 24 (noting the “practical differences in the administration of justice from county to county and city to city in any state, and among federal districts.”).
sitting judges and their actual rulings when faced with allegations, and often accompanying evidence, that the police are lying.

II. Prior Studies

A. Studies of Police Perjury

In support of his claim that police perjury is “commonplace,” Younger pointed to an abrupt, post-*Mapp* shift in police testimony during suppression hearings. He said that for the first few months after *Mapp*, “New York policemen continued to tell the truth [about how they had obtained evidence of unlawful drug possession], with the result that in a large number of cases the evidence was suppressed.” Younger declared that soon “police made the great discovery that if the defendant drops the narcotics on the ground, after which the policeman arrests him, the search is reasonable and the evidence is admissible.” Based on this sudden and systematic change in police testimony, Younger concluded that police had begun to lie during hearings and to create stories that would meet constitutional requirements and, correspondingly, avoid suppression of drug evidence.

A study conducted by students at Columbia Law School, which was published in 1968, suggested that Younger was correct. The students evaluated the evidentiary grounds for arrest and disposition of misdemeanor narcotics cases in New York City,

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36 Studies that pre-date the decision in *Mapp v. Ohio* are omitted from this discussion because scholars commonly assert that it was the decision in *Mapp* that increased the incentives for police to lie and, correspondingly, the pressure on judges to accept those lies to avoid excluding evidence of defendants’ guilt.
37 See supra, note 4.
39 Younger, *Constitutional Protection*, supra note 4, at 41.
40 *Id.*
before and after *Mapp*.\(^{42}\) The students’ study showed that a significant number of officers had probably fabricated their testimony to “fit[] the probable cause requirements of *Mapp*” and avoid the suppression of illegally-seized evidence.\(^{43}\) In part, the students’ findings were based on data revealing that after *Mapp*, there was a “sharp decline” in allegations that “contraband was found on the defendant’s body or hidden in the premises” and an accompanying “suspicious rise in cases in which uniform and plainclothes officers alleged that the defendant dropped the contraband to the ground” or had it “in hand” or “openly exposed in the premises.”\(^{44}\) The students’ research showed “a marked increase in allegations by uniform and plainclothes men which would fit within the requirements of *Mapp*.”\(^{45}\) As the authors of a 1998 empirical study of the exclusionary rule said of the Columbia law students’ report: “It strains credulity to believe that after *Mapp* there just happened to be a near three-fold increase in arrests based on drugs found in the open. The more likely conclusion is that, with the advent of exclusion, there was a dramatic increase in police fabrication.”\(^{46}\)

The findings of “the Mollen Commission,” which studied police corruption in New York City some twenty years later, were consistent with Younger’s assertions and the Columbia law students’ conclusions.\(^{47}\) The Mollen Commission, formally named the Commission to Investigate Allegations of Police Corruption and the Anti-Corruption

\(^{42}\) *Id.*
\(^{43}\) *Id.* at 87, 92.
\(^{44}\) *Id.* at 95.
\(^{45}\) *Id.* See also Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62*, 4 Crim. L. Bull. 549, 549-50 (1968) (study of 3,971 arrests in Manhattan, New York, suggesting that police had turned to “dropsy” testimony to avoid application of the exclusionary rule).
\(^{47}\) See *The Mollen Report*, *supra* note 7.
Procedures of the Police Department, was appointed in 1992 and produced a written report in 1994 after an extensive investigation.\textsuperscript{48} As part of the investigation, the Commission analyzed thousands of police department documents, including records within Internal Affairs,\textsuperscript{49} and conducted over one hundred private hearings and informal interviews. The interviews included “scores” of meetings with members of law enforcement who regularly dealt with the New York police, including employees of the district attorneys’ offices, employees of the U.S. Attorney’s office, agents of the Federal Bureau of Investigation, and employees of other federal agencies.\textsuperscript{50} The Mollen Commission found not only widespread corruption within the New York City Police Department, but also it reported that falsification by officers, including “testilying,” (lying while testifying under oath), was “probably the most common form of police corruption.”\textsuperscript{51}

Using various research methods and evaluating data from jurisdictions beyond New York, other legal scholars came to the same, reasoned conclusion as did Younger, the Columbia law students, and the Mollen Commission – police officers lie, even under oath, especially during suppression hearings. Based on extensive and personal observation research in a city of about 400,000 people, Jerome H. Skolnick concluded that police sometimes fabricate probable cause when they think that search and seizure laws are too restrictive.\textsuperscript{52} Skolnick spent extensive periods with police, “viewing and

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\footnote{48} Id. at 1.  
\footnote{49} Id. at 11.  
\footnote{50} Id. at 11-12.  
\footnote{51} Id. at 36.  
\footnote{52} Skolnick, \textit{Justice Without Trial, supra} note 35, at 215 (explaining that when the police see case law “as a hindrance to the primary task of apprehending criminals, they usually attempt to construct the appearance of compliance, rather than allow the offender to escape apprehension.”). Skolnick described the city he studied as “a ‘real city,’ . . . reputed to have an exemplary machinery for administering criminal justice.” \textit{Id.} at 25. \textit{See also} Oaks, \textit{Studying the Exclusionary Rule, supra} note 11, at 725 (“If the officer has any
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observing, talking about the life of the policeman, and the work of the policeman.”  

Skolnick’s conclusions were anecdotal, derived from what he saw and heard from officers, but his study “had the advantage of first-hand experience.”

Joseph Grano undertook a similar observation study. After spending a year working in a prosecutor’s office in Philadelphia, “handling almost exclusively motions to suppress evidence[,]” Grano resolved that the police are “not adverse to committing perjury to save a case.”

Grano explained that this conclusion rested on his “conversations with police officers in preparation for suppression hearings in which the willingness to change facts was subtly – and sometimes openly – expressed” and on the fact that in “many cases” the officers’ testimony “seemed incredible” but the court credited the testimony anyway.

Dallin Oaks, who used multiple research methods to explore the effect of the exclusionary rule on the criminal justice systems in Chicago and the District of Columbia reported that during his research “[h]igh-ranking police officers . . . admitted . . . that some experienced officers will ‘twist’ the facts in order to prevent suppression of evidence and release of persons whom they know to be guilty.”

According to Oaks, one officer maintained:

Fabrication occurs in two types of situations. First, where a patrolman has made an on-view arrest and officers of a special detail can reach the scene before he has submitted his written report, they assist him in submitting a report that will not prevent a conviction under some rule of an appellate reason to conceal improper behavior, the courtroom issue typically becomes a contest of credibility that the trier of fact is likely to resolve in favor of the officer.”

53 Skolnick, Justice Without Trial, supra note 35, at 33. He also spent time with prosecutors and defense lawyers. Id. at 40.
54 See Perrin, et al, If It’s Broken, supra note 46, at 710 (detailing previous empirical studies of the exclusionary rule and critiquing the pros and cons of the Skolnick study).
56 Id.
57 For instance, Oaks obtained data on motions to suppress filed in each jurisdiction. Oaks, Studying the Exclusionary Rule, supra note 11, at 681.
58 Id. at 739-40.
The officer estimated that this type of twisting of facts occurred in about one-third of the cases where special detail officers assisted patrolmen with their reports. The second type is a direct fabrication of probable cause for an arrest and search. The police stop and search a motor vehicle and its occupants. If they discover the proceeds or implements of a crime, such as stolen goods, burglary tools or a weapon, they “hang a traffic offense on him afterward to ice it up, and they say the evidence was in plain view on the floor when it was really under the seat.”

In 1992, noting the limited empirically-grounded information on the exclusionary rule’s application and effects[,]” Myron Orfield published the results of a study in which he “structured interviews with judges, prosecutors, and public defenders in the Chicago criminal court system” and in which “respondents outlined a pattern of pervasive police perjury intended to avoid the requirements of the Fourth Amendment.”

His research revealed that a sampling of judges, public defenders, and prosecutors estimated that “police commit perjury between 20 and 50% of the time they testify on Fourth Amendment issues.” Participants of the system also reported “systematic fabrications in case reports and affidavits for search warrants, creating artificial probable cause which forms the basis of later testimony.” Orfield had conducted a similar study, published in 1987, during which he interviewed twenty-six narcotics officers of the Chicago Police Department. The police interviews, undertaken with a lengthy questionnaire, asked, among other things, how frequently police officers lie in court.

