The Impeachment Exception: Decline of the Exclusionary Rule?

I. Introduction

Since its inception in 1914 in *Weeks v. United States*,[1] the exclusionary rule has become one of the chief remedies for the protection of constitutional guarantees in the criminal process. The rule, which precludes admission of evidence procured in violation of a defendant's rights in certain circumstances, has been applied in a number of situations to protect rights guaranteed by the fourth, fifth, sixth, and fourteenth amendments.[2]

The doctrinal basis of the rule varies with its applications. The self-incrimination clause of the fifth amendment mandates the exclusion of involuntary, self-incriminatory statements.[3] The basis for the rule in other cases seems to be two-fold. First, it is believed that the constitutional guarantee would be worthless without exclusion as a remedy to deter violations.[4] Secondly, it is

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[1]232 U.S. 383 (1914).

[2]Many applications of the rule involve more than one guarantee, and grouping of the applications under headings of single constitutional provisions is for illustrative purposes only. Exclusion has also been used to remedy violations of rights not of constitutional stature. In McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957), the Court held that a voluntary statement given by a defendant in the custody of federal officers was inadmissible if given during an unnecessary delay in bringing defendant before a federal magistrate. In Nardone v. United States, 302 U.S. 379 (1937), and Nardone v. United States, 308 U.S. 338 (1939), statements intercepted by wiretapping in violation of the Federal Communications Act of 1934, 47 U.S.C. § 605 (1970) (as amended), were declared inadmissible.

The *McNabb-Mallory* rule was abrogated by the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3501(c) (1970). The *Nardone* rule was modified by 18 U.S.C. §§ 2510-20 (1970) and 47 U.S.C. § 605 (1970), which provide for exclusion in some cases of illegal wiretapping. *See also* United States v. Thomas, 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973) (rule of exclusion established for evidence obtained in violation of the canons of ethics).

[3]"The Fifth Amendment in and of itself directly and explicitly commands its own exclusionary rule—a defendant cannot be compelled to give evidence against himself." Coolidge v. New Hampshire, 403 U.S. 443, 498 (1971) (Black, J., dissenting).

[4]This was first expressed in Weeks v. United States, 232 U.S. 383 (1914):

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and so far as those thus placed

felt that "judicial integrity" requires that courts not become parties to violations of the Constitution by admitting evidence obtained through such violations.[5]

Although the exclusionary rule has been applied in many diverse situations, its use is limited by several factors, including the burden on defendant to make a timely motion for suppression,[6] and the requirement of standing to challenge the introduction of the evidence, as well as various exceptions to the rule. The most important of these exceptions, and the only one as yet recognized by the United States Supreme Court, is the impeachment exception, which allows admission of otherwise excludable evidence for

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are concerned, might as well be stricken from the Constitution.

Id. at 393.

While exclusion is usually perceived as a deterrent to police violations, the Ninth Circuit has recently held that the rule should be applied to deter legislators from passing unconstitutional laws. Powell v. Stone, 507 F.2d 93 (9th Cir. 1974). In *Powell* the court held that evidence seized incident to an arrest under an unconstitutionally vague vagrancy ordinance should have been excluded, despite the arresting officers' good faith in relying on the ordinance. The denial of a "good faith" defense is not a novel holding, as the *Powell* court recognized. *See* Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (evidence seized under invalid statutes was excluded). But the *Powell* court's rationale seems novel: "the public interest is served by deterring legislators from enacting such statutes." 507 F.2d at 98.

[5]And if this Court should permit the Government, by means of its officers' crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the Government itself would become a lawbreaker.

Will this Court by sustaining the judgment below sanction such conduct on the part of the Executive? The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands.

Olmstead v. United States, 277 U.S. 438, 483 (1927) (Brandeis, J., dissenting) (footnote omitted).

This argument was "accepted" by the Court in McNabb v. United States, 318 U.S. 332, 338 (1943), and declared an "imperative of judicial integrity" in Elkins v. United States, 364 U.S. 206, 222 (1960). See Comment, *Judicial Integrity and Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A.L. REV. 1129 (1973).

[6]Gouled v. United States, 255 U.S. 298 (1921). Similar requirements are imposed in every state jurisdiction. In federal courts, however, failure to move for suppression at or before trial does not necessarily waive defendant's right to suppression. FED. R. CRIM. P. 52(b) provides that appellate courts shall have discretion to notice on their initiative "[p]lain errors or defects affecting substantial rights." Failure to exclude suppressable evidence may be such an error. Solomon v. United States, 408 F.2d 1306 (D.C. Cir. 1969).

Even when a state court has ruled that a defendant has waived his right to suppression, a federal court may review the question of waiver of the federal constitutional right. Henry v. Mississippi, 379 U.S. 443 (1965).

the purpose of impeaching a defendant who takes the stand on his own behalf. The exception originated in 1954 in *Walder v. United States*[7] and was given new vitality and impetus in 1971 in *Harris v. New York.*[8] The purpose of this Note is to examine the exclusionary rule and its probable future in terms of the effect of the impeachment exception on the continued usefulness of the rule as a constitutional remedy.

II. Origins and Development of the Rule

The exclusionary rule first developed in the area of unreasonable searches and seizures, and even today the rule is often narrowly applied to fourth amendment cases only. Exclusion of evidence because of the illegality of its procurement was unknown at common law,[9] although exclusion pursuant to a judicial determination of the lack of probative value of evidence offered was a basic feature of the law of evidence.

In 1886, the United States Supreme Court held, in *Boyd v. United States,*[10] that a defendant in a forfeiture proceeding could not be compelled by subpoena duces tecum to produce his business records, because such compulsory production was equivalent to an unreasonable seizure and because the fourth and fifth amendments prohibited the use of documents so obtained against their owner.[11] However, in 1904, *Boyd* was implicitly overruled in *Adams v. New York.*[12] Then, in 1914, the Court delivered the famous *Weeks v. United States*[13] opinion, holding that evidence obtained by federal officers through an unlawful search is not admissible in federal prosecutions.

The *Weeks* rule was soon expanded to exclude evidence derived from illegal searches and seizures.[14] The "derived" evidence,

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[7]347 U.S. 62 (1954).

[8]401 U.S. 222 (1971).

[9]McCormick's Handbook of the Law of Evidence § 165, at 365 (2d ed. E. Cleary 1972); 8 J. Wigmore, Evidence § 2183, at 6 (McNaughton rev. ed. 1961).

[10]116 U.S. 616 (1886).

[11]"[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Id.* at 633.

[12]192 U.S. 585 (1904).

[13]232 U.S. 383 (1914).

[14]Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). Justice Holmes, writing for the majority, said:

> The essence of a provision forbidding the acquisition of evidence in a certain way is not merely that evidence so acquired shall not be used before the court but that it shall not be used at all.

Id. at 392. In view of the exceptions to the rule, Justice Holmes' statement does not reflect the rule as it actually developed. See text accompanying notes 83-123 *infra.*

known as "fruit of the poisonous tree,"[15] is excluded if "tainted" by the unlawful act, unless the trial court finds that the connection between the act and the derived evidence has "become so attenuated as to dissipate the taint."[16] Verbal statements as well as tangible evidence may constitute "fruit."[17]

In 1949 in *Wolf v. Colorado*,[18] the Court refused to require exclusion of illegally seized evidence in state courts under the due process clause of the fourteenth amendment. The Court expressed the desire to allow the states to seek "other means of protection" for the guarantees of the fourth amendment.[19]

Exclusion from federal courts of evidence unlawfully seized by state officers was mandated in 1960.[20] This decision abrogated the "silver platter" doctrine,[21] which had existed since *Weeks*,[22] and rendered the legality of the seizure, rather than the character of the seizing authorities, the criterion of admissibility in federal court.[23] Then, in 1961 the Court decided *Mapp v. Ohio*,[24] hold-

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[15]The phrase was coined by Justice Frankfurter in Nardone v. United States, 308 U.S. 338, 341 (1939).

