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The Impeachment Exception to the Exclusionary Rules: Policies, Principles, and Politics

James L. Kainen*

INTRODUCTION

The exclusionary evidence rules derived from the Fourth, Fifth, and Sixth Amendments continue to play an important role in constitutional

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criminal procedure, despite the intense controversy that surrounds them. The primary justification for these rules has shifted from an "imperative of judicial integrity" to the "deterrence of police conduct that violates . . . [constitutional] rights."[1] Regardless of the justification it uses for the rules' existence, the Supreme Court continues to limit their breadth "at the margin," when "the acknowledged costs to other values vital to a rational system of criminal justice" outweigh the deterrent effects of exclusion.[2]

The most notable limitation on the exclusionary rules is the impeachment exception, which permits the use of illegally obtained evidence at trial to impeach the defendant's testimony. The shift from a judicial integrity rationale to a deterrence rationale for the rules, however, does not explain the origins of this exception. The Court created the impeachment exception in 1954 in *Walder v. United States*,[3] before rejecting the judicial integrity approach. *Walder* suggests that the Court has supported the exception based on principle, as well as on policy considerations.[4]

This article argues that attempts to justify the impeachment exception as a matter of policy or as a matter of principle are equally misguided. Both methods wrongly consider the integrity of factfinding at a criminal trial a value that can meaningfully be balanced against the constitutional values protected by the exclusionary rules.[5] Instead, a coherent approach to the scope of the exclusionary rules must approach that question entirely as a matter of constitutional criminal procedure. Constitutional guarantees do not supply independent values to balance against the integrity of factfind-

1. Stone v. Powell, 428 U.S. 465, 485-86 (1976).

2. *Id.* at 494.

3. 347 U.S. 62 (1954).

4. I use the terms principles and policies to refer respectively to noninstrumental and instrumental justifications for legal rules. *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978); Henry P. Monaghan, *The Supreme Court 1974 Term: Foreward: Constitutional Common Law,* 89 HARV. L. REV. 1 (1975); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication,* 83 YALE L.J. 221 (1973).

5. For those accustomed to thinking about the principle-based approach to constitutional adjudication as an "absolutist" alternative to balancing, it will seem odd to criticize a principled approach for balancing anything, much less balancing improperly. Nonetheless, because thoughtful principled approaches often acknowledge the need to determine the range of application of (at least potentially) conflicting principles according to their weight in varying circumstances, they entail balancing in the most profound sense of the term. The modern experience of the inevitability of balancing, ably described by Professor Aleinikoff, is, although often crudely associated with utilitarianism, by no means limited to instrumentalist legal reasoning. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing,* 96 YALE L.J. 943, 949-52 (1987) (noting that categorical distinctions emphasizing differences in kind rather than degree distinguish 19th century constitutional law, whether instrumentalist or not); *see also* James L. Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State,* 31 BUFF. L. REV. 381, 404-37 (1982) (describing how categorical distinctions between rights and remedies, and property and expectancies ordered the central jurisprudence of vested rights, whether conceived as instrumentalist or formalist, or whether supported by positivist or natural law theories). This article's critique of the Court's principled justifications for the impeachment exception, however, does not require resolution of the question whether principles properly can have the dimension of weight. The reader who finds references to balancing competing principles jarring may read the critique of the Court's approach as a criticism of its determination that the principle underlying the exclusionary rules does not trump that supporting the impeachment exception.

ing—they define that integrity.[6] Consequently, the impeachment exception should be eliminated because it improperly compromises constitutional rules of criminal procedure in the name of furthering what the Court claims to be "other values vital to a rational system of criminal justice."[7]

This article examines the doctrine that the courts have employed to establish the boundaries of the impeachment exception.[8] It develops an internal critique[9] of that doctrine's ability to establish coherent limits to the exception, given the underlying principles or policies that it purports to serve. The benefits of using an internal critique are twofold. First, this method permits a comparison between the assumptions underlying the doctrine and the reality of the criminal trial process. It uses the boundary disputes generated by cases to analyze how the Court's conception of the criminal process informs the impeachment exception. The critique challenges that conception in light of the Court's inability to coherently resolve recurring questions about the proper scope of the impeachment exception.