According to Orfield, “Virtually all of the officers admit that the police commit perjury,

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59 Id. at 742 (brackets original). The officer estimated that this second type of fabrication occurs very often (98% of the time when the target is a “professional” thief but “rarely,” if the subject is not notorious). Id.
60 Orfield, 1992 Study, supra note 7, at 75, 82-83.
61 Id. at 83.
62 Id.
64 Orfield, 1987 Study, supra note 63, at 1024-1025.
if infrequently, at suppression hearings." As Orfield noted in the officers article, the tendency of questions like the ones he posed would be to elicit self-serving responses. Therefore, “it is possible that the frequency of police lying in court is greater than the police admit.”

The accuracy of Orfield’s intuition about the under-reporting of police lies is buttressed by the resistance researchers experienced from police officers more recently when they proposed similar interview questions. Researchers wanted to ask police about the extent to which they lie to avoid the suppression of evidence. In pre-study testing, officer after officer “expressed concern about the questions, noting that they essentially required the respondent to admit or deny committing perjury.” Each officer who reviewed the questionnaire before its widespread distribution “urged that the questions be eliminated.” In the end, the researchers deleted the questions.

B. Studies of Judicial Rulings on Alleged Police Dishonesty

A number of researchers have studied the effectiveness of the exclusionary rule at deterring police misconduct, including its success at reducing police dishonesty and “testilying.” A few of those studies include information about the types of cases in which suppression motions are filed and the percentage of suppression motions judges granted. But there has been little study of judges’ reactions to police dishonesty and no study of judges’ rulings in response to defense arguments claiming police perjury.

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65 Id. at 1051. Of the 26 officers interviewed, 21 responded on the question about whether police “shade the facts.” Id. at 1050. Of those 21, 16 (76 percent) agreed that the police do “shade the facts a little (or a lot) to establish probable cause when there may not have been probable cause in fact.” Id. at 1050.
66 Id. at 1051.
67 Perrin, et al, If It’s Broken, supra note 46, at 718.
68 Id.
69 See, e.g., supra notes 7 and 11.
70 See, e.g., Oaks, Studying the Exclusionary Rule, supra note 11, at 689-96, 681-82 (noting that suppression motions occurred most often in narcotics, gambling, and weapons cases); Spiotto, Search and
Unlike other studies, both Myron Orfield’s 1987 study, which surveyed law enforcement officers, and his 1992 study, which surveyed judges and practicing criminal lawyers, gathered opinion information on how judges respond to police lies in the suppression context. Based on his interviews of Chicago judges, prosecutors and criminal defense lawyers, Orfield concluded “that judges in Chicago often knowingly credit police perjury and distort the meaning of the law to prevent the suppression of evidence and assure conviction.” The interviews revealed that nine out of twelve judges (75%) responding to questions, fourteen out of fourteen public defenders (100%), and nine out of fourteen prosecutors (approximately 65%) believed that judges sometimes fail to suppress evidence when they know police searches are illegal. In his similar study of Chicago narcotics officers, 86% of the 26 officers interviewed said that it was “unusual but not rare” for judges to disbelieve police testimony at a suppression hearing, and one officer reported that judges “never” disbelieve police testimony. An obvious drawback to the reliability of each of Orfield’s studies is his small sample

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Seizure, supra note 12, at 243, 253 (tracking the trends in the number of suppression motions filed over extensive periods of time in Chicago before and after Mapp and finding that motions in serious cases charging murder, burglary and robbery met with minimal success). Myron Orfield also reported that evidence was less likely to be suppressed in “big,” important cases than in cases with less severe offenses. Orfield, 1992 Study, supra note 7, at 78, 116. And Orfield found that judges rarely excluded evidence in violent crime cases. Id. at 78.

71 As Myron Orfield noted when discussing empirical studies that preceded his, studies like Oaks’s and Spiotto’s “may be explained by the efforts of judges to control dramatically increased narcotics case loads . . . and . . . judges’ use of suppression as a toll of leniency for relatively minor offenders.” Orfield, 1987 Study, supra note 63, at 1021.

72 Orfield, 1992 Study, supra note 7, at 75-76. Id. at 83 (court respondents believed that judges “knowingly accept police perjury as truthful.”); Orfield randomly selected 14 from 41 felony trial courtrooms in the Criminal Division of the Circuit Court of Cook County and attempted to interview the judge, a randomly selected assistant public defender, and an assistant state’s attorney assigned to the courtroom. Id. at 81.

73 Id. at 114-115. Of course, illegal searches do not necessarily equate to police perjury, but there appears to be a correlation between the two.

74 Orfield, 1987 Study, supra note 63, at 1049.

75 Id.
sizes. But especially given the likelihood of self-serving answers, Orfield’s findings are important.

Although not the focus of their study, the Columbia law students interviewed two assistant district attorneys and an unknown number of criminal court judges. Combining information garnered from those interviews with statistical evidence the students compiled from criminal court cases, they concluded: “While the New York judges have not adopted a uniform policy regarding their function in implementing \textit{Mapp}, the majority do not assume an active role.” And, as noted previously, based on his observations, Joseph Grano believed that judges in Philadelphia credited police testimony in many suppression cases even though the testimony “seemed incredible.”

III. Hypotheses

Based on the conclusions from prior empirical studies and other extensive anecdotal evidence, this project presupposes that some police officers lie about aspects of their criminal investigations and that many of these lies are repeated later, in court under oath. Given this premise, when I began the study, I expected criminal defendants to raise allegations of police dishonesty in a substantial number of cases, especially when defendants could contradict police with an independent witness or some other corroborative evidence. For example, I thought that defendants would argue police

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\item[76] See Perrin, et al, \textit{If It’s Broken}, \textit{supra} note 46, at 681 (criticizing Orfield’s 1984 study because of “the very limited sample size,” which they claim “limits its value and also precludes one from drawing any general conclusions about the effect of the [exclusionary] rule from his results.”).

\item[77] \textit{Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases}, \textit{supra} note 41, at 101, n. 35, 39 and 64.

\item[78] Id. at 101.

\item[79] Grano, \textit{A Dilemma for Defense Counsel}, \textit{supra} note 55, at 410.

\item[80] See \textit{supra} notes 7, 8, 9, 11, 12, 45, and 46.

\item[81] Remember, one prior study showed that a sampling of judges, public defenders, and prosecutors in Chicago estimated that “police commit perjury between 20 and 50% of the time they testify on Fourth Amendment issues.” Orfield, \textit{1992 Study}, \textit{supra} note 7, at 83. Because I expected defendants to exercise some restraint in raising allegations of police dishonesty, I surmised that defendants would assert police dishonesty in about 20% of all motions they filed and arguments they made in court.

\end{footnotes}
dishonesty when they could point to a written police report conflicting with an officer’s testimony and when they could produce a video that seemed inconsistent with a police report. Because defendants are naturally biased, in close cases with no independent and corroborative evidence, I expected judges to rule for the government on issues of credibility. Defense lawyers also understand this perceived bias and are likely to advise their clients against raising a police credibility argument that does not advance the defendant’s cause and might, in fact, prove counter-productive. Because defendants are unlikely to argue lies of any type that do not advance their interests, in cases lacking independent evidence of police dishonesty, I expected defendants to abstain from making the arguments, even when they knew the police were lying. These observations are my own, gleaned from my experience as a former prosecutor. They are derived from first-hand observations and from anecdotal evidence told to me by others who are (or were) part of the federal criminal justice system.

This study revealed even more reluctance than I anticipated. Defendants rarely claimed that the police lied, and when they did, they often couched their allegations in legal and procedural arguments, avoiding words like perjury and lie. Instead of making overt allegations, they might say that the government was unable to establish probable cause or failed to carry its burden of proof. Another surprising finding of the study --

82 To test this idea, I asked a highly experienced federal defender within the District of Kansas to comment on how often defendants confide that police have lied and to comment on the number of cases in which the lawyer advises the client against pursuing the issue of police dishonesty. The lawyer indicated that the determinative factor is whether proving dishonesty can advance the defendant’s case. The lawyer said that clients “often” say that the police have/are lying. Nevertheless, in only about ¼ of those cases does the lawyer present the issue to the court because in many cases, proving that the police lied will not benefit the client. The lawyer offered “Franks” lies as an example. In Franks v. Delaware, 438 U.S. 154 (1978), the Supreme Court ruled that there is a limited right to challenge the veracity of a police affidavit, if the challenger’s allegations are accompanied by an offer of proof. Id. at 171. But, even if an officer lies in an affidavit in support of a search warrant, unless the affidavit lacks probable cause when the dishonest parts are removed, the affidavit remains valid. Therefore, proving a “Franks” lie may not advance a defendant’s case. Id. at 172 n. 8.
Defendants’ decisions to assert police dishonesty appeared to have little correlation with the types of evidence they could produce in support of their claims. Some defendants argued credibility without pointing to any evidence in support.

