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The Bend at the End: What Lawyers Can Learn about Disruptions and Innovations in Criminal Defense Practice from Market Analysis

by Dr. Donald F. Tibbs*

and Justin Hollinger**

“The link to the workers’ struggle is located in the desire to blow up power at any point of its application.”¹

“[P]ast performance is not an indicator of future success.”²

In the world of stock market analysis, there is one certainty: the stock market is unpredictable.³ It acts with a will of its own, and despite experts’ attempts at market forecast, no single person or machine can accurately predict the highs and lows of each day.⁴ Nonetheless, market

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1. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *COLONIAL DISCOURSE AND POST-COLONIAL THEORY: A READER* 66, 67 (Patrick Williams & Laura Chrisman eds., 1994).

2. Jeff Stibel, *Why We Can't Predict Financial Markets*, *HARV. BUS. REV.* (Jan. 22, 2009), <https://hbr.org/2009/01/why-we-cant-predict-financial>.

3. See Dr. Woody Johnson, *Focus on the Trading Process not the Money*, *FXSTREET* (Apr. 19, 2017), <https://www.fxstreet.com/education/focus-on-the-trading-process-not-the-money-201704190810>.

4. See generally IRENE ALDRIDGE, *HIGH FREQUENCY TRADING: A PRACTICAL GUIDE TO ALGORITHMIC STRATEGIES AND TRADING SYSTEMS* (2d ed. 2013) (exploring computer use in high-frequency trading practices).

experts extol new techniques; develop computer algorithms;⁵ and attach interesting monikers, such as Stochastics, MACD, and Bollinger Bands.⁶ But, in the end, they all succumb to the same rule: the unpredictability of the market suggests that no trading strategy is 100%, without fail, perfect every single trade.⁷

That said, however, there is one simple market rule to which, if pressed hard enough, every investor, no matter how sophisticated or novice, would agree. That rule is simply that you should always follow the general direction of all the other investors until it is no longer popular to follow. So common is this approach, affectionately known as “Trend Trading,”⁸ that a popular mantra was developed: “The Trend is Your Friend . . . Until the Bend at the End.”⁹ At its base level, this mantra makes great sense. If everyone else is investing in one direction, why would you be contrarian? To be contrarian, or go against the trend, is a riskier investing strategy, mostly because the world of market investing is a zero-sum game.¹⁰ For every winner, there is a loser. Perhaps, the same can be said of the American criminal justice process.

When it comes to the practice of criminal law defense, some similarities exist to stock market investing. Lawyers employ their own strategies or styles, but in the end, they generally stick to the same game plan. That is because the criminal justice process is as unpredictable as the market¹¹ and is also a zero-sum game: for every winner there is a

5. See Tom C.W. Lin, *The New Financial Industry*, 65 ALA. L. REV. 567, 568 (2014) (“Machines are taking over Wall Street. Artificial intelligence, mathematical models, and supercomputers have replaced human intelligence, human deliberation, and human execution.”).

6. See GEORGE C. LANE & CLAIRE LANE, GETTING STARTED WITH STOCHASTICS 3 (1998); JACKIE ANN PATTERSON, TRUTH ABOUT MACD: WHAT WORKED, WHAT DIDN'T WORK, AND HOW TO AVOID MISTAKES EVEN EXPERTS MAKE 19–21 (2014); ANNE-MARIE BAIYND, THE TRADING BOOK: A COMPLETE SOLUTION TO MASTERING TECHNICAL SYSTEMS AND TRADING PSYCHOLOGY 272 (2011).

7. See Moritz Czubatinski, *There is No Perfection in Trading*, TRADECIETY (Nov. 29, 2016), <http://www.tradeciety.com/there-is-no-perfection-in-trading>.

8. ANDREAS F. CLENOW, FOLLOWING THE TREND: DIVERSIFIED MANAGED FUTURES TRADING 300 (2012).

9. *The Trend is Your Friend, Until the Bend at the End*, OCCAM'S RAZOR (McClean Asset Mgmt. Corp.), Oct. 2014, <http://www.mcleanam.com/wp-content/uploads/2014/10/Occams-Oct-2014-online-version.pdf>.

10. Henry Blodget, *Why Trading is a Zero-Sum Game*, INV. INTELLIGENCER (Mar. 8, 2007), http://247wallst.com/investing/2007/03/08/why_trading_is_/. Although there are critics of the zero-sum analysis, Blodget explains that “every dollar ‘won’ by one trader must be ‘lost’ by another.” *Id.*

11. Bruce A. Green, *The Right to Plea Bargain with Competent Counsel After Cooper and Frye: Is the Supreme Court Making the Ordinary Criminal Process “Too Long, Too Expensive, and Too Unpredictable” in Pursuit of Perfect Justice*, 51 DUQ. L. REV. 735, 735

loser.¹² Of all the different trial strategies employed, the most popular entails defense lawyers not allowing their clients to take the witness stand or not letting the Subaltern Speak.¹³

And perhaps one can understand the wisdom of such a strategy. First, there is the possibility of a cross-examination damaging the potential of the case. Also, defendants would be implicitly surrendering their privilege under the Fifth Amendment of the United States Constitution¹⁴ against self-incrimination. Finally, it is sometimes impossible to convince someone you are innocent of a crime. Most lay jurors wonder, “What do you have to hide? Why do you need to be silent? And if you were innocent, why would you be arrested?”¹⁵ While these are notable concerns, I suggest that a disruptive innovation would require defense lawyers to rethink that strategy given that we are at “the bend” at the end of “the trend.”