Second, the internal critique allows an evaluation of the impeachment exception free from different substantive arguments for particular exclusionary rules. Despite the continued controversy over evidentiary exclusion, and despite the constantly changing nature of constitutional criminal procedure, the Court seems disinclined to engage in a wholesale reversal of all Fourth,

6. The critique of the principle-based approach to the impeachment exception is directed at the Court's claim that principled justifications warrant the exception. I do not mean to imply that those who generally advocate a principle-based approach to constitutional adjudication would necessarily endorse the Court's appraisal of the relevant principles. Indeed, I think it likely that Dworkin, for example, would argue that a proper application of the principle-based approach would support this article's conclusion that the exception should be eliminated. That the principle- and policy-based approaches can each accommodate such different results demonstrates that a critique of only one approach to the doctrine will necessarily remain partial and, thus, of limited utility. *See generally* ROBERTO MANGABEIRA UNGER, KNOWLEDGE & POLITICS 1-3 (1975) (discussing limitations of partial critique).

7. *See* Stone v. Powell, 428 U.S. 465, 494 (1976).

8. This article is therefore a study of the way boundary doctrines function. It evaluates the "problem" purportedly "solved" by those doctrines and offers a framework within which to understand their historical evolution. For articles employing similar methods, see Kainen, *supra* note 5; Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 209 (1979). For general comment on the method, see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 213-68 (1987); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984). The emphasis on boundary doctrine is particularly appropriate to this article's internal critique of the impeachment exception. *See* note 9 *infra* and accompanying text. The inability of the principle- or policy-based justifications for the impeachment exception to generate limits that are consistent with those justifications provides the most compelling evidence that the exception is misconceived.

9. On the distinction between internal and external critiques, see R. DWORKIN, *supra* note 4, at 279-90. The internal critique developed in this article evaluates the impeachment exception within the frameworks established by the Court's policy- and principle-based analyses. Accordingly, it criticizes the exception because of its inability to rationally accommodate either its principle- or policy-based goals to those of the exclusionary rules. The critique is not internal in the sense of focusing only on the logic of the doctrine. It is grounded in empirical and normative realities of criminal trial practice, as presently practiced and conceived. Those realities undermine the legitimacy of the impeachment exception, not the more general notion that ultimately, the exception, no more than any other legal rule, can be demonstrated to represent an unproblematic solution to a difficult problem.

Fifth, and Sixth Amendment exclusionary rules.[10] Accordingly, general questions about the extent of those rules—questions cutting across different kinds of constitutional protections—are likely to persist.

The internal critique of the impeachment exception asks whether exclusionary rules, as currently qualified by the impeachment exception, serve their purported instrumental or principled goals. This article suggests that they do not, and argues that a meaningful reexamination of Fourth, Fifth, and Sixth Amendment exclusionary rules should focus on the substantive values underlying those rules, rather than on the effect of evidentiary exclusion on the factfinding process at a criminal trial.

Part One traces the doctrines with which the Court defined the scope of the impeachment exception until its recent decision in *James v. Illinois*.[11] The Court perceived the scope of the exception at various times as informed by policies or principles. The policy approach depicts the exception as the product of an instrumental balance between truth-seeking and deterrence. The principle-based approach defines the exception as the product of principles holding that the conviction of a defendant with illegally obtained evidence, or his exoneration by defense perjury, violates the integrity of a criminal trial.

Part Two examines the limits of the policy approach to the impeachment exception. The Court's decision in *James* reveals that a true balance between deterrence and truth-seeking cannot be achieved in practice. The Court relies on the evidentiary concepts of impeachment and rebuttal proof to determine the appropriate scope of the exception, but these concepts are unusable when wrenched outside of their traditional context. Thus, the balancing analysis fails in *James* because of its own incoherence rather than from any unique difficulty associated with the issue in that case.

Part Three examines the alternative, principle-based boundary doctrine. It explores how the Court limits the reach of the impeachment exception by using the evidentiary concepts of the burden of proof and collateral evidence to distinguish between affirmative and negative uses of illegal proof. The strained distinction between affirmative and negative uses reveals, however, that traditional evidentiary concepts are incapable of generating boundaries to the exception without betraying its underlying principles.

