Rampart: A Crying Need to Restore Police Accountability

Carol A. Chase

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A CRYING NEED TO RESTORE
POLICE ACCOUNTABILITY

Carol A. Chase*

I. INTRODUCTION

What has been revealed about police practices at the Los Angeles Police Department’s Rampart Division is certainly a scandal. That it occurred, however, is not a surprise in light of the rules we have in place to deal with police misconduct that occurs during criminal investigations. First, officers who violate the law during criminal investigations are not held directly accountable for their actions. Thus, for example, an officer who has violated a suspect’s Fourth Amendment rights is not directly punished for his or her misconduct, and, therefore, the officer is not efficiently deterred from future violations. Rather, the “penalty” for police officer misconduct is suppression of evidence, which often renders a case unprosecutable, thus benefitting the criminal defendant while simultaneously failing to penalize the law-breaking police officer. Second, police officer perjury in support of criminal cases has become so widespread that it is widely referred to as “testilying.” Although judges are aware that officers lie to preserve cases, they are reluctant to catch officers in their lies, especially when the consequence of doing so will lead to the suppression of evidence which is essential to prove the prosecution’s case.

* Professor of Law, Pepperdine University School of Law.
II. LACK OF DIRECT POLICE OFFICER ACCOUNTABILITY

When police officers violate the law during the course of a criminal investigation, as when they violate the Fourth Amendment search and seizure rules or the rules for obtaining statements from an arrestee under *Miranda v. Arizona*, the law addresses these violations primarily by excluding any evidence unlawfully obtained. While this denies the prosecution any benefit it might have incurred by the introduction of unlawfully obtained evidence, it does little to hold individual police officers accountable for their violations of the law. In theory, of course, the offending officer will feel the sting of being blamed for a lost prosecution. However, whether he or she even suffers this passing indignity depends upon whether the officer is informed of the outcome, whether the officer is apprised of the wrongfulness of his or her conduct, and whether a court's decision to suppress the evidence is viewed as meritorious or as merely a bad decision by a "misguided" or "pro-defendant" judge. In any event, although the prosecuting team suffers a negative—and perhaps dispositive—consequence as a result of the police officer's violation of the law, the officer is not individually penalized by the court.

In one survey in which law enforcement personnel were asked if the threat of suppression of evidence influences their conduct in interrogating arrestees, nearly one-third responded that it was only a minor concern or no concern at all. When asked the same question with respect to their conduct in searching for and seizing evidence, nearly nineteen percent responded that it was only a minor concern or no concern. In other words, a substantial number of police officers admit that they are unconcerned with the consequences that may flow from their conduct if the courts determine that they have violated the law. This is understandable in light of the fact that the consequences of their actions do not fall directly upon them.

2. This section deals only with police officer violations of law which occur during the course of a criminal investigation. It does not address independent crimes committed by police officers, such as narcotics trafficking.
5. See id.
In all but the most egregious of cases—those relatively rare cases where police misconduct leads to civil rights charges or those extraordinary cases, as in Los Angeles, in which racketeering charges are filed—a police officer faces no direct consequences of his or her violation. The message is clear: If you violate the rights of a criminal suspect, you will not be held personally accountable. There is little downside for the officer who violates the law in the course of a criminal investigation. The upside, of course, is that it is often easier to secure the evidence needed for a criminal conviction if the officer does not scrupulously follow the law. The lesson learned is that it is permissible to operate outside the law so long as you do not get caught. If you are caught, at least you will not be personally punished. And you may still succeed in convincing the court that you were acting within the law.

III. ACCEPTANCE OF POLICE OFFICER PERJURY

Thus far we have considered the lack of consequences that befall an officer who is found to have violated the law in the course of a criminal investigation. Even more troubling, however, is that most police officer misconduct escapes detection, at least in part, because the courts too often accept as true the exaggerated or perjured testimony of police officers testifying at suppression hearings.

It has long been apparent that police officers testify untruthfully to avoid detection of their misconduct. Early evidence of this is found in a study by Columbia law students undertaken in 1968. The goal of that study was to ascertain what effect Mapp v. Ohio, which made the Fourth Amendment exclusionary rule mandatory in state prosecutions, had upon the investigation of misdemeanor narcotics offenses. The study compared data for arrests from pre-Mapp and post-Mapp decisions. Of particular note are findings relating to police officer accounts of the location of narcotics seized during the course of an arrest. In the pre-Mapp period under study (1960-61), narcotics were found on the arrestee in 34.7% of all narcotics arrests, whereas that figure dropped to 3% during the post-Mapp period in

Further, in 1960-61, narcotics were found after being discarded in close proximity to the arrestee in 16.8% of all arrests and one year later, in 1961-62, that figure rose to 43.2%. How can one explain the nearly three-fold increase in the number of arrests based upon "discarded" narcotics other than to conclude that police officers were tailoring their testimony or their police reports to comport with their understanding of what the law permitted in the wake of Mapp? That certainly seems a more likely conclusion than the notion that narcotics defendants had dramatically changed their behavior and were now three times more likely to discard their narcotics for the police to find in the open!

