

UNNERVING THE JUDGES: JUDICIAL RESPONSIBILITY FOR THE RAMPART SCANDAL

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I. INTRODUCTION

I must have hit a nerve! On September 15, 2000, I participated in Loyola Law School's symposium on the Rampart scandal.¹ The focus of my remarks was the responsibility of participants in every branch of the criminal justice system to critically analyze how they may have contributed to the Rampart scandal and what reforms can

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1. As described in the Symposium's literature, the "Rampart Scandal" refers to recent revelations that as many as seventy officers of the Rampart Division of the Los Angeles Police Department falsified evidence in as many as 100 criminal cases, leading to convictions that have been overturned, potentially costing the city one billion dollars in civil lawsuits and raising serious questions about the current state of criminal justice in Los Angeles. *See generally* Tom Hayden, *LAPD: Law and Disorder*, NATION, Apr. 10, 2000, at 6 (discussing the "violent lawlessness" in the LAPD's anti-gang unit); Matt Lait & Scott Glover, *Police Credibility Debate Could Alter Legal System*, L.A. TIMES, Oct. 6, 2000, at A1 (discussing the effects of the Rampart scandal on the legal system in Los Angeles); Andrew Murr, *L.A.'s Dirty War on Gangs*, NEWSWEEK, Oct. 11, 1999, at 72 (discussing Rafael A. Perez's disclosure of the Rampart scandal); Dorothy Pomerantz, *Final Cost of Rampart: \$1 Billion?*, L.A. BUS. J., Feb. 28, 2000, at 1 (discussing that the Rampart scandal will end up "costing from \$400 million to nearly \$1 billion, or more"); Todd S. Purdum, *Los Angeles Police Scandal May Soil Hundreds of Cases*, N.Y. TIMES, Dec. 16, 1999, at A16 (discussing the grave effects of the Rampart scandal); Mike Tharp, *L.A. Blues: Dirty Cops and Mean Streets*, U.S. NEWS & WORLD REP., Mar. 13, 2000, at 20 (discussing various perceptions of the LAPD in the Rampart area).

be made in the future to prevent its recurrence. Given that others on the panel were focusing on the role of prosecutors, defense lawyers, the police, and the legislature, I concentrated my remarks on the responsibility of the judges.

The thrust of my remarks was that judges must accept some responsibility for the Rampart scandal and concentrate on ways to change their practices to prevent future abuses. While I do not believe that judges intentionally assist perjury and misconduct, actions or inaction from the Bench may have unintentionally led to the injustices that occurred.

When innocent people are convicted, everyone in the criminal justice system must share the responsibility. From the public's perspective, judges of course played a role in the injustices that occurred because they were the ones who ultimately pronounced judgment over the Rampart victims and imposed lengthy sentences for crimes the defendants did not commit.²

Some members of the Bench reacted extremely defensively and negatively to my comments at the Symposium.³ Rather than accepting responsibility for the problems facing the criminal justice system, judges asserted that their hands were tied and that reforms rested with prosecutors, police, and defense lawyers.⁴ In essence, they circled the wagons.

While I was not surprised by these judges' reactions, I was disappointed. The purpose of this Article is to articulate in more detail how judges contributed to the Rampart scandal, why they can make

2. See Ted Rohrlich, *Scandal Shows Why Innocent People Plead Guilty*, L.A. TIMES, Dec. 31, 1999, at A1 ("Criminal justice is administered so inexactly that courts regularly allow people to plead guilty while claiming they are innocent.").

3. See, e.g., Judge William F. Fahey, *Criticism of Court Was Misdirected*, METROPOLITAN NEWS-ENTERPRISE, Oct. 5, 2000, at 7; Robert Greene, *Fidler Defends Judiciary Against Calls for Change Sparked by Rampart*, METROPOLITAN NEWS-ENTERPRISE, Sept. 15, 2000, at 1. Of course, I should be careful to add that not all judges have reacted negatively. In fact, in private, many judges were willing to admit that they too were concerned about the issues raised by the Rampart scandal. However, the public response by vocal members of the judiciary was decidedly negative.

4. See, e.g., Victor E. Chavez, *Perspective on the LAPD Scandal: The "Referees" Are Not to Blame for Rampart*, L.A. TIMES, May 15, 2000, at B7.

changes consistent with their role in the adversarial system, and to address the detrimental effects of the defensive posture of the court. To do this, Part I begins with a description of how judicial conduct can contribute to the justice system's problems with dishonest police. Part II then discusses general responsibilities of judges in our adversarial system. Finally, Part III details how judges can help prevent police abuses.

I write with the sincere hope that the court will engage in some meaningful introspection and dialogue regarding the serious issues raised by the Rampart scandal. In many ways, this Article should be considered a work in progress. Just as the Rampart scandal is still unfolding, so are my ideas as to how its problems can be resolved. Under the time pressures of a symposium, it is impossible to anticipate all of the issues that should be addressed. In fact, even the structure for this Article is based upon my reactions to the initial reports regarding the Rampart scandal. However, this Article can serve as a starting point for a discussion as to what changes can and need to be made to prevent injustices in the future.

We have a unique opportunity to address long-festered ills in our criminal justice system. If we do so, meaningful reforms can occur. If we fail to do so, then I fear we will be engaging in the "Legal Code of Silence."⁵ It is time to take a long, hard look at criminal justice in Los Angeles.⁶ The credibility of everyone in the profession

5. This apt phrase was used by my colleague Professor Samuel H. Pillsbury in discussing the controversy over sealing settlement records from public inspection. The public, however, may choose to extend this phrase to the general failure of those in the criminal justice system to admit the severe problems it faces.

6. One of the repeated criticisms of academic examination of court practices is that those who do not sit on the Bench cannot appreciate the pressures and practices of those who do sit on the Bench. While there may be some validity to this comment, my remarks are not based upon a long-distance view from the "Ivory Tower." Having practiced criminal law for many years, and as an active and current member of the Bar, I have made it a point to listen to the concerns of both those on the Bench and those who must appear before the court. Sometimes, the perspective and independence of being an outsider can be helpful in analyzing a problem. Cf. Samuel H. Pillsbury, *Police Abuse: Outsiders May Be the Best Judges*, L.A. TIMES, Oct. 29, 2000, at M1 (discussing the history of police abuse in Los Angeles and the current Rampart scandal disappointing reformers).

depends upon it.

II. HOW JUDGES CONTRIBUTE TO POLICE MISCONDUCT

Assume, for a moment, that judges do not intentionally assist police misconduct. Is it nonetheless possible that judges contribute to police perjury and the framing of innocent defendants by their everyday practices? Certainly, the answer must be yes. The proof of this is the Rampart scandal itself.

Over 100 convictions have been overturned in Los Angeles because Los Angeles Police Department (LAPD) officers framed innocent persons, planted evidence, and committed perjury. Thousands of other cases are still under review.⁷ Within this group of victims are defendants who pled guilty to crimes they did not commit because they believed they faced insurmountable obstacles in asserting their innocence.⁸ It also includes defendants who exercised their right to a jury trial only to be convicted and sentenced to maximum terms because they failed to accept responsibility for actions they did not commit.⁹ Finally, the Rampart scandal includes defendants who suffered both the injustice of conviction and serious bodily injury because of police action.¹⁰

Each of the victims of the Rampart scandal appeared before members of the Bench, yet none of these Bench officers prevented the injustice. Where was the breakdown in the justice system?

First, judges unwittingly participate in police perjury and misconduct by not critically examining police credibility during proceedings before the court. Although nobody can expect judges to have crystal balls that can tell them to a certainty when witnesses are

7. See Beth Shuster & Vincent J. Schodolski, *Poor Morale Rife in LAPD, Survey Finds*, L.A. TIMES, Sept. 8, 2000, at A22.

8. See Rohrlich, *supra* note 2, at A1.

9. *See id.*

10. For example, Javier Francisco Ovando, at age nineteen, was shot by police officers in the head and permanently paralyzed. The officers planted a sawed-off .22 caliber rifle on him and claimed that Ovando had attacked them. After a jury trial, Ovando was sentenced to twenty-three years in prison for assaulting the police officers, despite the fact that he had no criminal record. See Nita Lelyveld, *Police Corruption Roils Los Angeles* (Sept. 27, 1999), at <http://www.freep.com/news/nw/qlapd27.htm>.

lying, judges appear to have been ignoring telltale signs that police officers fabricate testimony to obtain convictions. Such signs include amazingly similar stories by officers regarding the conduct of unrelated defendants, inconsistencies in police officer reports, dramatic recalls of memory by police officers, and the reluctance of officers to turn over notes or reports regarding their actions.¹¹ One can only assume that the officers who lied in the Rampart scandal felt emboldened to do so because they knew they could get away with it.

The ordinary reaction by judges to this allegation is a blanket statement that it is not the role of judges to decide credibility, but rather the role of the jurors. As discussed in Part II, it is absolutely the role of judges to make credibility findings throughout the criminal process. From motions to suppress to sentencing hearings, judges are responsible for ascertaining credibility. Abrogation of this responsibility could certainly lead to the misconduct that occurred in the Rampart scandal.

Moreover, it is insufficient for judges to assert that they will confront police perjury when there is overwhelming proof of it. Given that studies have revealed that judges and prosecutors suspect a significant rate of police perjury—perhaps as high as in twenty percent of all cases¹²—judges need to act upon their suspicions that police have testified untruthfully. The easy path is to do nothing and hide behind the traditional conception of judges as neutral referees. The harder but more valuable path is to probe the witness to determine the true facts of the case.¹³

11. See generally Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041-48 (1996) (discussing the nature of police testilying and tell-tale indications that it occurs). See also Stanley Z. Fisher, “Just the Facts, Ma’am”: *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 36-38 (1993) (discussing defense strategy, police control over access to exculpatory evidence, and the “double file” system).

12. See Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 107 (1992).

13. See Rohrlich, *supra* note 2, at A1 (reporting a case in which the court rejected a defense motion to dismiss because counsel failed to ask a preliminary witness a key question, even though the judge herself, who had also questioned the witness, never made the same inquiry).

A second way in which judges may have contributed unwittingly to the Rampart scandal is by their handling of guilty pleas. It has now become common practice for judges in California courts to rely on prosecutors to inquire about or set forth the factual basis for guilty pleas. Judges rarely engage in probing questioning to determine whether a defendant is pleading guilty because he is actually guilty, or whether the defendant is pleading guilty because he feels there is no way to contest trumped-up charges and fears imposition of the maximum sentence if he proceeds to trial.¹⁴

The truncated manner in which guilty pleas are handled is particularly a problem in California where the law allows a defendant to plead guilty to related charges, even as he is asserting his innocence to the formal charges against him. These so called "West" pleas, named after a case authorizing them,¹⁵ do not eliminate the need for judges to examine the factual basis for a plea. In fact, they make it more critical for the court to do so. The court in *West* authorized a plea bargaining process that allows defendants to plead to uncharged, but reasonably related crimes. It did not mandate that courts accept pleas to a crime the defendant did not or may not have committed. By requiring detailed factual bases, judges can help avoid the types of problems revealed by the Rampart scandal, including situations in which a defendant pleads guilty to any charge, whether or not it was committed, in order to avoid being framed by the police for more serious offenses.

