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## Incubating Monsters: Prosecutorial Responsibility for the Rampart Scandal

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# INCUBATING MONSTERS?: PROSECUTORIAL RESPONSIBILITY FOR THE RAMPART SCANDAL

*Gary C. Williams\**

## I. INTRODUCTION

When disgraced former Los Angeles Police Officer Rafael Perez made his statement to the court after pleading guilty to stealing cocaine from a police storage locker, he uttered words that reverberated throughout the City of Los Angeles as it wrestled with the enormity of the scandal enveloping its chief law enforcement agency. After reciting in sordid detail his descent into a life of deceit, crime, and debauchery, Perez concluded his statement by declaring: "Whoever chases monsters should see to it that in the process he does not become a monster himself."<sup>1</sup>

The Rampart scandal, and the resulting investigations of the conduct of officers of the Los Angeles Police Department (LAPD), raise a disturbing question: Have the actions, or inaction, of the Offices of the District Attorney and of the City Attorney of Los Angeles, created an atmosphere that allows the incubation of monsters like Rafael Perez?

Stories appearing in the press in the wake of the Rampart scandal indicate that many officers in the LAPD develop a callous indifference toward the truth as they fight the war against crime, drugs, and gangs.<sup>2</sup> These stories have revealed that some LAPD officers

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\* Professor of Law, Loyola Law School. I want to express my gratitude for the outstanding work done by my research assistant Min Tak. His work provided much of the backbone of this Article. I also want to thank my friend and colleague Laurie Levenson, for her commentary on these critical ethical issues and for her input on this Article.

1. Rafael Perez, *I Succumbed to the Seductress of Power*, L.A. TIMES, Feb. 26, 2000, at A25.

2. See Matt Lait & Scott Glover, *DNA Evidence in 4 Drug Cases Refutes*

consider planting evidence, falsifying documents, and committing perjury to be acceptable tactics in fighting that war.

Those press accounts suggest that, in some cases, attorneys in the Offices of the District Attorney and of the City Attorney were, or should have been, aware of police officer misconduct. In some instances, judges or prosecutors dismissed the affected charges, but the prosecutors did not report the officers' fraudulent conduct to the LAPD, to the prosecutors' supervisors, or to other members of their offices. In one case, it appears that a prosecutor proceeded with a criminal prosecution even though he was, or should have been, aware that the primary police witness against the defendant had severe credibility problems.<sup>3</sup> Another case raises serious questions whether a prosecutor was terminated because he was too aggressive in uncovering, and then revealing, evidence of police perjury.<sup>4</sup>

These actions of prosecuting attorneys invoke provisions of the American Bar Association (ABA) *Model Rules of Professional Conduct* and the *California Rules of Professional Conduct* that impose a special responsibility on prosecutors to bring or continue criminal charges only when they are supported by probable cause.<sup>5</sup> This Article briefly discusses how that duty should be carried out when police officers lie or shade the truth.

## II. POLICE MISCONDUCT AND PROSECUTORIAL INACTION IN THE NEWS

Three news stories portraying the manipulation of the justice system by LAPD officers present, in stark detail, the ethical issues this Article explores.<sup>6</sup> The first story comes directly from the

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*Officers*, L.A. TIMES, Apr. 26, 2000, at A1 [hereinafter Lait & Glover, *DNA Evidence*]; Matt Lait & Scott Glover, *Two from LAPD Indicted in Alleged Framing of Suspect*, L.A. TIMES, Apr. 6, 2000, at A1 [hereinafter Lait & Glover, *Two from LAPD*]; David Rosenzweig, *Officer Enters Guilty Plea in Federal Case*, L.A. TIMES, Aug. 5, 2000, at B1.

3. See Matt Lait & Scott Glover, *Case Overturned as Fired Officer's Role is Revealed*, L.A. TIMES, Aug. 9, 2000, at A1 [hereinafter Lait & Glover, *Case Overturned*].