Part Four generalizes the critiques of the policy and principle approaches to the problem of the impeachment exception's boundaries. It argues that these boundary doctrines fail to establish coherent limitations on the impeachment exception because of a common, faulty premise. That premise bifurcates the criminal process into fact-gathering and factfinding components governed by conflicting norms embodied in constitutional criminal procedure and evidentiary principles. The Court has failed to find boundaries to the impeachment exception that rationally accommodate these con-

10. *See, e.g.*, Minnick v. Mississippi, 111 S. Ct. 486 (1990) (extending the application of *Miranda*'s exclusionary rule).

11. 493 U.S. 307 (1990).

flicting values, demonstrating that the accommodation sought is illusory and its premise misconceived. The fundamental error of the impeachment exception does not arise from the decision to use a policy or a principled approach. Rather, it lies in the false conception that the contradictory values reflected in constitutional criminal procedure and evidentiary principles are susceptible to neutral accommodation.

Part Four also examines the immediate implications of this analysis for the impeachment exception. This article urges the elimination of the exception and proposes rethinking the limits of the exclusionary rules exclusively as a matter of the substantive values informing constitutional criminal procedure. The Court's attempt to distinguish between those constitutional rules of criminal procedure that define the means of obtaining evidence as illegal and those that define the use of such evidence at trial as illegal cannot be sustained. Thus, this article concludes that any analysis of the scope of the exclusionary rules should be recast exclusively as an issue of constitutional criminal procedure, rather than as a compromise between those rules and the principles of evidence.

I. THE DOCTRINAL BACKGROUND OF THE IMPEACHMENT EXCEPTION BEFORE *JAMES V. ILLINOIS*

The Supreme Court first applied the impeachment exception in the 1954 case of *Walder v. United States*.[12] In *Walder*, the Court allowed the prosecution to use illegally obtained evidence from a prior investigation to impeach a defendant's testimony that he had never possessed heroin.[13] An indictment stemming from the earlier investigation had been dismissed when the fruits of an illegal search were suppressed.[14] On a later, unrelated charge of heroin possession, Walder testified that he had never possessed heroin.[15] The trial court permitted the prosecution to introduce the evidence from the prior search, in spite of the Fourth Amendment exclusionary rule, and the Supreme Court affirmed Walder's conviction.[16] Although the exclusionary rules prohibited the prosecution from making "an affirmative use of evidence unlawfully obtained," the Court refused to permit the defendant to "turn the illegal method by which [the] evidence . . . was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths."[17]

Walder distinguished the earlier case of *Agnello v. United States*,[18] in which the Court had refused to permit the admission of an illegally seized can of cocaine to rebut a defendant's testimony. Agnello was charged with

12. 347 U.S. 62 (1954).
13. *Id.* at 65-66.
14. *Id.* at 62-63.
15. *Id.* at 63.
16. *Id.* at 64.
17. *Id.* at 65.
18. 269 U.S. 20 (1925).

conspiracy to sell cocaine.[19] The prosecution introduced testimony establishing that Agnello met with the conspirators at his home and then accompanied them to a location where he delivered small packages of cocaine in exchange for money.[20] In his direct testimony, Agnello conceded that he had possessed and delivered the packages, but denied having had knowledge of their contents.[21] On cross-examination, the prosecutor elicited Agnello's testimony that he had never seen narcotics.[22] The prosecutor then introduced, over objection, a can of cocaine that had been illegally seized from Agnello's house.[23] The Supreme Court reversed Agnello's conviction, noting that in his direct testimony Agnello "was not asked and did not testify concerning the can of cocaine" and thus "did nothing to waive his constitutional protection or to justify cross-examination . . . [regarding] the evidence."[24]

The *Walder* Court distinguished *Agnello* on the grounds that the prosecutor in *Agnello* had attempted "to smuggle . . . [the evidence] in on cross-examination by asking the accused the broad question" about whether he had ever seen narcotics.[25] More significantly, the *Walder* Court also emphasized the character of the respective defendants' testimony to explain the different results. Unlike Agnello, Walder "[o]f his own accord . . . went beyond a mere denial of complicity in the crimes . . . charged" and made a false assertion about a "collateral matter" (his past history).[26] Although "the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him" by leaving him "free to deny all the elements of the case against him without thereby giving leave to the Government to introduce . . . evidence illegally secured," Walder's testimony had not been so limited.[27] Thus, there was "hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility."[28]

