



Cellphones haven't stopped cops from lying — only courts can do that

David Oscar Markus

June 12, 2020

A 75-year old man was injured when he “tripped and fell.” That was the scenario the Buffalo police department released to the public before it knew that there was a video showing two officers shoving the old man to the ground and then walking over him while blood poured out of his head.

Many express shock that police officers would misrepresent — even lie — with such impunity. Those people naively ask what would happen if there wasn't a video of the whole affair. Criminal practitioners know exactly what would happen — because, sadly, it's what has been happening in courtrooms around the country every day for years. Too many officers are known to lie under oath, and there are judges and prosecutors who let them get away with it. This dirty secret is a true epidemic in the criminal justice system; it's called “testilying,” and it has been around a long time.

In 1982, Alan Dershowitz explained the “Rules of the Justice Game,” which included Rule IV: “Almost all police lie about whether they violated the Constitution in order to convict guilty defendants,” and Rule V: “All prosecutors, defense lawyers, and judges are aware of Rule IV.” The problem, Dershowitz explained, is that police officers know that they can lie in court without any consequence.

At the time, many brushed Dershowitz's rules aside as hyperbolic, but his point has become generally accepted by criminal practitioners on both sides of the aisle. For example, a former police chief in 1996 estimated that the infamous “War on Drugs” had caused “hundreds of thousands in law-enforcement officers [to] commit felony perjury every year testifying about drug arrests.” Two years earlier, Irving Younger, a former New York judge, explained: “When one looks at a series of cases, it then becomes apparent that policemen are committing perjury at least in some of them, and perhaps in nearly all of them.”

In 1992, the mayor of New York appointed former Judge Milton Mollen to investigate this problem. The Mollen Commission found not only that “the practice of police falsification ... is so common that it has spawned its own word: ‘testilying,’ but that other police officers would cover for lying cops for two reasons: 1) they believed the ends justified the means and 2) they knew that prosecutors and judges would not hold them accountable.

In the George Floyd case, police misrepresented what happened before realizing that there was a video that had gone viral. If officers were willing to misrepresent the circumstances of someone's death, imagine how often it occurs in the ordinary police encounter. And there is simply no question that the lying disproportionately affects minorities.

So, what should be done? The first answer is painfully obvious but — until now — has rarely happened: Hold police officers accountable when they lie by prosecuting them and by allowing them to be sued. Police officers are almost never prosecuted. Even rarer is a successful civil suit, because under a current legal doctrine called qualified immunity, it's almost impossible to sue a police officer and win.

For the first time, though, there seems to be a glimmer of hope. The Buffalo and Minneapolis officers have been charged. And uncommon allies, Justices Clarence Thomas and Sonia Sotomayor have called for the Supreme Court to revisit the doctrine of qualified immunity. The Court is expected to decide shortly whether to hear such a case.

The second answer is less obvious, but just as important because there isn't always going to be a cellphone video to expose the lie: Appoint fewer prosecutors as judges. We need judges who are more skeptical even when there isn't a video.

The Cato Institute recently explained that the huge imbalance of former prosecutors on the bench is “a doubtful way to ensure equal justice under law” because “a person's prior professional experiences are likely to influence not only their worldview but also their approach to particular cases.”

It's no surprise then, that some of these former-prosecutors-turned-judges rarely hold officers accountable when they testify falsely. They typically rubber stamp searches and warrants, which may have been the case with the no-knock warrant used in Breonna Taylor's case.

We need a Supreme Court, which has three former prosecutors but not a single former criminal defense lawyer, to dump the old, judicially created doctrine of qualified immunity, which generally shields police officers from being sued.

Thank goodness for cellphones.

Cellphones are finally showing the public what prosecutors, judges, and defense lawyers have known about the criminal justice system for a long time.

Now we need courts to step up.