Twenty-four years later, a study based upon a questionnaire sent to Chicago area judges, public defenders, and prosecutors confirmed the practice of police officer prevarication in an effort to avoid suppression of evidence. The study revealed that a majority of judges and public defenders believed that police officer perjury was the main factor in limiting the deterrent effect of the exclusionary rule. In fact, eighty-one percent of all respondents expressed their belief that the possibility that evidence would be suppressed caused police officers to change their testimony rather than their behavior during searches. Additionally, thirty-eight percent of the respondents said they believed supervising personnel in the police department "encouraged" police officer perjury, while sixty-seven percent believed that the supervising personnel tolerated it. Nine of eleven judges, nine of fourteen prosecutors, and fourteen of fourteen public defenders held the opinion that judges sometimes fail to suppress evidence even when they know the searches were illegal. Thus, whether due to police perjury or willful judicial blindness to police misconduct, it is evident that a significant amount of police misconduct goes undetected and unpunished.

8. See Comment, supra note 6, at 94.
9. See id.
11. See id. at 98.
12. See id.
13. See id. at 108.
14. See id. at 119 n.198.
Further, a study surveying law enforcement officers asked officers if they had ever heard of law enforcement personnel misrepresenting or failing to fully disclose information concerning a search or seizure to avoid having evidence suppressed. Of the responding officers, 17.4% acknowledged that this happened during in-court testimony, while 24.2% acknowledged that they knew of this happening in police reports. These responses almost certainly understate the problem because there is a natural reluctance on the part of many police officers to admit that they are aware of false statements or perjury on the part of fellow officers. It is particularly noteworthy, therefore, that some of the respondents acknowledged having observed this police officer dishonest behavior in excess of ten times—even up to fifty times.

What we have seen is a clear indication that police officers on occasion modify their account of events leading to the discovery of evidence in order to preserve the admissibility of evidence in criminal proceedings. Further, this practice is not effectively discouraged, and may even be encouraged, by police supervisory personnel. Finally, judges are reluctant to make findings that lead to the suppression of otherwise reliable evidence, even though they are aware that the evidence was unlawfully seized.

United States v. Heath, involving a suppression hearing, illustrates the problem of judicial tolerance of perjured or exaggerated police officer testimony. In Heath, police officers testified that after they had received a tip about drug trafficking out of a particular motel room, they knocked on a door and informed the defendant who answered the door that they were aware of possible drug activity in the room. The officers then asked if they could come in, after which the defendant opened the door and said, “Come on in.” The officers testified that they subsequently advised the defendant and a companion that they did not have to speak to the officers or consent to any requests to search, and that they were free to tell the officers

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15. See Perrin et al., supra note 4, at 725.
16. See id. at 725-27.
17. See id. at 725 n.429.
18. 58 F.3d 1271 (8th Cir. 1995).
19. See id. at 1273.
20. See id.
to leave at anytime. The officers testified that after they saw one of the men attempt to slide a shoebox under the bed, they asked if they could look inside the box and the defendant consented. The box was found to contain crack cocaine.

The defendant’s version of these events was very different. He testified that following a knock on the door, the officers stated that they had probable cause to search the room for narcotics. He said that one officer said harshly, "[I]f you don’t let me in I am going to get a f.... search warrant and tear your room apart." The defendant let go of the door, the officers pushed their way in, and an officer grabbed the shoebox and opened it.

The trial judge believed the officers’ version of the facts and denied the motion to suppress, which the defendant then appealed as clear error. The appellate court refused to grant relief, stating that “[a] district court’s decision to credit a witness’s testimony over that of another can almost never be clear error unless there is extrinsic evidence that contradicts the witness’s story or the story is so internally inconsistent or implausible on its face that a reasonable fact-finder would not credit it.” One of the appellate judges, who concurred “only because it is not the province of the appeals court to make credibility assessments,” expressed his doubts over the credibility resolution of the trial judge:

The police officers’ saccharine account of the events leaves a bitter aftertaste. Rarely, if ever, have I encountered a case in which the police conduct was so mild-mannered and the suspect so acquiescent. The “fact” that [the defendant] would so willingly consent to the search of his motel room and, more specifically, the shoe box, which he knew

21. See id.
22. See id.
23. See id.
24. See id. at 1274.
25. Id.
26. See id.
27. See id. at 1275.
28. Id.
29. Id. at 1276 (McMillian, J., concurring).
contained drugs and drug paraphernalia, is surprising, to say the least.\textsuperscript{30}