Third, wittingly or not, judges provide the additional hammer prosecutors and police officers need to coerce defendants to forego trial and their right to challenge the evidence. When judges routinely impose maximum sentences on those who go to trial, and much more lenient sentences on those who do not, the message to defendants is that there is a devastating cost to exercising their Sixth Amendment right to a fair trial.¹⁶

Fourth, judges often allow prosecutors to skirt their responsibility to turn over timely discovery so that there can be a full investiga-

14. *See id.*

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

16. *See Rohrlich, supra* note 2, at A1.

tion that will provide evidence to challenge the police officer's allegations. The *Brady* standard set forth by the Supreme Court, which allows the disclosure of exculpatory and impeachment materials at any time before the conclusion of trial, has been too low of a bar to set for prosecutors' discovery compliance. By allowing prosecutors to delay discovery, judges have hampered defense counsel in their duties to investigate prosecution witnesses and evidence.

Correspondingly, judges may be hampering defense efforts to discover perjury and misconduct by routinely denying defense requests for continuances of trials when there have been late disclosures by the prosecution. While the law affords judges the discretion to determine when a trial should be continued, judicial officers may too often put the needs of the court's calendars ahead of the defense interests in thoroughly investigating the case.

Fifth, the lack of diversity in judges on the Bench may be exasperating the aforementioned problems.¹⁷ By diversity, I do not mean only ethnicity or gender.¹⁸ Rather, the overemphasis on appointing

17. The California Bench has the largest judicial system in the world with more than 1600 judges. Progress in diversifying the Bench is slowly being made. Ten percent of Governor Jerry Brown's appointments to the Bench were Black, 9% were Hispanic, and 4% were Asian. See Jean Guccione, *Judge Wilson: The Governor Will Be Remembered for a Deep Judicial Imprint*, L.A. DAILY J., Dec. 14, 1998, at A1. Governor George Deukmejian appointed 87% Whites to the Bench, 3.4% Blacks, 5.1% Hispanics, and 3.2% Asians. See *id.*; see also Peter Allen, *Deukmejian's Judicial Legacy: The Retiring Governor Has Kept His Promise to Put a Conservative Cast on the State's Judiciary*, 11 CAL. LAW. 25 (1991) (discussing Deukmejian's selection of conservative judges "in his own image"). Eighty-five percent of his appointments were male; 15% were female. See Jean Guccione, *The Judicial Legacy: Governor Heavily Favored Ex-Prosecutors*, L.A. DAILY J., Jan. 7, 1991, at A1 [hereinafter Guccione, *The Judicial Legacy*]. Of Governor Pete Wilson's early appointments, 88% were White, 6% were Black, and 6% were Hispanic. See Jean Guccione, *Gov. Wilson's Judges Have a Different Look*, L.A. DAILY J., May 1, 1992, at A1. In total, former Governor Pete Wilson ended up appointing 344 judges. See Memorandum of California Judges Association on Statistics for Judicial Appointments (Oct. 30, 2000) (on file with Loyola Law Review). Of those, 73% were male and 27% were female. See *id.* So far, Governor Gray Davis has appointed forty-nine judges. One-third of Governor Davis' appointments have been women and only 13% come from prosecutorial ranks. See *id.*

18. One new way of thinking about judicial diversity may be to compare the concept of "community policing" to "community judging." Some reform-

former prosecutors has created a collection of judges whose natural inclination is not to be skeptical of law enforcement's presentation.¹⁹ When a judge has spent years as a prosecutor with an adversarial view toward defendants, it takes a particular conscientiousness to remain free from ingrained biases.

Finally, there has been a failure by judges who have witnessed police perjury to take meaningful action to prevent such misconduct in the future. A judge's standard course of action when an officer has lied is to dismiss the case or grant a motion to suppress, and ask the prosecutors to report the misconduct to appropriate police internal affairs authorities. There is no follow-up by the court, no judicial reporting of the misconduct, no contempt orders, and no tracking of the problem officers. As a result, while a judge may occasionally take an interest in a particular case, systemic problems with corrupt police officers continue.

III. JUDGES' RESPONSIBILITIES IN THE ADVERSARIAL SYSTEM

The defensive reaction by the Bench to these accusations indicates that the court has adopted an overly narrow and parochial view of the role of a judge in our criminal justice system. Typical responses include: "It's not my job to decide credibility"; "If I call an officer a liar then I can be recused as being a biased judge"; "I often

ers have maintained that selecting officers who have ties to various constituencies in a community may help improve law enforcement. Although diversity in departments, or even ties to a community, does not necessarily guarantee better law enforcement officers or judges, it does enhance the credibility of those working within the criminal justice system institutions. See Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1253, 1291-92 (2000).

19. See Jean Guccione, *The Judicial Legacy*, *supra* note 17 (stating that 65% of Governor Deukmejian's judicial appointments had prosecutorial backgrounds; of the 604 prosecutors he appointed, 74% had worked in a district attorney's office, 14% had worked for the attorney general, 13% had worked for a city attorney, and 8% had worked as federal prosecutors); Jenifer Warren & Daniel M. Weintraub, *The Road to the Bench*, L.A. TIMES, July 11, 1988, at B1 (criticizing governors for appointing primarily government prosecutors to the Bench). Only seven percent of Governor Wilson's and Governor Deukmejian's appointees had experience as public defenders. See Rohrlich, *supra* note 2, at A1.

suspect there are problems with the officers' story, but the defense cannot prove it to me"; "It is the defense lawyer's job to challenge the prosecution's case, not mine"; or "I am the judge, not the jury."²⁰

In fact, a closer analysis proves that judges have far-reaching responsibilities in criminal proceedings, even in those that may eventually involve a jury trial. To understand where breakdowns can occur in justice, it is important to examine all of the roles that judges serve in our criminal justice system.

A. Credibility Determinations

A judge in our criminal justice system is more than a referee.²¹ Depending on the proceeding before the court, the judge must perform a myriad of roles. Sometimes the judge must interpret the law applicable to the case; sometimes the judge must determine what evidence should be admitted; sometimes the judge must maintain courtroom order; and sometimes, the judge must make key credibility determinations.

Consider, for example, the various proceedings in a criminal case. Contrary to what several judges profess, it is the responsibility of the court to make credibility calls in many of the proceedings over which they preside. In fact, the trial is one of the rare situations where, after making all the appropriate evidentiary rulings, the court must defer to jury findings of credibility and weight of evidence.

20. See Judith C. Chirlin, *Trial by Jury: Judges Must Respect Juror's Role as Ultimate Fact Finder*, L.A. DAILY J., Aug. 3, 2000, at 6 (arguing that credibility determinations must generally be left to the jury, but recognizing that judges regularly must make credibility determinations in ruling on motions to exclude evidence).

21. As one letter to the editor in response to a judge's editorial stated:

I do not elect judges as referees in a sports contest. Rather, I expect judges to uphold the law and see to it that justice prevails. But even if one were to accept [the judge's] view regarding a judge's role, his analogy is faulty. A referee's prime responsibility is to enforce the rules and prevent cheating by either side. Lying by a witness and/or falsifying evidence are against the rules; they are the worst kind of cheating. A judge who turns a blind eye to police officers who lie and falsify evidence and prosecutors who encourage or conduct such illegal activities is no better than a referee who only calls fouls against one team.

Robert L. Sachs, *Letter to the Editor*, L.A. TIMES, May 18, 2000, at B10.

Beginning with bail determinations, the judge must make a decision regarding the strength of prosecution allegations that a defendant is a flight risk or danger to the community. Although courts need not hold trial-like hearings in making these determinations, it is within the judge's discretion to question witnesses before making a final determination. Rarely do judges avail themselves of this opportunity.

In other pretrial stages of a case, the judge must also make key credibility decisions. The most obvious of these are preliminary hearings and motions to suppress. Under current Proposition 115 guidelines, prosecutors are entitled to present hearsay police testimony at preliminary hearings.²² Judges must evaluate the testimony of these officers to determine whether a defendant should be held for trial. Given that there is no jury to evaluate the evidence, and judges know that the officers may be relying on reports, it is critical that judges be satisfied that the reports are accurate or require that live witnesses be brought into court to testify.

Likewise, when evidence has been seized without a warrant, or where the defendant contests the validity of a confession, judges are often called upon to determine whether the police officer's testimony is reliable enough to permit admission of the evidence. Judges tend to evade this responsibility by not questioning an officer's testimony unless the defense has demonstrated indisputably that the officer has lied. Judges may also decline to make credibility decisions because evidence, other than the officer's testimony, supports the prosecution's position. Judges can remain impartial decision-makers while still probing the evidence to assure that it was not illegally obtained

22. See CAL. PENAL CODE § 872(b) (West 2000); *Whitman v. Superior Court*, 54 Cal. 3d 1063, 1072-73, 820 P.2d 262, 266, 2 Cal. Rptr. 2d 160, 164-65 (1991). See generally LAURIE L. LEVENSON, CALIFORNIA CRIMINAL PROCEDURE § 10:22, at 400 (2000) (discussing the introduction of hearsay testimony by a qualified officer into evidence). Many concerns have been raised about the impact of Proposition 115 on the accuracy and fairness of preliminary hearings and plea bargaining. With the greater reliance on hearsay and modifications in the discovery rules, there is certainly the increased possibility that it will be more difficult for judges to detect inaccuracies, intentional or otherwise, in police reports. See Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 AM. U. L. REV. 465, 508-15 (1998).

or manufactured.

A judge does not become an advocate merely by asking questions. Even in a jury trial, the rules of court allow a judge to question witnesses.²³ In fact, “[w]ithin reasonable limits, the court has a duty to see that justice is done and to bring out facts relevant to the jury’s determination.”²⁴ Although a trial judge should not appear to take sides in proceedings before the jury,²⁵ the judge may properly ask questions to clarify the testimony and seek the truth from witnesses.²⁶

There are also hearings on motions in limine and evidentiary rulings in which judges must make credibility determinations. Once again, in these situations, judges should not feel uncomfortable engaging in the type of inquiry needed to assure themselves not just that the defense cannot prove perjury, but that, in fact, the prosecution’s evidence is sound.

Even at sentencing and probation revocation hearings, judges must make credibility determinations. Deferring to police officer testimony is not a neutral stance. It is, in fact, placing a thumb on the scale in favor of the prosecution.

The key to understanding why the power and responsibility to make credibility determinations is an inherent part of the judge’s role is to consider how much discretion is built into our criminal justice

23. See *People v. Camacho*, 19 Cal. App. 4th 1737, 1744, 24 Cal. Rptr. 2d 286, 290 (1994) (“The trial judge has a right to question witnesses.”).