The American criminal justice system is infected by a virus that impacts the outcome of most trials: anti-black sentiment and racism.¹⁶

(2013) (Justice Antonin Scalia wrote that the criminal justice process is “[t]oo long, too expensive, and unpredictable.”) (quoting *Lafler v. Cooper*, 566 U.S. 156, 175 (2012) (Scalia, J., dissenting)).

12. See James Marshall, *Lawyers, Truth, and the Zero-Sum Game*, 47 NOTRE DAME L. REV. 919, 919 (1972).

13. See Marcus E. Green, *Rethinking the Subaltern and the Question of Censorship in Gramsci's Prison Notebooks*, 14 POSTCOLONIAL STUD. 387, 387 (2011). In post-Colonial Theory, the term “Subaltern,” coined by Antonio Gramsci and made popular by Gayatri Spivak, refers to populations of society that are socially, politically, and geographically outside of the hegemonic power structure. *Id.* In the case of the American criminal justice system, those people would almost certainly include African-Americans but also other minorities and poor underclass people who are ensnared in the criminal justice process. See *id.*

14. U.S. CONST. amend. V.

15. See Jeffrey Lichtman, *To Testify or Not to Testify: A Most Important Trial Decision*, N.Y. CRIM. DEF. L. BLOG (Oct. 30, 2016), <https://www.topnewyorkcriminalattorneysblog.com/2016/10/30/testify-not-testify-important-trial-decision>. See also Jeremy F. Rosenthal, *5 Reasons Not to Testify in Your Own Defense*, ROSELAWTX (Mar. 12, 2014), <https://roselawtx.wordpress.com/2011/10/01/5-reasons-not-to-testify-in-your-own-defense/>.

16. Bennett L. Gershman, *Racism in Criminal Trials: What Will U.S. Supreme Court Say*, HUFFINGTON POST (Oct. 4, 2016), https://www.huffingtonpost.com/entry/racism-in-criminal-trials-what-will-us-supreme-court_us_57f4080fe4b0ab1116a54aad. See, e.g., W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* (Univ. of Mass. Press 2018) (1903); JAMES BALDWIN, *THE FIRE NEXT TIME* (Taschen 2017) (1963); TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015). For an excellent commentary on perceptions of the police and criminal justice, see Justice Sotomayor's dissent in *Utah v. Streiff*, where she discusses how it is

no secret that people of color are disproportionate victims of [police] scrutiny. For generations black and brown parents have given their children “the talk”—instructing them never to run down the street; always keep your hands where

For African-American defendants, especially young black men and women, this virus, despite their lawyer's best efforts, impacts the success of their trial, thereby making the zero-sum game an unbalanced one.¹⁷ Simply, black people believe they live in a world where they can't win. In fact, in most instances, they don't win.¹⁸ If it is true, and I think most people would agree that racism condemns many black defendants long before the trial even gets underway, this means the trial outcome is not dictated solely by trial strategy.¹⁹ If that is the case, it brings one to ask, what is the wisdom of having defendants sit silent while the state, and more importantly, the police officer, present the only narrative of their case?

Of course, criminal defense attorneys can put on their own witnesses,²⁰ but that would be tantamount to following the trend or utilizing the same trial strategy that all defense lawyers follow. The real disruption (or profit in terms of successful outcomes) in criminal defense happens at the point or moment of recognizing the end of the popular trend, known again

they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.

136 S. Ct. 2056, 2070 (2016) (citations omitted).

17. See generally Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Race in Criminal Trials*, 127 Q. J. ECON. 1017 (2012) (exploring the impact of race and racism on outcomes in the criminal justice system). According to Anwar et al., “the application of justice is highly uneven and raise[s] obvious concerns about the fairness of trials in jurisdictions with a small proportion of blacks in the jury pool.” *Id.* at 1017.

18. *Report of the Sentencing Project to the United Nations Human Rights Committee: Regarding Racial Disparities in the United States Criminal Justice System*, SENTENCING PROJECT 1 (Aug. 2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf>. According to the Sentencing Project's report,

Racial minorities are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they are more likely to face stiff sentences. African-American males are six times more likely to be incarcerated than white males and 2.5 times more likely than Hispanic males. If current trends continue, one of every three black American males born today can expect to go to prison in his lifetime, as can one of every six Latino males—compared to one of every seventeen white males.

Id. Making matters worse, in cases of wrongful convictions, blacks are more likely to be convicted compared to any other racial minority and all whites. See generally Samuel R. Gross, Maurice Possley & Klara Stephens, *Race and Wrongful Convictions in the United States*, NAT'L REGISTRY EXONERATIONS (Mar. 7, 2017), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf (examining vastly disproportionate rates of wrongful convictions).

