

PANEL II: THE ACCUSED AS VICTIM—THE CASE OF CRIMINAL LAW

VICTIMS AND THE EXCLUSIONARY RULE

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I was at San Quentin on the night of April 20-21, 1992, for the execution of Robert Alton Harris¹—the first execution in California in twenty-five years. As the chief law enforcement officer of the State of California, I am responsible for notifying the warden when all legal checks have been made and no impediments remain for a scheduled execution. Enforcing a death-penalty sentence is not a fun thing to do, but it must be done. That night we made history because we went up four times to the United States Supreme Court in six hours, confronting four different stays offered by a total of eleven different federal judges.²

We had anticipated every claim to be made against the right of the State to carry out that execution by completing anticipatory briefs. We filed them with the United States Supreme Court, the Court of Appeals for the Ninth Circuit, the California Supreme Court, and the relevant district court. We logged them (we did not file them, because there was nothing for us to respond to at the time); then, as more than one-thousand documents flowed in over the last week (and this was over an Easter weekend), we would call up the clerk of the relevant court and tell him to activate the appropriate brief.

On the occasion of the second stay, I sought out the mother of one of the fifteen-year-old boys who had been brutally murdered more than thirteen years before by Harris. I explained

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1. Harris abducted two boys from a restaurant in San Diego, murdered them, and then finished the hamburgers they had been eating. *See California v. Harris*, 623 P.2d 240 (Cal. 1981), *cert. denied*, 454 U.S. 882 (1981).

2. *See Harris v. Vasquez*, 503 U.S. 1000 (1992) (vacating one stay); *Gomez v. United States Dist. Court*, 503 U.S. 653 (1992) (vacating two stays); *Vasquez v. Harris*, 503 U.S. 1000 (1992) (vacating the final stay and ordering that no further stays be granted except on the order of the Supreme Court).

our strategy in responding to the second stay order and that we expected to be successful. She took a deep breath and said to me, "Oh, I get it: it's like a chess game." I have dedicated my professional life to the writing and enforcement of the law, and that remark hit me like a cold blast of wind. My only reply was, "It should not be a game at all, it should be about justice." That event summarizes where we are in the criminal justice system on the whole question of victimology.

Are we, in fact, involved in the pursuit of justice? Or are we sidetracked with certain types of gamesmanship? In Los Angeles today, and throughout California, there are many people who truly believe that the police routinely victimize citizens accused of crime—by planting evidence, breaking into homes or offices, using unnecessary force, or actively discriminating on the basis of race or ethnicity. The Rodney King experience and the Mark Fuhrman tapes come swiftly to the minds of the pundits who explore the question of police misconduct in our criminal justice system.³ Even as long ago as 1971, William Ryan's book *Blaming the Victim* portrayed the urban rioters of the late 1960s as oppressed and impatient idealists who merely engaged in a little property damage and portrayed the police and other repressive forces of law and order as truly violent to a homicidal degree.⁴

Although no one condones police misconduct (my office acts in many ways to root it out throughout the State), we ought to consider the rest of society that regularly is victimized. The perpetrators' lawyers seek every opportunity to make the issue at trial become police conduct, not the guilt or innocence of the accused.⁵ Over the past thirty years, the criminal defense bar and the courts have shaped our criminal procedure and courtroom practice, in the face of congressional legislative acquiescence and abdication, in such a way that criminal defendants can

3. See, e.g., ALAN M. DERSHOWITZ, REASONABLE DOUBTS 55 (1996) ("Every objective study of police perjury has come to the conclusion that police perjury is widespread and condoned.") (citing Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311 (1994); Stanley Z. Fisher, "Just the Facts, Ma'am": *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1 (1993)). Thomas Sowell has dubbed these all-knowing pundits as "our anointed ones." THOMAS SOWELL, *The Vision of the Anointed: the Left and Social Policy*, NAT'L REV., July 31, 1995, at 47.