Why are judges reluctant to recognize and reject perjured or exaggerated police officer testimony? The answer is not difficult to discern. Judges hesitate to make rulings that lead to the suppression of incriminating evidence against criminal defendants because these rulings are very unpopular. One only has to consider the plight of Federal District Court Judge Harold Baer, Jr. to appreciate the pressures that may be brought to bear upon a judge whose findings lead to the suppression of incriminating evidence. Judge Baer’s ruling was heavily criticized by public officials, including the President of the United States.\textsuperscript{31} Ultimately, the judge reversed himself.\textsuperscript{32} If a federal judge—whose appointment is a life tenure—can feel strong public pressure based upon a suppression ruling, it stands to reason that state court judges—many of whom must face periodic public reelection—would feel even greater pressure to avoid suppressing incriminating evidence against an “obviously guilty” defendant. In many instances, the decision of whether to suppress evidence will depend upon judicial resolution of witness credibility. Judges, then, have an incentive to believe even the “saccharine”—or perjured—testimony of a police officer in order to preserve the admissibility of incriminating evidence.

\textsuperscript{30} Id. (McMillian, J., concurring).

\textsuperscript{31} See Ian Fisher, Gingrich Asks Judge’s Ouster For Ruling Out Drug Evidence, N.Y. TIMES, Mar. 7, 1996, at B4; Clifford Krauss, Giuliani and Bratton Assail U.S. Judge’s Ruling in Drug Case, N.Y. TIMES, Jan. 27, 1996, § 1, at 25; Alison Mitchell, Clinton Pressing Judge to Relent, N.Y. TIMES, Mar. 22, 1996, at A1 (stating that White House Press Secretary Michael D. McCurry remarked that the President regrets Judge Baer’s decision and that the President’s decision to ask for Baer’s resignation would turn on how the judge ruled on a motion for reconsideration).

\textsuperscript{32} See United States v. Bayless, 913 F. Supp. 232 (S.D.N.Y. 1996), vacated by 921 F. Supp. 211 (S.D.N.Y. 1996). Judge Baer insisted that his reversal was based on additional evidence presented at the reconsideration hearing which caused him to change his opinion about the credibility of the defendant and the arresting officers. Yet, several legal experts commenting upon the original ruling concluded that it had been “well within the law.” Don Van Natta, Jr., Judge’s Drug Ruling Likely to Stand, N.Y. TIMES, Jan. 28, 1996, § 1, at 27.
IV. TO RAMPART . . . AND BACK

What does the foregoing have to do with the Rampart scandal, where sworn law enforcement personnel stand accused—upon apparently solid evidence—of planting evidence and otherwise “framing” individuals who are not guilty of the crimes for which they were arrested and of which, in many cases, they were convicted? The answer is simple: We have created a culture that has placed officers above the law, or at least has placed them in a position where the consequences of violating the law do not affect them personally. Even if they are caught red-handed, they will not feel the sting of punishment. Further, they have learned the lesson that by tailoring their testimony to the parameters set by the constitutional limits on police investigative practices, even if they are justly accused of malfeasance, they may succeed in thwarting the only mechanism in place to deter misconduct of this type: the exclusionary rule. They will also almost certainly escape any type of personal sanction. So long as their account of the facts is plausible and is not contradicted by physical evidence, the courts have a strong incentive to accept uncritically the officer’s account of the events that occurred during the investigation. To preserve the admissibility of evidence, the courts strive to credit police officer testimony. All of this has created a culture of arrogance. In the “us against them” world of criminal investigation, the means may be viewed as easily justified by the end—especially when the end is the use of incriminating evidence, albeit unlawfully seized, against a criminal defendant the officers know is guilty of a crime. This approach apparently meets with public approval, if the reaction to the opposite result reached by Judge Baer is any indication.

It is not much of a leap for police officers in this “end justifies the means” culture to go beyond tailoring testimony and police reports to preserve the admissibility of evidence against a criminal defendant known to the officers to be guilty of the offense charged. The next logical—if wrongful—step is to tailor or invent the evidence needed to gain a criminal conviction against someone the police strongly suspect is engaging in criminal activities, when there is no true evidence to tie him or her to a particular offense. The Rampart scandal is, in fact, the natural result of this culture we have developed in which police officers are believed, even when it is
illogical to do so. Even when found to have violated the laws governing criminal investigations, the officers escape any direct sanction.

We must revisit the way we treat police lawlessness in the course of criminal investigations. If we are to avoid additional Rampart-style scandals, we must change our rules to permit direct punishment of police officers for violations of the law. This will certainly more effectively deter violations of the law by police officers. Further, we also need to encourage prosecutors and judges to be more critical in their evaluation of police officer accounts of their criminal investigations. As a part of this we need to reexamine the exclusionary rule in light of evidence indicating that courts strain to avoid suppressing incriminating evidence even if the only way they can do so is to ignore obviously perjured testimony. In short, we need to take steps to ensure that police officers truly recognize that they—like the rest of us, including the criminal suspects they pursue—are not above the law.