Following *Walder*, the lower courts attempted to follow this reasoning, permitting impeachment with illegally obtained evidence only when it related to "collateral matters."[29] The Court did not revisit the impeachment

19. *Id.* at 28.
20. *Id.* at 29.
21. *Id.*
22. *Id.*
23. *Id.* at 29-30.
24. *Id.* at 35. The Court also relied upon Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), in which it had noted: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."
25. Walder v. United States, 347 U.S. 62, 66 (1954).
26. *Id.* at 65.
27. *Id.*
28. *Id.*
29. *See* Mary Jo White, Comment, *The Impeachment Exception to the Constitutional Exclusionary Rules,* 73 COLUM. L. REV. 1476, 1479-80 (1973); Note, *The Collateral Use Doctrine: From Walder to Miranda,* 62 NW. U. L. REV. 912, 923 (1968); *see also* United States *ex rel.* Dixon v. Cavell, 284 F. Supp. 535, 541 (E.D. Pa. 1968) (holding that the statements at issue "were sufficiently collateral to be properly characterized as harmless"); United States v. Birrell, 276 F. Supp. 798, 817

exception until 1971 in *Harris v. New York*[30] when it decided to apply the exception to evidence obtained in violation of the defendant's Fifth Amendment right to receive the now familiar *Miranda* warnings before custodial interrogation. In so doing, the Court also dealt a severe blow to *Agnello* by eliminating its collateral use requirement. The *Harris* Court acknowledged that Harris was impeached with evidence "bearing more directly on the crimes charged," while Walder's impeachment related "to collateral matters included in his direct examination."[31] Nonetheless, the Court found no "difference in principle" between direct and collateral evidence because excluding either would turn "[t]he shield provided by *Miranda* . . . into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."[32]

The demise of the collateral use limitation might also be explained by the passing of the anti-perjury, judicial integrity rationale from which it sprang. By the time of the *Harris* decision, the deterrence rationale for the exclusionary rules had come to the fore.[33] Thus, in addition to discussing principles of judicial integrity underlying the exception, the Court rationalized its decision by balancing the effect of admissibility on trial accuracy against the effect of exclusion on deterring *Miranda* violations. While the truth-seeking benefits of the exception were manifest because "[t]he impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility," the Court also found that "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief."[34]

In the 1975 decision of *Oregon v. Hass*,[35] the Court again addressed the admissibility of statements obtained in violation of *Miranda*. But in *Hass*, the police properly gave the defendant the required warnings; they violated *Miranda* when they improperly continued interrogation after Hass requested counsel.[36] The Oregon Supreme Court had distinguished this situation from one in which the police fail to give proper warning. It asserted that despite the impeachment exception, the police might be deterred from the latter vio-

(S.D.N.Y. 1967) (holding that "suppressed evidence may be used to impeach the testimony of defense witnesses as to collateral matters").

30. 401 U.S. 222 (1971).

31. *Id.* at 225. The evidence in question was an admission that contradicted the defendant's denial of the crime charged (sale of drugs to undercover police officers). *Id.* at 223.

32. *Id.* at 225, 226.

33. Kamisar identifies the origins of the shift from the judicial integrity rationale to the deterrence rationale in the Court's decision in Linkletter v. Walker, 381 U.S. 618 (1965). Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 627 (1983). These origins came to fruition in Stone v. Powell, 428 U.S. 465 (1976). *See* notes 1-2 *supra* and accompanying text.

34. *Harris*, 401 U.S. at 225. Dissenting, Justice Brennan relied on the collateral use doctrine but also noted dicta in *Miranda* asserting that statements "used to *impeach* . . . [a defendant's] *testimony at trial . . . are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.*" *Id.* at 230-31 (Brennan, J., dissenting) (alteration in original) (quoting Miranda v. Arizona, 384 U.S. 436, 477 (1966)).

35. 420 U.S. 714 (1975).