4. See Lait & Glover, *Two from LAPD*, *supra* note 2.

5. See MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (1996); CAL. RULES OF PROF'L CONDUCT R. 5-110 (1989).

6. See Lait & Glover, *Two from LAPD*, *supra* note 2; Lait & Glover, *DNA Evidence*, *supra* note 2; Lait & Glover, *Case Overturned*, *supra* note 3.

Rampart Division of the LAPD.<sup>7</sup> In July of 1998 Rampart officers David Vinton and Scott Voeltz arrested two men on suspicion of drug possession. The officers claimed that one of the defendants, Antonio Nunez, spit bagged drugs out of his mouth as he was being apprehended. When Mr. Nunez's case went to trial, the public defender requested a DNA test of the drugs. The result of the test scientifically excluded the possibility that Nunez had the drugs in his mouth. The trial judge dismissed the charges.

After the dismissal, prosecutors were troubled by the officers' testimony positively identifying Nunez. In fact, one prosecutorial source said Officer Vinton's attitude "was so bad that quite frankly it was as if he were lying."<sup>8</sup> Nevertheless, a few months later, prosecutors were back in court presenting testimony from the same officers about another arrest where a defendant allegedly spit drugs out of his mouth. Again, DNA testing revealed the cocaine was not coated with the defendant's saliva, and three months later, the charges were dismissed.<sup>9</sup>

In the third case, Officer Vinton arrested a woman, claiming she walked up to his police car while he was parked and spit rock cocaine out of her mouth, next to his door. This case was dismissed by Sally Thomas, Director of Central Operations for the District Attorney's Office, after she called Officer Vinton in and questioned him about the story. In response, Officer Vinton told her that "[you] and the LAPD were doing things the old way and didn't understand the way things had to be done to catch these gangbangers."<sup>10</sup> Ms. Thomas finally reported Officer Vinton to his commanding officer, Captain Robert Hanson, saying that she had serious concerns whether Officer Vinton should remain on the streets.<sup>11</sup>

Ultimately, this story illustrates what should happen when a police officer is caught lying or falsifying evidence. Unfortunately, it took three instances of misconduct by Officer Vinton before a District Attorney investigated his credibility and reported his

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7. See Lait & Glover, *DNA Evidence*, *supra* note 2.

8. *Id.*

9. *See id.*

10. *Id.*

11. Despite this report, Officer Vinton was back on the streets within weeks. *See id.*

untruthfulness to his superiors. Although Officer Vinton was allowed to return to the streets, there is no indication that lawyers in the Office of the District Attorney and of the City Attorney were alerted to Officer Vinton's perjurious method of catching gangbangers.

In the second story, James Bryant was convicted of selling drugs in 1997, and sentenced to twelve years in prison.<sup>12</sup> A key witness against Bryant was Officer Gustavo Raya of the LAPD, who testified during the trial that he observed Bryant selling drugs to another man. Just nine days before Raya testified against Bryant, the LAPD referred a potential criminal case against Raya to the District Attorney's domestic violence unit.<sup>13</sup> Furthermore, four days before he testified, Officer Raya was suspended by the LAPD based on more than two dozen violations of departmental regulations, including improper handling of narcotics evidence and the use and possession of drugs. Yet, none of this information was revealed to defense counsel.<sup>14</sup>

Bryant's conviction was overturned because Bryant, while in prison serving out his sentence, read a newspaper article about Raya's subsequent termination from the LAPD. Bryant then wrote a letter to his lawyers and the judge who presided over his trial, informing them of the miscarriage of justice.<sup>15</sup> When questioned about this incident, Prosecutor Paul Bronstein, who handled the Bryant trial, said, "I never had any knowledge of this."<sup>16</sup>

A third story comes out of the Seventy-Seventh Division of the LAPD. In this case Evan Freed, a newly hired City Attorney, was assigned to handle a case charging Victor Tyson with carrying a

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12. See Lait & Glover, *Case Overturned*, *supra* note 3.