24. *People v. Santana*, 80 Cal. App. 4th 1194, 1206, 96 Cal. Rptr. 2d 158, 166 (2000); see also AM. BAR ASS’N, AMERICAN BAR ASSOCIATION STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE ch. 6, at 1 (1978) (stating that the adversarial nature of trial proceedings do not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times, matters which may significantly promote a just determination of the trial).

25. See, e.g., *People v. Carpenter*, 15 Cal. 4th 312, 353, 935 P.2d 708, 728, 63 Cal. Rptr. 2d 1, 21 (1997) (stating that it is misconduct for a court to persistently make “discourteous and disparaging remarks so as to discredit the defense or create the impression it is allying itself with the prosecution”).

26. See *People v. Corrigan*, 48 Cal. 2d 551, 559, 310 P.2d 953, 958 (1957); *People v. Melton*, 206 Cal. App. 3d 580, 595, 253 Cal. Rptr. 661, 671 (1988); *People v. Alfaro*, 61 Cal. App. 3d 414, 426-27, 132 Cal. Rptr. 356, 363-64 (1976).

system. We do not arbitrarily limit a judge's exercise of discretion.²⁷ Likewise, there are no systemic restrictions on how the judge can go about making credibility determinations. In encouraging judges to be more aggressive in their inquiries, I join Judge Learned Hand's assessment of how to best allow a trial judge to achieve justice: "With all his sins upon him, his self-importance, his ignorance, his bad manners, his impatience, he is all you have got, and I believe he will produce better results if you give him a little more room to roam about."²⁸

B. Judges' Responsibilities at Guilty Pleas

Judges' responsibilities will also vary depending on whether they are presiding over a jury trial or taking a guilty plea. The jury trial is the most adversarial of our court proceedings and it thereby requires the judge to function much more as a referee. However, when judges preside over guilty pleas, they have special responsibilities.²⁹ They must determine whether a plea is knowing and voluntary.³⁰ To do so, judges must make important inquiries and credibility decisions. The U.S. Supreme Court emphasized the following when it adopted the rule that the voluntariness of a guilty plea must be demonstrated on the record: "[A] plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be

27. The one notable exception to this rule is the recent movement to limit judicial discretion at sentencing by imposing mandatory minimum sentences and rigid sentencing schemes, such as the Three-Strikes Law. A complete discussion of this issue is beyond the purview of this paper. For more information, see Debate, *Mandatory Minimums in Drug Sentencing: A Valuable Weapon in the War on Drugs or a Handcuff on Judicial Discretion?*, 36 AM. CRIM. L. REV. 1279 (1999), and Ronald Weich, *The Battle Against Mandatory Minimums: A Report From the Front Lines*, 9 FED. SENTENCING REP. 94 (1990).

28. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 147 (1994).

29. See Randall Lockhart, Comment, *The People of the State of Michigan Versus Rex Reichenback—Separation of Powers or Judicial Activism?*, 75 U. DET. MERCY L. REV. 355, 367 (1998).

30. See *Boykin v. Alabama*, 395 U.S. 238, 240-41 (1969).

a perfect cover-up of unconstitutionality.”³¹

In California, the procedures for guilty pleas were set forth by the California Supreme Court in *In re Tahl*.³² The focus of both *Boykin* and *Tahl* was the express advisement and waiver of a defendant’s constitutional rights to a jury trial, confrontation and protection from self-incrimination. Thus, much of the caselaw focuses on how explicit the court’s explanation of those rights must be.

However, another critical aspect of a guilty plea is the requirement that there be a factual basis for the plea.³³ In federal court, the standard practice for judges is to elicit from the defendant “what he or she did” in ascertaining whether the defendant actually committed the crime to which he or she is pleading guilty.³⁴ Alternatively, judges may ask the prosecution to articulate a factual basis for the plea and then ask the defendant to verify whether the prosecution’s information is accurate.

By contrast, judges in California often seek to meet the requirement of a factual basis for the plea merely by asking the defendant on the record if he or she is pleading guilty because he or she is guilty.³⁵ Unless the defendant’s guilty plea to a felony is conditioned on receipt of a particular sentence or other exercise of the court’s power (i.e., negotiated pleas), California law does not require the court to satisfy itself in any more detail than determining whether there is a factual basis for the plea.³⁶ This rule even applies in capital

31. *Id.* at 242-43.

32. 1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969).

33. See CAL. PENAL CODE § 1192.5 (West 2000).

34. See FED. R. CRIM. P. 11(f).

35. See 4 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 2193 (Supp. 1999) (discussing that a stipulation by defense counsel and prosecutor that a factual basis exists for the plea satisfies the requirement that the court itself inquire about the factual basis) (citing *People v. McGuire*, 1 Cal. App. 4th 281, Cal. Rptr. 2d 846 (1991)). Alternatively, some judges allow the prosecutor to conduct this portion of the guilty plea procedure by asking them to conduct the inquiry of the defendant.

36. See CAL. PENAL CODE § 1192.5; *People v. Wilkerson*, 6 Cal. App. 4th 1571, 1576, 8 Cal. Rptr. 2d 392, 395 (1992) (noting that an independent inquiry that a factual basis exists is required under section 1192.5 for all negotiated pleas, i.e., those pleas that result from plea bargaining); see also *People v. Hoffard*, 10 Cal. 4th 1170, 1181-84, 899 P.2d 896, 902-04, 43 Cal. Rptr. 2d

cases.³⁷

Yet, if the courts were so inclined, there is no rule that would bar California judges from conducting more detailed examinations of the factual bases for all guilty and nolo contendere pleas. In fact, the California Supreme Court, while declining to impose a specific rule of criminal procedure, approved the practice of eliciting a detailed factual basis for all pleas.³⁸ Probing questions from the Bench may reveal situations such as those that occurred in Rampart where tainted and contrived evidence was used to pressure defendants to plead guilty. “Conducting a factual basis inquiry before accepting or entering judgment on a guilty plea may further important interests, [including] . . . protecting against the entry of a plea by an innocent defendant . . .”³⁹ The only cost to the judge of conducting such an inquiry is that it may consume more time and it may result in more jury trials. Neither of these concerns are legitimate reasons for foregoing a detailed examination.

In fact, not only may California judges follow their federal counterparts in conducting more detailed questioning regarding the factual basis for pleas, they have good reason and ability to do so. Many of the state court appointees come from the ranks of state and federal prosecutors’ offices.⁴⁰ Others come from private criminal

827, 833-35 (1995) (noting that the factual basis requirement used in federal court is not a federal constitutional requirement but one established by federal rules).

37. See *People v. Fairbank*, 16 Cal. 4th 1223, 1245-46, 947 P.2d 1321, 1333, 69 Cal. Rptr. 2d 784, 796 (1997).

38. See *Hoffard*, 10 Cal. 4th at 1183-84, 899 P.2d at 904, 43 Cal. Rptr. 2d at 835 (“In light of [a factual basis’s] potential salutary effects, we approve of the practice, which we understand many trial courts follow, of attempting to ensure the existence of a factual basis for all guilty and no contest pleas.”). In *Hoffard*, the California Supreme Court noted that “[a]lthough not constitutionally compelled, a factual-basis inquiry may help to ensure the constitutional standards of voluntariness and intelligence are met.” *Id.* at 1183 n.11, 899 P.2d at 904 n.11, 43 Cal. Rptr. 2d at 835 n.11. The court wrote that “[a]scertaining the existence of a factual basis assumes particular importance to the constitutional standard when the defendant’s plea of guilty is coupled with a contradictory claim of innocence.” *Id.* Of course, that is exactly the situation that developed in many of the cases involved in the Rampart scandal. See discussion of *People v. Munoz infra* at Part IV.D.

39. *Hoffard*, 10 Cal. 4th at 1183, 899 P.2d at 904, 43 Cal. Rptr. at 835.

40. See Harriet Chiang, *Davis’ Chance to Mold State Judiciary*, S.F.

practice or public defenders' offices. In each of these scenarios, the judges would have had an opportunity to learn what kinds of pressures can be imposed on a defendant to plead guilty and to admit a factual basis, not because it is true, but simply to dispose of the case. Judges would be well served to use their experiences to identify cases where the defendant mouths the correct response for the plea, but the actual facts of the case may not support it.

Conducting a probing inquiry during the guilty plea does not make the judge an advocate in the case. The judge remains the neutral decision-maker, but is in a better position to fulfill his constitutional obligation to ensure the plea is voluntary. Judges should not delegate this responsibility to prosecutors or defense lawyers. There are different pressures on counsel to ensure that a guilty plea is accepted. The only pressure on the judge should be from the U.S. Constitution—the requirement that the plea be knowing and voluntary.

C. Judges' Responsibilities to Prevent Injustice

Judges ordinarily think of "justice" one case at a time. In other words, the goal of a judge is to fairly adjudge the individual case before him or her at the time, without consideration of its impact on other matters that may or may not appear before the court in subsequent, unrelated cases. With this goal in mind, judges may comfortably dismiss a case because of police misconduct or perjury, but they do not feel a responsibility to take further action to penalize that officer for misconduct. At most, some judges will ask the prosecutor to follow up on reporting the police officer's misconduct and seek some penalty for it.

It may be time, however, for judges to share broader responsibility for justice. Judges have the power, through contempt citations and reporting of misconduct, to take more aggressive steps to prevent police misconduct. The Code of Judicial Ethics alludes to this responsibility when it states, "[a] judge . . . shall act at all times in a manner that promotes public confidence in the integrity and impar-

CHRON., Nov. 30, 1998, at A1. The great influx of prosecutors began with Governor George Deukmejian and continued through the administration of Governor Pete Wilson. *See id.*

ality of the judiciary.”⁴¹ Ethical codes also impose on judges the obligation to report misconduct by other judges or those appearing before the court.⁴² One of the reasons that judges have these responsibilities is that they are responsible for justice beyond their own docket sheets. Certainly after the Rampart scandal, judges cannot be complacent in assuming that some other institution—prosecutors, police, defense counsel—will take the appropriate steps to curtail perjury and misconduct in the courts.

Judicial passivity, while typical in our adversary system,⁴³ is not necessarily the equivalent of judicial impartiality. For those who seek to circumvent the truth, judicial passivity allows them to rely on a judge’s reluctance to curb perjury or misconduct as an opportunity to succeed in their deception. When a judge remains passive to such efforts, misconduct is, in effect, encouraged.⁴⁴

A judge’s efforts to prevent injustice may range from exerting extra control over the parties and witnesses in a case⁴⁵ to reporting misconduct. There is nothing improper if the court takes reasonable steps to ensure that the truth will prevail in the individual case before the court and that any efforts by parties or witnesses to mislead the court will not be repeated in future cases.