36. *Id.* at 715-16.

lation because they risk losing "incriminating evidence for their case in chief."[37] On the other hand, as the Court itself noted, "when proper *Miranda* warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material."[38] Thus, applying the exception to statements obtained in these circumstances would provide the police with "almost no incentive for following *Miranda*'s requirement that [interrogation be ceased]."[39]

The Court framed the question as the admissibility of Hass's statements "solely for impeachment purposes" and found little distinction between the principles announced in *Harris* and those required in Hass's case.[40] Conceiving that *Harris* had struck a "balance" between the costs of admission and the costs of exclusion, the Court found that this balance controlled *Hass* as well, and allowed the prosecution to use its illegally obtained evidence.[41]

Although conceding the Oregon court's view that a police officer might "have little to lose and perhaps something to gain"[42] if the interrogation were improperly continued, the Court declined to accept Justice Brennan's prediction that "police interrogation will doubtless be vigorously pressed to obtain statements before the attorney arrives."[43] The Court noted that police would gain as much, if not more, useful evidence from defective warnings as they would from continued interrogation after providing adequate warning.[44] Thus, whether a substantial number of additional violations would be encouraged by the impeachment exception in this new context was necessarily speculative.[45] The Court concluded that the speculative possibility that *Hass*, unlike *Harris*, would encourage routine *Miranda* violations did not justify exceeding the level of deterrence already provided in *Harris*, which prohibited the use of illegally obtained evidence in the prosecution's case-in-chief.[46]

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37. *Id.* at 718 (quoting Oregon v. Hass, 267 Or. 489, 492, 517 P.2d 671, 673 (1973)).
38. *Id.* at 723.
39. *Id.* at 725 (Brennan, J., dissenting).
40. *Id.* at 715, 722.
41. *Id.* at 723-24.
42. *Id.* at 723.
43. *Id.* at 725 (Brennan, J., dissenting).
44. *Id.* at 723.
45. *Id.*
46. *Id.* at 722-23. The Court applied a similar analysis to a Sixth Amendment case in Michigan v. Harvey, 494 U.S. 344 (1990). Police contacted Harvey in jail, after he was indicted and represented by counsel, eliciting a statement from him in violation of Michigan v. Jackson, 475 U.S. 625 (1986), by leading him to believe that his lawyer's presence was unnecessary. *Harvey*, 494 U.S. at 346. According to Justice Stevens's dissent,

> [t]he police would have everything to gain and nothing to lose by repeatedly visiting with the defendant and seeking to elicit as many comments as possible about the pending trial. Knowledge that such conversations could not be used affirmatively would not detract from the State's interest in obtaining them for their value as impeachment evidence.

Id. at 365 (Stevens, J., dissenting). Relying on *Hass*, the Court dismissed the prospect of deterrence of future violations as merely a "speculative possibility" and thus outweighed by the "search for truth in a criminal case." *Id.* at 351-52 (quoting *Hass*, 420 U.S at 722, 723).

After the creation of the impeachment exception in *Walder*, and the abolition of the collateral use doctrine in *Harris*, *Agnello*'s life hung by a single thread. While able to use illegally obtained evidence to impeach a defendant's direct testimony, the prosecution could not "smuggle in" such evidence via cross-examination. The Court delivered the death blow in *United States v. Havens*,[47] when it returned to the Fourth Amendment context and considered whether the impeachment exception should permit illegally seized evidence "to impeach a defendant's false trial testimony, given in response to proper cross-examination, where the evidence does not squarely contradict the defendant's testimony on direct examination."[48] A prosecution witness, allegedly Havens's co-venturer, testified that Havens had helped him use altered T-shirts, with drugs sewn into makeshift "pockets," to smuggle heroin.[49] On direct examination, Havens denied assisting the witness in smuggling the heroin and altering the T-shirts.[50] On cross-examination, the prosecutor again elicited the defendant's denials but then elicited that Havens's suitcase had contained the remaining cloth from the T-shirts used to construct the pockets.[51] The prosecutor was thus able to introduce the T-shirts even though they had previously been suppressed as the fruit of an illegal search.[52]

The Court thus extended the impeachment exception to cover "a defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination."[53] It reasoned that "[t]he defendant's obligation to testify truthfully" does not vary according to whether his testimony is given on direct or cross-examination, and that prohibiting impeachment of testimony elicited on cross-examination "plainly within the scope of the defendant's direct examination" would "severely impede[]" the truth-seeking function of cross-examination.[54] Accordingly, the Court expanded the exception to permit any use of the evidence, on the prosecution's "direct case, or otherwise," on condition that it not be used "as substantive evidence of guilt."[55] Finally, despite finding that *Agnello* had largely been overruled, the Court also suggested that it might be distinguishable from *Havens*. The "close relationship" between Havens's direct examination and the suppressed proof would have suggested the challenged questions to any reasonably competent cross-examiner, while the prosecutor in *Agnello* had sought to use Agnello's cross-examination to "smuggle in"