13. See *id.* The District Attorney declined to prosecute the case because Officer Raya's wife refused to cooperate with the investigation of the charges. See *id.*

14. See *id.*

15. See *id.*

16. *Id.* It is hard to believe that an experienced trial attorney would not make any inquiries into the reliability of his star witness before presenting his testimony at trial. Even accepting prosecutor Bronstein's denial at face value, one can certainly say that he should have known about Officer Raya's criminal and domestic troubles before he presented him as a witness. At minimum, Mr. Bronstein's claim of ignorance suggests a reckless disregard for the truth. See generally CAL. RULES OF PROF'L CONDUCT R. 5-110 (1989).

concealed weapon.<sup>17</sup> LAPD officers Edward Ruiz and Jon Taylor testified at trial that they saw Tyson throw a gun down as the officers chased him from the scene of an apparent robbery.

Freed realized that elements of the officers' story were suspicious. The broken window that allegedly led the officers to suspect that a robbery had occurred was in fact unbroken. Ruiz's report of the incident stated that both officers saw Tyson drop the gun, but Ruiz testified that only Taylor witnessed that act. Taylor testified that although it was dark and he did not have a flashlight, he could clearly see Tyson drop the weapon. Because of these discrepancies, Freed decided to visit the scene of the incident. While there, he determined that the officers could not have seen Tyson throw the gun down because the alleyway was too dark at night, when the arrest occurred.<sup>18</sup>

The prosecutor sent a memorandum to his supervisors detailing the officers' false allegations, as Freed felt ethically bound to seek dismissal of the case because he was not convinced of Tyson's guilt.<sup>19</sup> After Freed's supervising attorney agreed, Freed moved to dismiss the criminal charges against Mr. Tyson. When Freed presented his doubts to the trial court, Judge Kenneth Chotiner dismissed the charges against Tyson, and took the unusual step of declaring him "factually innocent," while praising Freed for his actions. The judge also recommended that the LAPD Division of Internal Affairs be notified of the alleged perjury.<sup>20</sup>

However, the City Attorney's Office failed to take any action, as recommended by Judge Chotiner. Later, when the Judge mentioned to civil rights attorney Carol Sobel his decision to dismiss the criminal charges in the Tyson case, she reported the facts to the Office of the United States Attorney.<sup>21</sup> That office then investigated the affair and brought federal charges against both officers. As of the writing of this Article, former Officer Ruiz has pleaded guilty to violating

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17. See Matt Krasnowski, *Cop, Ex-Cop are Indicted in New L.A. Rights Case*, S.D. UNION TRIB., Apr. 6, 2000, at A3; Lait & Glover, *Two from LAPD*, *supra* note 2.

18. See Krasnowski, *supra* note 17, at A3.

19. See *id.*

20. See *id.*

21. See *id.*

Tyson's civil rights, and the charges against former Officer Taylor are pending.<sup>22</sup>

Freed was fired at the end of his probationary period, allegedly because of questionable judgment in handling plea bargains and his low conviction rate.<sup>23</sup> While it cannot be said with certainty that Mr. Freed's zeal in exonerating Tyson and identifying the errant officers led to his dismissal,<sup>24</sup> it can be surmised that Freed's actions were not welcomed by the City Attorney's Office. In discussing the behavior of prosecutors in the Rampart scandal, Superior Court Judge James Albracht, a former prosecutor, observed: "There is tremendous pressure on prosecutors and judges to ignore police lying. A young prosecutor who challenges a veteran cop's claim is 'dead meat.' They'll complain to your supervisor: 'You've got some kind of Jerry Brown liberal here.'"<sup>25</sup>

### III. "TESTILYING": ITS EXISTENCE AND ITS ACCEPTANCE

The stories of police officers perjuring themselves to create probable cause to support an arrest or the issuance of a search warrant are old news to anyone involved in the criminal justice system. The practice was so common in New York that police officers there coined a term for it—"testilying."<sup>26</sup> Judge Alex Kozinski, a very conservative member of the Ninth Circuit Court of Appeal, stated that the practice of police perjury is "an open secret long shared by prosecutors, defense lawyers and judges."<sup>27</sup>

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22. See Rosenzweig, *supra* note 2.

23. See Lait & Glover, *Two from LAPD*, *supra* note 2; Patrick McGreevy, *Suit Claims Hahn Covered Up Perjury: Man Says He Was Fired for Exposing False Testimony*, L.A. DAILY NEWS, Jan. 9, 1998, at N3.