41. CAL. CODE OF JUDICIAL ETHICS Canon 2A (2000).

42. See MODEL CODE OF JUDICIAL CONDUCT Canon 3D(1), (2) (2000).

43. See FRANKLIN STRIER, RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM 15 (1994) (arguing that judicial passivity is a style embraced by most American trial judges because they want to distance themselves from unpopular decisions and are concerned about the political repercussions of being reversed on appeal).

44. It is certainly not axiomatic that judges must remain passive in order to preside over a case impartially. Even within the American adversary system, decision makers often play an active role without losing their impartiality. Consider, for example, arbitrators or certain types of mediators. They play very active roles in questioning witnesses and seeking out the truth without sacrificing their impartiality. “Clearly, impartiality and passivity are not necessarily corollaries.” *Id.* at 84.

45. See, e.g., *Geders v. United States*, 425 U.S. 80 (1976) (finding that trial judges may properly restrain lawyers from coaching witnesses as long as the court’s sequestration order does not violate the defendants’ right to assistance of counsel).

D. Judges as Leaders

Although the suggestion now makes some judges uncomfortable, traditionally it has been an important role of the judiciary to serve as leaders of our society. As far back as Biblical times, judges were both the moral and legal leaders of entire nations. From Moses to Deborah to King Solomon, the Bible is replete with examples of judges both deciding difficult cases and serving as moral guides for society.⁴⁶ These ancient heroes led their nations in war and peace. The law and moral beliefs were their guides. Even the traditional qualifications for judges reflected the broader role they served in society. The great philosopher Maimonides included among the fundamental qualities of a judge wisdom, humility, disdain of money, love of truth, love of people, and a good reputation. “[A judge] must be wise and sensible, learned in the law and full of knowledge”⁴⁷

Today, we no longer expect our judges to don suits of armor and ride the countryside pursuing justice. However, we do expect them to be on the frontline in identifying and redressing problems in the justice system. There is a reason that codes of judicial ethics specifically authorize judges to “speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, legal system [and] the administration of justice”⁴⁸ Judicial officers are presumed to have a “unique position to contribute to the improvement of the law, the legal system, and the administration of justice”⁴⁹

Judges from across the political spectrum have recognized this

46. See ADIN STEINSALTZ, *BIBLICAL IMAGES: MEN AND WOMEN OF THE BOOK* 99-105, 153-67 (1984). Interestingly, the Bible also discusses a system of judiciary that is not unilateral governance by a single judge. Rather, Moses himself delegated his judicial powers to appointed “chiefs of thousands, hundreds, fifties and tens,” and the early judicature developed laws by establishing judicial precedents. See MENACHEM ELON, *THE PRINCIPLES OF JEWISH LAW* 562 (1974).

47. ELON, *supra* note 46, at 563. Maimonides also included “fear of God” in his list of attributes. See *id.* In a secular system of justice, such a requirement would of course be unconstitutional. However, a judge’s understanding of the consequences of his or her acts is still reflected in the criteria currently employed to select judges.

48. MODEL CODE OF JUDICIAL CONDUCT Canon 4B (2000).

49. *Id.* at Canon 4 cmt.

important responsibility of the Bench. From Chief Justice Earl Warren's emphasis on "the positive qualities of public service, and the need for 'a new commitment to the rights of man,'"⁵⁰ to Associate Justice Louis Brandeis's commitment to Greek ideals of public service,⁵¹ to Chief Justice William Rehnquist's call for reforms in the judicial system,⁵² judges have not limited their responsibilities to resolving only the disputes before them. They have strived to look at the bigger picture and institute reforms that may assist the system in general.

Today, many judges appear to be locked in a box. While they devotedly decide the cases presented to them, too many are reluctant to voyage into the world of reforms. Part of the reason for this may be the enormous demands on judges' time. I fear, however, that part of the reason may be that judges no longer perceive themselves as leaders of the community.

Consistent with the role of leadership is the responsibility to identify and address persistent problems in the justice system. Although there is no way to know for sure, it is unlikely that the entire Bench had no inkling that police officers were slanting their testimony or not being completely candid with the court and prosecutors regarding the investigations they conducted. Affirmative efforts by the court to have court committees address such concerns, especially those that interact with the Bar, could be helpful in preventing the spread of abusive practices.

50. G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 324 (1982).

51. See PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 238 (1984).

52. Chief Justice Rehnquist regularly addresses the American Bar Association regarding a wide variety of issues, ranging from the death penalty to the scope of federal jurisdiction. See, e.g., Paul Marcotte, *Rehnquist: Cut Jurisdiction: Chief Justice Outlines Reform Proposals in ABA Speech*, 75 A.B.A. J. 22 (1989); W. John Moore, *Death Row Delays*, 21 NAT'L L.J. 768 (1989) (recounting speeches by Chief Justice Rehnquist and Associate Justice Lewis F. Powell, Jr. on the issue of reforming appellate procedures in death penalty cases); *All Things Considered! Rehnquist Against Making Crimes Federal* (Nat'l Pub. Radio broadcast, Feb. 4, 1992). The Justices have no hesitancy in meeting with groups throughout the country to address issues that they believe affect public trust and confidence in the justice system. See *Rehnquist, O'Connor, Cuomo to Address Trust, Confidence in Justice System*, U.S. NEWSWIRE, May 12, 1999.

With a greater appreciation for the wide range of their responsibilities, judges may feel more comfortable taking those steps that could prevent a recurrence of the Rampart scandal. These steps will not change judges from impartial decision-makers to advocates or accusers. They will, however, provide a safety check in a system where the imbalance in strength of the adversaries no longer provides an adequate safeguard.⁵³

IV. SEIZING THE OPPORTUNITIES: HOW JUDGES CAN HELP PREVENT POLICE ABUSES

In his report, Professor Erwin Chemerinsky made several recommendations as to how the judiciary can help prevent future police abuses, such as those that occurred in the Rampart scandal.⁵⁴ These recommendations ranged from increasing judicial independence to instituting a mandatory reporting requirement for police perjury. Each of Professor Chemerinsky's recommendations deserves serious consideration. Some members of the Bench have already expressed their skepticism and rejected these recommendations, perhaps based upon an incomplete or mistaken understanding of the actual proposal. However, it serves all of us to carefully analyze each proposal. Certainly, maintaining the same course is unlikely to help. If the Rampart scandal has taught society anything, it is that there must

53. The enactment of the California Three-Strikes Law has changed dramatically the relative bargaining power of prosecutors and defense counsel in plea negotiations. See CAL. PENAL CODE § 667 (West 1999). The law provides for a life sentence for a third-time offender, even if the third strike is not for a violent offense. See Greg Krikorian, *Repeat Offender Law Strikes Activists as Exceedingly Unjust*, L.A. TIMES, Dec. 11, 1999, at B1. Thus, if a defendant with a prior record wants to contest even a relatively minor offense, he or she risks a severe sentence by opting for a trial. See *ABC News: Nightline* (ABC television broadcast, May 12, 2000); see also Samuel Pillsbury, *Perspective on Justice: Even the Innocent Can be Coerced into Pleading Guilty*, L.A. TIMES, Nov. 28, 1999, at M5 (discussing the "shameful legacy" of plea bargaining).

54. See Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 40 LOY. L.A. L. REV. 545 (2001) (I have hereinafter referred to this as the "Chemerinsky Report."). I was proud to assist Professor Chemerinsky as a "collaborator" on his Report. While I agree with an overwhelming number of his suggestions, I have not joined in all of his final recommendations.

be a critical reexamination of all aspects of our criminal justice system.

A. Recommendation #30⁵⁵: Institute a Judicial Reporting Requirement

The primary recommendation in the Chemerinsky Report is that the legislature or judicial ethical rules require judges to report findings by the court of police perjury or false statements. The Report

recommends that this requirement be mandatory so that judges will not fear political reprisal by police supporters.

Reporting requirements for judges are not new. Canon 3(D)(1) of the California Code of Judicial Ethics already requires judges to report ethical violations by other judges.⁵⁶ Similarly, Canon 3(D)(2) requires that “[w]henever a judge has personal knowledge that a lawyer has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action.”⁵⁷ The Advisory Committee Commentary further explains that “appropriate corrective action” includes reporting the violation to the presiding judge or bar authority responsible for disciplinary action.⁵⁸

Under current state law, judges must report to the State Bar if a lawyer suffers a discovery sanction of more than \$1000⁵⁹ or improperly threatens criminal charges to obtain an advantage in a civil dispute.⁶⁰ If a lawyer violates the rules against pretrial publicity,⁶¹ the court must also take corrective action. Even if a judge has personal

55. My discussion begins with Recommendation #30 because this was the first recommendation of the Chemerinsky Report that related to the responsibilities of the judiciary. In discussing the Report’s recommendations, I have chosen to discuss them sequentially. Although I have done so, the result has been that some of the most important recommendations, like encouraging judges to insist on a complete factual basis for guilty pleas, are not discussed until later in this Article. The order in which I discuss the recommendations should not be read as a ranking of their importance.

56. See CAL. CODE OF JUDICIAL ETHICS Canon 3(D)(1) (1999).

57. *Id.* at Canon 3(D)(2).

58. See *id.* at Canon 3(D) cmt.

59. See CAL. BUS. & PROF. CODE § 6068 (West 2000).

60. See CAL. RULES OF PROF’L CONDUCT R. 5-100(A) (West 2000).

61. See *id.* at 5-120.

knowledge of illegal advertising or client solicitation,⁶² the judge has a duty to report the misconduct. All these situations are important, but they pale in comparison with the need to take action to prevent and punish police perjury and misconduct.

It is consistent with the judge's role in making credibility findings and ensuring the integrity of the courtroom to require reporting perjury to an administrative authority that could conduct the appropriate follow-up to ensure that the officer is appropriately disciplined and monitored in future cases. Other than through courtroom gossip, judges do not have the ability to alert other judges to the problem with particular police witnesses. They also do not have the ability to take steps to correct a police officer's inappropriate behavior. Alerting the appropriate administrative agency to the officer's misconduct will give those in the best situation to remedy the problem the notice and opportunity to do so.

In rejecting this proposal, one judge voiced the concern that judges would be asked to be harsher in their evaluation of police officers' testimony than that of other witnesses. Professor Chemerinsky's recommendation makes no such suggestion. It does not call for additional findings of police perjury by the court. It does not assume that judges will always know when such misconduct has occurred. It does not require that judges assume police officers are lying.⁶³

What the proposal does, however, is provide an avenue by which judges can be assured that their concerns about police misconduct and perjury will be addressed. Rather than rely on prosecutors, who often ally themselves with the police, to take corrective action, the court can alert an authority charged with that specific responsibility. Given that court records are already public, sharing a court's

62. *See id.* at 1-400.

63. In fact, one of the risks of this recommendation is that judges will be even more reluctant to find police perjury and misconduct because they will be reluctant to involve themselves in the reporting requirements. This is a difficult issue. If the standard is lowered for reporting, some officers' credibility could be judged unfairly. On the other hand, with the current high standard, it is far too easy for judges and prosecutors to ignore police misrepresentations. I hope to discuss in a future paper the proper standard of proof for judges to use in evaluating whether there has been intentional police misrepresentations and misconduct.

findings with another institution would not seem to be particularly problematic.