[16]*Id.* at 341.

[17]Wong Sun v. United States, 371 U.S. 471 (1963).

[18]338 U.S. 25 (1949).

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> Accordingly, we have no hesitation in saying that were a state affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.

Id at 28.

[20]Elkins v. United States, 364 U.S. 206 (1960).

[21]This is another of Justice Frankfurter's phrases. Lustig v. United States, 338 U.S. 74, 79 (1949).

[22]*See* Lustig v. United States, 338 U.S. 74 (1949); Byars v. United States, 273 U.S. 28, 33 (1927); Center v. United States, 267 U.S. 575 (1925); Weeks v. United States, 232 U.S. 383, 398 (1914).

In 1957 the Court held that federal courts could enjoin the use in state courts of evidence unlawfully seized by federal officers. Rea v. United States, 350 U.S. 214 (1957). However, in Wilson v. Schnettler, 365 U.S. 381 (1961), a similar injunction was refused. In Cleary v. Bolger, 371 U.S. 392 (1963), the Court refused to enjoin the use in state court of evidence seized by federal officers in violation of the Federal Rules of Criminal Procedure.

[23]Evidence illegally seized by a private individual remains admissible, unless the individual acts for the police. See McCormick's Handbook of the Law of Evidence § 168 (2d ed. E. Cleary 1972).

[24]367 U.S. 643 (1961).

ing that the fourteenth amendment requires exclusion from state prosecutions of evidence seized in violation of the fourth amendment.[25] Justice Clark, writing for the majority, emphasized that the exclusionary rule was not merely an exercise of the Court's supervisory power over admission of evidence in the federal courts, but was constitutionally mandated.[26] Subsequently, the Court said that *Mapp* did not require state courts to adhere to federal formulations of search and seizure reasonableness, so long as their own standards did not infringe constitutional guarantees.[27]

In recent years, wiretapping[28] and electronic eavesdropping[29] have been held to be "searches" within the meaning of the fourth amendment, and accordingly, their products are subject to suppression when obtained by an unreasonable invasion of an area of constitutionally protected privacy.

A defendant's involuntary, self-incriminatory statements have long been recognized as inadmissible.[30] In *Miranda v. Arizona*[31] the Court announced the controversial rule that no statement given by a suspect during "custodial interrogation" was admissible unless he was first warned of and had waived the now famous "*Miranda* rights."[32] It appears that evidence derived from a statement excluded by *Miranda* will be inadmissible as "fruit of the

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[25]In Wolf v. Colorado, 338 U.S. 25 (1949), the Court held that the fourteenth amendment encompasses "the security of one's privacy against arbitrary intrusions by the police." *Id.* at 27.

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> Finally the Court in [*Weeks*] clearly stated that use of the seized evidence involved "a denial of the constitutional rights of the accused." . . . This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistance upon which the Fourth Amendment would have been reduced to "a mere form of words."

367 U.S. at 648, *quoting from* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (Holmes, J.).

[27]Ker v. California, 374 U.S. 23 (1963).

[28]Katz v. United States, 389 U.S. 347 (1967).

[29]Berger v. New York, 389 U.S. 41 (1967).

[30]3 E. WHARTON, CRIMINAL EVIDENCE § 671, at 135 (Torcia rev. ed. 1972). Apparently at common law involuntary confessions and admissions were excluded by the beginning of the seventeenth century as a matter of evidentiary law. *See* Bram v. United States, 168 U.S. 532, 540-61 (1897); *cf.* 8 J. WIGMORE, EVIDENCE § 2266, at 401 (McNaughton rev. ed. 1961).

[31]384 U.S. 436 (1966).

[32]"Prior to any questioning, the person must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." *Id.* at 484-85.

poisonous tree,"[33] but the question is not completely settled.[34]

The fifth amendment traditionally has been applied to exclude testimony given in a prior proceeding under a grant of immunity. In 1896 compulsion of testimony under such a grant was upheld against fifth amendment challenge.[35] Recently, the Court held that the witness need not be afforded immunity against prosecution for the transaction of which he testifies, but need only be protected against use of the testimony given and evidence derived from that testimony.[36]

The Court also recognized the dilemma of the defendant who seeks to suppress evidence seized in violation of the fourth amendment. To establish his standing to object to the evidence, defendant must testify to the existence and his possession of the evidence.[37] In 1968 such self-incriminatory testimony given in pretrial suppression hearings was held inadmissible at trial.[38]

Use of the exclusionary rule to implement the sixth amendment began in a number of cases decided in the 1960's. Statements given by a defendant against whom formal charges were pending, made in the absence of defendant's retained attorney, were declared inadmissible.[39] In *Escobedo v. Illinois*[40] the Court held that a statement made by a "particular suspect" upon whom an investigation had focused was inadmissible if the suspect requested and was denied an opportunity to consult his attorney. Statements given at a pretrial hearing at which the defendant was not represented by counsel were declared inadmissible at defendant's trial.[41]

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[33]*Id.* at 479; Orozco v. Texas, 394 U.S. 324 (1969); United States v. Cassell, 452 F.2d 533 (7th Cir. 1971); Sullins v. United States, 389 F.2d 985 (10th Cir. 1968).

[34]In Michigan v. Tucker, 417 U.S. 433 (1974), the Court, while finding it unnecessary to reach "the broad question of whether evidence derived from statements taken in violation of *Miranda* rules must be excluded regardless of when the interrogation took place," held that the testimony of a witness uncovered as result of a *Miranda*-violative statement need not be excluded when the interrogation (but not the trial) took place before *Miranda*, and when the violation consisted only of a failure to advise defendant of his right to counsel. *Id.* at 447. *See* Comment, *The Fruits of* Miranda: *Scope of the Exclusionary Rule*, 39 U. Colo. L. Rev. 478 (1967).

[35]Brown v. Walker, 161 U.S. 591 (1896), *reaffirmed in* Ullman v. United States, 350 U.S. 422 (1956).

[36]Kastigar v. United States, 406 U.S. 441 (1972).

[37]See text accompanying notes 78-82 *infra*.

[38]Simmons v. United States, 390 U.S. 377 (1968).

[39]Massiah v. United States, 377 U.S. 201 (1964).

[40]378 U.S. 478 (1964).

[41]Pointer v. Texas, 380 U.S. 400 (1965). *Pointer* was one of the first of many cases relying on the confrontation clause of the sixth amendment to exclude testimony not subject to cross-examination. *See* Berger v. California,

In 1967 the Court held that eyewitness identification of a charged defendant is a "critical stage" of the prosecution, at which the defendant is entitled to the presence of his attorney.[42] Exclusion of the identification was the remedy provided. An eyewitness identification obtained through an unnecessarily suggestive procedure violates due process and is to be excluded.[43] In 1972 the derivative evidence rule was held to exclude in-court identification when an invalid pretrial identification created a "very substantial likelihood of irreparable misidentification."[44]

Further, the Court has held that the record of prior felony convictions, which convictions are void under *Gideon v. Wainwright*[45] because defendant was not represented by counsel, are not admissible to impeach defendant's credibility,[46] to determine his liability for sentencing under a recidivist statute,[47] or to fix a convicted defendant's sentence.[48]

Finally, exclusion has been used to enforce the due process clause of the fourteenth amendment in its requirement of "fundamental fairness." In 1952, before exclusion of evidence seized in

393 U.S. 314 (1969); Roberts v. Russell, 392 U.S. 293 (1968); Bruton v. United States, 391 U.S. 123 (1968); Barber v. Page, 390 U.S. 719 (1968); Brookhart v. Janis, 384 U.S. 1 (1966); Douglas v. Alabama, 380 U.S. 415 (1965) (testimony excluded); *cf.* Mancusi v. Stubbs, 408 U.S. 204 (1972); Nelson v. O'Neil, 402 U.S. 622 (1971); Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970) (testimony admitted).