At the start of this project, I also hypothesized that defendants would typically allege police dishonesty in the context of motions to suppress evidence and when seeking new trials. Prior studies have found that police lie most often during suppression hearings because officers think lies in that context are more justifiable and less culpable than lies they tell about a defendant’s substantive guilt or innocence. Based on those studies, I expected defendants to challenge more lies in their motions to suppress evidence and during hearings on those motions. Furthermore, although there are no studies of the subject, defendants have strong incentives to make any argument after a conviction, no matter how impolitic. Thus, I anticipated that defendants would allege police dishonesty post-trial when they were reluctant to claim such lies before or during the trial.83

Finally, despite innuendo and studies finding to the contrary, I expected federal judges, who are appointed for life and insulated, to some extent, from outside influences, to find police dishonesty in at least a moderate number of cases in which the defense produced independent evidence of police inconsistency, meaning either that the police were mistaken or that they were fabricating. Because we know that police do lie, I thought that in close cases, judges would err on the side of caution, ruling for defendants who face a loss of liberty. Given that the government usually bears the burden of proof;84

83 This hypothesis is also consistent with the experienced federal defender’s view that defendants should not raise police dishonesty unless proving such lies can help their case. See supra note 82.
84 Except in cases challenging the truth of statements in an affidavit used to support a warrant. See Franks v. Delaware, 438 U.S. 154 (1978).
that officers usually maintain the ability to accurately document their investigation and its findings; that police lies are difficult to establish; that lies can result in the conviction of innocent people; and that police lies often erase constitutionally-guaranteed rights, such as the right to remain free from unreasonable searches and against compelled self-incrimination, I expected judges to rule for the defense when a motion or hearing revealed inconsistent police statements, eye-witness testimony conflicting with police testimony, and when documents or video cast doubt on the policeman’s story.

My findings, however, were consistent with the conclusions reached by others in prior studies, reporting that judges rarely acknowledge police dishonesty.

IV. Methodology

This article presents the results of my review of orders issued by federal trial judges in criminal cases in the District of Kansas. I reviewed all orders published in the “Recent Opinions” section on the website for the United States District Court for the District of Kansas for fiscal years 2008 and 2009, which includes orders posted from

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85 Police can document the facts with video, audio, and through preparing thorough contemporaneous written reports of what occurred and when.
86 Morgan Cloud has offered five reasons that judges may accept police perjury. First, he argues, police perjury “can be very difficult to determine.” Cloud, The Dirty Little Secret, supra note 2, at 1321. Second, judges dislike suppressing probative evidence, especially if suppression will result in the freedom of a guilty defendant. Id. at 1322. Third, some judges believe that most defendants are guilty; thus, it “is not too disturbing that evidence will not be suppressed” because guilty defendants should be punished. Id. at 1323. Fourth, judges may assume that “as a class criminal defendants will commit perjury”; therefore, judges credit police testimony over defendant testimony. Id. at 1323. Finally, Cloud says, “Judges simply do not like to call other government officials liars—especially those who appear regularly in court.” Id. at 1323-24. On a related topic, Myron Orfield’s 1992 Study found that judges fail to suppress evidence in serious cases in which the law requires suppression for three reasons: 1) a personal sense of justice; 2) fear of adverse publicity; and 3) fear that suppression will “lead to future difficulty in a judicial election.” Orfield, 1992 Study, supra note 7, at 121.
87 In this Article, trial judges include U.S. magistrate judges as well as district court judges because both are included on the website.
88 In calendar year 2008, Kansas had a population of 2,802,134. U.S. Census Bureau Quick Facts, available at http://quickfacts.census.gov/qfd/states/2000.html. About 89% of the population is white. Id. About 50% of residents are female. Id. Forty-five percent of registered voters in 2008 were registered Republicans, and unaffiliated voters outnumber Democrats. See Palin Gives McCain Extra Boost in Kansas, USA Today (Sept. 27, 2008). The Kansas state judicial system includes seven Supreme Court
October 1, 2007 through September 30, 2008, and those posted from October 1, 2008 through September 30, 2009, a twenty-four month period. I chose fiscal years rather than calendar years because the federal government (including the courts) operates on a fiscal-year basis. The information I gathered can, therefore, be readily compared to information compiled by federal prosecutors and reported by the Department of Justice during fiscal years 2008 and 2009.

In all, I reviewed 584 orders. Every criminal order listed on the website was reviewed, regardless of its length or subject matter. Magistrate judges’ rulings on motions to detain a defendant pending trial, which are often short and based on proffered “evidence,” rather than witness testimony, were initially given the same review and analysis as were orders raising substantive and more complex procedural issues.

Examples of substantive orders include orders deciding motions to suppress evidence, motions to vacate or reduce a sentence, motions for acquittals, and motions for a new trial.

Initially, I reviewed each order to determine whether there was any ruling on, or reference to, police credibility. The review was a substantive, full-read review, not a review for specific words or terms. I chose to read the orders rather than conduct a word search in an effort to capture both overt claims of police dishonesty, arguing that the police lied, and more subtle claims couched in legal, rather than factual, arguments. For

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89 The orders can be accessed at [http://www.kscourts.gov/](http://www.kscourts.gov/) under the recent opinions tab.

90 As explained more below, these detention orders were eventually excluded from the statistics on how judges rule in response to arguments that police have lied.

91 Some of the orders included under the criminal designation on the site are actually civil habeas petitions, but I included them in this analysis because the court identified them as criminal orders and because the petitions complain about the acts or omissions of the police, trial counsel, the trial judge, or some other aspect of a criminal case.
example, rather than saying that an officer lied, a defendant might assert that the
government was unable to establish probable cause by a preponderance of the evidence
and then support such a claim with evidence contradicting the officers’ factual
justification for conducting the search or seizure. While such an argument would not
necessarily use words like credibility, lies, dishonesty, or perjury, the implication of the
defendant’s argument might be that an officer lied about what happened.

When my initial review of an order indicated that the defense raised an issue of
police dishonesty, I reviewed the order a second time to discern the details of the claim.
When the order failed to provide context, I used the Pacer system\(^2\) to look for additional
documents, such as motions, briefs, or transcripts, giving more details about the
defendant’s dishonesty argument.\(^3\) Finally, if these materials did not explain the
asserted dishonesty, I sought information from sources such as court reporters and
defense lawyers.

Once all of the orders addressing police dishonesty were identified, I reviewed
them a third time to classify the type of motion that gave rise to the dishonesty claim; to
determine whether the case involved drug charges or gun charges; and to document the
type of evidence the defense used to support her argument.\(^4\) The most difficult point of
classification was deciding whether an order raised an implicit claim of police
dishonesty. The express claims were simple to identify. They used words like false and
credibility. In contrast, the implicit claims required some exercise of subjective

\(^2\) Pacer is an on-line system that allows access to all publically-available pleadings filed in federal court for
a fee of $.08 per page.

\(^3\) For instance, in United States v. Troxel, No. 07-20051 (Jun. 17, 2008), I was able to secure a transcript of
the suppression hearing from the judge’s court reporter. I was able to obtain a similar transcript from Pacer

\(^4\) For instance, did the defendant claim a violation of the Fourth Amendment or \textit{Miranda}? Did the
defendant produce an eye witness who contradicted a police affidavit?
judgment. In deciding whether the defendant was implicitly challenging police credibility, I looked for signs of conflicts in the evidence, for words such as the government or officer “claims” or an allegation that the government was unable to carry its burden, and for any argument about the lack of sufficient evidence, especially if this assertion was coupled with any discussion of a conflict in the evidence.

As with all studies, this one has its limits. Its greatest limit is, perhaps, the study’s inability to compare known lies to judges’ rulings. At its core, this article reports data on how federal trial judges have ruled on arguments asserting police dishonesty in criminal investigations and prosecutions. Unfortunately, there is no scientific way to measure when police are telling the truth in a particular case. As a result, this study is necessarily imprecise. Because we are unable to count the number of lies police tell, we cannot compare that number to the number of orders in which judges ruled for the government on police credibility when they should have ruled for defendants, or vice versa.