47. 446 U.S. 620 (1980).
48. *Id.* at 621.
49. *Id.* at 622.
50. *Id.*
51. *Id.* at 622-23.
52. *Id.*
53. *Id.* at 627.
54. *Id.*
55. *Id.* at 628. The injunction against using the proof "substantively" to prove guilt purported to reaffirm the balance of truth-seeking and deterrence established by prohibiting the use of illegally obtained evidence on the prosecution's case-in-chief. The idea was that, insofar as the evidence was used solely for impeachment purposes, it was not being used to improperly enhance the prosecution's case-in-chief, even if the prosecutor had elicited the proof via cross-examination.

the suppressed proof.[56]

Justice Brennan's dissent rightly rejected any distinction between *Havens* and *Agnello* "turning upon the tenuity of the link between the cross-examination involved . . . and the subject matter of the direct examination."[57] After all, Agnello's professed ignorance that he was transporting cocaine reasonably suggested cross-examination about his prior possession of cocaine to establish that knowledge.[58]

Thus, despite the majority's denials, the pre-*James* evolution of the impeachment exception completed the destruction of *Agnello*. Throughout this evolution, two models for determining the scope of the impeachment exception can be seen at work. The currently dominant one, originating in *Harris*, seeks a balance between deterrence and truth-seeking. This "policy" approach conceives that the exclusionary rules promote constitutional rights by deterring police violations; the exception promotes the ability of the factfinding process to determine the truth; and the extent to which the exception permits the use of illegally obtained evidence at trial depends upon the appropriate balance between these two goals. In applying that balance, the Court has consistently equated the integrity of the factfinding process in a criminal trial with the accuracy of that process, repeatedly noting that "[t]here is no gainsaying that arriving at the truth is a fundamental goal of our legal system."[59]

The second model derives from the Court's distinction between the prosecution's affirmative use of unlawfully obtained evidence and the defendant's affirmative use of perjurious testimony in reliance on the "shield" of the exclusionary rules.[60] The scope of the exception implicates principles holding that both perjury and conviction with illegally obtained proof violate the integrity of the factfinding process, apart from the policy discussion balancing the deterrence of future violations against the accuracy of factfinding. Although no longer dominant, this approach continues to influence arguments about the appropriate scope of the exception.

II. POLICIES: DETERRENCE VERSUS TRUTH-SEEKING

In the recent case of *James v. Illinois*, the Court considered whether to extend the impeachment exception to the testimony of defense witnesses.[61] Earlier cases permitted illegally obtained evidence only to impeach the testimony of the defendant himself.[62] Thus, the question in *James* was whether the Court would cross the implicit boundary of its previous cases.

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56. *Id.* at 625.

57. *Id.* at 630 (Brennan, J., dissenting).

58. *Id.* at 630-31 (Brennan, J., dissenting).

59. *See, e.g.*, James v Illinois, 493 U.S. 307, 311 (1990) (quoting *Havens*, 446 U.S. at 626); *see also* Oregon v. Hass, 420 U.S. 714, 722 (1975).

60. *See* Walder v. United States, 347 U.S. 62, 65 (1954).

61. *See James*, 493 U.S. at 309.

62. *See* Harris v. New York, 401 U.S. 222, 225 (1971) (rejecting requirement that illegally obtained evidence be "collateral" to the crime charged in order to be admitted under the exception); *Hass*, 420 U.S. at 721-23 (applying exception to evidence obtained after defendant requested coun-

In its case-in-chief at James's murder trial, the prosecution introduced testimony of several eyewitnesses, who identified James as having shot the victim.[63] Each of the eyewitnesses testified that the shooter had shoulder-length "reddish" hair worn in a slicked-back "butter" style.[64] They claimed to recognize James as the shooter because they had seen him at a parade several weeks before the shooting.[65] At trial, however, James's hair was black and worn in a "natural" style.[66] A defense witness testified that James also wore short black hair on the night of the crime.[67] In rebuttal, the prosecution introduced James's statement, originally suppressed as a fruit of his unlawful arrest, in which he acknowledged that he had had long reddish hair on the night of the shooting.[68]