24. In 1998, Freed filed a wrongful termination action against the City Attorney's office, alleging in part that his termination was in retaliation for his actions in the Tyson case. See McGreevy, *supra* note 23. That lawsuit was dismissed in 1999. See Lait & Glover, *Two from LAPD*, *supra* note 2.

25. Ted Rohrlich, *Scandal Shows Why Innocent Plead Guilty*, L.A. TIMES, Dec. 31, 1999, at A1.

26. See Eric Monkkonen, *Crossing the (Blue) Line*, L.A. TIMES, Sept. 26, 1999, at M1; David Rohde, *Jurors' Trust in Police Erodes in Light of Diallo and Louima*, N.Y. TIMES, Mar. 9, 2000, at B1.

27. Rohrlich, *supra* note 25.

Irving Younger<sup>28</sup> described how he experienced testilying when he was on the bench:

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 “dropsy” testimony. It disturbs me now, and it disturbed me when I was at the Bar.

....

... Our refusal to face up to the “dropsy” problem soils the rectitude of the administration of justice.<sup>29</sup>

Recently, an investigation revealed that a District Attorney and a LAPD detective were giving crime victims photographs of alleged assailants *before* live line-ups were conducted.<sup>30</sup> When asked to react to this impropriety, a source in the District Attorney’s Office emphasized that “the defendants in each of the cases had long criminal records and may have committed the crimes even though their cases were dismissed [after the misconduct was revealed].”<sup>31</sup> This comment, and the actions of the prosecuting attorneys in the cases discussed in section II, suggest that many prosecutors in Los Angeles are willing to accept testilying, or at least to look the other way when it occurs, because it results in convictions.

#### IV. WHO IS RESPONSIBLE?

My friend and colleague, Laurie Levenson, argues quite persuasively in this Symposium that judges must share some responsibility for the Rampart scandal because they tolerate the practice of testilying in their courtrooms.<sup>32</sup> That point is indisputable. Our system of

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28. The late Irving Younger was a well respected professor of Evidence. Prior to entering into academia, he was a trial judge.

29. JOSEPH GOLDSTEIN ET AL., *CRIMINAL LAW: THEORY AND PRACTICE* 484-85 (1974).

30. See Scott Glover & Matt Lait, *Role of Officer, D.A. Official Questioned*, L.A. TIMES, July 19, 2000, at A1.

31. *Id.*

32. See Laurie Levenson, *Unnerving the Judges: Judicial Responsibility for the Rampart Scandal*, 34 LOY. L.A. L. REV. 787 (2001).



criminal justice has grown so cynical about this phenomenon that judges tolerate the practice of defendants pleading guilty to crimes even though they deny committing the acts with which they are charged. This practice is so common that the plea has a name: a "West" plea.<sup>33</sup> As described in one news article, judges will allow the prosecution to ask the defense counsel: "[I]s this a . . . West plea or is this a plea because the defendant in truth and in fact is guilty?"<sup>34</sup> So long as the defendant answers it is a West plea, the court will accept the result.<sup>35</sup>

The courts, by acknowledging the "open secret" of testilying, yet doing nothing about it, and by accepting West pleas, have essentially accepted the use of dishonest testimony and behavior by police and other law enforcement authorities.<sup>36</sup>

Despite the courts' responsibility for the existence of these problems, prosecutors are better positioned to prevent testilying. First, judges are not ordinarily in a position to exclude evidence because of false police testimony. To do so, the judge must be able to say categorically that an officer is lying in that specific case—a difficult challenge. In discussing the "dropsy" problem, Irving Younger noted that "[o]ne is tempted to deal with it now by suppressing 'dropsy' evidence out of hand; yet I cannot. Reason and settled rules of law lead the other way, and Judges serve the integrity of the means, not the attractiveness of the end."<sup>37</sup> Second, approximately ninety percent of all criminal cases are resolved through plea bargaining.<sup>38</sup> Unless the defendant's plea presents a West problem, the judge will have no idea that there is a problem with the police testimony implicating the defendant.