These cases are not further considered in this Note because they differ from those cases in which evidence is excluded due to the illegality of its procurement. In the "confrontation clause" cases, the evidence is excluded because its introduction would infringe the defendant's sixth amendment rights. Accordingly, these cases have developed separately and distinctly from the exclusionary rule cases in which the procurement of the evidence infringes defendant's constitutional rights.

In Coleman v. Alabama, 399 U.S. 1 (1970), the Court held that an adversary, evidentiary hearing to determine probable cause is a "critical stage" of the criminal process, at which defendant is entitled to the assistance of counsel. More recently, the Court held that a "full scale" hearing is not constitutionally required, and assistance of counsel is not required at less formal hearings. Gerstein v. Pugh, 420 U.S. 103 (1975). *Pointer* would still apply to exclude testimony given at a preliminary hearing at which defendant was not represented by counsel.

[42]United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

[43]Stovall v. Denno, 388 U.S. 293 (1967). *Stovall* is based on the "fundamental fairness" requirement of the due process clause rather than the right to counsel.

[44]Neil v. Biggers, 409 U.S. 188, 197 (1972), *quoting from* Simmons v. United States, 390 U.S. 377, 384 (1968).

[45]372 U.S. 335 (1963).

[46]Loper v. Beto, 405 U.S. 473 (1972).

[47]Burgett v. Texas, 389 U.S. 109 (1967).

[48]United States v. Tucker, 404 U.S. 443 (1972).

violation of the fourth amendment was said to be mandated by the fourteenth amendment, the Court, in a case involving invasion of defendant's person by forced stomach pumping, held inadmissible any evidence obtained by official "conduct that shocks the conscience."[49]

III. Criticism of and Alternatives to the Rule

The exclusionary rule has never enjoyed unanimous support, and in recent years it has come under widespread attack by the public as well as by a number of judicial and scholarly commentators. Particularly criticized are those applications of the rule which "regulate" police behavior: the exclusion of evidence unlawfully seized and of statements given by defendants in custody.

The rule excluding evidence unlawfully seized—the *Weeks* rule as applied to federal courts and the *Mapp* rule as applied to state courts—has been criticized as ethically unjustifiable,[50] as entail-

[49]Rochin v. California, 342 U.S. 165 (1952). Since *Rochin*, blood tests have been held not to be "conduct that shocks the conscience." Breithaupt v. Abram, 352 U.S. 432 (1957). This is so even if the defendant is conscious and objects. Schmerber v. California, 384 U.S. 757 (1966).

The issue has recently surfaced in body cavity searches for narcotics by customs or border officials. The Ninth Circuit held that a doctor should have been summoned by a customs agent, who removed a heroin packet from the defendant's rectum. United States v. Carpenter, 496 F.2d 855 (9th Cir. 1974). *See also* Guy v. McCauley, 385 F. Supp. 193 (E.D. Wis. 1974).

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> However much we may be revolted by the methods used by the police to obtain the evidence, we cannot rationally say that the defendant whose crime may be at least equally revolting should have a personal right to go free as a result.

Barrett, *Exclusion of Evidence Obtained by Illegal Searches*, 43 Calif. L. Rev. 565, 581 (1955).

> To be unable to find a murderer guilty, although competent evidence is before the court to warrant a conviction, for the reason that someone else is guilty of petit larceny in connection with the obtaining of such evidence, seems a handicap rather than a help to the administration of justice.

People v. Defore, 213 App. Div. 643, 652, 211 N.Y.S. 134, 142 (1925).

"On ethical grounds the rule in its most direct application seems unfair. It benefits only the guilty. . . . Further the application of the rule punishes society and not the offending officer." Brief for State of Illinois as Amicus Curiae, United States v. Robinson, 414 U.S. 218 (1973), *as quoted in* F. Inbau, J. Thompson, J. Haddad, J. Zagel & G. Starkman, Cases and Comments on Criminal Procedure 164 (1974).

The late Dean Wigmore delivered a famous attack on the "heretical influence of Weeks v. United States" as an "unnatural method" of enforcing the fourth amendment:

> Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall

ing undue social cost in terms of obstruction of the administration of justice,[51] and as an ineffective deterrent to violations of the fourth amendment.[52] The *Weeks* rule has been criticized as

> let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. . . . Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.

8 J. WIGMORE, EVIDENCE § 2184a, at 31 n.1 (McNaughton rev. ed. 1961) (emphasis in original).

All of these arguments seem to miss the point that the gravamen of the wrong sought to be remedied by exclusion is not the misdemeanor of the offending officer against the laws of the state, but the denial of a constitutional right personal to the defendant, committed by an agent of the state. This distinction is supported by the rule, under which governmental involvement is required to render illegally seized evidence inadmissible. See note 23 *supra*.

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> The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be suppressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice. The rule of the Adams Case strikes a balance between opposing interests.

People v. Defore, 242 N.Y. 13, 25, 150 N.E. 585, 589, *cert. denied*, 270 U.S. 657 (1926), *referring to* People v. Adams, 176 N.Y. 351, 68 N.E. 636 (1903) (denying exclusion).

[52]Before *Mapp*, a Northwestern University law student study of motions to suppress in Chicago, where the *Weeks* rule was in effect, People v. Castree, 311 Ill. 392, 143 N.E. 112 (1924), concluded that "the rule has failed to deter any substantial number of illegal searches . . ." and was particularly ineffective in minor offenses where illegal searches were utilized to disrupt illegal activities through harassment. Comment, *Search and Seizure in Illinois: Enforcement of the Constitutional Right to Privacy*, 47 NW. U.L. REV. 493, 497-98 (1952).

An empirical study by Columbia University law students in 1968 of misdemeanor narcotics arrests in New York City before and after *Mapp* suggests that the exclusionary rule produced police perjury rather than greater security for fourth amendment rights.

> In general the data indicate that police allegations as to how evidence was obtained changed after the *Mapp* decision. There is some indication, however, that police practices in the field have not changed substantially, and that police officers often merely fabricate testimony to avoid the effect of *Mapp*-based motions to suppress illegally seized evidence.

Comment, *Effect of* Mapp v. Ohio *on Police Practices in Narcotics Cases*, 4 COLUM. J.L. & SOCIAL PROB. 87 (1968).

In 1970 Professor Dallin Oaks published a study of, *inter alia*, motions to suppress in Cook County Circuit Court (Chicago) during 1969-1970, concluding that:

> [I]llegal searches and seizures were commonplace in the enforcement of gambling, narcotics, and weapons offenses by the Chicago police. [The statistics] also provide evidence that the exclusionary rule does not deter the Chicago police from making illegal searches and seizures in a large proportion of the cases that come to court in these crime areas.

not logically following from the precedents cited,[53] and as a reversal of a long-standing doctrine without explanation. The *Mapp*

Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 706-07 (1970).

Professor Oaks also studied Cincinnati Police Department records and concluded that "the exclusionary rule made no significant change in Cincinnati search and seizure practices in narcotics and weapons cases, but [the study] suggests a possible effect in gambling." *Id.* at 707.

A 1973 study of motions to suppress in preliminary hearings in the Cook County Circuit Court (Chicago) from 1950-1971 by James Spiotto reveals a "sharp increase in narcotics and gun cases." Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243, 246 (1973).

> The increase in motions to suppress . . . can be traced at least in part to increased social pressure for aggressive enforcement in these areas. Still, had the exclusionary rule deterred police from making illegal search and seizures, one might expect the number of motions to suppress to have declined in all offenses . . . .

Id. at 248.

The same study also noted that some individual police officers were not deterred in the least.

> [D]uring June 1971, while 276 defendants in 172 Narcotics Court cases made motions to suppress, only 130 police officers were involved. Thus nine officers were responsible for 25 cases involving 34 defendants and in each of the 25 cases each of the officers repeated, within a one-month period, the same type of search practice that had already in that month been held unlawful by the court.

Id. at 276-77. It should be noted that some authorities doubt the validity of statistical studies in this matter because of the inadequacy of data available. LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I*, 30 MO. L. REV. 391, 394 (1965).