Recognizing that this study cannot produce conclusive results, the article seeks to add to the dialogue by evaluating cases in which the defense viewed police credibility as sufficiently doubtful to argue it formally in court. In furtherance of this goal, the study looks at only those cases in the District of Kansas in which a defendant has expressly or tacitly claimed police dishonesty. Presumably, defendants will argue police lies in cases they think they can establish such lies. Informal interviews of current and former defense lawyers, as well as common sense, suggests that defense lawyers screen out many allegations of police lies and that the defense is more likely to argue police dishonesty

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95 Cloud, *The Dirty Little Secret*, supra note 2, at 1313 (“We know it exists, but it is impossible to determine with any precision how often it occurs”).
when there is some evidence to support such a claim, as well as when the defendant is adamant that police have lied.\textsuperscript{96} Given that our system of criminal justice is built on an adversarial process, it seems appropriate to expect judges to scrutinize police credibility carefully when the defendant’s advocate raises the issue.

Although this article reports data derived from judicial orders deciding defendants’ claims of police dishonesty and thereby provides reliable and concrete information, not conjecture, about Kansas judges’ acceptance or rejection of such arguments, the study’s implications are limited by its relatively narrow focus. For instance, there may be differences in the way state court judges respond to claims that the police have lied. Federal judges are appointed for life and, therefore, avoid re-election attacks that could make them particularly vulnerable to claims of being “soft on crime.”\textsuperscript{97} They may feel more independence to identify and “punish” officers whom they believe are lying, regardless of the impact such a ruling may have on a case or on an officer’s career.\textsuperscript{98} State court judges, who generally handle a greater number of cases,\textsuperscript{99} may see the same officers day in and day out, making it less likely that they will feel comfortable calling an officer a liar in any one case.\textsuperscript{100} And, state court judges sometimes face

\textsuperscript{96} See, e.g., supra note 82.

\textsuperscript{97} Add reference to study on elected judges increasing length of sentences immediately before elections.

\textsuperscript{98} But see United States v. Bayless, 913 F. Supp. 232 (S.D.N.Y. 1996) (case in which federal district court judge in New York changed his ruling suppressing large quantity of drugs after reportedly receiving pressure from the Clinton administration over the initial ruling).

\textsuperscript{99} For instance, more drug cases are prosecuted in state court than in federal court. See, e.g., Office of National Drug Control Policy, Drug Policy Information Clearinghouse Report for Kansas (June 2008), available at http://www.whitehousedrugpolicy.gov/statelocal/ks/ks.pdf (showing that in 2006, the federal Drug Enforcement Agency made 255 arrests for drug violations in Kansas while overall there were 11,937 adult drug arrests in the state during that time).

\textsuperscript{100} See Cloud, The Dirty Little Secret, supra note 2, at 1323-24 (noting that “Judges simply do not like to call other government officials liars – especially those who appear regularly in court.”).
contentious campaigns to retain their positions on the court. Because there are notable
difference between the state and federal judicial systems, the results of this study should
not be read to apply equally to state court judges.

Also, federal judges in Kansas may be more or less likely to acknowledge police
lies than federal judges in different parts of the United States. Because there are ninety-
four U.S. attorneys offices, the District of Kansas may be too different from other federal
districts to extrapolate to rulings by federal trial judges generally. Cultural, population,
and political differences among districts probably affect how comfortable judges feel in
addressing police dishonesty and how likely judges will be to side with the government in
doubtful cases. In small towns, it is not unusual for judges to know and like officers,
creating a bias in favor of officers’ credibility.

Furthermore, even within a single district, there are police hierarchies that affect
police training and motivation. “[T]he police’ is not a monolithic entity. There are
officers in positions of command, staff, special assignment (like narcotics detail) and
patrol, to name only a few.” FBI agents, many of whom begin their careers as police

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101 In his study of Chicago’s criminal justice system, Myron Orfield noted that judges may fail to suppress
evidence because of a desire to avoid adverse publicity or because they fear that suppression will hurt their
chances for re-election. Orfield, 1992 Study, supra note 7, at 121-122.

102 See Oaks, Studying the Exclusionary Rule, supra note 11, at 687 (describing differences between the
jurisdictions of Chicago and D.C., including advanced screening of cases by prosecutors in one district but
not the other, resulting in a significantly smaller number of motions to suppress in D.C. than in Chicago).

103 In districts in which officers appear repeatedly before the same judge, the judge may be less likely to
discredit the officers’ testimony. On the other hand, the opposite could also prove true. In a district with a
smaller number of people, once an officer gains a reputation for dishonesty, the reputation may be difficult
to overcome and may spread to other judges by word of mouth outside the courtroom. This risk may be
lessened by the fact that many districts with large populations maintain multiple offices within the district.
For instance, in the Northern District of Georgia, the U.S. Attorney maintains a presence in Newnan,
Georgia and Rome, Georgia, both much smaller cities than Atlanta, the main office.

104 In one case reviewed during this study, a county detective indicated that he had known a particular state
court judge “a long time,” that the judge was one of only two in the area, and that the officer and the judge
had worked together in law enforcement before the judge became a judge. See Transcript, United States v.
Troxel, 07-20051, at 68, 87 (Jun. 17, 2008).

105 Oaks, Studying the Exclusionary Rule, supra note 11, at 716.
officers or other members of county and state law enforcement, may receive more
training and have more experience and education than city, county, and state officers,
who are generally newer to law enforcement and paid significantly less. Thus, another
limitation of the study is that it may not adequately capture the differences among
different groups of law enforcement. To the extent the study does not capture the full
spectrum of police conduct, meaning investigations and testimony by federal, state,
county and city officers, it is under-inclusive.  

In addition, individual judges act according to their own beliefs and prejudices.
Therefore, because the sample size of the study is small, it may over or understate
judges’ tolerance of allegations of police lies. And, this study does not attempt to
account for racial prejudices that may (consciously or subconsciously) play a role in
judges’ decisions about whose testimony to credit.

Moreover, I reviewed hundreds of orders, but an order is only a subset of a
complete case. A single case could produce numerous orders. One or more orders in a
case could decide a claim of police credibility; other orders in that same case might not
mention the subject. Thus, even when my review of a given order does not reflect a
discussion or claim of dishonesty, I cannot conclude that the defendant or judge did not
discuss police credibility at some other time during the case. On the other hand, it is

106 The study captured investigations by more state, county, and city officers than I thought it would. Five
of the 31 judicial orders addressing police dishonesty did not state whether the police officers were federal
or state officers. In 18 orders, state, county or city officers were identified. In 4 orders, federal officers
were identified. Four orders referenced both state and federal law enforcement officers.
107 Eight different judges issued orders in response to defendants’ allegations of police dishonesty. They
include: 1) Sam A. Crow; 2) John W. Lungstrum; 3) Kathryn H. Vratil; 4) Wesley E. Brown; 5) Julie A.
Robinson; 6) J. Thomas Marten; 7) Karen M. Humphreys; and 8) Richard D. Rogers.
108 Oaks, Studying the Exclusionary Rule, supra note 11, at 716 (“In this incredibly diverse milieu of
different police departments and criminal justice systems and different individual motivations and
sensitivity to sanctions, the researcher must consider not one but a variety of possible effects . . . some
subtle and some obvious.”)

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likely that when police dishonesty is important to the defense, whether on suppression or later, the theme will reoccur and, therefore, may be captured by the review of other orders within a given case.

A final limit. Although I reviewed all of the orders that were publically available on the District of Kansas’s website, a site designed to provide access to all orders issued in the district, it is likely that some orders were never posted to the site. Sealed orders are, of course, omitted by definition. Moreover, according to the Clerk’s Office, each judge is responsible for ensuring that his or her orders are uploaded to the site. If an individual judge or his staff fails to post one or more orders, those orders will be missed by this study. One district court judge, who was recently appointed, did not post any orders to the website during the time under review.

V. Findings

A. General Findings:

In all, I reviewed 584 orders covering a 24-month period, from October 1, 2007 through September 30, 2008. Of those 584 orders, 142 resolved issues of pretrial detention. These detention orders were typically short, one or two pages, and reflected a summary proceeding in which a defendant agreed to detention or the government proffered “evidence,” after which the judge found sufficient grounds to incarcerate the defendant pretrial. Not one of these detention orders reflected a dispute about police dishonesty. See Figure 1 below.