Judges may be concerned, however, about the mandatory nature of the proposed reporting requirements. There are reasons for and against making the requirement mandatory. One strong reason for making the requirement mandatory is that a mandatory requirement will provide some protection for judges who may fear political retaliation for their decisions. Rather than judges being blamed for using their discretion to report problem officers, the judges can stand on their ethical duty to report.

The issue of judicial independence is not an easy one to discuss with the court. Some judges deny that there is political pressure on judges when they make decisions.⁶⁴ History shows otherwise. For example, in 1970, Los Angeles voters ousted Judge Alfred Gitelson because of his decision to enforce busing laws.⁶⁵ More recently, judges such as Joyce Karlin have had to face tough and expensive judicial races when their seats have been challenged.⁶⁶ Untenured

64. See Robert Greene, *Fidler Defends Judiciary Against Calls for Change Sparked by Rampart*, METROPOLITAN NEWS-ENTERPRISE, Sept. 15, 2000, at 1. Greene reported that Judge Fidler dismissed as "absolute nonsense" the assertion that political pressures prevent judges from adequately scrutinizing and reporting questionable testimony by police officers in criminal cases. Judge Fidler further alleged that judges do not even talk among themselves about possible political pressure placed on the judiciary. See *id.*

65. For a full account of the attack on Judge Gitelson for his ruling in the Los Angeles school busing case, see JOHN CAUGHEY, *TO KILL A CHILD'S SPIRIT: THE TRAGEDY OF SCHOOL SEGREGATION IN LOS ANGELES 156-65* (1973).

66. Given the high cost of successfully defending a judicial seat, there is a significant risk that just the cost of running for judicial office may deter some judges from making controversial rulings. See Sheryl Stolberg, *Politics and the Judiciary Coexist, But Often Uneasily*, L.A. TIMES, Mar. 21, 1992, at A1. The cost to a judicial candidate of including a statement in the voter pamphlet can exceed \$45,000. See Jim Newton, *Efforts to Alter Judge Elections Is Dismissed*, L.A. TIMES, Aug. 13, 1996, at B1. A study by the "California Commission on the Courts found that the cost of the average superior court race in the Los Angeles area more than doubled every year, increasing twenty-two fold from 1976 to 1994." Sheila Kaplan, *The Buying of the Bench*, NATION, Jan. 26, 1998, at 11. Median spending for a contested election to the Los Angeles County Superior Court rose "from \$3,177 in 1970 to \$70,000 in 1994." Mark Hansen, *A Run for the Bench*, A.B.A. J., Oct. 1998, at 68, 69; see also Lorenza Munoz, *Judicial Campaign Costs Soar*, L.A. TIMES, Nov. 29, 1995, at

judges often face some level of political pressure, whether it be from organized citizen groups, police unions, or prosecutors.⁶⁷ While some judges feel secure in their ability to withstand such pressures, others may not. A mandatory reporting requirement can provide some protection for those judges who might otherwise be marked as "anti-law enforcement."

Another concern that could be raised about a mandatory reporting requirement is the problem with shifting disciplinary focus away from the officers who lied and onto the judges who may fail to report the perjury. There is the possibility that a judge would be deterred from making the finding of perjury because the reporting require-

B1 (discussing that a candidate's average expenditure has climbed to \$70,000).

More specifically, when Superior Court Judge Joyce Karlin was challenged in 1992 because of her controversial ruling in the Latasha Harlins/Soon Ja Du case, she was forced to expend \$43,707.87 for the services of a political campaign consultant. See Keith Donoghue, *The Judge Maker; Power Broker Joseph Cerrell, Jr. Wrote the Book on Judicial Race*, AM. LAW., May 28, 1996, at 1; see also Miguel Bustillo, *Foes of Judge Karlin Short of Signatures*, L.A. TIMES, Nov. 21, 1993, at A9 (discussing failure of second effort to recall Judge Karlin). Notably, she was the only one of the Superior Court's eighty-two judges challenged in that election. See Elka Worner, *L.A. Judicial Race Being Closely Watched*, UPI, May 31, 1992. For more information regarding the Latasha Harlins/Soon Ja Du case, see Wanda Coleman, *Blacks, Immigrants and America: Remembering Latasha*, NATION, Feb. 15, 1993, at 187.

67. Moreover, even judges with life tenure can face enormous political pressure for their rulings against law enforcement. In one particularly striking case, Judge Harold Baer, Jr. of the United States District Court for the Southern District of New York suppressed police evidence on a narcotics charge because he did not believe the police testimony establishing probable cause. See *United States v. Bayless*, 913 F. Supp. 232, 242 (S.D.N.Y. 1996). In harshly worded dicta, Judge Baer criticized the police officers' conduct and, citing to the Mollen Commission's Report on police misconduct in New York, suggested that defendants were right in believing that police in their neighborhood were abusive and violent. See *id.* The media attacked his ruling and over 100 members of Congress threatened to impeach him. See Morgan Cloud, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System: Judges, "Testilying," and the Constitution*, 69 S. CAL. L. REV. 1341, 1347-50 (1996); Andrew J. McClung, *Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Police Lying*, 32 U.C. DAVIS L. REV. 389, 406-12 (1999). Thereafter, Judge Baer agreed to hold a second evidentiary hearing with new testimony from other officers. He reversed his original decision and formally apologized to the police. See *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996); Mark Hamblett, *Second Circuit Vindicates Baer in Drug Case*, N.Y. L.J., Jan. 20, 2000, at 1.

ment is only triggered upon such a finding. While this is a legitimate concern, a reporting requirement might actually have the extra benefit of requiring courts to focus on the question of intentional deception. No one wants judges to cavalierly accuse police officers of serious misconduct like perjury. Because the reporting requirement only applies in those extreme situations where the police have been found to lie or plant evidence, there should be the highest scrutiny by judges before making this decision. In those situations where there is a mere suggestion of misconduct but insufficient proof,⁶⁸ judges would have the discretion to ask prosecutors to follow up on the matter, voluntarily report the issue to appropriate authorities, or simply factor their suspicions into the rulings in the case.

As Judge Susan Ehrlich of the Arizona Court of Appeals discussed during the Loyola Rampart Symposium, other jurisdictions already have reporting procedures for their judges.⁶⁹ Likewise, they are not reluctant to insist to counsel and a witness that the officer tell the truth. An Arizona judge who observes police perjury may report it for perjury prosecution without disqualifying her entire court as somehow biased. Although that judge should obviously not preside over the perjury prosecution because he or she was a percipient witness to the lies, another judge of the same court is not similarly disqualified.⁷⁰

68. In general, the defendant bears the burden in a suppression hearing to demonstrate that the government's evidence was unlawfully obtained and therefore should be suppressed. *See United States v. Arboleda*, 633 F.2d 985, 989 (2d Cir. 1980). The defendant must present a prima facie case of a constitutional violation. *See id.* Once this showing is made, the burden shifts to the government to justify its intrusion on the defendant's rights. *See United States v. Mapp*, 476 F.2d 67, 76 (2d Cir. 1973). Thus, at least when the government has acted without a warrant, the ultimate burden is upon the government to show that its evidence is not tainted. *See Alderman v. United States*, 394 U.S. 165, 183 (1969). Unlike in other criminal proceedings, the standard of proof in suppression hearings is not proof beyond a reasonable doubt, but a preponderance of the evidence standard. *See United States v. Matlock*, 415 U.S. 164, 177-78 n.14 (1974) (citing *Lego v. Twomey*, 404 U.S. 477, 488-89 (1972)). Thus, the government may prove that evidence is admissible as long as most of its evidence is credible, even though the testimony of some of its officers may be somewhat suspicious.

69. *See Greene, supra* note 64, at 4.

70. *See id.*

Given the scope of the problem with police perjury and misconduct in Los Angeles, it is time to consider changes in how judges handle such matters. Judges no longer have the luxury to assume that someone else, such as the prosecutor, will follow through with investigations of police perjury and misconduct. A mandatory reporting requirement, while not perfect, is one such option. At minimum, it would steer judges from the course of least resistance, i.e., ignoring the police misconduct and hoping that others in the future will not be fooled by the officer's misrepresentations.

B. Recommendation #30A: Using Contempt of Court to Combat Perjury or False Statements

Professor Chemerinsky also suggests that judges can, in extreme cases, use their contempt powers to punish officers who make intentional misrepresentations to the court. There were two bases for that suggestion. First, a California appellate court in *People v. Truer*⁷¹ expressly acknowledged the power of judges to use their contempt powers to punish perjury.⁷² Second, in courts outside California, such as those in Arizona, judges have been active in using contempt as a way to deter and punish perjury.

It was no surprise that some judges immediately reacted negatively to this proposal.⁷³ Because of the procedural difficulties in issuing an effective contempt order, judges are generally reluctant to use their contempt powers. For example, in a recent case, a superior court judge held a lawyer in contempt for "yelling at the judge in front of the jury in a loud, rude, hostile and disrespectful tone of voice."⁷⁴ Even though the judge had warned counsel and the con-

71. 168 Cal. App. 3d 437, 443, 214 Cal. Rptr. 869, 872-73 (1985).

72. *See id.* at 442-43, 214 Cal. Rptr. at 872-73. Indeed, one of the reasons the *Truer* court held that contempt is a remedy for police perjury is that it will decrease the pressure on courts to use the exclusionary rule to punish police misconduct. If contempt is eliminated as an option by the courts, as well as application of the exclusionary rule, there is even less disincentive for officers to lie. *See id.*; *see also* *People v. Barry*, 153 Cal. App. 2d 193, 200, 314 P.2d 531, 535 (1957) (discussing that even if a defendant can be prosecuted civilly or criminally for perjury, contempt sanctions may still apply).

73. *See* Greene, *supra* note 64, at 1.

74. *Boysaw v. Superior Court*, 23 Cal. 4th 215, 217, 999 P.2d 748, 750, 96 Cal. Rptr. 2d 531, 532-33 (2000) (emphasis omitted).

temptuous acts were committed in the court's presence, the court's contempt order was reversed because it did not specifically state that the petitioner was warned that the tone of voice he was using was objectionable.⁷⁵ Thus, the technical procedural requirements for imposing contempt may make it a less feasible tool for dealing with witness misconduct or perjury.

Nonetheless, contempt is a lawful sanction for judges to use when witnesses, including police officers, affront the dignity of the courtroom by lying to the judge or presenting false evidence.⁷⁶ In fact, contempt has many advantages over other sanctions. Its effects are felt immediately, the judge has control over the sanctions that are imposed, there will be a clear record of the offending officer's behavior, the media is more likely to report the misconduct, the contempt sanction can be used to impeach the officer's credibility in the future, and the sanction serves as a strong deterrent to others involved in the case.