19. See Bennett L. Gershman, *How Racism Infects Jury Verdicts*, HUFFINGTON POST: THE BLOG (Oct. 6, 2017), https://www.huffingtonpost.com/bennett-l-gershman/how-racism-infects-jury-v_b_12354142.html.

20. See Alfonso Gambone, *Criminal Defense Witnesses and the Prosecution's Burden of Proof*, GAMBONE LAW, <https://www.gambonelaw.com/library/defense-witnesses-creating-reasonable-doubt.cfm> (last visited Jan. 15, 2018).

as “the bend,” rather than employing the strategies that have yielded small profits or gains.

I. RECOGNIZING THE TREND

Before recognizing “the bend,” one must first recognize “the trend.” Finding “the trend” exposes the possibility of disruption in common practices. As with traditional market analysis, the trend always follows sentiment, feelings, or emotions attached to traditional beliefs.²¹ Interestingly, the same can be said for criminal defense. The trend in criminal law practice and policy has historically been influenced by the sentiment and emotions attached to anti-black racism.²² Historically, it has hovered between overt and covert practices. Whether Jim Crow segregation (overt racism)²³ or stop-and-frisk (covert racism),²⁴ racial injustice exists in the law, and the courts have been loath to fix the problem. Indeed, in some instances, the courts have been the problem more than the solution.²⁵

Failing to recognize the trend (in this case the history) that the criminal justice process is heavily indebted to American racism leaves criminal defense lawyers, and by association their clients, exposed to failure. American courts began their history burdened with the responsibility of enforcing anti-black laws. The United States Constitution compromised the issue of black rights to ensure white unity, and the early decisions of the Supreme Court of the United States in the racial area reflected both law and society’s firm belief that blacks were not entitled to rights reserved for white men.²⁶ There were exceptions,

21. See Malcolm Baker & Jeffrey Wurgler, *Investor Sentiment in the Stock Market* 1–2 (Nat’l Bureau of Econ. Research, Working Paper No. 13189, 2007), <http://www.nber.org/papers/w13189.pdf>.

22. See Bill Quigley, *Fourteen Examples of Racism in Criminal Justice System*, HUFFINGTON POST: THE BLOG (July 26, 2010, 7:45 AM), https://www.huffingtonpost.com/bill-quigley/fourteen-examples-of-raci_b_658947.html.

23. See generally C. VANN WOOWARD, *THE STRANGE CAREER OF JIM CROW* 7 (Oxford Univ. Press 2006) (1955) (laying out the history of racist Jim Crow laws). Another excellent example of overt racism in laws during Jim Crow Segregation can be found in the Black Codes. See generally David F. Forte, *Spiritual Equality: The Black Codes and the Americanization of the Freedmen*, 43 LOY. L. REV. 569 (1998).

24. See Brentin Mock, *How Police are Using Stop-and-Frisk Four Years After a Seminal Court Ruling*, CITYLAB (Aug. 18, 2017), <https://www.citylab.com/equity/2017/08/stop-and-frisk-four-years-after-ruled-unconstitutional/537264> (reporting on the continuation of stop-and-frisk practices four years after a federal judge found the practice racially discriminatory).

25. See Sherrilyn A. Ifill, *When Courts Pretend It’s Not About Race*, CNN (May 25, 2012), <http://www.cnn.com/2012/05/25/opinion/ifill-racial-dignity/index.html>.

26. See *id.*

but Chief Justice Taney ostensibly summarized this belief in the infamous Dred Scott case where he wrote that blacks "had no rights which the white man was bound to respect."²⁷

II. THE EARLY BEND: RECONCILING THE CRIMINAL PROCEDURE REVOLUTION

Unfortunately, black defendants find little comfort in recounting the unfairness in the criminal justice system as deficiencies in the court system. Such recognition also fails to alter their perceptions of a fair outcome. To black people, the courts are an alien process controlled by a white majority; which since the courts created the process, the courts could choose to fix the process if they so preferred. While some might point to the Warren Court's Criminal Procedure Revolution as a positive gain for black defendants,²⁸ unfortunately, the legal outcomes of that era have changed the actual plight of the average criminal defendant so little that black defendants have been given no reason to alter their conception of the criminal justice system.

It is not that the Criminal Procedure Revolution was insignificant or that the legal rulings were unwelcome by blacks. Rather, many of the procedures were less concerned with protecting the souls of black folk, than as a means of requiring police and prosecutors to comply with long established rules of due process.²⁹ Said differently, the changes wrought

27. *Scott v. Sanford*, 60 U.S. 393, 407 (1857). On March 6, 1857, Chief Justice Roger Taney issued what is widely regarded as the worst Supreme Court opinion ever. He noted that the question before the Court was whether African-Americans are citizens of the United States and thus able to file suit in federal court. His analysis of that issue is couched in abjectly racist language. In speaking about African-American slaves, he claimed,

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.

Id.

28. See generally A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968) (hailing constitutional advances in criminal procedure during the Warren court era); CRAIG M. BRADLEY & THOMAS Y. DAVIES, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* (1993).

29. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966).