Professor LaFave has commented on the pressures on the police to ignore fourth amendment requirements because of public opinion. The public expects the police to uncover evidence and make arrests. "There is no substantial corresponding public pressure upon the police to conform their activities with what the law on arrest, search, and seizure allows." *Id.* at 444-45. *See also* J. SKOLNICK, JUSTICE WITHOUT TRIAL 219-26 (1967).

It has been noted that the subtleties, inconsistencies, and constant changes in search and seizure law provide little enlightenment to the police officer who attempts to follow that law. Burns, Mapp v. Ohio: *An All-American Mistake*, 19 DEPAUL L. REV. 80 (1969). It has also been noted that there is no adequate communication of that law from the courts to the police. LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1005 (1965).

Chief Justice Burger, dissenting in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), a civil action for damages against federal officers for an illegal search, criticized the exclusionary rule. He listed the following reasons for the rule's failure as a deterrent: (1) the absence of direct sanction against the offending officer, (2) the inability of the prosecutor, upon whom the actual sanction is imposed, to control police practices, (3) the lack of educational value of judicial review in apprising the police of acceptable search and seizure practices, and (4) the lack of deterrent value of exclusion in cases in which no prosecution results. *Id.* at 415-18.

doctrine has been attacked as being a federal judicial rule of evidence forced upon the states and a judicially-created set of rules of criminal procedure.[54]

Exclusion of self-incriminatory statements, particularly as required by *Miranda*, has also been widely criticized as being destructive of effective law enforcement,[55] as being constitutionally unsound,[56] and as being a usurpation of legislative power. The unpopularity of this rule with the public is well known[57] and led to a congressional disavowal of *Miranda* in Title II of the 1968 Omnibus Crime Control and Safe Streets Act.[58] The Act provides that in federal courts the criterion for admissibility is voluntariness; the giving of warnings is to be considered but is not conclusive in the determination of voluntariness.[59]

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[53] 8 J. WIGMORE, EVIDENCE § 2184a, at 31-34 (McNaughton rev. ed. 1961); *id* § 2264 n.4, at 381-84.

[54] "The majority treats the exclusionary rule as a judge-made rule of evidence designed and utilized to enforce the majority's own notions of proper police conduct. The Court today announces its new rules of police procedure in the name of the Fourth Amendment." Coolidge v. New Hampshire, 403 U.S. 443, 498-99 (1971) (Black, J., dissenting). *See also* Mapp v. Ohio, 367 U.S. 643, 678 (1961) (Harlan, J., dissenting).

[55] Miranda v. Arizona, 384 U.S. 436, 500 (1966) (Clark, J., dissenting); *id.* at 518-19 (Harlan, J., dissenting); *id.* at 542 (White, J., dissenting). *See also* S. REP. No. 1097, 90th Cong., 2d Sess. (1968).

Inbau and Reid argue that, in many criminal investigations, confessions obtained through interrogation are the only possible means of solving a crime and convicting the criminal:

> In many criminal investigations, even of the most efficient type, there are many, many instances where physical clues are entirely absent, and the only approach to a possible solution of the crime is the interrogation of the criminal suspect himself, as well as others who may possess significant information. Moreover, in most instances these interrogations, particularly of the suspect himself, must be conducted under conditions of privacy and for a reasonable period of time; and they frequently require the use of psychological tactics and techniques that could well be classified as "unethical" if we are to evaluate them in terms of ordinary, everyday social behavior.

F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSION 203 (1962).

[56] *See* Miranda v. Arizona, 384 U.S. 436, 506 (1966) (Harlan, J., dissenting); *id.* at 526 (White, J., dissenting).

[57] "The general public is becoming frightened and angered by the many reports of depraved criminals being released to roam the streets in search of other victims." S. REP. No. 1097, 90th Cong., 2d Sess. (1968).

[58] 18 U.S.C. § 3501 (1970).

[59] *Id.* provides in part:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. . . .

A number of attempts have been made to find an acceptable alternative for the exclusionary rule as a remedy for constitutional guarantees, especially as regards unreasonable searches and seizures. An illegal search or seizure is, of course, a common law tort.[60] Moreover, under the Federal Civil Rights Act of 1871, one who deprives another of any constitutional right "under color of law" is liable in a civil action for damages.[61] However, these

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(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between the arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel, and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

. . . .

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminatory statement made or given orally or in writing.

As of this writing, the constitutionality of section 3501 has not been ruled upon. Most courts reviewing voluntariness determinations under this section have found no *Miranda* violations in cases in which the confession was found voluntary. *See, e.g.*, United States v. Vigo, 487 F.2d 295 (2d Cir. 1973).

The Tenth Circuit has recently held that Michigan v. Tucker, 417 U.S. 433 (1974), implicitly upheld section 3501 as constitutional. United States v. Crocker, 510 F.2d 1129, 1137 (10th Cir. 1975). See notes 88-94 & accompanying text *infra*.

[60]Entick v. Carrington, 19 How. St. Tr. 1029 (C.P. 1765), *cited in* Boyd v. United States, 116 U.S. 616, 626-30 (1886), was actually an action in trespass to recover £2000 damages for an unlawful search and seizure.

[61]42 U.S.C. § 1983 (1970) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

remedies have generally proven inadequate. Problems of lack of jury sympathy,[62] judgment-proof police, and sovereign immunity of states preventing vicarious liability are obvious.[63] The federal remedy is further limited in usefulness in that it does not impose liability on municipalities or state governments.[64] Moreover, "good faith" belief by the officer in the lawfulness of his action is a defense in a civil action against him.[65] Similarly, an illegal search or seizure may be a crime, but criminal prosecutions for such crimes are very rare, "for the obvious reason that policemen and prosecutors do not punish themselves."[66]

Internal police discipline has been suggested as a remedy to prevent unlawful police activities, but suffers from the drawback that the primary duty of policemen is perceived to be the detection and apprehension of criminals, not adherence to the fourth amendment.[67] A streamlined tort claim process has been suggested by Chief Justice Burger[68] and by Edward Horowitz.[69] Each proposal involves a non-jury hearing before a tribunal composed of lawyers.[70] Horowitz, whose proposal is more detailed, suggests a measure of damages and a provision for appeal. Both plans entail a remedy against the governmental entity employing the offending officer. Such a process would meet many of the objections leveled at both the exclusionary rule and the presently available tort actions as effective remedies.

Chief Justice Burger has also suggested disciplinary action by a civilian review board against offending officers.[71] This al-

Section 1983 applies to unlawful searches and seizures. Monroe v. Pape, 365 U.S. 167 (1961).

[62]*See* Foote, *Tort Remedies For Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 499-501 (1955). The author suggests that recovery is likely only for "the respectable plaintiff who can come into court with relatively clean hands." *Id.* at 500.

[63]*See* Greenhill & Murto, *Governmental Immunity*, 49 TEXAS L. REV. 462, 463-66 (1971).

[64]Monroe v. Pape, 365 U.S. 167 (1961) (municipalities); Williford v. California, 352 F.2d 474 (9th Cir. 1965) (states). *Cf.* Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201 (1971).

[65]Pierson v. Ray, 386 U.S. 547 (1967).

[66]Foote, *supra* note 62, at 493.

[67]*Id.* at 494.

[68]Bivens v. Six Unknown Named Agents, 403 U.S. 388, 422-23 (1971) (Burger, C.J. dissenting).

[69]Horowitz, *Excluding the Exclusionary Rule*, 47 L.A. BAR BUL. 91, 94-99, 121-24 (1972).

[70]The Chief Justice envisioned the tribunal as "quasi-judicial in nature or perhaps patterned after the United States Court of Claims." Bivens v. Six Unknown Named Agents, 403 U.S. 388, 423 (1971) (Burger, C.J., dissenting). Horowitz suggests an "administrative or quasi-judicial body." Horowitz, *supra* note 69, at 94.