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109 These were almost always issued by a magistrate judge.
In contrast to the brief detention orders, 66 of 584 orders decided motions to suppress evidence. These suppression orders were substantially longer and were often combined with discovery motions. Twenty-four of the 66 suppression orders (about 36%) alleged police dishonesty. Habeas petitions, seeking to amend or modify a defendant’s sentence, also represented a significant number (72) of motions decided in the two-year period, and they too included an occasional allegation of police dishonesty.

Although the 584 orders were issued in a multitude of case types, including cases charging violations of the Racketeer Influenced and Corrupt Organizations Act, bank robbery, violations of the Migratory Bird Treaty Act, the making of false bomb threats, and fraud counts, 53% of all orders were issued in cases involving drug charges, gun charges, or both. In FY 2008, 107 of 280 orders (38%) were issued in drug cases, and in FY 2009, judges ruled on 108 out of 304 (about 36%) motions in cases charging drug violations. Gun charges were also a common context for orders. See Figure 2 below. In the two fiscal years combined, there were 94 orders in cases charging gun crimes. Both drug and gun cases contained claims of police dishonesty.

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110 Included in this count of motions to suppress are motions to reconsider the denial of a prior motion to suppress.
111 Four orders deciding habeas issues alleged police lies.
112 Compare the total of 215 orders in drug cases in the 24-month period to figures from the Department of Justice reporting that in FY 2008 14,519 cases of 63,042 (about 23%) charged drug offenses.
Types of Orders Issued in the District of Kansas in FY 2008 and FY 2009

- 52% All other Orders
- 25% Orders on Habeas Petitions
- 12% Orders on Motions to Suppress
- 11% Detention Orders

Figure 1

Types of Cases in Which Orders Were Issued in the District of Kansas in FY 2008 and FY 2009

- 47% Drug cases
- 37% Gun cases
- 16% All other cases

Figure 2
B. Specific Findings on Police Dishonesty:

1. How often does the defense accuse the police of lying?

Defendants and their lawyers rarely accused officers of lying. Of the 584 orders issued in 24 months, only 31 orders (approximately 5%) resolved an issue of police credibility on the defense’s urging. See Figure 3 below. Whether defendants or their lawyers privately assert that the police are prone to lie or that officers have been dishonest about the facts in a given case, they rarely express that view in Kansas federal court pleadings or hearings. Even discounting the detention orders, which were the product of summary proceedings, none of which reflected a discussion of police credibility, defendants asserted police dishonesty only 7% of the time. See Figure 4 below. Accordingly, the evidence from this study undercuts the idea that defendants and their lawyers are “often . . . willing to accuse officers of lying.”

Figure

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113 Other than Maldonado, discussed infra in Part V.B.7, in which the defendant implicitly suggested police dishonesty and the judge appeared to doubt police credibility on his own, there were no other orders indicating that a judge raised an issue of police dishonesty sua sponte.

114 See Cloud, The Dirty Little Secret, supra note 2, at 1314 (“Defendants and their lawyers often are willing to accuse officers of lying, but these claims typically receive little attention beyond the lawsuits in which the accusations are made.”).
Because the defendant usually will know when the police have lied, this finding could mean that police dishonesty rarely occurs in the District of Kansas. On the other hand, even if the defendant knows that the police have falsified police reports, lied in affidavits to secure a warrant, or committed perjury in a hearing to justify a search in which the defendant’s constitutional rights were violated, she may not argue police dishonesty. If the defense is convinced that such an argument is unlikely to advance her cause, because of the defendant’s inherent bias, because of lack of corroborative proof, because she perceives judges generally or this particular judge as pro-government, a defendant may not assert dishonesty arguments, even when the police have, in fact, lied.

Also, because it is generally viewed as “indelicate” to call any witness a liar, defendants may reserve police dishonesty as a last resort defense, asserting it only if they have no other legitimate or persuasive argument. In any event, this study indicates that very few defendants will claim, let alone prove, that police are liars.

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115 Cloud, The Dirty Little Secret, supra note 2, at 1324 (noting also that many trial lawyers think it is a “tactical mistake to call any witness a liar – unless the lie is palpable and the witness is unsavory”).
2. Are defendants’ claims of police perjury asserted overtly, using words like perjury, or are they couched in legal arguments or other subtle ways?

Even when defendants claimed that the police lied, about 42% of the time they did so indirectly. Of the 31 cases in which the defense argued that police lied during some portion of a case, 13 of the arguments were couched in language or legal arguments that implied police dishonesty without actually saying that an officer perjured herself. For instance, in one case the defendant asserted a violation of *Miranda*, claiming that he did not speak English well enough to understand or waive his rights, and also made a Fourth Amendment argument, contending that police lacked probable cause for a stop of his vehicle, despite an officer’s citation of the defendant for driving his truck over the “fog line,” which divides the driving lane from the shoulder of the road. The defendant never expressly said that the police lied about his waiver of *Miranda* rights. But the implication was clear. The Court understood this implication. On the *Miranda* issue, the Court found: “[D]efendant’s claimed inability to understand English is belied by the evidence and testimony. First, Trooper Henderson testified that defendant fully understood English . . . .”

Maybe defendants choose subtlety because calling someone a liar is viewed as rude. Or, defense lawyers may believe that they have the greatest chance of winning a motion using a legal argument, instead. Perhaps, defense lawyers believe, as did Younger, that judicial recognition of police dishonesty is so uncommon that it will rarely advance the defendant’s cause to claim police lies in the absence of overwhelming proof.

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117 Id.
Regardless of their reasons for doing so, defendants couch their police dishonesty arguments in vague, polite ways approximately 42% of the time.

3. How often do trial judges agree that the police lied during an investigation?

Although defendants are not quick to claim that the police have lied, judges are even more reluctant to accept these arguments. Of the 31 orders discussing police dishonesty, in only 2 (about 6.5%) did the trial judge rule for the defendant, finding that an officer lied during a hearing or falsified material information in an affidavit. See Figure 5 below.

![Orders in the District of Kansas Finding Police Dishonesty in FY 2008 and FY 2009](image)

**Figure 5**

_United States v. Jose Maldonado_ is the first case in which a trial judge recognized police dishonesty. The second is _United States v. John D. Troxel_. In _Maldonado_ Judge J. Thomas Marten suppressed drugs seized from the defendant’s truck and excluded the defendant’s admissions about his involvement with those drugs after

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119 In one other order, the trial judge ruled that the government had failed to carry its burden of proof but did not find police dishonesty. See United States v. Burtin, 07-10111 (Dec. 18, 2007).
120 No. 08-10216-01-JTM (Apr. 14, 2009).
121 No. 07-20051-JWL (June 17, 2008).
concluding that an officer’s testimony during a hearing on a motion to suppress was not believable. In *Troxel*, Judge John W. Lungstrum invalidated a state search warrant, finding that “[t]here were several false statements and material omissions included in the affidavit to get the search warrant.”

Because there is no sure method of establishing when police have lied, we cannot know if trial judges in the District of Kansas, like those in Chicago, are “pretend[ing] to believe police officers who they know are lying.”

Maybe officers in the District of Kansas tell fewer lies than officers tell in other parts of the country, like Illinois and New York. Maybe judges in this district are astute at identifying lies. Maybe they recognized police perjury in every case in which it occurred during the time studied. But the very low percentages of orders finding police perjury support the late Irving Younger’s belief that “judicial recognition of [police perjury] is extremely rare” and the assertion that judges “habitually accept[] the policeman’s word.”

Notably, if police dishonesty occurs in the District of Kansas at a rate similar to the percentages Myron Orfield found in his study, reporting that police perjury may occur in 22 to 92% of suppression matters.

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122 *Troxel* Transcript, No. 07-20051.
123 See Alan Dershowitz’s key rules of the justice system, supra note 23, at xxi, and Orfield, *1992 Study*, supra note 7, at 75-76.
124 See Younger, *Constitutional Protection on Search and Seizure Dead?*, supra note 4, at 41.
125 *Id.*
in Chicago, in Chicago, then judges in the District of Kansas are facilitating police perjury, knowingly or not.

In less than half of one percent of all orders posted to the website, Kansas trial judges found police lies. In only 8% of cases in which suppression hearings were held, Kansas judges ruled that the police had lied. And judges agreed with defendants less than 7% of the time when the defense specifically argued that police were lying about the investigation of the case. Because there is no way to know that police in the District of Kansas lie in 22 to 92% of suppression matters, we simply cannot accurately conclude that judges are facilitating perjury.

In addition, while the findings of this study suggest that trial judges may be fostering police dishonesty, the data offers no explanation of why judges are siding with police so often. This study does not reflect that judges are intentionally or consciously encouraging police dishonesty, only that the consequence of judges’ inability to identify police lies or their hesitation to characterize them as lies may be enabling it.