For example, *Miranda*, one of the most controversial of the decisions, has had only slight impact on law enforcement. As one empirical report found, "The police continue to question suspects, and succeed despite the new constraints." The interrogation situation was found to be "inherently coercive," and the required warnings, even when given, fail to place the suspect on an equal footing with the police.

by the series of constitutional protections engrafted onto criminal procedure during the last decade are more heart-warming to those who worked to attain them than helpful to those they were designed to shield.

Since *Mapp v. Ohio*,³⁰ it has become standard procedure in some police departments for an arresting officer to "learn the script."³¹ The script is so noticeable that if one sits and listens to several different police officers testify about drug cases, it appears that every defendant engaged in the exact same action, which is humanly impossible. The commonality of the testimony of police officers leads one to believe that either every defendant had the exact same set of circumstances, or simply, that someone is lying.

Officers routinely testify that as they approached, the defendant dropped the evidence to the ground, the officer picked it up, found that it was contraband, and placed the defendant under arrest.³² This narrative makes sense because it is rock solid on constitutional grounds during cross-examination.³³ Defendants, however, usually deny this story,

Derrick A. Bell, Jr., *Racism in American Courts: Cause for Black Disruption or Despair*, 61 CAL. L. REV. 165, 185 (1973) (quoting Note, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L. J. 1519, 1613 (1967)).

30. 367 U.S. 643 (1961).

31. In *People v. McMurty*, 314 N.Y.S.2d 194 (N.Y. City Crim. Ct. 1970), New York Supreme Court Judge Irving Younger wrote the following:

Were this the first time a policeman had testified that a defendant dropped a packet of drugs to the ground, the matter would be unremarkable. The extraordinary thing is that each year in our criminal courts policemen give such testimony in hundreds, perhaps thousands, of cases—and that, in a nutshell, is the problem of "drosy" testimony. It disturbs me now, and it disturbed me when I was at the Bar.

Id. at 195–96. In 1967, Younger wrote that "[t]he 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 nearly all of them." Irving Younger, *The Perjury Routine*, THE NATION, May 3, 1967, at 596.

32. See generally Case Comment, *Police Perjury in Narcotic "Drosy" Cases: A New Credibility Gap*, 60 GEO. L.J. 507 (1971) [hereinafter *Police Perjury*]. See also OLIVER A. ROSENGART, THE BUST BOOK FOR LAWYERS 66–67 (1970).

33. "Drosy" cases, as they are commonly called, are cases where the suspect drops or discards the contraband so that it is not in their possession at the time of a search or arrest. As such, they are governed under the law regarding the abandonment of property. The right under the Fourth Amendment of the United States Constitution to be secure against unreasonable searches and seizures is based upon an expectation of privacy in a person's property. If a person abandons their property, they no longer have an expectation of privacy in the property. The police may conduct a search of the abandoned property and may seize the abandoned property without a warrant. See, e.g., *California v. Greenwood*, 486 U.S. 35 (1988).

In *Greenwood*, the police (without a warrant) asked the local trash collector to turn over Greenwood's trash once they picked it up. Using evidence found in the trash, they secured a search warrant and found evidence of drug possession in Greenwood's home.

telling their lawyers that the police simply walked up and searched them. One judge has noted that the extraordinary number of cases in which such testimony has been given suggests a disturbing amount of police perjury.³⁴

Unfortunately, police perjury is widespread. Not only is it used to obtain criminal convictions in “dropsy”³⁵ and “plain view” cases³⁶ but also to cover up police brutality, bribery, and shakedowns. This process of testifying under oath to facts the officer knows to be untrue is so normative that it has earned the moniker of “testilying.”³⁷ Testilying is so common that a simple web-based search details an ample number of videos and news stories of officers perjuring themselves to either obtain

Greenwood asserted that he had an expectation of privacy with his trash, but the Court determined that his expectation was not one that society would consider legitimate. *Id.* at 37–38. The Court reasoned that Greenwood abandoned his property by placing it on the curb for pickup. *Id.* at 43. According to the Court, Greenwood “placed [his] refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through [it] or permitted others, such as the police, to do so.” *Id.* at 40. “[T]he police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public.” *Id.* at 41. Said differently, an owner has zero expectation of privacy with regard to abandoned property because the owner relinquishes his rights to privacy over that effect.

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

35. See generally *Police Perjury*, *supra* note 32.

36. In plain view cases, the officer testifies that the defendant’s apartment door was open, and seeing the narcotics in “plain view” on a table or sofa, the officer went in without a warrant or probable cause and made the arrest. See, e.g., Robert Eyer, Commentary, *The Plain View Doctrine After Horton v. California: Fourth Amendment Concerns and the Problem of Pretext*, 96 DICK. L. REV. 467, 482–83 (1992).