[71]Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964).

ternative may be subject to greater popular opposition than the exclusionary rule itself among those fearful of "handcuffing the police."[72] There are also questions as to such a board's effectiveness.[73]

Contempt of court has been suggested as a remedy against offending officers.[74] This remedy has the virtue of not depending upon prosecution or victim for institution of an action, but might amount to a denial of due process, since if the offending officer appears in court in the suspect's trial he would give evidence against himself upon a charge of which he has no notice.

Finally, a modified exclusionary rule which would restrict exclusion to flagrant and intentional violations of the fourth amendment has been proposed by Judge Friendly.[75]

In the area of self-incriminating statements, alternative remedies are available in fewer situations, but it appears that coercion of a confession can constitute a wrong actionable under the Civil Rights Act of 1871,[76] even when no physical abuse is involved.[77] Criminal sanctions are again available but seldom employed.

Whatever the merits of criticism of the exclusionary rule in its various applications, it is indisputable that disaffection with the rule has produced pressure for relief from its effects. The

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Chief Justice (then Circuit Judge) Burger's board would contain a minority of police members, have subpoena powers, act on both citizen complaints and court cases in which suppression is ordered, and hold hearings at which the assistance of counsel would be allowed. Judge Burger did not decide whether the board's disciplinary powers should be actual or advisory.

[72]*See* Barton, *Civilian Review Boards and the Handling of Complaints Against the Police*, 20 U. TORONTO L.J. 448, 460-63 (1970). The author refers to the John Birch Society pamphlet, "Support Your Local Police."

[73]*Id.* Judge Burger, in support of the efficacy of his suggestion, likened it to industrial and aviation accident injuiries and judicial review. Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 15, 20 (1964). Neither seems a compelling analogy.

[74]Blumrosen, *Contempt of Court and Unlawful Police Action*, 11 RUTGERS L. REV. 526 (1957). The procedure envisioned is a contempt citation which would take effect if the police authorities fail to take appropriate disciplinary action.

[75]Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 952 (1965). *See also* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 8.02(2) (Tent. Draft No. 4, 1971). This proposal is similar to the "balancing test" between individual and societal interests undertaken by the courts in Scotland on a case-by-case basis to determine admissibility. *See* F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL, & G. STARKMAN, CASES AND COMMENTS ON CRIMINAL PROCEDURE 169 (1974).

[76]Kerr v. City of Chicago, 424 F.2d 1134 (7th Cir.), *cert. denied*, 400 U.S. 833 (1970). See note 61 *supra*.

[77]Duncan v. Nelson, 466 F.2d 939 (7th Cir.), *cert. denied*, 409 U.S. 894 (1972).

limitations on and exceptions to the rule must be viewed in this light.

IV. Limitations on and Exceptions to the Rule

A. *Requirement of Standing*

As already noted, the exclusion of evidence is contingent upon successful challenge by the defendant.[78] In order to challenge admission of evidence, the defendant must establish standing: he must show that a right of his was violated by the acquisition of the evidence and not merely by its admission.[79] If the evidence objected to was obtained by unlawful search and seizure, defendant must have been in possession of or have had a proprietary interest in either the evidence itself or the premises searched.[80] Similarly, the confession of a co-defendant may not be challenged by defendant on the grounds of involuntariness and incrimination of defendant.[81] Generally a co-defendant cannot claim "derivative" standing through the defendant whose rights were violated.[82]

B. *Exceptions*

Even if defendant has standing to contest the admission of evidence and has done so by the proper procedure, evidence subject to suppression may still be used against him in several ways. As an investigative lead, the inadmissible evidence may uncover additional evidence; theoretically, this new evidence should be excluded as "fruit of the poisonous tree,"[83] but this is not always the case. Evidence derived from inadmissible evidence is not ex-

[78] *See* note 6 & accompanying text *supra*. *See generally* 2 J. Varon, Searches, Seizures, and Immunities 840-51 (2d ed. 1974).

[79] Alderman v. United States, 349 U.S. 165 (1969); Jones v. United States, 362 U.S. 257 (1960). It has been held a violation of the defendant's sixth amendment rights when admissions or confessions by co-defendants are admitted into evidence at a joint trial without these defendants taking the stand. Bruton v. United States, 391 U.S. 123 (1968). Here, however, the admission itself infringes the defendant's right to confront witnesses against him. *See* note 41 *supra*.

[80] Brown v. United States, 411 U.S. 223 (1973). In Jones v. United States, 362 U.S. 257 (1960), distinctions between proprietary interests were held irrelevant to standing; anyone legitimately on the premises searched has standing to challenge the evidence. *Jones* also created "automatic standing" when possession of the evidence sought to be suppressed is an essential element of the offense charged. In *Brown*, however, it was suggested that the rule of Simmons v. United States, 390 U.S. 377 (1968), excluding incriminatory statements made by a defendant at the suppression hearing, may have made "automatic standing" unnecessary.

[81] United States *ex rel.* Falconer v. Pate, 319 F. Supp. 206 (N.D. Ill. 1970); People v. Varnum, 66 Cal. 2d 808, 427 P.2d 772, 59 Cal. Rptr. 108 (1967); People v. Denham, 41 Ill. 2d 1, 241 N.E.2d 415 (1968).

[82] Combs v. United States, 408 U.S. 224 (1972).

[83] Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

cluded if the connection between the original and the derivative evidence has "become so attenuated as to dissipate the taint."[84] Moreover, if the new evidence is connected to the original inadmissible evidence but derives from an "independent source," it is admissible.[85] As Justice Marshall noted in his dissent in *Kastigar v. United States*,[86] difficulty in proving that the offered evidence was derived from the excluded evidence, because the defendant is not privy to the prosecution's investigation, renders the "fruit of the poisonous tree" doctrine "a loose net to trap tainted evidence."[87]

Some cases have held that witnesses discovered as a result of a constitutional violation are not precluded from testifying because of their relationship to the illegal source.[88] In 1974 the Supreme Court decided *Michigan v. Tucker*,[89] in which a witness, discovered through a statement obtained without adequate *Miranda* warnings, was allowed to testify against a defendant who was interrogated before, but tried after, *Miranda*. The Court held that this did not violate the defendant's fifth, sixth, or fourteenth amendment rights, but the reason for the decision is unclear. The Court expressly declined to decide whether the derivative evidence rule is generally applicable to *Miranda* statements[90] but intimated that *Miranda* violations may not be sufficiently serious infringements to invoke the rule.[91] Justice Rehnquist's majority opinion noted that exclusion of the witness' testimony would not serve to deter future *Miranda* violations because the instant violation was committed in good faith.[92] Justice Rehnquist said that a second basis for exclusion of involuntary statements is untrustworthiness, so that there is no reason to exclude the admittedly reliable witness' testimony.[93] Finally, he relied on *Harris v. New York*[94] as authority for the proposition that *Miranda* did not completely

[84]Nardone v. United States, 308 U.S. 338, 341 (1939).

[85]Costello v. United States, 365 U.S. 265 (1961).

[86]406 U.S. 441, 467 (1972) (Marshall, J., dissenting).

[87]*Id.* at 469.

[88]United States v. Tane, 329 F.2d 848 (2d Cir. 1964); People v. Eddy, 349 Mich. 637, 85 N.W.2d 117 (1957), *cert. denied*, 356 U.S. 918 (1958). *See also* Smith v. United States, 324 F.2d 879 (D.C. Cir. 1963) (witness discovered in violation of *McNabb-Mallory* rule allowed to testify).

[89]417 U.S. 433 (1974).

[90]*Id.* at 447.

[91]*Id.* at 445-46.

[92]*Id.* at 447-48. Generally the good faith of the officer committing the violation does not prevent exclusion. See note 4 *supra*.

[93]*Id.* at 449. *Cf.* Jackson v. Denno, 378 U.S. 368 (1964); McCormick's Handbook of the Law of Evidence § 165, at 365 (2d ed. E. Cleary 1972). Justice Rehnquist dismisses the "judicial integrity" rationale as "an assimilation of the more specific rationales." 417 U.S. at 450.