Moreover, contrary to the suggestion of one judge during the Symposium, issuing a contempt sanction does not impede that particular judge's ability, or that of others in the same court, to decide future cases involving law enforcement. There is no rule that requires the court to recuse itself because it has held a witness in contempt. Such a rule would be highly counterproductive. It would, in essence, send a signal to violators that one way to avoid the heightened standards of a court is simply to act in a contumacious manner.

75. *See id.* at 223, 999 P.2d at 753, 96 Cal. Rptr. 2d at 536.

76. There is relatively little case law in California regarding the applicability of the contempt laws to perjury by a witness. However, in other states that have used contempt laws in this manner, courts have emphasized that strict standards apply. As noted by one court, "to punish perjury in the presence of the court as a contempt, there must be added to the essential elements of perjury, under the general law, the further element of obstruction to the court in the performance of its duty." *Hicks v. Stigler*, 323 N.W.2d 262, 263 (Iowa Ct. App. 1982) (quoting *People v. Koniecki*, 171 N.E.2d 666, 668-69 (Ill. App. Ct. 1961)); *see also Emanuel v. State*, 601 So. 2d 1273, 1274-76 (Fla. Dist. Ct. App. 1992) (expressing that the preferred procedure for dealing with lying witnesses is a separate perjury charge, not contempt). The strongest case for imposing contempt is where the falsity of the witness's testimony to the court is proven by the contemnor's own contradictory statements to the court. *See People v. LaRosa*, 556 N.E.2d 611, 612-13 (Ill. App. Ct. 1990).

Each witness and each case must be evaluated individually. Therefore, a prior ruling that a witness has lied need not disqualify the court from hearing other matters involving other police officers.

While contempt may be viewed as an extreme measure in dealing with witness credibility issues, the problem with police perjury and fabrication of evidence is a severe enough problem to call for strong measures. Judges should not automatically discount this alternative merely because the Bench has not previously employed it.

C. Recommendation #31: Limit Peremptory Challenges of Judges

Because of the concern with judicial independence, Professor Chemerinsky recommends limiting the ability of the District Attorney's Office to strike judges from cases through their peremptory challenges under section 170.6 of the California Code of Civil Procedure.⁷⁷ This provision permits both the defense and prosecution to file an affidavit to move to disqualify a judge that they believe would not be impartial. While either side has the opportunity to file such an affidavit in any individual case, in the long term, the power of the affidavit works to the benefit of prosecutors. By repeatedly filing affidavits against a judge and disqualifying him or her from criminal proceedings, prosecutors can effectively freeze that judge from working on criminal cases. The result is often the judge's reassignment to another court.⁷⁸

By contrast, defense counsel typically exercise less clout over judges because they are not as frequently in the same courtroom. The exercise of an individual affidavit by one defense lawyer against a judge is unlikely to result in the reassignment of that judicial officer. Moreover, defense counsel must worry about which judge the case will be reassigned to when the affidavit is filed.⁷⁹

77. CAL. CIV. PROC. CODE § 170.6 (West 2000).

78. As stated in one recent article, "[j]udges are in a pickle." Rohrlich, *supra* note 2, at A1. "If you called the police liars, they'd 'paper' you [Then,] instead of working on a nice assignment near your home, they—your fellow judges—send you downtown or to juvenile or dependency court, where they send the slugs." *Id.*

79. Given that the reassignment of cases is not random, Public Defender offices are reluctant to use their blanket affidavit power because they fear being assigned to an even less sympathetic court. As a result, it appears that

Professor Chemerinsky has identified an important concern created by prosecutors' unlimited use of peremptory challenges against a single judge, albeit in different cases. He proposes limiting the ability of the District Attorney's Office to use its ability to exclude a judge in criminal cases. However, there are several reasons this proposal is problematic.

First, there are often valid reasons for prosecutors to exercise peremptory challenges, and the public would be ill-served by arbitrarily barring them from doing so. Consider, for example, a judge who was a former police officer and still maintains strong ties with law enforcement. It would not be unreasonable for prosecutors to want to avoid that judge when prosecuting law enforcement officers for police corruption and misconduct. Ironically, by limiting the number of times prosecutors could challenge a judge, this new proposal would make it more difficult to criminally prosecute culpable police officers.

Second, the proposal does not suggest how many challenges, over what time period, would satisfy both prosecutors' interests in securing a fair judge and yet not undercut the defense power to obtain the same. Clearly, any number would be arbitrary. It would,

therefore, arbitrarily allow some cases to be tried before a judge who is perceived as biased and others to be spared.

Third, the proposal assumes that prosecutors could not otherwise put pressure on judges, even absent their affidavit power. Under the current structure of the courts, presiding and supervising judges assign judges to their courts. The presiding judge can take a "wait and see" approach to some judges because they know that the parties themselves retain the affidavit power to disqualify the judge. If their affidavit power is limited, prosecutors may be encouraged to lobby more vociferously for or against the assignment of a particular judge to their courthouse because the prosecutors will not be in a position to evaluate the judge's impartiality on a case-by-case basis.

In general, I support the independence of judges. Accordingly, I am not a strong supporter of the affidavit system. I would strongly

judges are generally more concerned about affidavits from the prosecutor's offices, than those from defense counsel. *See id.*

prefer that California courts adopt the federal model by which a judge cannot be removed from a case unless there is a showing of actual bias.⁸⁰ However, I am not convinced that even the pressing need to address police corruption makes arbitrarily changing the number of times prosecutors can use their affidavit power a prudent and effective move.

*D. Recommendation #32: Judges Must Take Seriously Their
Responsibility for Ensuring that there is a True,
Factual Basis for a Guilty Plea*

Perhaps the single most important proposal offered by Professor Chemerinsky is that California judges take seriously their responsibility for ensuring true, factual bases for guilty pleas entered before them. This proposal is also the easiest to institute. One of the cases under review in the Rampart scandal serves as a prime illustration of the need for this reform.⁸¹

Raul Alfredo Munoz and Danny Banuelos were charged with assault upon a peace officer.⁸² In 1996, LAPD Officer Michael Buchanan charged that Munoz, a member of a local gang, struck him with his truck as he was engaged in a gang sweep. According to Buchanan, the truck was traveling about twenty-five miles per hour down an alley when he was hit on his left knee, causing him to roll over and strike his head. The truck then headed for his partner, Officer Brian Liddy, who had to sidestep to avoid being hit by the open passenger door.

After the preliminary hearing, both Munoz and Banuelos agreed to plead guilty, pursuant to a plea offer from the Los Angeles District

80. See 28 U.S.C. §§ 144, 455 (2000). Under § 144, a party must file a timely recusal motion accompanied by an affidavit that states facts establishing the challenged judge's personal prejudice against the party. See *id.* § 144. Unlike the California system, recusal of the judge is not automatic. Rather, the issue is evaluated by that judge to determine whether it should be referred to another judge for a decision on its merits. See *id.* Section 455 allows for sua sponte recusal when the impartiality of the judge may be reasonably questioned. See *id.* § 455.

81. See *People v. Munoz*, No. BA 135359 (Super. Ct. for the County of L.A. Dec. 17, 1996) (on file with court).

82. See CAL. PENAL CODE § 245(c) (West 2000).

Attorney's Office. The defendants were offered three years of probation, with no more than 365 days in county jail in exchange for their pleas.

At his guilty plea, Munoz was advised of the charge to which he was pleading guilty, asked if his plea was voluntary, advised of his constitutional rights, and advised of the consequences of his plea.⁸³ Neither he nor his codefendant were ever asked to state a factual basis for their plea. In fact, the only mention of a factual basis during the entire plea colloquy were the following remarks by the judge:

THE COURT: All right. Thank you. Okay. Then, gentlemen, let me start with Mr. Munoz, Sir. Sir, to the charge in count 2 that you violated Penal Code Section 245(c), assault on a peace officer, how do you plead to that charge, sir?

DEFENDANT MUNOZ: Guilty.

THE COURT: And to the allegation that in the commission of that offense, you personally used a deadly and dangerous weapon, a motor vehicle, do you admit or deny that allegation?

DEFENDANT MUNOZ: I admit.

THE COURT: Counsel, you join in the waivers, concur in the plea and stipulate to a factual basis?

MR. POWELL:⁸⁴ Yes, Your Honor.

At no time during the plea were the defendants asked to describe their encounter with the police or asked whether the officers' statements at the preliminary hearing were accurate. The court assumed, without probing, that the defendant was pleading guilty because he had committed the offense, and not for any other reason.

As it turns out, there was another reason Munoz was pleading guilty. He pled guilty because he felt he had no choice. Before his sentencing, Munoz sought to withdraw his guilty plea. His lawyer made the following comments to the court before sentencing:

83. See Transcript of Plea at 4-11, *People v. Munoz*, No. BA 135359 (Super. Ct. for the County of L.A. Dec. 17, 1996) (on file with author).

84. Defendant Raul Alfredo Munoz was represented by an alternate public defender. His codefendant was represented by a lawyer of the Los Angeles County Public Defender's Office. See *id.* at 11.

MR. POWELL: Well, your Honor, before we [sentence], when we were here the last time, the defendant wanted to withdraw his plea, and we put it over to this day so I may talk to him about it. And the reason that Mr. Munoz wants to withdraw his plea, and I am making a motion at this point in time, is that, first of all, he feels as though he is factually innocent. That we have information—and this is his position, that we have information that the officer testified at the prelim and lied about the police’s opposition about breaking the windshield, because we have information—we have a fix it ticket that shows the window was broke about two weeks before this incident.

So he feels, for that reason, that the officer lied about that; that he feels as though—and it has always been his contention that he has been innocent all along; that he didn’t try to run down the officers.⁸⁵

The prosecution opposed defendant’s request, calling it “clearly a case of buyer’s remorse.”⁸⁶ The prosecutor claimed that just because the windshield was broken, it did not mean the officer had lied.⁸⁷ Without making further inquiry or asking for more investiga-

85. Transcript of Sentencing at 2-3, *People v. Munoz*, No. BA 135359 (Super. Ct. for the County of L.A. Jan. 7, 1996) (on file with author). Defense counsel also argued that defendant felt coerced and intimidated by his co-defendant to plead guilty after an altercation the two had in court the day before their plea. *See id.* at 3. It appears as if the defendants had been offered a “package-deal.” Under such a deal, both defendants must plead guilty or the prosecution will proceed to trial against both. The California Supreme Court has recognized that “package-deal” plea bargaining, while not impermissible per se, can be coercive under individual circumstances. *See In re Ibarra*, 34 Cal. 3d 277, 283, 66 P.2d 980, 983, 193 Cal. Rptr. 538, 541 (1983). Counsel must be extra diligent in such circumstances to ensure that his or her individual defendant’s interests are being served by entering into the plea. *See id.* at 284, 66 P.2d at 983, 193 Cal. Rptr. at 541.