37. See Mark Curriden, *The Lies Have It*, 81 A.B.A. J. 68, 71 (May 1995) (quoted in Lisa C. Harris, *Perjury Defeats Justice*, 42 WAYNE L. REV. 1755, 1768–69 (1996) (footnote omitted)). See generally Hon. Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 SUFFOLK U. L. REV. 35, 47 n.52 (1996) (“Perjury cases are not often pursued, and perhaps should be given greater consideration by prosecuting attorneys as a means of enhancing the credibility of the trial system generally.”); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1060 n.13 (1996) (“[N]o trial lawyer that I know will argue that police perjury is nonexistent or sporadic.”) (quoting Fred Cohen, *Police Perjury: An Interview With Martin Garbus*, 8 CRIM. L. BULL. 363, 367 (1972)); *The Consequences of Perjury and Related Crimes*, 105th Cong. 84 (1998), http://www.constitution.org/lrev/dershowitz_test_981201.htm (statement of Alan M. Dershowitz, Felix Frankfurter Professor of Law, Harvard Law School); Joseph D. McNamara, *Has the Drug War Created an Officer Liar’s Club?*, L.A. TIMES (Feb. 11, 1996), http://articles.latimes.com/1996-02-11/opinion/op-34758_1_drug-war-propaganda; Michelle Alexander, *Why Police Lie Under Oath*, N.Y. TIMES (Feb. 2, 2013), <http://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html>; Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311 (1994).

convictions or to avoid criminal prosecution in their own cases.³⁸ These stories are a worthy read for any nascent defense lawyer because, although they surely are aware of the practice, its widespread usage may come as a surprise.

III. "THE BEND" AT THE END

To practitioners of criminal law, it is not a new idea that "police scandals are cyclical; official misconduct, corruption, brutality, and criminality are endemic; and necessarily, so is police lying to disguise and deny it."³⁹ Yet, the same practitioners have afforded tremendous credibility to the testimony of police officers. For defense attorneys, this consideration frequently belies the reluctance to counsel clients to take the stand and present their side of the story. Now, however, shifting popular consciousness and technology may be changing that calculation.

Criminal defense lawyers have an important role not just in the lives of their clients but also in advancing the cause of social justice and constitutional rights.⁴⁰ Constitutional protections of individual freedom ring hollow if defense attorneys acquiesce to the treatment of police testimony as unassailable, allowing it to be the only side of the story heard in court. By challenging this approach, defense attorneys have the ability to disrupt institutional and social biases. The popular decision to counsel a defendant to stay off the stand will remain as one tool in the defense attorney's kit. This is a nuanced calculation.⁴¹ However, in light of growing public awareness of the existing dynamics between police and communities and the expansion of available digital evidence, now may be the right time to begin allowing defendants to tell their side of the story.

IV. THE CASE OF STEVEN LUPO AND THE PROBLEM OF TESTIFYING

On August 5, 2001, Philadelphia Police Officer Steven Lupo pulled over a car driven by Amiraria Farsi in what began as a routine traffic stop. With no time to establish probable cause, he walked directly to the back door of the car, ordered a passenger out, searched him, then immediately opened up the front door to search Farsi. After the arrival of

38. See generally GOOGLE, <http://www.google.com> (search "police officer commits perjury"); *Police Perjury*, *supra* note 32.

39. David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 458 (1999).

40. See generally Andrew Cohen, *Defending Defense: Why Defense Attorneys Matter*, BRENNAN CTR. FOR JUST. (Aug. 23, 2013), <https://www.brennancenter.org/analysis/defending-defense-why-defense-attorneys-matter>.

41. Barbara Allen Babcock, *Introduction: Taking the Stand*, 35 WM. & MARY L. REV. 1, 14-15 (1993).

his supervising sergeant, the two officers performed an illegal, warrantless search of Farsi's trunk.⁴² In this string of actions, Officer Lupo bucked protocol and broke the law.⁴³ A K-9 unit later arrived on the scene, but only after the officers had relocated Farsi's car to the impound lot.⁴⁴

Officer Lupo told the story very differently in his report and sworn testimony. In his version, all violations of the law were neatly buffed out. In an evidentiary hearing, Lupo testified that he saw a plastic baggie of marijuana when he approached the car, had a conversation with Farsi, and established probable cause before searching the men. He also testified that he performed no search of the trunk until a drug-sniffing dog "hit" on Farsi's car; he then obtained a search warrant and opened the trunk hours later in the impound lot. Michael Diamondstein, Farsi's lawyer, locked Lupo into this fictional narrative on the witness stand before presenting security camera footage of the entire stop. The footage plainly contradicted Lupo's version. Judge Lydia Y. Kirkland immediately suppressed the evidence of the drugs, and the prosecutor withdrew the charges. Reflecting on the episode, Diamondstein said, "I can just tell you from my experience . . . while the clients may not deny having narcotics, in the vast majority of cases the circumstances surrounding the arrest did not happen as it was described in the paperwork or in court."⁴⁵

Officer Lupo's story cuts to the heart of the problem of police perjury. The officer broke the law by violating the rights of the defendant and then lied about it under oath, relying on the presumption of his own credibility. If individual rights are to be considered second to the swift punishment of every person who is, in fact, breaking the law, there may be no problem with an officer saying whatever is necessary to secure a conviction. Fortunately, constitutional jurisprudence refutes such compromises. Historically, as discussed *supra*, absent incredibly rare video evidence, the force of these rights was easily and critically undermined.