4. See WILLIAM RYAN, *BLAMING THE VICTIM* (1971).

5. See ALAN M. DERSHOWITZ, *THE BEST DEFENSE* xiv (1983) ("In representing criminal defendants—especially guilty ones—it is often necessary to take the offensive against the government: to put the government on trial for its misconduct.").

scapegoat the police and go free,⁶ as Judge Cardozo put it, "because the constable has blundered."⁷

We have apparently forgotten Adam Smith's admonition that mercy to the guilty is cruelty to the innocent.⁸ In this regard, we must remind ourselves that we can adopt many different perspectives from which to view the criminal justice system. For example, we can choose the viewpoint of the accused, the prosecutor, the judge, the defense attorney, or the police investigator. Remarkable clarity is achieved when we assume the perspective of the crime victim. After all, the only reason for a criminal justice system is to protect the law-abiding from law-breaking predators.

A criminal justice system that contorts itself to the extreme in a purported effort "to protect the accused," with the result that the innocent victim is denied justice (which includes retribution), is a system which has lost its sight and soul and forfeited its right to be called "just" or justice. Extending the definition of victim so broadly that it includes perpetrators devalues the plight of those who truly are victimized. I urge you not to forget the true victims of crime: those who have been violently assaulted by others, and the families of victims. On their behalf, it is time to debate whether to retain, to modify, or to codify the exclusionary rule.

The exclusionary rule is used to ban most courtroom use of unlawfully-seized evidence. The Supreme Court originally adopted the exclusionary rule for the federal criminal prosecutions in 1914, in *Weeks v. United States*.⁹ In 1961, the Court extended it to the States in *Mapp v. Ohio*.¹⁰ I believe it is clear, however, that the rule is not constitutionally compelled. As the Court argued in *United States v. Leon*,¹¹ the rule is strictly "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a per-

6. See *Miranda v. Arizona*, 384 U.S. 436 (overturning a conviction because the defendant was not informed of his rights prior to questioning); *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying the exclusionary rule to the States).

7. *People v. Defoe*, 150 N.E. 585, 587 (N.Y. 1926), *cert. denied*, 270 U.S. 637 (1926).

8. See THOMAS SOWELL, *THE VISION OF THE ANOINTED* 107 (1995) (quoting ADAM SMITH, *THEORY OF MORAL SENTIMENT* 170 (Liberty Classics 1976)).

9. 232 U.S. 383 (1914).

10. 367 U.S. 643 (1961).

11. 468 U.S. 897 (1984).

sonal constitutional right of the party aggrieved."¹² As the *Leon* Court explained, the Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands,¹³ and an examination of the Amendment's origin and purposes makes clear that the use of fruits of an unlawful search or seizure works no new Fourth Amendment wrong.¹⁴ In *Leon*, the Court adopted an exception to the exclusionary rule for any good-faith or reasonable mistake by an officer who obtains evidence in violation of the Fourth Amendment. This Court extended this principle in *Illinois v. Krull*,¹⁵ in which the police reasonably relied on a statute authorizing them to conduct a search.

If the exclusionary rule is not constitutionally compelled, it undoubtedly is within the power of Congress to alter it. More than a decade ago, as a member of Congress serving on the Judiciary Committee, I repeatedly offered bills to create a statutory good-faith exception to the exclusionary rule in both warrant and warrantless cases.¹⁶ Today, the options before the Congress include proposals to codify the good-faith exception to exclusionary rule or to abolish the rule altogether.¹⁷

I submit, then, that Congress may alter what is strictly a "judicially created remedy," as the *Leon* court put it, "designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."¹⁸ The early development of the exclusionary rule left some doubt as to the basis of the rule. In the *Weeks* decision, the Court appeared to rest the rule squarely on Fourth

12. *Leon*, 468 U.S. at 906 (citing *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

13. See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

14. See *Leon*, 468 U.S. at 906-08.

15. 480 U.S. 340 (1987).