86. Transcript of Sentencing at 4, *People v. Munoz*, No. BA 135359 (Super. Ct. for the County of L.A. Jan. 7, 1996) (on file with author).

87. This theory would later come back to haunt the prosecution when it criminally charged Officer Buchanan with lying in his report. In defense of the charge, Buchanan made the same claim the prosecution had made in arguing against Munoz’s motion to withdraw his plea—the officer’s report was either mistaken or the broken windshield did not make a difference as to whether the

tion, the judge agreed with the prosecutor and refused to allow Munoz to withdraw his plea. The court then imposed a sentence. Munoz served his time in jail for a crime he did not commit. Long after his plea and sentence, prosecutors learned from their cooperating witness that Munoz had been framed by Officers Buchanan and Liddy.

What is the lesson in all of this? Although there is no guaranty that asking for a specific factual basis will elicit facts undermining the prosecution's case, the procedure provides an additional safeguard for defendants who are being railroaded by the system. One wonders whether if, at the time of the guilty plea, defendant Munoz had been asked specifically about what had occurred in the alley with the police, the revelations regarding the police officers' conduct might have come to light earlier.

Too many state court judges have fallen prey to the practice of routinely skipping over the factual basis when taking a guilty plea. Because a record of the factual basis is only required in negotiated pleas, and there is no set requirement for how a factual basis must be elicited in those cases,⁸⁸ judges tend to pay little attention to the

factual basis for a plea.⁸⁹ At most, there is a perfunctory mention to

officer's testimony was true. See Ann W. O'Neill, *Rampart Testimony Presents 2 Versions of 1996 Gang Sweep*, L.A. TIMES, Oct. 24, 2000, at B3.

88. See *People v. Wilkerson*, 6 Cal. App. 4th 1571, 1576, 8 Cal. Rptr. 2d 392, 395 (1992) ("The extent of the inquiry must be left to the discretion of the trial court, but it should develop the factual basis on the record.").

89. Some judges are even under the misguided assumption that if the parties have agreed to a plea, the judge is required to accept the plea bargain, regardless of whether there is a factual basis for the conviction. In *People v. West*, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970), the California Supreme Court upheld the use of plea bargaining and held that it was error for judges to summarily reject plea bargains, even if they include crimes that are not "necessarily included offenses." See *id.* at 613, 477 P.2d at 421, 91 Cal. Rptr. at 397. *West* does not stand for the principle, however, that judges must accept any guilty plea, as long as it is agreed upon by the parties. It also does not reject the notion that there should be a factual basis for a plea. Rather, it emphasizes that plea bargaining should be used to accurately portray a defendant's criminal conduct and that plea bargaining may help to accomplish this result. By proposing that judges inquire into the factual basis of a plea, I do not seek to undermine the practice of plea bargaining. However, the extra pro-

a stipulation between the parties that such a factual basis exists.

Yet, there are courts that have been concerned about the possibility that innocent people might be pleading guilty to crimes they did not commit. For example, it is much more typical in federal court for the judge to conduct a searching inquiry into whether there is a factual basis for a plea. Not only do federal judges routinely ask for a detailed factual basis, but they often do it in a manner by which they can judge whether a defendant is pleading guilty because he or she committed a crime or because of external pressures.⁹⁰

One of the most effective ways to solicit the factual basis for a plea is by simply asking the defendant, "What did you do?"⁹¹ If the defendant, without coaching, is unable to articulate facts that constitute a crime, the plea is rejected and the case is assigned for trial. Giving the defendant an opportunity to speak also signals to the defendant that he has a chance to tell the judge directly about any problems in the prosecution's accusations.⁹²

cedure may prevent innocent defendants from entering into such bargains because they do not believe the court will listen to their accounts of the charged incidents.

90. In *Henderson v. Morgan*, 426 U.S. 637 (1976), the Supreme Court noted the importance of testing the voluntariness of a plea by having detailed, non-technical discussions with the defendant. Such a discussion occurs both when the defendant is explained the nature of the charges and when there is a determination of whether there is a factual basis for the plea. *See id.* at 646.

91. In *Wilkerson*, the court suggested the following procedure for eliciting the factual basis for a guilty plea: "The trial court should ask the accused to describe the conduct that gave rise to the charge, make specific reference to those portions of the record providing a factual basis for the plea, or elicit information from either counsel." *Wilkerson*, 6 Cal. App. 4th at 1576, Cal. Rptr. 2d at 395; *see also* *People v. Tigner*, 133 Cal. App. 3d 430, 434, 184 Cal. Rptr. 61, 63 (1982) (stating that the trial court failed to make an "on-the-record inquiry as to a factual basis for appellant's pleas"). While it is permissible for the court to rely on stipulated portions of preliminary hearing or grand jury transcripts to determine the factual basis for a guilty plea, *see People v. Watts*, 67 Cal. App. 3d 173, 179-80, 136 Cal. Rptr. 496, 500 (1977), such an approach is less likely to discover situations where defendants are pleading guilty when, in fact, they are innocent.

92. In those situations where the defendant wants to enter a guilty plea, but is unwilling to admit culpability, the court may accept a plea of *nolo contendere* or an Alford plea. *See Watts*, 67 Cal. App. 3d at 180, 136 Cal. Rptr. at 501. The court is not required to interrogate the defendant personally, but "is free to utilize whatever procedure is best for a particular case before it to ensure that the defendant is entering a plea to the proper offense under the facts

Two downsides exist in seeking a more detailed, direct factual basis for a plea. First, pleas become more time-consuming. Second, some defendants, who would rather plead guilty regardless of whether they committed a crime, would now face trials. Neither of these downsides justifies the current system that has led to the unsubstantiated pleas in the Rampart scandal cases.

Criminal proceedings should be expeditious, but not at the price of fair adjudication. The process of rapid-fire guilty pleas may need to change to ensure a higher quality of justice. Given that the guilty plea may be the only time outside of sentencing that the judge has an opportunity to interact with the parties, it would behoove the court to take the time to hear from the defendant.

Additionally, today's criminal justice system places many pressures on defendants to forego their right to trial. For some defendants, it is the cost. For most defendants, it is the extraordinarily harsh punishments, such as life imprisonment under the Three Strikes Law.⁹³ Given the sentencing patterns of the courts, a corollary to recommending that judges take detailed factual bases at guilty pleas would be that they also refrain from routinely giving maximum sentences when defendants exercise their right to trial.⁹⁴ Likewise, the court could enhance the validity of pleas by affording defense counsel sufficient resources and time to prepare an adequate defense for trial.⁹⁵

Finally, judges should carefully examine evidence offered in support of a motion to withdraw a plea. It may not be until after the guilty plea when a defendant is able to obtain the evidence to demonstrate that he or she is being framed. The standard of "good cause"

of the case." *Id.*

93. *See, e.g.,* Rohrlich, *supra* note 2, at A1 (discussing Hobson choice facing defendant Joseph Jones—plead guilty and serve sixteen months for a crime he did not commit or risk being convicted at trial and sentenced to life under the Three Strikes Law).

94. *See* Tamar Toister, *Rampart Hasn't Changed How Criminal Courts Do Business*, L.A. TIMES, Sept. 21, 2000, at B11.

95. A common complaint by defense counsel is that they are often surprised before trial by the last-minute disclosures by prosecutors and law enforcement. *See id.* There is no way of knowing how many defendants, concerned about the impact of last-minute evidence, chose to plead guilty because their lawyers may not be fully prepared at trial.

applied to motions to withdraw guilty pleas⁹⁶ should be interpreted broadly to provide for withdrawal of pleas when there is clear and convincing evidence that the defendant is innocent of the alleged crime.⁹⁷

E. Recommendation #33: Encourage Diversity and Balance in the Selection of Judges and Promote Increased Sensitivity by Judges to the Issue of Police Perjury and Misconduct

Since the Christopher Commission Report, there has been a greater focus on the type of people hired for law enforcement.⁹⁸ People of different race, gender, and life experience bring different perspectives to their work.⁹⁹ For example, detailed studies have indicated that female law enforcement officers are generally more

communicative and skillful at de-escalating potentially violent situations without the use of excessive force.¹⁰⁰

Following revelations of the Rampart scandal, similar suggestions are being made with regard to the court.¹⁰¹ In 1993, a Blue

96. See CAL. PENAL CODE § 1018 (West 2000); *People v. Cruz*, 12 Cal. 3d 562, 566, 526 P.2d 250, 252, 116 Cal. Rptr. 242, 244 (1974) (holding that defendant must demonstrate good cause to withdraw plea).

97. The federal courts typically look at the following factors to determine whether a fair and just reason exists to allow withdrawal of a plea: (1) whether there has been an assertion of legal innocence; (2) the amount of time between the plea and the motion; and (3) whether the government would be prejudiced by withdrawal of the plea. See FED. R. CRIM. P. 32(d) advisory committee's note (1983 Amendment).

98. See INDEPENDENT COMMISSION OF THE LOS ANGELES POLICE DEPARTMENT Ch. 4 (1991) [hereinafter Christopher Commission Report].

99. See Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 141-48 (1997) (discussing that through exercise of discretion, judges perform a representative function).

100. See Christopher Commission Report, *supra* note 98, at 84.

101. The Report of the Commission on the Future of the California Courts states: "Ensuring that those who work within the courts—both judicial officers and other judicial branch personnel—be representative of the populations they serve can have a salutary effect on public confidence in justice." COMM'N OF THE FUTURE OF THE CAL. COURTS, JUSTICE IN THE BALANCE: 2020, at 75 (1993). As the then-Presiding Judge of Los Angeles Superior Court, Robert M. Mallano, stated: "Without an ethnically diverse Bench, there is a height-

Ribbon Report on California's judiciary stated, "[t]he virtues of a culturally diverse court system need no argument. Through its inclusiveness such diversity promotes public trust in justice. Through its diversity such a court system enhances its own cultural competence."¹⁰²

Today, instead of focusing just on the racial and gender breakdown of the court, the question has been raised as to the relative life experiences of judges. The legitimate question has been asked as to whether judges who have spent most of their professional lives as prosecutors are less inclined to be suspicious or critical of law enforcement's work.

The assertion is not that a judge who is a former prosecutor should be precluded from ruling on criminal cases because he or she is necessarily biased. Rather, the issue is whether the sensitivity of judges to police misconduct issues can be enhanced by including, together with judges who have always been in the position of supporting the police, judges who come from a professional background of challenging police actions. Aggressively recruiting lawyers with a broad range of community and professional experiences could be one step toward educating the Bench as to the community's broad concerns with police officers.