4. In what types of cases are defendants most likely to assert police dishonesty?

Motions challenging searches and seizures accounted for a substantial portion of the cases in which Kansas defendants claimed that police lied. Of 31 cases in which

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126 Orfield’s figures related to police lies told under oath during suppression hearings, not to other types of proceedings (like trials) and false statements in police affidavits. Orfield, 1992 Study, supra note 7, at 107. Ninety-two percent of judges, prosecutors and defense lawyers questioned in Orfield’s study believed that police lie in court to avoid suppression at least “some of the time” and 22% thought police lie more than half of the time when they testify in relation to Fourth Amendment issues. Public defenders thought police perjury occurred 53% of the time police testify about Fourth Amendment matters. Id. Orfield’s earlier study revealed that 95% of responding officers believed that officers sometimes lie in court to avoid the suppression of evidence. Orfield, 1987 Study, supra note 63, at 1049 n.130.

127 Although this study is not confined to suppression matters, as was Orfield’s, Orfield’s findings are still significant because, as explained later, this study also determined that a large percentage of defendants’ claims of police dishonesty arise in suppression matters. Thus, rejection of these claims by Kansas judges would tend to encourage police to lie in the Fourth Amendment suppression context.

128 As Orfield noted in his 1992 Study, “it is not clear whether judges’ unwillingness to suppress evidence . . . is an entirely conscious process.” Orfield, 1992 Study, supra note 7, at 121.
defendants asserted police dishonesty, 26 (approximately 84%) involved challenges to a search, a seizure, or both. Twenty-five of those 26 cases (approximately 96%), involved a claim that the unlawful search or seizure violated the Fourth Amendment; in the other case, the defendant claimed that the unlawful search violated Title III, which governs wire taps. In 5 cases (approximately 16%), a defendant asserted both a violation of search and seizure law and a breach of Miranda or Fifth Amendment rights. In only 5 of 31 cases (16%) did a defendant assert police dishonesty in a setting other than search or seizure.129 See Figure 6 below.

**Orders Ruling on Alleged Police Dishonesty in Search and Seizure Context**

- Orders Addressing Police Dishonesty in the Context of a Challenge to Search and Seizure: 16%
- Orders Addressing Police Dishonesty Outside the Search and Seizure Context: 84%

**Figure 6**

Of the 31 orders discussing police lies, 22 (approximately 71%) were issued in “drug” cases, charging the defendant with possession with intent to distribute a controlled

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substance and/or possession of a firearm while unlawfully using drugs.\textsuperscript{130} By comparison, drug offenses make up only about 23\% of all federal offenses prosecuted by U.S. attorneys across the United States.\textsuperscript{131}

Ten of 31 orders discussing police dishonesty (about 32\%) were issued in cases charging the defendant with a “gun” crime -- possessing a firearm as a convicted felon, possessing a gun while unlawfully using drugs, or committing a robbery or gang violence using a firearm. By comparison, only about 6\% of all federal prosecutions in a given year charge gun offenses.\textsuperscript{132} Four of the 31 orders were decided in cases charging both drug and gun offenses. Only three of 31 orders (about 10\%) discussing police dishonesty were issued in cases that charged neither a drug nor gun crime.\textsuperscript{133} \textit{See} Figure 7 below.

\textsuperscript{130} One case alleged a RICO gang/drug/violence conspiracy.
\textsuperscript{131} \textit{See} Table 5.7.2008, Criminal Cases Filed and Disposed Of and Number of defendants Handled by U.S. Attorneys for FY 2008, available at \url{http://www.albany.edu/sourcebook/pdf/t572008.pdf}. This data is derived from cases across the United States because data from the District of Kansas was unavailable.
\textsuperscript{132} \textit{See} Table 1.1, Suspects Arrested for Federal Offenses and Booked by the U.S. Marshals Service, by Offense, available at \url{www.ojp.usdoj.gov/bjs/pub/html} (indicating that for Fiscal Year 2006, only 6.2\% of cases were weapon offenses).
\textsuperscript{133} Two of the orders were issued in cases alleging violations of the Migratory Bird Treaty Act; the other was a case charging the defendant with making a false bomb threat.
These findings (that defendants usually claim police dishonesty in the context of motions to suppress evidence and in cases charging drug and gun offenses) are consistent with the findings from earlier studies conducted in different geographic areas. For instance, the findings here are the same as the conclusions reached by the Mollen Commission, which studied police corruption in the early 1990’s in New York City, reporting that a common form of police corruption was “police falsification” and that it happened most often in connection with arrests for narcotics and gun violations.\(^{134}\) The results also correspond with Dallin Oaks’ conclusions, in 1969, that illegal searches and seizures occurred primarily in weapons and drug cases, because of the importance of drug and gun evidence to a conviction in those cases.\(^{135}\) And the conclusions from this study coincide with Myron Orfield’s studies, indicating that police commit perjury most often at suppression hearings.\(^{136}\)

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\(^{134}\) See The Mollen Report, supra note 7, at 36.
\(^{135}\) See Oaks, Studying the Exclusionary Rule, supra note 11, at 682.
\(^{136}\) See Orfield, 1987 Study, supra note 63, at 1050-51; Orfield, 1992 Study, supra note 7, at 83.
5. In what types of cases are judges most likely to rule that police engaged in dishonesty?

Judges found police credibility lacking in only two orders over a twenty-four-month period. Both cases that spawned the orders involved drugs charges. One also charged possession of a firearm. In the first case, United States v. Jose Maldonado, the defendant allegedly possessed, with intent to distribute, more than 500 grams of methamphetamine and cocaine. In the second, United States v. John D. Troxel, the government charged the defendant with possession of a weapon while unlawfully possessing a controlled substance.

6. What types of evidence do judges suppress when they find police lies?

In the two cases in which the defendant successfully alleged police lies, the judges suppressed evidence of drug possession. In one, suppression of the evidence doomed the entire case. In the other, the defendant’s motion to suppress was granted in part and denied in part; therefore, suppression did not end the government’s prosecution, and the defendant soon admitted guilt in a change of plea hearing.

In United States v. Maldonado, the judge suppressed methamphetamine and cocaine found in the defendant’s truck during a traffic stop, as well as statements the defendant made in conjunction with the search and his arrest. Once the drugs and statements were excluded from the defendant’s trial, the government voluntarily dismissed the indictment without prejudice.

In the second case, United States v. Troxel, the judge suppressed drug evidence found in a small cooler, which was searched pursuant to a state warrant. The suppressed

137 08-10216-01-JTM (Apr. 14, 2009).
139 This information was gleaned from the court’s Pacer system.
evidence included: a glass pipe containing drug residue, a cigar container with two syringes in it, rolling papers, a rolling machine, and a bag of marijuana. The suppressed evidence was not the only proof against the defendant. Other evidence of the defendant’s criminal conduct survived the defendant’s motion to suppress. Defendant Troxel later entered a plea of guilty.

Because judges issued only two orders finding police lies, the data is too limited to draw reliable conclusions about the types of evidence that judges typically suppress when they conclude that the police have engaged in dishonesty during suppression hearings or in the search and seizure context. Thus, the study is inconclusive on whether judges suppress evidence more often in less important cases than in cases charging violent crimes or crimes involving significant quantities of illegal drugs.

7. What indicators are present when trial judges find police perjury?

Only two orders identified police lies. Therefore, the data is insufficient to draw conclusive inferences about what factors influence judges generally to rule for defendants on issues of police credibility. Nevertheless, in the two cases, the indicators of dishonesty are similar. In both, an aggressive cross-examination by defense counsel emphasized inconsistencies between and among the testimony of police officers. In *Maldonado*, there were inconsistencies in three officers’ in-court testimony and between the officers’ testimony and their written police reports. In *Troxel*, two officers told a different story during a hearing than one of the officers had previously told a state court judge in a sworn affidavit for a search warrant. In neither case did the defendant testify. In neither did the defense call civilian or eye witnesses to contradict police. In neither did the advocates produce video evidence. Contrary to the type of independent and
corroborative evidence I expected to see, the most persuasive indicators appeared to originate with the statements of police themselves.

This section takes a concentrated look at the two cases in which judges found police lies and also considers the types of arguments and evidence that failed to convince judges in other cases.