[94]401 U.S. 222 (1971). See notes 106-11 & accompanying text *infra*.

preclude the use of statements obtained in violation of that decision. Thus, while *Tucker* provides some support for the existence of a "witness exception," it falls short of firmly establishing such an exception and of clearly defining the scope of *Miranda's* exclusionary rule.[95]

C. The Impeachment Exception

The most important exception, however, allows use of otherwise inadmissible evidence to impeach a defendant's credibility. The Supreme Court first considered such an exception in 1925 in *Agnello v. United States*,[96] a prosecution for conspiracy to sell cocaine illegally. Federal agents had unlawfully seized some cocaine from the defendant's room. On direct examination, the defendant was not asked about the cocaine in his room, but, on cross-examination, "he said he had never seen narcotics."[97] The prosecutor then showed him the cocaine seized in his room and asked him if he had ever seen it, to which the defendant answered negatively. The prosecution was then allowed to introduce the cocaine and testimony as to its seizure. The Court reversed the defendant's conviction, holding that unlawfully seized evidence is not admissible to impeach a defendant by rebutting a statement made on cross-examination.

However, in *Walder v. United States*,[98] a defendant denied on direct examination that he had ever possessed narcotics, and the trial court's admission of a heroin capsule illegally seized from the defendnt in a prior arrest was permitted to impeach the defendant by rebutting his denial. *Agnello* was distinguished on two grounds. First, the statement rebutted in *Walder* was not "forced" from defendant by a question on cross-examination. Secondly, in *Agnello* the impeachment evidence bore directly on defendant's guilt in the offense charged, while in *Walder* it dealt with a collateral issue. Justice Frankfurter, writing for the *Walder* majority, said:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and pro-

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[95]Justice Brennan suggested that *Tucker* could be resolved by holding that *Miranda* did not apply to interrogations conducted before the decision. 417 U.S. at 458 (Brennan, J., concurring).

[96]269 U.S. 20 (1925).

[97]*Id.* at 29.

[98]347 U.S. 62 (1954).

vide himself with a shield against contradiction of his untruths.[99]

For years the lower courts applied the *Walder* decision without extending it. The decision was generally interpreted as allowing rebuttal of perjurous statements made on direct examination relating to matters collateral to the issue of a defendant's guilt.[100] There was some doubt as to whether a statement inadmissible under *Miranda* could be so used, especially in view of language in *Miranda* suggesting otherwise.[101]

In the Court of Appeals for the District of Columbia Circuit, however, Judge Warren Burger found *Walder* a strong precedent. In 1960 in *United States v. Tate,*[102] the court, in an opinion by Judge Burger, held that statements which *United States v. McNabb*[103] would otherwise exclude were admissible to impeach a defendant by rebutting his testimony denying commission of the offense. In 1967 the same court decided *Woody v. United States,*[104] and Judge Burger, writing for the majority, said that when a defendant at trial denies making any statement to the police, he cannot then demand a suppression hearing to determine the voluntariness of a statement introduced at trial. In dictum the court said that incriminating statements made at a suppression hearing would be admissible at trial to rebut inconsistent testimony given by a defendant. That same year, in *Gordon v. United States,*[105] Judge Burger wrote that testimony given by a defendant at a hearing to determine the admissibility of a prior conviction would be admissible to impeach the defendant. Thus, Judge Burger showed a willingness to expand *Walder* into new areas of the exclusionary rule and exhibited a disregard for the *Walder-Agnello* distinctions.

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[99]*Id.* at 65.

[100]Groshart v. United States, 392 F.2d 172 (9th Cir. 1968); Wheeler v. United States, 382 F.2d 998 (10th Cir. 1967); Inge v. United States, 356 F.2d 345 (D.C. Cir. 1966); White v. United States, 349 F.2d 965 (D.C. Cir. 1965); Johnson v. United States, 344 F.2d 163 (D.C. Cir. 1964); Jackson v. United States, 311 F.2d 686 (5th Cir. 1963). *Cf.* United States v. Curry, 358 F.2d 904 (2d Cir. 1966).

[101]The *Miranda* Court stated that "unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation may be used against [the defendant]." 384 U.S. at 479. *See also* Bosley v. United States, 426 F.2d 1257 (D.C. Cir. 1970); Proctor v. United States, 404 F.2d 819 (D.C. Cir. 1968); United States v. Fox, 403 F.2d 97 (2d Cir. 1968); Commonwealth v. Padgett, 428 Pa. 229, 237 A.2d 209 (1968).

[102]283 F.2d 377 (D.C. Cir. 1960). *See also* Lockley v. United States, 270 F.2d 915, 918 (D.C. Cir. 1959) (Burger, J., dissenting).

[103]318 U.S. 332 (1943). See note 2 *supra.*

[104]379 F.2d 130 (D.C. Cir. 1967).

[105]383 F.2d 936 (D.C. Cir. 1967).

In 1971, when Judge Burger had become Chief Justice Burger, and the composition of the Court had greatly changed from that of the late 1960's, the Court decided the case of *Harris v. New York.*[106] The defendant, charged with the sale of heroin, took the stand and denied making the sale. On cross-examination, the prosecutor asked the defendant if he had given the police a statement. When the defendant said he did not remember, the prosecutor read to him from the statement, which was then admitted on defendant's motion. The trial court instructed the jury that the statement should be considered only in assessing the defendant's credibility and not as direct evidence of his guilt. The defendant appealed his conviction, arguing that allowing the prosecutor to use the statement, which violated *Miranda* but was not claimed to be involuntary, was reversible error.

The Court, in an opinion by the Chief Justice, held that the statement was admissible to impeach the defendant by rebutting the inconsistent statement on direct examination that he had not sold the heroin. The opinion dismissed the *Miranda* language as dictum[107] and, quoting the *Walder* Court's statement that a defendant should not be allowed to use the illegality of the government's action to "provide himself with a shield against contradiction of his untruths,"[108] said that the direct-collateral distinction in *Walder* was immaterial to the rationale of that case, which the Chief Justice apparently saw as prevention of perjury.[109] The Court effectively abolished the other *Walder* distinction as well: the defendant's denial of the sale on direct examination was the "perjury" which the statement was admitted to rebut. *Harris* has been much criticized,[110] but in 1973 the Court denied certiorari in a case in which *Harris* could have been limited.[111]

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[106]401 U.S. 222 (1971).

[107]*Id.* at 224. See note 101 *supra.*

[108]401 U.S. at 224, *quoting from* Walder v. United States, 347 U.S. 62, 65 (1954).

[109]401 U.S. at 224.

[110]Dershowitz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 YALE L.J. 1198 (1971); Kent, Harris v. New York: *The Death Knell of* Miranda *and* Walder?, 38 BROOKLYN L. REV. 357 (1971); 25 ARK. L. REV. 190 (1971); 23 BAYLOR L. REV. 639 (1971); 48 CHI.-KENT L. REV. 124 (1971); 40 FORDHAM L. REV. 394 (1971); 39 GEO. WASH. L. REV. 1241 (1971); 85 HARV. L. REV. 44 (1971); 49 TEXAS L. REV. 1119 (1971).

Before *Harris,* several commentators wrote that *Miranda* should be read as forbidding impeachment use of *Miranda*-violative statements. Kent, Miranda v. Arizona—*The Use of Inadmissible Evidence for Impeachment Purposes,* 18 W. RES. L. REV. 1177 (1967); Comment, *The Impeachment Exception to the Exclusionary Rules,* 34 U. CHI. L. REV. 939 (1967).