16. See H.R. 5210, 100th Cong., 2nd Sess. (1988); H.R. 5484, 99th Cong., 2nd Sess. (1986).

17. See, e.g., Kenneth J. Cooper, *House Substitutes Block Grants for Police Hiring Funds*, WASH. POST, Feb. 15, 1995, at A1 (reporting passage in the House of Representatives of a bill to relax the exclusionary rule); Mimi Hall, *Crime Fight No Contest in House*, USA TODAY, Feb. 15, 1995, at 6A (same); Ann O'Hanlon, *The Contract with America: Where it Stands*, WASH. POST, Feb. 13, 1995, at A19 (reporting that an exclusionary-rule reform bill has passed the House); *A Move to Ease Limits on Searches: House Approves 'Good Faith' Raids*, MIAMI HERALD, Feb. 9, 1995, at 1A (same).

18. *Leon*, 468 U.S. at 906.

Amendment grounds, holding it was necessary to give "force and effect" to the Amendment.¹⁹ This reasoning found its genesis in a decision issued three decades earlier, *Boyd v. United States*,²⁰ in which the Court implied that exclusion under the Fifth Amendment²¹ may be the correct response to a Fourth Amendment violation, as, under this rationale, illegally-obtained evidence essentially compels an accused to give evidence against himself.²² In *Olmstead v. United States*,²³ a 1928 decision concerning illegally-obtained wiretap information, the Court was disabused of the Fifth Amendment rationale, but Justices Holmes and Brandeis, in their dissents, offered a new nonconstitutional ground for the rule—the judicial integrity rationale.²⁴ Under this reasoning, the Court must protect itself from contamination; the government should not foster the criminal acts of its agents and thereby ratify the violation of the Fourth Amendment.

In *Elkins v. United States*²⁵ and *Mapp v. Ohio*,²⁶ the Court appeared to mix the constitutional, judicial-integrity, and deterrence rationales in a somewhat confounding manner. Since *Mapp*, however, the Court has emphasized the deterrent rationale and seems to have abandoned all pretense of a constitutional foundation for the exclusionary rule. Scholars keep looking for such a foundation. For example, Duke University Professor Ruth Grant wrote in the *Harvard Journal of Law and Public Policy* in 1991 that a constitutional foundation for the rule exists in the separation-of-powers doctrine.²⁷ However, one thing is certain. Unlike the Fifth Amendment, nothing in the text of the Fourth Amendment compels the prohibition of the use of illegally-seized evidence.²⁸ Certainly the Framers of the Constitution did

19. *Weeks v. United States*, 232 U.S. 383, 392 (1914).

20. 116 U.S. 616 (1886).

21. See U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . .").

22. See *Boyd*, 116 U.S. at 630.

23. 277 U.S. 438 (1928).

24. See *id.* at 469-71 (Holmes, J., dissenting); *id.* at 482-85 (Brandeis, J., dissenting).

25. 364 U.S. 206 (1960).

26. 367 U.S. 643 (1961).

27. See Ruth W. Grant, *The Exclusionary Rule and the Meaning of Separation of Powers*, 14 HARV. J.L. & PUB. POL'Y 173, 175 (1991).

28. Compare U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.") with U.S. CONST. amend. V ("No person shall be held to

not contemplate, nor did the common law of 1789 mandate, the suppression of unlawfully-obtained evidence. Undoubtedly such evidence, which is in any case highly-reliable evidence, was admissible as to the guilt or innocence of the accused.