It is always a delicate task to suggest that judges be more sensitive. Judges have been notorious about resisting sensitivity training, although it is now a focus at judicial colleges. The immediate negative reaction by the Bench to the suggestion that the court should take some responsibility for the Rampart scandal is the best proof of how the culture of the court must change. One judge issued a public attack because the Chemerinsky Report dared to report that a federal judge took the position that police lying is an open secret in our criminal justice system.¹⁰³

ened perception that the judiciary is not for everybody." *Id.*

102. BLUE RIBBON REPORT ON CALIFORNIA'S JUDICIARY (1993); *see also* JUDICIAL COUNCIL ADVISORY COMM. ON RACIAL & ETHNIC BIAS IN THE COURTS, FINAL REPORT OF THE CALIFORNIA JUDICIAL COUNCIL ADVISORY COMMITTEE ON RACIAL AND ETHNIC BIAS IN THE COURTS 125-38 (1997).

103. Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit stated: "It is an open secret long shared by prosecutors, defense lawyers and judges that perjury is widespread among law enforcement officers." Stuart Taylor, Jr., *For the Record*, AM. LAW., Oct. 1995, at 71. In a let-

Although it may be embarrassing for the judiciary to admit, the facts of the Rampart scandal conclusively indicate that police officers have been getting away with lying on a regular basis. No one is suggesting that judges have consciously conspired with officers to undermine justice, but current practices have undoubtedly contributed to the problem. Either judges have become lax in their evaluation of police officer testimony or law enforcement has become quite astute in evading the critical evaluation of judges.

As one commentator aptly wrote:

Perjury is often accepted because it can be very difficult to determine whether a witness is lying The difficulty is increased when a police officer is the witness The problem is that some officers have learned to describe investigations that conform to constitutional requirements—regardless of the reality of the investigation. Identifying this form of perjury presents the most difficult problems.¹⁰⁴

As some members of law enforcement become more sophisticated at misleading the court, the court must become more sophisticated in detecting such misrepresentations. Alerting judges to the problems with police perjury is an important step in that effort. Including in the rank of judges those persons who, either personally or through their acquaintances, have experienced police abuses adds to the pool of judicial expertise. Moreover, giving those who are not closely allied with the police an opportunity to sit in judgment may assist in the early detection of police perjury and abuse.

There is a temptation for judges to ignore police perjury and misconduct because the evidence in a case otherwise indicates a defendant's guilt.¹⁰⁵ We need to "encourage a much deeper exploration

ter to Los Angeles's local legal newspaper, one Superior Court judge criticized the mere reporting of Judge Kozinski's statement as harmful and unfair to the image of the judiciary. See Fahey, *supra* note 3, at 7.

104. Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1321-22 (1994); see also Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 725 n.175 (1996) (noting that the police "code of silence" makes police perjury difficult to prove, though lawyers and judges know it occurs).

105. See David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455 (1999); Andrew J. McClung, *Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Police Lying*, 32 U.C. DAVIS L.

of the issue of police credibility than presently occurs in our criminal courts.”¹⁰⁶ To do this, “[j]udges who have been giving the wink and nod to questionable police testimony, who have been working with an improper (and frankly illegal) presumption in favor of police witness credibility must change both practice and perspective.”¹⁰⁷ Continuing education of the court, and an influx of judges with varying attitudes and perspectives, can greatly add to this process.

F. Additional Recommendations

1. Taking claims of ineffective assistance of counsel seriously

In his report, Professor Chemerinsky makes a variety of suggested reforms for all participants in the criminal justice system, including prosecutors and defense lawyers. To some extent, the court has a role in enforcing these recommendations as well. For example, without effective assistance of representation, there is little hope that the adversary system will ferret out police perjury. It is therefore imperative that judges critically evaluate claims of ineffective assistance of counsel.

Although the constitutional standards for reversing convictions on the basis of ineffective assistance of counsel are extremely high,¹⁰⁸ a judge need not stand idly by when it is apparent that coun-

REV. 389, 404 (1999); see also Gail Cox, *Larry Fidler: LA's Rampart Judge Is Strictly Business*, RECORDER, Mar. 7, 2000, at 5 (stating Judge Fidler's reaction to the Rampart scandal was problematic because "clearly guilty people in totally unrelated future cases are going to walk free because jurors no longer feel they can trust the word of police officers").

106. Dorfman, *supra* note 105, at 464.

107. *Id.* at 465.

108. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). One recent case demonstrates how difficult it is for defendants to overturn a conviction based upon a challenge of ineffective assistance of counsel. On appeal, Calvin J. Burdine, a defendant in a capital murder trial in Texas, alleged that he was denied effective counsel because his lawyer slept through trial. In a divided opinion, the Fifth Circuit affirmed the conviction because "it is impossible to determine . . . that counsel's sleeping" actually hurt Burdine's case. Henry Weinstein, *Judges Reject Appeal in "Sleeping Attorney" Case*, L.A. TIMES, Oct. 28, 2000, at A1. For a comment highly critical of the *Strickland* standard, see Richard L. Gabriel, Comment, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259 (1986).

sel is unprepared for a criminal proceeding. It is sometimes apparent to a judge well before trial or a plea that counsel has failed to investigate a matter, has not prepared for trial, or has misadvised a client.¹⁰⁹ Judges cannot afford to treat as “sour grapes” a defendant’s complaint about his or her counsel. Given the breakdown of the criminal justice system in the Rampart scandal, it is imperative that the court fully investigate any claim that counsel is failing to provide effective representation.

2. Supervision of prosecution discovery and *Brady* obligations

Similarly, the Chemerinsky Report recommends that prosecutors take more seriously their obligations to provide exculpatory materials to the defense.¹¹⁰ Once again, while the primary responsibility for disclosure rests with the prosecutors, it is the responsibility of the court to monitor the prosecution’s compliance. Game playing during discovery, such as providing the names of additional police witnesses at the last minute when the defense does not have sufficient time to investigate their background, should not be tolerated. Neither can courts tolerate noncompliance with the requirements of *Pitchess v. Superior Court*¹¹¹ and California Evidence Code section 1043.¹¹² Recent events have demonstrated that the City Attorney’s Office and the LAPD have been extremely reluctant to provide full access to personnel records of problem officers.¹¹³ Ultimately, it is the court’s responsibility to ensure that all participants in the criminal justice system fulfill their obligations to provide defendants with fair pro-

109. See, e.g., *In re Vargas*, 82 Cal. App. 4th 250, 257-63 (2000) (discussing that failure to prepare a case constituted ineffective assistance of counsel); see also *In re Ibarra*, 34 Cal. 3d 277, 283-84, 666 P.2d 980, 983, 193 Cal. Rptr. 538, 541 (1983) (warning that counsel must completely advise a client before agreeing to a plea bargain on behalf of that client).

110. See *Giglio v. United States*, 405 U.S. 150, 154 (1972) (stating that evidence that may impeach the prosecution’s witnesses must be disclosed); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (stating that evidence demonstrating defendant’s innocence or lesser culpability for a crime must be revealed).

111. 11 Cal. 3d 531, 522 P.2d 305, 113 Cal. Rptr. 897 (1974).

112. CAL. EVID. CODE § 1043 (West 2000) (codifying the rules under *Pitchess* for disclosure of peace officer personnel files or records).

113. See Tony Ortega, *Disorder in the Court*, NEW TIMES, Oct. 12, 2000, at 1.

ceedings.

V. CONCLUSION

“What really gets to me is the possibility that one of the culprits in the Rampart Scandal, the judicial system, will get away unscathed and uncorrected I propose a simple test to see how blameless the court really is: Who is ultimately responsible for the discretion to determine what is or is not evidence, what evidence is admissible, relevant or prejudicial and what juries may see, hear or consider when deliberating?”¹¹⁴

“Trust is a social good to be protected just as much as the air we breathe or the water we drink. When it is damaged, the community as a whole suffers; and when it is destroyed, societies falter and collapse.”¹¹⁵

As the public critically evaluates the causes of the Rampart scandal, it is inevitable that part of the blame—justifiably or not—will focus on the judiciary. Regardless of how responsibility is apportioned, there is no question that judicial reforms can and should be instituted to prevent a recurrence of Rampart’s injustices.

Recognizing this fact, the court is already instituting some changes. For example, Supervising Judge Larry Fidler is holding hearings on whether prosecutors are complying with their ethical obligations under *Brady v. Maryland*¹¹⁶ to provide all exculpatory evidence to the defense. He and his colleagues are challenging whether current laws guarding police personnel files need to be reexamined to

114. Dan Mariscal, *Fault in LAPD Rampart Scandal*, L.A. TIMES, Apr. 2, 2000, at M4.

115. David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 460 n.17 (1999) (quoting SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 26-27 (1978)). A recent study of levels of trust in the judiciary indicated that only thirty-two percent of those surveyed were extremely or very confident in the work of judges. By comparison, forty-seven percent were very confident in the work of local police. While this study was conducted on a national level and not specifically in California, it indicates that judges throughout the nation must work hard for citizens’ trust. See AM. BAR ASS’N, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 50 (1999).

116. 373 U.S. 83 (1963).

ensure defense access to materials that may impeach police credibility. Judges are precluding prosecution witnesses when there has not been timely compliance with discovery orders. Information about problem officers is being unsealed.¹¹⁷

Most importantly, the court is earnestly reevaluating the convictions of those whose cases may have been tainted. Approximately 100 cases have been reversed.¹¹⁸ Certainly, the judges in those cases have seen firsthand how important it is that they take every possible and lawful step to ensure that only the guilty are convicted.

Hopefully, justices of the California Courts of Appeal and California Supreme Court will also take note of the issues raised by the Rampart scandal. They too bear some responsibility. As appellate judges make it more difficult for defendants to challenge their convictions, there is less incentive for those in the criminal justice system to hold police officers and prosecutors to exacting standards. Defendants' rights disappear into the world of "harmless error."¹¹⁹ If meaningful reform is to take place, appellate judges must carefully examine records to determine if there is factual basis for guilty pleas. They must also take seriously claims of police misconduct and ineffective assistance of counsel.

The judges of California did not intentionally cause the Rampart scandal.¹²⁰ They can do something, however, to prevent its recurrence. By being open to changes in everything from court operations

117. See Anne La Jeunesse, *Judge Lifts Seal on Material in Rampart Case*, L.A. DAILY J., Oct. 11, 2000, at 1.

118. See Ann W. O'Neill, *Testimony Presents 2 Versions of 1996 Gang Sweep*, L.A. TIMES, Oct. 24, 2000, at B3.

119. See, e.g., *People v. Mickens*, 38 Cal. App. 4th 1557, 1560-62, 45 Cal. Rptr. 2d 633, 635-36 (1995) (finding that the judge did not solicit a factual basis for defendant's guilty plea, but that defense counsel's stipulation, together with the probation report, was adequate to establish the factual basis).

120. None of the criticisms in this Article are intended as personal attacks on any given judge. Rather, the Rampart scandal has revealed that we have systematic problems. We have encouraged a destructive passivity by our judges, encouraging them to look the other way from police misconduct and allowing them to use procedural shortcuts to survive the overwhelming caseload with which they are faced. In essence, we have created bad habits and are just beginning to realize the enormous consequences of our approach.

to judicial attitudes, the court can support prudent reforms that may prevent future abuses. All it takes is the judicial will to change.