Well-documented instances of Philadelphia police corruption and the subsequent cover-ups demonstrate a rampant and blatant abuse of public

42. See Nathan Gorenstein, *Video of Pot Bust Spotlights Lapses by Police*, PHILA. INQ. (Nov. 4, 2011), http://www.philly.com/philly/news/20111104_Drug_case_illustrates_common_procedural_problems.html?page=1&c=y.

43. *Id.* See *Arizona v. Gant*, 556 U.S. 332, 338 (2009) ("[S]earches conducted . . . without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.") (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

44. Gorenstein, *supra* note 42.

45. *Id.*

trust,⁴⁶ and the problem is not unique to Philadelphia.⁴⁷ Professor and former San Francisco police commissioner Peter Keane explains that police lie for two simple reasons.⁴⁸ One, because they can.⁴⁹ Absent the most glaring inconsistency, police officers enjoy deferential treatment in search hearings and know they can expect it.⁵⁰ Secondly, because their perjury hurts people that “no one cares about.”⁵¹ Unconstitutional searches of personal property most frequently target people who are poor, uneducated, or otherwise marginalized.⁵²

Compounding the matter, police officers have good reasons to lie, and those reasons are intertwined with the reasons for disrespecting the rights of a suspect in the first place: a reward system exists that insidiously encourages both behaviors. Part and parcel of the war on drugs, grant programs, like the Edward Byrne Memorial Justice Assistance Grant Program, have incentivized state and local law enforcement agencies to boost drug arrests in order to compete for millions of dollars in federal funding.⁵³ These funds flow to drug task forces, which measure their success in numbers of arrests, regardless of the quality of evidence, or severity of the offenses.⁵⁴ Numerous scandals

46. See, e.g., Joel Mathis, *Three Philadelphia Cops Arrested, Charged*, PHILA. MAG. (Apr. 23, 2015), <http://www.phillymag.com/news/2015/04/23/three-philadelphia-cops-arrested-charged/>; Daniel Denvir, *The Price of Perjury: The Story of One Lying Cop in Philly's Wild West Drug War*, CITYPAPER (Apr. 8, 2015), <https://mycitypaper.com/cover/the-price-of-perjury-the-story-of-one-lying-cop-in-phillys-wild-west-drug-war/>; Halmý Assefa, *Six Philadelphia Police Officers Arrested On Corruption-Related Charges*, CNN (July 31, 2014), <http://www.cnn.com/2014/07/30/justice/philadelphia-police-corruption/index.html>.

47. See Daniel Denvir, *Perjury USA: Rampant Police Lying Taints Criminal Justice System Nationwide*, SALON (Jan. 6, 2016), https://www.salon.com/2016/01/06/perjury_usa_rampant_police_lying_taints_criminal_justice_system_nationwide/; S.F. Public Defender, *Henry Hotel December 23 2010*, YOUTUBE (Mar. 2, 2011), <https://www.youtube.com/watch?v=GFwr9lJP35U> (surveillance video depicting San Francisco narcotics officers performing an illegal search, which the officers later lied about on falsified reports).

48. See Peter Keane, *Why Cops Lie*, GOLDEN GATE UNIV. SCH. L. DIGITAL COMMONS (Mar. 15, 2011), <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1535&context=pubs>.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Federal Byrne Grants: Drug War Funds Available for Drug Treatment*, DRUG POL'Y ALLIANCE 1 (Sept. 2010), https://www.drugpolicy.org/sites/default/files/FactSheet_ByrneJAG_Sept.%202010.pdf.

54. *Id.*

involving police officers lying or planting drugs have been motivated by an interest in federal grant money.⁵⁵

Political pressures also contribute to the phenomenon. The “get tough” movement shifted priorities and influenced the way police departments operate, exploding the numbers of arrests for drug-related offenses.⁵⁶ Even in states where the practice of using quotas is illegal,⁵⁷ such as New York, officers face pressure to rack up big numbers. New York City police officer Adhyl Polanco described it like this: “The culture is, you’re not working unless you are writing summonses or arresting people.”⁵⁸ Officers are more likely to take shortcuts and then lie to cover them up when doing so may improve their stature within the department or lead to promotions or acknowledgements.⁵⁹ In an instructional article for other police officers on testifying in court, Miami-Dade County Police veteran Ramesh Nyberg writes that “from time to time we are walking in [to meet with a prosecutor] with a crappy case poisoned by shaky witnesses and skimpy evidence. Sometimes it’s all we’ve got and, again, we have the battle temperament that says, ‘Go for it!’”⁶⁰

Certainly, police officers are people, and people lie a lot, especially out of self-preservation. Research shows that regular people lie multiple times every day.⁶¹ Add strong financial, political, and institutional pressures, and the motivation to massage the truth naturally intensifies. Jury instructions in criminal trials do not reflect the reality that, for many reasons, testifying police officers are, in fact, interested parties.⁶²

55. Anthony Papa, *Anti-Drug Task Force Funding Leads to Corruption and Destruction of Lives*, HUFFINGTON POST: THE BLOG (May 25, 2011), http://www.huffingtonpost.com/anthony-papa/anti-drug-task-force-fund_b_99219.html.