Prosecutors, on the other hand, are in the best position to determine whether an officer has a dropsy problem, is "an expert on

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33. See *People v. West*, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970).

34. Rhorlich, *supra* note 25.

35. See *id.*

36. See *id.*

37. GOLDSTEIN ET AL., *supra* note 29, at 485.

38. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1997, at 397 tbl.5.21 (Kathleen Maguire & Ann L. Pastore eds., 1998); Warren E. Berger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 931 (1970).

catching gangbangers," or is testilying in a specific case. Prosecutors have access to most of the evidence, both tangible and testimonial, that can reveal whether an officer's proposed testimony is truthful. Prosecutors, if they so choose, have access to the personnel files and incident reports involving officers who are slated to testify in their cases. Thus, prosecutors can, for example, ascertain that one officer has testified to exactly the same set of circumstances (such as spitting out a bag of illegal drugs) on multiple occasions.

Prosecutors, if they choose to inquire, should be able to learn whether an officer is the subject of criminal or departmental charges that reflect poorly on the officer's credibility as it relates to the case being tried. Also, prosecutors can meet with their police officer witness, discuss the case with him/her, and then make judgments about the officer's credibility, and his/her willingness to lie on the witness stand. No one else in the criminal justice system has this ability.

#### V. THE ETHICAL OBLIGATION OF PROSECUTORS TO ACT AS "MINISTERS OF JUSTICE"

While the *California Rules of Professional Conduct* and American Bar Association (ABA) *Model Rules of Professional Conduct* seldom agree, they speak with one voice regarding the special status and responsibility of prosecutors.<sup>39</sup> California Rule 5-110 mandates that a prosecutor shall not bring criminal charges when he knows, or *should know*, that the charges are not supported by probable cause. The rule further states that when the prosecutor learns, after charges have been filed, that they are not supported by probable cause, the prosecutor must promptly notify the court.<sup>40</sup>

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39. See MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (1996); CAL. RULES OF PROF'L CONDUCT R. 5-110 (1989).

40. See CAL. RULES OF PROF'L CONDUCT R. 5-110 (1989). Rule 5-110 states:

A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know the charges are not supported by probable cause. If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending.

*Id.*

ABA Model Rule 3.8(a) provides that a prosecutor shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.<sup>41</sup> The comment accompanying Rule 3.8 describes a prosecutor as “a minister of justice” who has a specific obligation to ensure that guilt is decided on the basis of sufficient evidence.<sup>42</sup> An earlier version of the ABA rules, the *Model Code of Professional Responsibility*, explains that as a minister of justice, “[i]t is the duty of a prosecutor to seek justice, not merely to convict.”<sup>43</sup>

What do these ethical rules mean? Courts and bar associations have not interpreted these provisions extensively.<sup>44</sup> The prosecutor’s role as a minister of justice demands, at a minimum, that a prosecutor should not bring a case where he/she harbors serious doubts about the credibility of an officer’s version of an arrest or investigation.

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41. See MODEL RULES OF PROF’L CONDUCT R. 3.8(a) (1996). The relevant portion of Rule 3.8 reads: “The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . . .” *Id.*

42. See MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. (1996). The comments to the ABA Model Rules provide guidance for the interpretation of those rules: “The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.” MODEL RULES OF PROF’L CONDUCT, SCOPE (1996).

43. MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (1981). Ethical Consideration 7-13 cites *Berger v. United States*, 295 U.S. 78 (1935), in support of this proposition. See MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 n.24 (1981). An ABA opinion issued shortly after the *Berger* decision summarized its import: “The prosecuting attorney is the attorney for the state, and it is his primary duty not to convict, but to see that justice is done.” ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 150 (1936). More recently, the Court declared “it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause.” *United States v. Lovasco*, 431 U.S. 783, 791 (1977).

