# CRIMINAL PROCEDURE: MOVING FROM THE ACCUSED AS VICTIM TO THE ACCUSED AS RESPONSIBLE PARTY

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During the 1960s, the Supreme Court substantially multiplied the number of procedural rules that help to defeat the truth-finding function of the criminal justice system.[1] Some scholars, such as Professor Peter Arenella, support many of these rules;[2] and many commentators would argue that these rules do not significantly affect the system's ability to ascertain truth.[3] Whatever the actual effect of these rules, however, it is hard to deny that they reflect a philosophical view that subordinates the ascertainment of truth to various other goals.

A primary example of such rules, of course, is the search-and-seizure exclusionary rule, which typically operates to suppress reliable evidence.[4] Other examples include rules excluding evidence obtained from violations of the prompt-arraignment requirement[5] and from illegally-conducted lineups;[6] *Miranda v. Arizona*,[7] which takes aim not at coercive police tactics but at the institution of police interrogation itself; the rule forbidding comment on the accused's failure to testify;[8] automatic reversal

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1. *See generally* Joseph D. Grano, *The Changed and Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice's Office of Legal Policy*, 22 U. MICH. J.L. REF. 395 (1989); Office of Legal Policy, U.S. Dep't of Justice, Truth in Criminal Justice Series (1986-89), *reprinted in* 22 U. MICH. J.L. REF. 437-1121 (1989).

2. *See* Peter Arenella, *Demystifying The Abuse Excuse: Is There One?*, 19 HARV. J.L. & PUB. POL'Y 703 (1996).

3. *See, e.g.*, Stephen J. Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996) (supporting the *Miranda* rule for its effective restraint of police power and negligible effect on effective law enforcement). *But see* Paul G. Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996) (reviewing empirical data suggesting that the *Miranda* rule constitutes a substantial burden on effective law enforcement).

4. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

5. *See* Mallory v. United States, 354 U.S. 449 (1957).

6. *See* Gilbert v. California, 388 U.S. 263 (1967).

7. 384 U.S. 436 (1966).

8. *See* United States v. Wade, 388 U.S. 218 (1967); Griffin v. California, 380 U.S. 609

rules that reject the notion of harmless error (although the Warren Court did not do much damage on this point); and the greatly expanded writ of habeas corpus, which not only denigrates finality but also reinforces the notion that even after the direct appellate process is over, it is more important to correct the state's mistakes than to preserve the conviction of a guilty defendant.[9]

How was it possible that these truth-defeating rules gained such widespread support from the judiciary and from the judiciary's many academic supporters? One factor that may have made it easier was the perception of the accused as a victim rather than as a responsible moral agent. If we can bring ourselves to see a guilty defendant as the victim of an oppressive society, we can acquiesce more readily in his acquittal; we may even be guilty of perversely applauding when, like David vanquishing Goliath,[10] he beats the system.

It is not a coincidence that most of these truth-defeating rules of criminal procedure developed in the 1960s during the civil rights revolution. The judges looked at the deserving plaintiffs in the civil rights courtrooms, and they looked at defendants whom they should have perceived as undeserving in the criminal courtrooms, and they made the monumental mistake of thinking that they saw the same people. Although the substantive criminal law during this period refused to recognize new excuses, the rules of criminal procedure increasingly offered the defendant-victim class an end run around the system and at least a sporting chance to avoid conviction.

That the Supreme Court saw the accuseds as victims of economic inequality, racism, and police abuse can be gleaned from its cases. In *Escobedo v. Illinois*,[11] which set the stage for *Miranda*, the Court described the defendant as a "22-year-old of Mexican extraction"[12] who was unaware that admitting complicity in the crime was legally as damaging as admitting that he was the

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(1965).

9. *See* Fay v. Noia, 372 U.S. 391 (1963) (holding that federal grounds may be defaulted only by the deliberate decision of the defendant not the raise the issue at trial), *overruled by* Coleman v. Thompson, 501 U.S. 722 (1991); Brown v. Allen, 344 U.S. 443 (1953) (allowing federal judges to issue the writ of habeas corpus if any federal right was violated at trial).

10. *See* 1 *Samuel* 17:19-51.

11. 378 U.S. 478 (1964).