[111]Burt v. New Jersey, 475 F.2d 234 (3d Cir.), *cert. denied,* 414 U.S. 938

In March of 1975, the Supreme Court decided *Oregon v. Hass,*[112] applying the principles of *Harris* to a statement given after the defendant, who was in custody, had requested to be allowed to call his attorney, and before the attorney was called.[113] The Oregon Supreme Court had held that such a statement could not be used to impeach the defendant.[114] The United States Supreme Court reversed, holding that the fourth and fourteenth amendments did not preclude impeachment use of the statement,[115] although *Miranda* had held that such statements would be inadmissible in the prosecution's case-in-chief.[116] The Court's opinion, by Justice Blackmun, relied on *Harris* and found that the requirements for admissibility for impeachment purposes established in *Harris* were present in *Hass.*[117] The trustworthiness of the statement satisfied legal standards, as in *Harris.*[118] The material used to impeach "undoubtedly provided valuable aid to the jury in assessing petitioner's credibility," and the "benefits of this process should not be lost."[119] Finally, as in *Harris,* the deterrence rationale was found to be sufficiently served by exclusion of the statement from the prosecution's case-in-chief.[120]

(1973). Relying on *Harris,* the Third Circuit Court of Appeals concluded that it was not error to allow rebuttal of defendant's exculpatory testimony by testimony of his failure to tell his story to the police.

[112]95 S. Ct. 1215 (1975).

[113]Hass was arrested for the first-degree burglary of a garage from which a bicycle was stolen. After his arrest and the giving of *Miranda* warnings, he admitted to the arresting officer that he had possessed a stolen bicycle. Hass then asked to telephone his attorney and was told he could do so when they reached police headquarters. Before the attorney was called, Hass admitted knowing that the bicycle was stolen from a residence and pointed out to the officer the residence from which he thought it was taken.

The trial court admitted Hass' first statement but excluded the statement made after the request for his attorney. Hass testified, denying knowledge that the bicycle had been taken from a residence, and the State was allowed to rebut this denial with Hass' admission of such knowledge made after the request for counsel. An instruction was given limiting use of this testimony to impeachment of Hass' credibility. *Id.* at 1217-18.

[114]Oregon v. Haas, 267 Ore. 489, 517 P.2d 671 (1973).

[115]95 S. Ct. at 1221. Justice Marshall, in dissent, urged that it was not clear from the opinion of the state court whether federal or state law was relied upon to prohibit impeachment use of the statement, and that therefore the decision of the Oregon Supreme Court should be affirmed as resting on adequate state grounds. 95 S. Ct. at 1222 (Marshall, J., dissenting). *See* California v. Krivda, 409 U.S. 33 (1972); Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965); Herb v. Pitcairn, 324 U.S. 117 (1945).

[116]384 U.S. at 474.

[117]95 S. Ct. at 1220-21.

[118]*Id.* at 1221. *See* Harris v. New York, 401 U.S. 222, 224 (1971).

[119]95 S. Ct. at 1120, *quoting from* Harris v. New York, 401 U.S. 222, 225 (1971).

[120]95 S. Ct. at 1220.

Justice Brennan, in dissent, argued that this application of the *Harris* rule effectively removed all incentive for the police to comply with a prisoner's request for counsel, since most attorneys would simply advise their clients to say nothing at all. A statement obtained in the absence of the requested counsel, on the other hand, is at least admissible for impeachment.[121] The majority termed this a "speculative possibility."[122] Thus, the Court, in an opinion joined by six justices, affirmed *Harris* in theory and in practice.[123]

V. The Future of the Exclusionary Rule

The courts of appeals have not only followed *Harris* in similar situations but, relying on the combination of *Harris* and *Walder*, have expanded the impeachment exception to virtually all the applications of the exclusionary rule.[124] The state courts have seized upon *Harris* as a means of mitigating the unwelcome effects of *Miranda* and, in some cases, of *Mapp*.[125]

In June of 1974 the Court of Appeals for the Seventh Circuit decided *United States v. Tweed*.[126] In that case the defendant was charged with possession of dynamite and on direct examination testified that he had never handled or carried any dynamite. In rebuttal the government introduced the testimony of a forensic chemist to the effect that traces of chemicals indicative of dynamite were found on defendant's illegally seized clothing. The appellate court held that the trial court correctly admitted the testimony. *Tweed* was similar to *Walder*, except that the rebuttal evidence strongly tended to prove defendant's guilt.

In September of 1974 the Supreme Court of Illinois held in *People v. Sturgis*[127] that a statement filed by the defendant in

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[121] *Id.* at 1221.

[122] *Id.*

[123] Justices Brennan and Marshall dissented. Justice Douglas took no part in *Hass*, but was among the dissenters in *Harris*. Thus, the majority in *Hass* included four members of the majority in *Harris*: the Chief Justice and Justices Stewart, White, and Blackmun. The two new members of the Court since *Harris*, Justices Powell and Rehnquist, completed the *Hass* majority. Justice Harlan, who was in the majority in *Harris*, and Justice Black, who dissented, both retired in September of 1971.

[124] United States v. James, 493 F.2d 323 (2d Cir. 1974); United States v. Purin, 486 F.2d 1363 (2d Cir. 1973); Roland v. Michigan, 475 F.2d 892 (6th Cir. 1973); United States v. McQueen, 458 F.2d 1049 (3d Cir. 1972).

[125] No attempt will be made here to catalogue the state decisions following *Harris*. The Supreme Court of Hawaii has rejected *Harris*. State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971).

[126] 503 F.2d 1127 (7th Cir. 1974).

[127] 58 Ill. 2d 211, 317 N.E.2d 545 (1974). Apparently, more than mere de-

support of a motion to suppress was admissible to rebut the defendant's denial of guilt of the offense charged. Thus, the Illinois court adopted Judge Burger's conclusion in *Woody v. United States*[128] and overruled its own contrary holding in *People v. Luna*,[129] rendered at about the same time as *Woody*.

Relying on *Harris*, several courts have held that a defendant may be impeached by his silence in custody: if the defendant makes exculpatory statements on the stand, he may be impeached by testimony or questions regarding his failure to tell the police this story.[130] *Miranda* prohibits comment on a suspect's silence in custody,[131] but these courts have evidently considered such silence to be equivalent to an inconsistent statement with which defendant may be impeached.[132]

Another controversy arising in the wake of *Harris* regards impeachment by prior convictions which were invalid because defendant was denied assistance of counsel. The Supreme Court, in *Loper v. Beto*,[133] decided after *Harris*, held that such convictions were inadmissible for general impeachment purposes. The Court did not decide whether they could be used to rebut defendant's specific denials of prior convictions.[134] In 1971 the Court of Appeals for the Second Circuit held that such convictions could be used for such rebuttal.[135] Before *Harris*, the First and Ninth Cir-

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nial of commission of the offense is necessary to allow impeachment use of tangible evidence seized in violation of the fourth amendment. Some statement must be made on direct examination that can be rebutted by the evidence. United States v. Trejo, 501 F.2d 138, 143-46 (9th Cir. 1974).

[128]379 F.2d 130 (D.C. Cir. 1967). See text accompanying note 104 *supra*.

[129]37 Ill. 2d 299, 226 N.E.2d 586 (1967).

[130]Burt v. New Jersey, 475 F.2d 234 (3d Cir.), *cert. denied*, 414 U.S. 938 (1973); United States v. Ramirez, 441 F.2d 950 (5th Cir.), *cert. denied*, 404 U.S. 869 (1971).

[131]

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment right when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute . . . in the face of accusation.

384 U.S. at 468 n.37. This statement is technically dictum, since none of the cases involved in *Miranda* involved use of defendant's silence.

[132]*Cf.* United States v. Hale, 95 S. Ct. 2133 (1975), *aff'g* United States v. Anderson, 408 F.2d 1038 (D.C. Cir. 1974). The Court held silence of an accused in custody is not "inconsistent" so as to allow the impeachment of a defendant by evidence of such silence. The Court did not reach the issue of the constitutionality of such impeachment. *See also* Deats v. Rodriguez, 477 F.2d 1023 (10th Cir. 1973); Johnson v. Patterson, 475 F.2d 1066 (10th Cir. 1973) (impeachment admission of testimony of silence held error).

[133]405 U.S. 473 (1972).

[134]*Id.* at 482 n.11.