44. A LEXIS search conducted on November 1, 2000, revealed no reported California cases interpreting Rule 5-110 of the California Rules of Professional Conduct. In discussing a case arising under ABA Model Rules of Professional Conduct Rule 3.8, one federal district court noted that “few reported cases discuss the ethics rules governing prosecutors; as one commentator observed, ‘there is an astonishing absence from appellate court decisions or reports by discipline groups of cases dealing with misconduct by prosecutors.’” *United States v. Acosta*, 111 F. Supp. 2d 1082 (E.D. Wis. 2000) (citing Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 445 (1992)).

This duty is not satisfied when the prosecutor dismisses charges *after* defense counsel has been lucky enough to discover a “smoking gun”—evidence that the officer has lied or planted evidence. In all circumstances of serious doubt, the prosecutor must refuse to proceed with criminal charges.

Also, the duty not to prosecute is not discharged when a prosecuting attorney simply accepts an officer’s account of an arrest or observation uncritically, even though it happens to fit the contours of the latest United States Supreme Court decision relaxing the standards for probable cause or reasonable suspicion.<sup>45</sup>

Lastly, the duty to serve as a minister of justice is certainly not discharged when a District Attorney presents testimony in a drug possession case based upon the testimony of an officer who has been suspended by the LAPD for suspicion of drug use.<sup>46</sup> The California standard for ethical conduct states that charges should not be brought when a prosecuting attorney should know the charges are not supported by probable cause.<sup>47</sup> This requires prosecutors to exercise “due diligence” in researching the background and qualifications of their witnesses. Thus, even accepting *arguendo* the prosecutor’s claim in *Bryant* that he was unaware that the officer had been investigated and suspended for drug use and other misconduct, the California standard for ethical conduct was not met by the prosecutor. There simply is no excuse for this kind of ignorance.

The ethical rules requiring prosecutors to act as ministers of justice demand that they no longer tolerate the open secret of testilying.<sup>48</sup> Where prosecutors know, or should know, that an officer is committing perjury, and that officer’s testimony is pivotal to securing a conviction or preserving evidence, they must refuse to prosecute the case or refuse to introduce the evidence. Furthermore, the prosecutor must document the officer’s failing, and turn that information over to the Police Department. The prosecutor must also publicize it within his/her own department, and in the case of Los Angeles, to their sister prosecuting agencies, to prevent further miscarriages of justice. Supervising attorneys in the Offices of the

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45. See Lait & Glover, *Case Overturned*, *supra* note 3.

46. See *id.*

47. See CAL. RULES OF PROF’L CONDUCT R. 5-110 (1989).

48. See Rohrlich, *supra* note 25.

District Attorney and of the City Attorney should, in turn, raise questions about any subsequent prosecution relying upon the testimony of the same officer. At the very least, supervisors should suggest to the District Attorney or City Attorney responsible for prosecuting a subsequent case, that he/she should carefully check the veracity of the officer's story.

#### VI. THE CONSEQUENCES OF PROSECUTORS' FAILURE TO ACT AS MINISTERS OF JUSTICE

Why is it critical that we demand that prosecutors live up to, and indeed go beyond, the duties stated in the rules of professional responsibility? As a result of the Rampart scandal, over one hundred convictions have been overturned due to police corruption involving perjury or planting of evidence.<sup>49</sup> In at least ten of those cases, the defendants pled guilty to criminal charges even though the arresting officers committed perjury or fabricated evidence in the case.<sup>50</sup>

Why would a defendant plead guilty to a crime that he/she did not commit? Because of the three strikes law,<sup>51</sup> the law lowering the standard of evidence required to secure an indictment,<sup>52</sup> and the general willingness of juries to place great faith in the testimony of police officers, a defendant charged with a felony faces a Hobson's choice. The defendant can fight the charges, and run the risk that he/she will be convicted despite the false evidence. At that point, the defendant will likely face a judge who will impose the maximum sentence allowed because the defendant has not shown remorse—for a crime that he/she did not commit.<sup>53</sup> On the other hand, there is the

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49. *See id.*

50. *See id.*

51. *See* CAL. PENAL CODE § 1170.12 (West 2000).

52. *See* CAL. PENAL CODE § 939.8 (West 1985).