12. *Id.* at 482.

shooter.[13] When the Court looked back on *Escobedo* in *Miranda*, it stated that the entire thrust of the interrogation in *Escobedo* "was to put the defendant in such an emotional state as to impair his capacity for rational judgment."[14] In other words, Escobedo was the victim not only of his background, but also of police who abused him by outwitting him. Escobedo was no match for these skillful interrogators, one of whom even spoke to him in Spanish. The Court left unanalyzed the question why we should have wanted Escobedo to be a match for his interrogators. This question is easy to ignore, of course, if you forget that Escobedo was a murderer and view him instead as a victim of an oppressive state.

In *Miranda*, the Court expounded upon the same themes. The Court expressed concern about the inequality between sophisticated and unsophisticated defendants,[15] and it indicated that the majority of confessions are made by indigent defendants[16]—the persons most often subject to police interrogation.[17] The Court described the potential for compulsion in Ernesto Miranda's case, "where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies."[18] In a companion case, the Court described the defendant, Roy Stewart, as "an indigent Los Angeles Negro who had dropped out of school in the sixth grade."[19] Although the *Miranda* opinion begins on page 439 of volume 384 of the United States Reports, one must wait until page 492 to learn that Miranda was convicted of kidnapping and rape and until page 498 to learn that Stewart was convicted of murder.[20] In its lengthy opinion, the Court provided few details of the crimes in question. Yet the Court devoted several pages early in its opinion to describing in detail all sorts of police abuses,[21] even though the Court admitted that the records in the cases before it did "not evince overt physical coercion or even patent psychological ploys."[22]

Academic commentators were quick to follow the Court's lead

13. *See id.* at 486.
14. Miranda v. Arizona, 384 U.S. 436, 465 (1966).
15. *See id.* at 472.
16. *See id.*
17. *See id.* at 473.
18. *Id.* at 457.
19. *Miranda*, 384 U.S. at 457.
20. *See id.* at 439, 492, 498.
21. *See id.* at 445-55.
22. *Id.* at 457.

in viewing the accused as a victim. It became a frequent lament in the academic literature that defendants typically are no match for their interrogators and that interrogations succeed most often with racial minorities and those from the lowest social and economic groups.[23] Moreover, academics typically exaggerated police improprieties while virtually ignoring the cruelty of so many crimes and the human suffering they cause. Then-Professor (now Dean) Gerald Caplan captured the flavor of the academic writing on criminal procedure in his 1985 article criticizing *Miranda*, when he wrote:

> When commentators make reference to crime control, they usually use such narrow terms as "the police interest" or "law enforcement goals." Unlike the discussion of perceived police abuse, in which passion abounds, the passing references to the possibility of uncaught murderers and rapists are flat. *It is the police rather than the criminals who are treated as aliens.*[24]

This view of the accused as a victim is particularly dangerous because it is not readily cabined. Just as affirmative action policies induce more and more groups to seek to join the preferred categories, the view of the defendant as victim is highly contagious. Left unchallenged, this view threatens to permeate and ultimately to consume our whole system of criminal justice.

The O.J. Simpson case illustrates the risks associated with this view. O.J. Simpson, a prominent and wealthy sports hero, was able to purchase a "dream" defense team. From the very beginning, however, the defense tried to portray O.J. Simpson as a victim. It tried to portray him as a victim first of police incompetence and, second—and this is more sinister—of racism and of a police conspiracy to frame an innocent man.[25] The defense strategy was to cause the jury, the press, and the public to forget

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23. *See, e.g.*, Henry H. Foster, Jr., *Confessions and the Stationhouse Syndrome*, 18 DEPAUL L. REV. 683 (1969); Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826 (1987); Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69 (1989).

24. Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1425 n.47 (1985) (emphasis added).