*United States v. Maldonado* -- During an evidentiary hearing on the defendant’s motion to suppress, the government called just one police witness, Officer Cooper of the Wichita (Kansas) Police Department. With the help of leading questions from the prosecutor, the officer explained why he stopped the defendant’s pickup truck during highway travel and testified about acquiring the defendant’s consent to search the truck.¹⁴⁰ Eventually, officers found “three packages of narcotics hidden in the passenger side bed . . . wall of the pickup and three packages found in the driver’s side bed wall of the pickup.”¹⁴¹

Early in the defense’s cross-examination of Officer Cooper, the officer admitted that he and his partner followed the defendant’s truck “[b]ecause it was tagged out of Texas,” as opposed to deciding to investigate the truck because of a traffic violation.¹⁴² Then the defendant’s lawyer began to highlight other doubtful details from the officer’s testimony. For instance, the lawyer elicited Officer Cooper’s admission that he entered the highway at mile marker 45 and began following the defendant but did not observe any traffic infraction until marker 46, about 1 mile, and his acknowledgement that the truck’s infraction was minor -- “the only thing that drifted over the dotted line were the

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¹⁴⁰ Maldonado Transcript 1, No. 08-10216-01, at 6, 10, 17-19 (Apr. 14, 2009).
¹⁴¹ Id. at 23.
¹⁴² Id. at 27-28.
tires on the driver’s side.” The defense lawyer also elicited that nothing about the defendant’s license, registration, the purchase of his pickup, or any other information raised any suspicion of the defendant’s wrongdoing prior to the consent search.

By the conclusion of the prosecutor’s re-direct examination of Officer Cooper, the judge seemed to be experiencing doubts about the officer’s credibility. Speaking directly to the officer, the judge said: “Officer, I’ve got to tell you, I’m a little troubled that you decided to follow him because he was tagged out of Texas. Now, there are a lot of vehicles that come up [highway] 135 that have Texas tags or Oklahoma tags, isn’t that accurate?”

In a successful effort to create inconsistencies in the testimony of the government’s only witness, the defense called two other police witnesses. The first was Officer Cooper’s partner, who was with Officer Cooper in the police cruiser. The second was a sheriff’s deputy who helped search defendant’s pickup. Officer Cooper’s partner testified that he saw the defendant’s truck drift from its lane only one time, not two, as Officer Cooper had testified. He also testified that the lane violation occurred after two miles of observation, not earlier, as Officer Cooper had said. In addition, the partner’s written report contradicted Officer Cooper’s testimony about when Cooper asked for permission to search the defendant’s truck.

The defense’s second police witness highlighted even more conflicts in the government’s version of events. Although Officer Cooper had testified that a sheriff’s

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143 Id. at 28.
144 Id. at 37.
145 Id. at 44.
146 Id. at 48. On cross-examination by the prosecutor, Cooper’s partner testified that he was watching the defendant’s pickup truck but only saw it leave its lane once.
147 Id. at 48.
148 Id. at 52.
deputy just happened on the traffic stop after a drug dog alerted to defendant’s truck, the deputy testified that Officer Cooper told the deputy to “join [Cooper] at the stop[.]”

Even in the written transcript, the deputy’s answers appeared evasive. For example, when asked whether a video from his car taken at the time of the stop showed him accelerating to the scene, the deputy insisted: “I don’t know where I was going at this time. I have no idea where I was going.”

The judge interrupted the questioning, admonishing the deputy not to talk over the lawyer; the deputy continued to avoid answering questions directly. The deputy insisted that he “d[id]n’t know if [he was] heading to [Officer Cooper’s] place” at the time on the video, even though his own police report said that at approximately the same time, he “was contacted by Officer Cooper to assist him with a car stop” at “Mile Marker 47.”

The deputy’s written report also contradicted Officer Cooper’s direct examination testimony. Defense counsel elicited that in the original of the report, a word had been deleted using white out. Although the deputy testified that he did not know what word was removed, in context, it appeared that he had removed the word so that the report did not reflect that three drug-dog searches had been conducted before drugs were found.

At the conclusion of the evidentiary portion of the suppression hearing, the judge announced orally:

In short, there was really no reason at all, first of all, for Mr. Maldonado to be followed. And second of all, I simply don’t believe the
officers in terms of their reasons for pulling him over. I am making a credibility determination and finding that they are not credible in this case.

... The evidence in this case ... I am suppressing the evidence. 155

The second case, United States v. Troxel -- In Defendant Troxel’s motion to suppress evidence, he challenged the veracity of two police officers who conducted a warrantless search of his home. He also attacked the truth of statements in an affidavit of one of the officers, which was used to obtain a search warrant for a subsequent search of the same home. Troxel’s motion first implied that Sergeant Chambers of the Anderson County Sheriff’s Department and Trooper Jason Mills, Kansas Highway Patrol, falsely claimed to be looking for the defendant in his mobile home, when really they were searching for drug evidence. The motion argued:

The officers then approached the Defendant’s approximately 10 X 10-sized room in an attempt to locate him. ... The officers entered the small room in their efforts to locate the Defendant. In the middle of the room sat a single brown wooden barstool. On top of the stool was a small plastic tub, similar to a Blue Bunny ice cream container, with no lid on it. Sgt. Chambers looked down inside the container while attempting to locate the Defendant and observed several syringes. Upon observing the syringes, Sgt. Chambers abandoned the search for the Defendant. 156

In the same motion, Troxel expressly attacked, as “incorrect,” several statements in the affidavit used to obtain a search warrant from a state-court judge. 157

The federal trial judge first ruled that the drugs and related evidence officers found in a “closed container inside the ‘gun room!’” had been seized illegally. 158

155 Id. at 56-57.
156 Troxel Motion to Suppress Evidence, p. 4, Paras 11, 12, and 13.
157 Id. at 21 (“Fact (2) is incorrect on several accounts. ... The Affidavit makes not [sic] mention of the fact the alleged marijuana, methamphetamine, and drug paraphernalia were found was [sic] pursuant to a specific search for those substances and not simply a discovery in plain view. In addition, the alleged marijuana and methamphetamine had not been determined to be those substances. There is no indication the items were field tested and it was later determined that the suspected methamphetamine on the cotton ball was actually cocaine ... .”).
According to the judge, while the defendant’s wife gave officers consent to look for her husband in their mobile home, she “did not have authority to consent to the search of the ‘gun room’” and Mr. Troxel could “not possibly have been found inside [a small] cooler [officers searched].”\(^\text{159}\)

The judge was also convinced “based on the evidence at the March 17, 2008 hearing” that the affidavit contained false statements.\(^\text{160}\) Testimony of the officers during the hearing contradicted statements in the search warrant affidavit. The lead officer on the investigation testified that he conducted a complete search of defendant’s mobile home for drugs before seeking a search warrant. The affidavit, however, made the search out to be a cursory, “walk-through” search.\(^\text{161}\) Also, the officer testified that he did not field test the residue suspected to be methamphetamine but agreed that the affidavit said conclusively that the substance was methamphetamine.\(^\text{162}\)

In contrast to \textit{Maldonado} and \textit{Troxel}, in which defendants relied solely on traditional trial advocacy and police inconsistencies to establish dishonesty, in several of the cases in which judges rejected defendants’ claims of police dishonesty, defendants introduced testimony from non-police witnesses.\(^\text{163}\) Several other defendants pointed to

\(^{158}\) Troxel Order at 3.

\(^{159}\) \textit{Id.}

\(^{160}\) \textit{Id.} at 10.

\(^{161}\) Troxel Hearing Transcript, pp. 31, 39, 68, 72.

\(^{162}\) \textit{Id.} at 65, 89.

\(^{163}\) I identified seven orders reflecting witnesses other than a police officer or the defendant. United States v. Charles, 07-40140 (Mar. 11, 2008) (two officers testified for the government; defendant called an eye witness to testify on his behalf); United States v. Villa, 08-10004 (Jul. 30, 2008) (two deputies testified that dog alerted on defendant’s car; defendant introduced an eye-witness who testified that she did not see dog alert); United States v. Walker, 08-10112 (Sept. 23, 2008) (defendant called contract pumper as witness to dispute agent’s testimony that he could see into open heater/treater); United States v. Apollo Energies, Inc., 08-1011 (Sept. 23, 2008) (same); United States v. Buchanan, 08-40067 (Jan. 21, 2009) (defendant offered alibi witness contradicting officer’s statements in an affidavit); United States v. Geartz, 09-40026 (Jul. 13, 2009) (a citizen witness testified for the defendant and contradicted two officers’ testimony); United States v. Robbins, 09-40002 (Sept. 24, 2009) (two officers testified for the government and defendant’s wife, who
inconsistencies in the testimony of police officers but failed to convince the judge to rule in their favor. In at least 5 of 31 cases, defendants alleged that the police lied without producing evidence of any kind to support their claims.