[135]United States *ex rel.* Walker v. Follette, 443 F.2d 167 (2d Cir. 1971). The Fifth Circuit followed *Walker* in United States v. Nadaline, 471 F.2d

cuits had held to the contrary,[136] and, since *Harris*, the Ninth Circuit has reaffirmed its decision.[137]

The only applications of the exclusionary rule to which the impeachment exception have at this time apparently not been applied are immunized testimony and identification testimony. In 1973 the Court of Appeals for the Third Circuit distinguished *Harris* and held that testimony given under a grant of immunity could not be used to rebut an inconsistent assertion by defendant at his trial for perjury.[138] No cases limiting the exclusion of eyewitness identification due to the absence of counsel or suggestive procedure are reported.

In all cases in which otherwise inadmissible evidence is used to impeach defendant, such evidence is admissible only to aid in the determination of defendant's credibility, and the jury is instructed accordingly.[139] However, notwithstanding the Supreme Court's confidence in the efficacy of the limiting instruction,[140] it seems unrealistic to assume that the jury members, being human, could believe that defendant's confession of murder makes him a liar but not a murderer.[141]

The impeachment exception, as developed in *Harris* and following cases, has left a curious imbalance in the exclusionary rule. A defendant may still have evidence suppressed if it was obtained in any of the circumstances invoking the exclusionary rule. In many cases of minor offenses, particularly those involving drug possession, the unavailability of this evidence is fatal to the prosecution's case, and dismissal results.[142] Thus, *Harris* has not answered any of the salient criticisms of the rule. Reliable evidence procured in good faith through a slight or technical infringement of a constitutional guarantee remains inadmissible.

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340 (5th Cir. 1973), and Williams v. Wainwright, 502 F.2d 1115 (5th Cir. 1974). The Seventh Circuit followed *Walker* in United States v. Jansen, 475 F.2d 312 (7th Cir. 1973).

[136]Gilday v. Scafati, 428 F.2d 1027 (1st Cir. 1970), *cert. denied*, 400 U.S. 926 (1971); Tucker v. United States, 431 F.2d 1292 (9th Cir. 1970).

[137]Howard v. Craven, 446 F.2d 586 (9th Cir. 1971).

[138]United States v. Hockenberry, 474 F.2d 247 (3d Cir. 1973).

[139]*But see* United States *ex rel.* Wright v. LaVallee, 471 F.2d 123 (2d Cir. 1972) (admission of incriminating statement upheld despite lack of limiting instruction).

[140]*See* Nelson v. O'Neil, 402 U.S. 622 (1971). *But cf.* Bruton v. United States, 391 U.S. 123 (1968).

[141]Several commentators have expressed doubt as to the effectiveness of the limiting instruction. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 171-80 (1966); MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 59, at 136 (2d ed. E. Cleary 1972); Note, *The Limiting Instruction—Its Effectiveness and Effect*, 51 MINN. L. REV. 264 (1967).

[142]Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 684-87 (1970).

However, if defendant proceeds to trial, he is faced with a choice between relinquishing his right to testify in his own behalf and "waiving" exclusion, since the prosecution can use the illegally obtained evidence to rebut his denial of the commission of the offense charged.[143]

Thus, *Harris,* born undoubtedly of dissatisfaction with applications of the exclusionary rule when reliable evidence is excluded because of minor infringements of constitutional rights, results in the sole criterion of admissibility being defendant's choice to testify. This circumvention of the rule remedies none of its defects while effectively sabotaging its purposes of deterrence and maintenance of judicial integrity.[144]

It is submitted that if the purposes of the exclusionary rule are to retain validity, the impeachment exception must be limited in two respects. First, impeachment use should be restricted to trustworthy evidence. Whenever unreliability was a factor in establishing the rule excluding certain evidence, that evidence should not be admissible to impeach. Recognition of this limitation appears implicitly in *Harris.* Chief Justice Burger noted that Harris' statement was not claimed to be involuntary and in-

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[143]Burt v. New Jersey, 414 U.S. 938 (1973) (Douglas, J., dissenting from order denying certiorari).

Justice Brennan, dissenting in *Harris,* said:

> The choice of whether to testify in one's own defense must . . . be "unfettered," since that choice is an exercise of the constitutional privilege . . . . The . . . prosecution's use of the tainted statement "cuts down on the privilege by making its assertion costly."

401 U.S. at 230, *quoting from* Griffin v. California, 380 U.S. 609, 614 (1965). *See also* Brooks v. Tennessee, 406 U.S. 605 (1972) (statute requiring a defendant who testifies in his own behalf to do so before other defense witnesses invalidated as impermissible restriction on defendant's fifth and sixth amendment rights).

[144]*Harris* is typical of the present Court's indirect attacks on the exclusionary rule. The Court has limited the scope of the constitutional rights which exclusion is used to enforce. *See* United States v. Robinson, 414 U.S. 218 (1973) (fourth amendment does not ban warrantless search incident to custodial arrest for traffic violation); United States v. Ash, 413 U.S. 300 (1973) (sixth amendment does not require that defendant's counsel be present at photographic identification); Adams v. Williams, 407 U.S. 143 (1972) (fourth amendment allows "stop-and-frisk" based on informant's tip); Kirby v. Illinois, 406 U.S. 682 (1972) (sixth amendment does not require exclusion of eyewitness identification made in absence of defendant's counsel unless formal charges pending against defendant); Wyman v. James, 400 U.S. 309 (1971) (fourth amendment allows requirement of consent to caseworker "home visits" as prerequisite to receiving benefits under Aid to Families with Dependent Children). The Court has also restricted the availability of exclusion. *See* United States v. Calandra, 414 U.S. 338 (1973) (witness cannot object to Grand Jury question as based on illegally obtained evidence); Lego v. Twomey, 404 U.S. 477 (1972) (prosecution need prove voluntariness of confession only by preponderance of evidence).

timated that an involuntary statement would not be admissible even for impeachment.[145] If *Harris* was meant to prevent exclusion from being "perverted into a license to use perjury by way of defense,"[146] then its exception should also be limited to evidence which *shows* perjury by its clear probative value.

If evidence subject to exclusion were placed on a continuum according to reliability, tangible evidence unlawfully seized or derived from unlawful acts would probably be considered the most reliable. Statements given at pretrial hearings are also considered trustworthy, as is testimony of witnesses derived from deprivations of rights. *Miranda*-violative statements are less reliable, and coerced statements even less so. Least reliable of all would be eyewitness identifications.[147] At some point on this continuum, a limit should be imposed beyond which the suppressed evidence is insufficiently reliable to invoke the impeachment exception. Since *Harris* has held admissible statements obtained in violation of *Miranda*, the limit would seem best placed there, excluding less reliable evidence such as coerced confessions and invalid eyewitness identifications.

Secondly, the exception should distinguish according to the gravity of the infringement of defendant's rights by which the evidence was obtained. This limitation is not explicitly recognized in *Harris*, but it may well be significant that the *Miranda* violation in that case was not a flagrant deprivation of Harris' rights. Further support for such a distinction may be found in *Michigan v. Tucker*,[148] where the slightness of the infringement, a *Miranda*-violative interrogation, was offered as a factor supporting the admissibility of the testimony of the witness to whom defendant's statement led.

Some sixty years ago the Supreme Court recognized that the mere existence of constitutional provisions would not alone secure the rights which those provisions guaranteed.[149] Whatever its defects, the exclusionary rule has served to vindicate these guarantees. It is to be hoped that rather than emasculate the rule by further indirect attacks, the Court will limit the impeachment exception so as to protect the exclusionary rule's ability to implement the Constitution.

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[145] 401 U.S. at 225-26. *See* LaFrance v. Bohlinger, 499 F.2d 21, 35 (1st Cir. 1974).

[146] 401 U.S. at 226.

[147] *See* United States v. Wade, 388 U.S. 218 (1967).

[148] 417 U.S. 433 (1974). See text accompanying notes 88-94 *supra*.

[149] Weeks v. United States, 232 U.S. 383 (1914). See note 4 *supra*.