53. One graphic example from the Rampart scandal is Javier Ovando, who was shot in the head by Perez and his partner Nino Durden. Ovando was then framed, with Durden and Perez planting a gun on Ovando and then claiming that he fired at them first. Ovando insisted to his attorney that he was innocent and demanded to go to trial. Despite obvious discrepancies in the officer's testimony, Ovando was convicted by the jury. Before the trial, the prosecution offered to allow Ovando to plead guilty in exchange for a thirteen-year sentence. After the conviction, Judge Stephen Czuleger sentenced Ovando to twenty-three-years in prison. In meting out that sentence, Judge Czuleger cited, as an aggravating factor, Ovando's insistence on going to trial. Judge

prospect of pleading guilty to a crime that the defendant knows he/she did not commit, but receiving a much shorter sentence and perhaps, depending on the negotiating skill of their defense counsel, no additional strikes on his/her record.

Defense counsel have an ethical obligation to advise their clients of the likely result should the defendant contest a criminal charge. ABA Model Rules of Professional Conduct Rule 1.4(b) and California Rules of Professional Conduct Rules 3-500 and 3-600 demand that counsel inform their clients about all aspects of the representation, so that the clients can make informed decisions about the resolution of their cases.<sup>54</sup> For example, in criminal cases defense counsel must inform their client about how difficult it is to discredit police witnesses. Also, counsel must inform their client that should the defendant contest the criminal charge and lose, it is likely that the judge will impose a far harsher sentence.<sup>55</sup> It is little wonder West pleas are so common in our courts.

## VII. CONCLUSION

One way to move towards eliminating West pleas and testilying is to demand that prosecutors live up to their responsibility to act as ministers of justice. The apparent existence of multiple "monsters" within the LAPD calls for the offices of the City Attorney and of the District Attorney, pursuant to their ethical obligations, to adopt new rules requiring that prosecutors in each case carefully investigate and evaluate the truthfulness of police officer testimony.

To guard against the incubation of even more monsters, rules should be enacted requiring prosecutors, in those cases where they determine that an officer has been untruthful, or has tampered with or fabricated evidence, to inform the LAPD, their supervising attorneys,

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Czuleger observed that "[m]ost apparently the defendant has no remorse." Rohrlich, *supra* note 25.

54. See MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (1996); CAL. RULES OF PROF'L CONDUCT R. 3-500, 3-600 (1989).

55. Deputy Public Defender Tamar Toister, who represented Ovando in the criminal trial, explains her ethical obligation this way: "My first felony trial. Innocent guy gets convicted. Gets the maximum sentence. My third felony jury trial: Innocent guy gets convicted. Gets the max. Now why would I tell anybody, 'don't plea bargain because you're innocent?'" Rohrlich, *supra* note 25.

and any sister agencies. The notice should identify the officer, and their unlawful conduct.

The Rampart scandal, and the stories that it has aired about police officer tactics, pose a monumental question: Is our system of criminal law, as it is applied in Los Angeles County, a criminal *justice* system, or merely a system obsessed with obtaining convictions by any means necessary? Proper attention to, and application of the rules of professional conduct by prosecutors in evaluating and handling police testimony, would go a long way toward ensuring that our system is one of justice.

The facts emerging from the Los Angeles police scandal further illustrate why prosecutors must adhere to the minimum ethical standards demanded by the rules of professional responsibility. Prosecutors must refrain from filing or pursuing charges where it becomes clear that the prosecution would be based on false evidence, perjured testimony, or police misconduct.

In chronicling his fall from grace, Rafael Perez identified the behavior which initiated his descent:

In the Rampart CRASH unit, things began to change. The lines between right and wrong became fuzzy and indistinct. The us-against-them ethos of the overzealous cop began to consume me. And the ends justified the means. We vaguely sensed we were doing the wrong things for the right reasons. Time and again I stepped over that line. Once crossed, I hurdled over it again and again, landing with both feet sometimes on innocent persons.<sup>56</sup>

The Los Angeles Police Department and the Offices of the District Attorney and of the City Attorney should never allow police officers to step over that line again.

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56. Perez, *supra* note 1.