The biggest surprise, given my hypotheses that independent and corroborative evidence of police dishonesty would sway defendants to claim police lies and would convince judges to find them, was that video evidence appeared to play little role in the judges’ decisions. When video was a factor, it favored the government. In United States v. Roberts, the defendant pointed to discrepancies between the police department’s surveillance camera records and times listed in an officer’s affidavit, hoping to cast doubt on the police’s credibility and their purported probable cause for detaining the defendant. The judge failed to address the discrepancy in finding sufficient probable cause for the subsequent seizure. In United States v. Robert Thomas Johnson, the

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164 In addition to the Maldonado and Troxel orders, 5 orders discussed police inconsistencies. See, e.g., United States v. Tapia, 06-20072 (Nov. 13, 2007) (defendant called an officer to testify and elicited errors or inconsistencies in a police report and argued that police conducted a warrantless search; despite government’s failure to produce the warrant at the evidentiary hearing, judge ruled for government); United States v. Donaghue, 07-10022 (Nov. 26, 2007) (during hearing defendant showed that police possessed several documents establishing that defendant’s address was not the one in the affidavit for a search warrant); United States v. Dixon, 07-40124 (Apr. 24, 2008) (several police witnesses testified and there were inconsistencies about whether defendant was asked about robberies for which he had previously invoked his right to silence); United States v. Roberts, 08-40048 (Aug. 21, 2008) (defendant pointed to discrepancies in the evidence, such as affidavit showing that defendant was present at 6:12 when video showed defendant present at 5:24); United States v. Johnson, 08-40010 (May 22, 2009) (there were inconsistencies in the officers’ testimony and between the testimony and the dispatch record).

165 See e.g., United States v. Harvey, 07-40030 (Oct. 2, 2007) (judge said that defendant “summarily argue[d]” the police lies point but “fail[ed] to identify what information . . . was misleading . . . and was known . . . to be false.”); United States v. Stewart, 06-40160 (Apr. 28, 2008) (court said defendant “made no offer of proof that Officer Garman misrepresented her criminal history.”); United States v. Soto-Alanis, 07-40149 (Apr. 28, 2008) (“While defendant denies committing this [traffic] infraction in his motion, he has offered no such proof.”). Sometimes orders did not indicate what, if any, evidence the defendant produced in support of his arguments.

166 No. 08-40048 (Aug. 21, 2008).
167 Roberts Order of Aug. 21, 2008, at 5.
168 Id. at 13-14, 16-17.
169 No. 08-40010 (May 22, 2009).
defendant contended\textsuperscript{170} that police lied and claimed that they subjected the defendant’s car to a drug dog sniff when, in fact, they did not. He claimed that video from the police cars and from a nearby casino would prove his claims. Apparently, the casino destroyed its video before the defendant could obtain it, and the police testified that there was video of the traffic stop but not the dog sniff. The judge was unmoved. “There is no proof of what the video recordings would have shown. There is no proof that the government, as opposed to the casino, destroyed the video recordings. There is no proof that the government acted in bad faith, only defendant’s assertions that alleged inconsistencies or errors in testimony amount to perjury.”\textsuperscript{171}

In \textit{United States v. Felipe J. Peralis},\textsuperscript{172} the judge viewed a video of a traffic stop and considered an officer’s testimony during an evidentiary hearing before ruling that the stop was supported by probable cause, that the defendant’s detention was not unreasonably prolonged, and that the defendant understood English and voluntarily relinquished his \textit{Miranda} rights. “The videotape of the traffic stop corroborates Trooper Henderson’s testimony.”\textsuperscript{173} There was also video of a traffic stop in \textit{United States v. Ramon Paez-Mata}.\textsuperscript{174} The judge there referenced the video in finding the defendant’s consent to search to be voluntary, but made no additional reference to the video when crediting the officers’ testimony on the disputed issue of waiver of \textit{Miranda}.

\textsuperscript{170} First through his attorney and later pro se.
\textsuperscript{171} Johnson Order of May 22, 2009, at 6.
\textsuperscript{172} No. 08-40055 (Nov. 19, 2008).
\textsuperscript{173} \textit{Id.} at 11.
\textsuperscript{174} No. 09-40006 (Jun. 18, 2009).
VI. Extrapolations, Inferences, and Conclusions

The results of this study show that defendants formally claim that police have lied in approximately 2.24% of all criminal cases in the District of Kansas. Defendants usually argue police perjury in a motion to suppress evidence challenging a search or seizure. Most of these motions to suppress are filed in cases charging the defendant with a drug crime; about one third are raised in cases charging the defendant with a gun crime. Some defendants produce documents that contradict the police; some call non-police witnesses in support of their allegations; others rely on allegations alone, or depend on their lawyers to conduct an aggressive cross-examination of the police to highlight suspect testimony. Despite the small number of police perjury allegations and the varied methods defendants use to prove their claims, few convince judges in the District of Kansas to rule that the police have lied. Even when a judge rules that the police committed perjury, she may exclude only some of the evidence in the case, allowing the prosecution to proceed and providing little or no deterrence of future police perjury.

Because this study covers only one of ninety-four federal judicial districts, there is no proof that the District of Kansas is typical of districts nationwide. But if

175 This percentage was derived from averaging the number of cases pending in the District of Kansas at the beginning of Fiscal Year 2008 and the number of cases pending at the end of Fiscal Year 2008, which yielded 691 cases. Then, I multiplied the average number of cases per year (691) by 2 (the number of years for which I gathered data). That yielded 1,382 cases. I then divided the number of cases for two years by the number of orders in FY 2008 and 2009 in which defendants claimed police dishonesty (31). That calculation indicated that defendants allege police lies in about 2.24% of all cases brought in the District of Kansas.
176 See supra Part IV.B.4.
177 See supra Part IV.B.6.
178 See supra Part IV.B.3.
179 See supra Part IV.B.6.
180 See U.S. Courts, http://www.uscourts.gov/districtcourts.html ("There are 94 federal judicial districts, including at least one district in each state, the District of Columbia and Puerto Rico.").
Kansas is typical and judges throughout the United States are rejecting defendants’ allegation of police dishonesty at the same rate Kansas judges are rejecting them, then judges in large numbers are probably fostering police perjury. In a typical fiscal year, U.S. attorneys initiate 63,000 criminal cases in the federal district courts nationwide. Thus, extrapolating from the Kansas findings, in approximately 1,411 of those cases, a defendant will assert police dishonesty, and of those 1,411 cases, a judge will find police dishonesty in only 92. Each of those 92 rulings will occur in the context of deciding a defendant’s motion to suppress evidence. Even when the judge recognizes police perjury during a suppression hearing, she will exclude only part of the government’s evidence, and the case will survive.

In other words, if federal district court judges in Kansas are representative of federal district court judges everywhere, then district judges “habitually accept[] the policeman’s word,” in the face of mounting anecdotal and empirical evidence that, not uncommonly, police lie about their investigations. Furthermore, there is no reason to think that judicial acceptance of police perjury is not more pronounced in the state courts, where judges often face intense pressures from re-election campaigns to remain “tough on crime.” There is also no reason to believe that police perjury is not more rampant in big cities, like New York, Los Angeles, and Chicago, than it is in Kansas.

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182 See U.S. Attorneys Annual Statistics Reports for Fiscal Years 2006-2008. This figure was derived from averaging (and then rounding down) the two fiscal years’ data.
183 6.5% represents the percentage of orders in which Kansas judges found police dishonesty when defendants argued the issue. See Part V.B.3.
184 See supra Part V.B.4, noting that the cases in which judges found police lies were limited to suppression matters and search and seizure issues and that defendants who claimed police dishonesty did so in non-search and seizure contexts only 16% of the time in Kansas.
185 See Wilson, An Exclusionary Rule for Police Lies, supra note 9 (cataloguing evidence of police lies, including lies during a criminal trial in Los Angeles, which were belied by video evidence, and lies told by police to deflect blame for a car accident to an alleged drunk driver).
If police perjury is prevalent in court proceedings, as the mounting anecdotal and empirical evidence suggests, then trial judges, at least in the District of Kansas, are fostering police perjury by failing to recognize its prevalence with their rulings.