25. *See, e.g.*, California v. Simpson, No. BA097211, 1995 WL 27397 (Cal. Super. Ct. Oct. 3, 1995) (trial transcript). Professor Alan Dershowitz, one of Simpson's defense attorneys, wrote that "[e]very objective study of police perjury has come to the conclusion that police perjury is widespread and condoned." ALAN M. DERSHOWITZ, REASONABLE DOUBTS 55 (1996) (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)).

the real victims of this gruesome double murder and to substitute in their place O.J. Simpson. Indeed, at times the trial seemed more like the Mark Fuhrman trial than the O.J. Simpson trial.[26]

Regarding victims, some people sympathetic to Mark Fuhrman might be tempted to view him as a product not only of the unspeakable ugliness of our crime-ridden city streets, but also of a criminal justice system that, by its truth-defeating rules, constantly frustrates police efforts to cope with this ugliness. That is, some might be tempted to condone Fuhrman's acts as an unfortunate product of the profound cynicism that such a system breeds in our police officers.[27] Such a portrait, however, depicts Mark Fuhrman as a victim rather than a responsible moral agent; and, in this sense, it does not differ from the view under discussion. Police complaints about our system are essentially valid. Nevertheless, the validity of these complaints cannot justify, excuse, or even mitigate Fuhrman's conduct.

Although eliminating many of the truth-defeating rules is an essential first step in reforming the current system, this step will not cure the sickness that is destroying our criminal justice system. More fundamentally, we may have to reorient our whole way of thinking about the system: its adversarial nature, the role of defense counsel, and the so-called rules of ethics that govern counsel's behavior. The following are tentative suggestions that obviously require further thought regarding their desirability and practicality.

First, perhaps the rules of ethics should require defense counsel to ask the defendant whether he committed the crime. Under the current practice, most defense lawyers do not ask their clients this question. This practice is designed to preserve the option of putting the defendant on the stand, because the ethics rules state that a lawyer should not knowingly offer perjured testimony.[28] This practice of willful ignorance about a client's guilt

26. *See, e.g.*, California v. Simpson, No. BA097211, 1995 WL 530467 (Cal. Super. Ct. Oct. 3, 1995) (trial transcript).

27. *Cf.* DERSHOWITZ, *supra* note 25, at 68 ("Most police perjury is committed by decent cops who honestly believe that a guilty defendant will go free unless they fib about how they gathered the incriminating evidence.").

28. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1995) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1995) ("A lawyer shall not knowingly... offer evidence that the lawyer knows to be

only seems to facilitate the guilty defendant's opportunity to commit perjury and the possibility of defense counsel's complicity.

Second, maybe defense counsel should be required to suggest to the defendant that although he is legally entitled to profess his innocence, the moral thing to do, if he is guilty, may be to admit his guilt and accept responsibility for his actions.[29] Elsewhere I have sketched out an argument that a person who commits a crime may have a moral obligation to confess.[30] For example, imagine that a person commits a crime but someone else is convicted of the crime and is about to be executed. It seems that the guilty person would have a moral obligation to confess to save the innocent person, even though by confessing he would bring harm upon himself. The question is whether it is possible to extend examples like this into a general moral obligation to confess. If so, the next question becomes whether the defense lawyer should have an ethical obligation to address the client's moral well-being, as well as his physical, material, and legal well-being.[31]

Third, perhaps defense counsel should be ethically precluded not just from presenting perjurious testimony but also from offering defenses that counsel knows to be false, even when this can be done without perjured testimony. For example, if Simpson had told his attorneys that he had committed the murders, perhaps they should have been precluded from suggesting to the jury, through cross-examination or honest defense witnesses, the possibility of a frame-up.

Fourth, and more controversially, perhaps defense counsel should be ethically precluded from presenting defenses with less than a scintilla of evidence to support them. O.J. Simpson's defense team made an effort—primarily, though not exclusively, by playing the "race card"—to convince the jury of the implausible possibility that the police framed Simpson. Why should the legal system regard this as ethical and acceptable legal conduct? Even

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false.").

29. *See generally* Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317 (1992) (discussing the importance of confessions in Japan's criminal justice system).

30. *See* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 41-43 (1993).

31. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1995) ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral . . . factors . . . .").

if O.J. Simpson did not admit to his lawyers that he committed the murders, maybe they should have been ethically barred from presenting such a completely implausible defense.

These ideas may seem radical and impossible to implement, but at least they are worthy of thought. Many ethical rules are essentially self-enforcing. For example, many attorneys comply with the rule that prohibits putting a client on the stand to commit perjury. Even if direct enforcement of these suggested rules might prove difficult, the rules might achieve their desired effect by creating an ethical benchmark against which lawyers could measure their own behavior. In any event, these suggestions at least can force us to reconsider what the essential goals of the criminal justice system should be.