56. Between 1981 and 1994, arrests for drug abuse increased from 560,000 to 1.4 million. James P. Lynch & William J. Sabol, *Did Getting Tough on Crime Pay? Crime Policy Report No. 1*, URB. INST. 1, 4 (Aug. 1, 1997), <https://www.urban.org/sites/default/files/publication/70411/307337-Did-Getting-Tough-on-Crime-Pay-.pdf>.

57. New York, California, Illinois, Texas, Nebraska, and Pennsylvania have laws proscribing quotas. Shaun Ossei-Owusu, *Race and the Tragedy of Quota-Based Policing*, AM. PROSPECT (Nov. 3, 2016), <http://prospect.org/article/race-and-tragedy-quota-based-policing-0>.

58. Joel Rose, *Despite Laws and Lawsuits, Quota-Based Policing Lingers*, NPR (Apr. 4, 2015), <http://www.npr.org/2015/04/04/395061810/despite-laws-and-lawsuits-quota-based-policing-lingers>.

59. See Alexander, *supra* note 37.

60. Ramesh Nyberg, *How to Testify in Court*, POLICE MAG. (Apr. 1, 2006), <http://www.policemag.com/channel/patrol/articles/2006/04/how-to-testify-in-court/page/2.aspx>.

61. Kim B. Serota, Timothy R. Levine & Franklin J. Boster, *The Prevalence of Lying in America: Three Studies of Self-Reported Lies*, HUMAN COMM. RES. 8 (2010), https://msu.edu/~levinet/Serota_etal2010.pdf (finding, on average, people lie twice each day).

62. Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 249 (2017).

Ironically, though they are some of the more tolerated lies within the criminal justice system, the lies of police officers have the most devastating effects. One such lie can deprive a person of employment, freedom, or a lifetime of opportunities.⁶³ Considering the marginalized status of the individuals most likely targeted with such abuses and the biases of fact-finders in criminal trials, the trend of police lying has become a calculated part of the criminal justice system. However, like all trends, there is a bend at the end; a reversal.

V. THE RISE OF CITIZEN JOURNALISM

When George Holliday leaned over his balcony and captured the beating of Rodney King on a VHS camcorder, he produced historic, amazingly rare, undeniable video evidence of police officers brutally beating an unarmed black man.⁶⁴ Then, in 1991, it may have seemed unthinkable that twenty-some years later, the majority of people on the street at any given moment would be equipped with state-of-the-art video recording equipment. Not only would these recording devices be fast and discreet, but they would also be linked to an almost infinite network of wireless connections, capable of circulating imagery around the globe in moments—even live.

Today, public disruptions are frequently captured by somebody's cell phone or recording device. This modern phenomenon, sometimes called mobile or citizen journalism, cuts out the middle-man, allowing images and video to circulate among individuals without the curating or contextualization of a media production entity.⁶⁵ Increasingly, these recordings are transmitted in real time. When it comes to the presumption of police credibility on the witness stand, such citizen recordings of police misconduct have an undeniable impact. Professor Paul D. Butler explained that "[a] lot of white people are truly shocked by what these videos depict; I know very few African Americans who are surprised The videos are smoking-gun evidence . . . both literally because they are very graphic, which generates outrage, and figuratively, because people believe their own eyes."⁶⁶ Such videos have become part

63. Alexander, *supra* note 37.

64. See Erik Ortiz, *George Holliday, Who Taped Rodney King Beating, Urges Others to Share Videos*, NBC NEWS (June 9, 2015), <https://www.nbcnews.com/nightly-news/george-holliday-who-taped-rodney-king-beating-urges-others-share-n372551>.

65. See Kate Bulkley, *The Rise of Citizen Journalism*, THE GUARDIAN (June 10, 2012), <https://www.theguardian.com/media/2012/jun/11/rise-of-citizen-journalism>.

66. Mercy Benzaquen, Damien Cave & Rochelle Oliver, *The Raw Videos That Have Sparked Outrage Over Police Treatment of Blacks*, N.Y. TIMES (Dec. 6, 2017), <https://www.nytimes.com/interactive/2017/08/19/us/police-videos-race.html>.

of the American political landscape, vindicating dissenters in their long-fought struggle against police brutality and corruption and empowering relatively new movements like Black Lives Matter.⁶⁷

The racialized nature of the problem means that, in recent decades, injustices suffered by black people at the hands of police officers in the United States remained in the margins of the consciousness and conscience of white America.⁶⁸ While conflict between poor black communities and the police defined daily life for many, others were privileged to live without giving such dynamics a passing thought.⁶⁹ “Data from the federal Centers for Disease Control [and Prevention] reveals that, between 1968 and 2011, black people were 4.2 times more likely than whites to die at the hands of law enforcement.”⁷⁰ Following a decline in the seventies and eighties, the rate of killings of black Americans has remained relatively steady and still broadly disproportionate. Current statistics indicate that African Americans are more than twice as likely as whites to die at the hands of police, while African Americans under twenty-five years old are killed by police at a rate 4.5 times higher than people of all other races.⁷¹