Thus as a society, we need now to examine whether the rule serves any of its purported purposes, and I suggest we examine the rule from the perspective of the victim of the crime that was committed. Some, such as Judge Henry Friendly, have suggested that the exclusionary rule supplies a benefit "wholly disproportionate to the wrong suffered" by the guilty because even a minor error by the police can lead to the suppression of evidence and the inability to prosecute a clearly-guilty offender.²⁹

As Professor Akhil Reed Amar reminds us, this is a rule "rejected by the Founders, a rule whose principal effect is to protect guilty criminals."³⁰ It is not used to protect the innocent. "Make no mistake," he continues, "when it applies, the exclusionary rule helps the guilty get off, and go free—free to prey on innocent citizens who are in important ways thereby made less 'secure in their persons, houses, papers, and effects.'"³¹ In sum, the unbridled exclusionary rule appears to be a remedy excessive to the wrong. It rewards the guilty and imposes a disproportionate sanction on society. Society at large must cope with the knowledge and reality that the perpetrators of crime may go free, depending on indistinct and intangible legalities to be debated in a courtroom at some time in the future. Defense attorneys are obliged to raise suppression motions at virtually every stage, in every case involving physical evidence, if for no other reason than to avoid subsequent claims of ineffective assistance of counsel.

The criminal justice system was set up to protect the innocent from the predators. If, in our specific approach to protecting the accused, we go so far that the innocent are put at risk, have we undermined the credibility of the system itself? What has been

answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury [except for various military cases]; nor shall any person be subject to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself . . .").

29. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 951 (1965).

30. Akhil Reed Amar, *Testimony Before the Senate Judiciary Comm. *2*, available in Westlaw, Database USTESTIMONY, 1995 WL 96022 (F.D.C.H. Mar. 7, 1995).

31. *Id.* (quoting U.S. CONST. amend. IV).

wrought by the past application of the exclusionary rule may be greatly tempered by the application of a good-faith exception. It make sense. If deterrence is the reason for the rule, then a good-faith exception makes absolute sense.

The impact of the judicially-oriented metamorphosis from crime perpetrator to society's victim is probably felt nowhere greater than in federal habeas corpus death penalty cases.³² It is extremely difficult to explain to individuals thirteen and fifteen years after a crime has taken place, and a judgment of guilt and a sentence of death has been rendered, why there is no finality. Yet it is not the accused but the convicted murderer who assumes the position of victim in most habeas cases.

Prisoner lawsuits also assume that those who are imprisoned are the victims as opposed to the perpetrators.³³ Some insist that it is the prison's mission to punish prisoners and hence to maintain and reinforce an imbalance of power, and that the judiciary is properly concerned with providing a redress to that imbalance of power. This is nonsense.

There ought to be an imbalance of power between those who have been convicted of crimes and those who are in charge of the system. To suggest that the federal courts are there to redress that imbalance is victimology run amuck. It is just another example of how we have to address this problem directly, not to get rid of our constitutional protections, but to right our system so that it is not perceived as a system which revictimizes the true victims of crime.

32. See generally DANIEL E. LUNGREN & MARK L. KROTOSKI, *Retrospective Forum: The Robert Alton Harris Execution: Public Policy Lessons from the Robert Alton Harris Case*, 40 UCLA L. REV. 295, 298-99 (1992) (stating that Harris filed ten state and six federal habeas corpus petitions, requiring his victims' families to wait 4,794 days for the finalization of the jury's original verdict); Joseph M. Ditkoff, Recent Development, *The Ever More Complicated "Actual Innocence" Gateway to Habeas Review: Schlup v. Delo*, 18 HARV. J.L. & PUB. POL'Y 889, 903 (1995) (arguing that habeas corpus review of capital convictions has become "confusing and inequitable").

33. See, e.g., *Merit v. Faulkner*, 823 F.2d 1150 (7th Cir. 1987) (Posner, J., dissenting) ("frivolous cases are the norm in prisoner civil litigation"); *In re Green*, 669 F.2d 779, 781-82 (D.C. Cir. 1981) (per curiam) (recording that an inmate had filed more than 600 complaints, most of which were dismissed); Mary Van Vort, *Controlling and Deterring Frivolous In Forma Pauperis Complaints*, 55 FORDHAM L. REV. 1165, 1165-66 (1987) (arguing that the majority of prisoners' pro se suits lack merit).