Motivated by the potential of mobile technology to improve accountability and fight oppressive police misconduct, various groups have positioned themselves to effectively leverage its application. WeCopwatch, a grassroots organization with affiliates around the country, seeks to train citizens to “Copwatch,” which is the intentional, organized practice of observing, recording, and documenting encounters with the police.⁷² Additionally, the American Civil Liberties Union (ACLU) launched “Mobile Justice,” a mobile application that allows witnesses of suspected misconduct to instantaneously submit their recordings to the ACLU for review and safekeeping.⁷³ With the

67. Bijan Stephen, *How Black Lives Matter Uses Social Media to Fight the Power*, WIRED (Nov. 2015), <https://www.wired.com/2015/10/how-black-lives-matter-uses-social-media-to-fight-the-power/>.

68. Peter Dreier, *Caught on Camera: Police Racism*, AM. PROSPECT (July 11, 2016), <http://prospect.org/article/caught-camera-police-racism>.

69. See generally Jamie Varon, *Why White People Can't See There is 'White Reality' and 'Everyone Else's Reality'*, SPLINTER (Sept. 28, 2016), <https://splinternews.com/why-white-people-cant-see-there-is-white-reality-and-ev-1793862283>.

70. See Dreier, *supra* note 68.

71. Mike Males, *Who are Police Killing?*, CTR. ON JUV. & CRIM. JUST. (Aug. 26, 2014), <http://www.cjcrj.org/news/8113>.

72. See WECOPWATCH, <http://www.wecopwatch.org> (last visited Jan. 15, 2018).

73. Amanda Hess, *Justice Through a Lens*, SLATE (Apr. 9, 2015), http://www.slate.com/articles/technology/users/2015/04/copwatch_mobile_justice_and_others_apps_for_citizens_filming_police_encounters.html. Mobile Justice joined CopWatch, a similar mobile application launched in January 2014. *Id.*

understanding that these recordings are a crucial tool for accountability and reform, these groups want individuals to understand and assert that to record police encounters with a third party is increasingly recognized as a constitutional right.⁷⁴ These movements are emblematic of a growing acknowledgment that law enforcement officers are not above reproach and that citizens have a role in holding them accountable.

Video clips of police conduct that crosses the line, or soars over it, are piling up. The broad circulation of the horrific killings of Philando Castile, Laquan McDonald, Eric Garner, and many other black Americans have sparked national conflict and dialogue. Though a certain contingent remains quick to rationalize and justify the decisions of such officers, high- and low-profile police incidents and their documentation have contributed to a decline in popular perception of police credibility.⁷⁵ The statistics show a generational trend. Adults under fifty are more critical of the performance of police departments nationwide.⁷⁶

While any attorney would attempt to introduce video evidence that contradicts testimony of a law enforcement official, the rapid proliferation of cell phone video evidence has opened new opportunities. First-person narrative, especially from the defendant, lacks the potency of actual footage. Accordingly, criminal defense attorneys would be well-advised to structure their practice to reflect the potential power of such evidence. This could be achieved through the advancement of using tech-savvy clerks and investigators, who are uniquely skilled and qualified to locate existing evidence by leveraging social media and networking, or by investing in advanced digital forensics.⁷⁷

When a police officer's testimony diverges widely from that of the defendant, criminal defense attorneys ought to bear these social and technological trends in mind before advising a client to stay off the witness stand. While reasonable considerations may still render a defendant's testimony inadvisable, withholding it leaves a judge or jury

74. See, e.g., *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017) (holding that the First Amendment protects the recording of police activity by protecting the creation of material, not merely its possession, and the right of the public's access to information about officials' public activities).

75. Conor Friedersdorf, *Video Killed Trust in Police Officers*, THE ATLANTIC (Aug. 18, 2014), <https://www.theatlantic.com/national/archive/2014/08/police-officers-havent-earned-our-instinctive-trust/378657/>.

76. *Few Say Police Forces Nationally Do Well in Treating Races Equally*, PEW RESEARCH CTR. 1, 6 (Aug. 25, 2014), <http://www.people-press.org/files/2014/08/8-25-14-Police-and-Race-Release.pdf>.

77. See generally LARRY DANIEL & LARS E. DANIEL, *DIGITAL FORENSICS FOR LEGAL PROFESSIONALS: UNDERSTANDING DIGITAL EVIDENCE FROM WARRANT TO THE COURTROOM* (2012).

with only one side of the story. Indeed, juries will remain loath to acquit a defendant who never speaks; in his silence, he is "a mere referent . . . a piece of meat the dogs fight over, the trophy awarded [to] the winning gladiator."⁷⁸ This is a serious cost that requires serious consideration. Considering the incentives police officers have to distort the facts of an arrest or bust, continued acquiescence to the assumed bias of fact-finders, in the aggregate, undermines the integrity of our justice system. The trend has existed for a long, long time. Now is the time to watch for "the bend" at the end—and lean into it.

78. Barbara A. Babcock, *Introduction: Taking the Stand*, 35 WM. & MARY L. REV. 1, 13 (1993).