Applying the truth-seeking/deterrence balancing test,[69] a bare majority of the Court reversed the decision of the Illinois Supreme Court and excluded the defendant's statement.[70] The Court, in an opinion by Justice Brennan, held that the prosecution may only use suppressed evidence to impeach the testimony of a defendant and not that of a defense witness.[71] Justice Kennedy, joined by three other members of the Court, applied the same test in his dissent,[72] but concluded that the illegally obtained evidence had been properly admitted.[73]

A close examination of the majority and dissenting opinions reveals that both are unable to reach their preferred results without making internally inconsistent claims.[74] Moreover, both opinions are inconsistent with argu-

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sel); *Havens,* 446 U.S. at 625-28 (applying exception to permit impeachment of defendant's testimony on cross-examination).

However, several lower courts had assumed the exception to apply equally to the impeachment of defense witnesses. *See, e.g.,* United States v. Kenny, 462 F.2d 1205, 1224-25 (3d Cir.), *cert. denied,* 409 U.S. 914 (1972); Jacks v. Duckworth, 486 F. Supp. 1366 (N.D. Ind. 1980), *aff'd,* 651 F.2d 480 (7th Cir. 1981), *cert. denied,* 454 U.S. 1147 (1982); *see also* note 192 *infra* (citing cases in which courts admitted suppressed proof to contradict defense counsel's misleading cross-examination or argument).

63. *James,* 493 U.S. at 310.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* The defendant had successfully suppressed this statement, made at the time of his arrest, because the arresting officers had no warrants and lacked probable cause for his warrantless arrest. *Id.* at 309-10.

69. *See id.* at 312 n.1 (noting that the Court must balance the likelihood of deterrence against the costs of withholding reliable information from the truth-seeking process) (citing Illinois v. Krull, 480 U.S. 340, 347 (1987)).

70. *Id.* at 309.

71. *Id.* at 319-20.

72. *Id.* at 324-25 (Kennedy, J., dissenting).

73. *Id.* at 330 (Kennedy, J., dissenting).

74. This approach is consistent with the development of an internal critique that analyzes the impeachment exception's ability to accomplish the goals its proponents have established for it. In contrast, several commentators have criticized the Court's balancing approach with respect to the exclusionary rules on the ground that the values that it purports to balance are incommensurate. *See* Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering,* 48 IND. L.J. 329, 332-33 (1973); Kamisar, *supra* note 33, at 646; James Boyd White, *Forgotten Points in the "Exclusionary Rule" Debate,* 81 MICH. L. REV. 1273, 1281-82 (1983); *see also* United States v.

ments that had informed the Court's previous application of the balance.

A. *The Indeterminate Application of the Truth-Seeking/Deterrence Balance in* James v. Illinois

1. *The majority opinion.*

Writing for the Court, Justice Brennan argued that extending the exception to include defense witnesses would reduce the likelihood of deterrence without a compensating increase in accurate factfinding.[75] On the truth-seeking side of the balance, Justice Brennan offered two arguments why impeaching defense witnesses was less likely to improve factfinding than impeaching defendants. First, defense witnesses have less at stake than defendants and are less likely to offer perjured testimony.[76] Second, because defense witnesses are less subject to control by counsel, and may even be hostile, defense counsel is more likely to forego calling such witnesses to avoid the possibility that the witness's testimony will open the door to illegally obtained proof.[77] Thus, although applying the exception to the defendant deters perjured testimony without discouraging truthful testimony, applying it to defense witnesses would deter counsel from calling witnesses who might give truthful, probative evidence.[78]

On the deterrence side of the balance, Justice Brennan argued that extending the exception would substantially increase the prosecution's incentive to gather evidence illegally for use as impeachment proof. Recognizing that such proof could deter the testimony of defense witnesses or impeach

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Leon, 468 U.S. 897, 942-43 (Brennan, J., dissenting). Despite their criticism, these commentators do not demonstrate that it is impossible to develop a common denominator for truth-seeking and deterrence that can properly balance the two goals. This fact has contributed to the Court's persistent analysis of the issue in light of this trade-off. *Cf.* Aleinikoff, *supra* note 5, at 972-75 & n.203 (generalizing incomparability critique to balancing tests in general, but noting their tenacity because "we seem regularly to reduce value choices to a single currency for comparison" and because "a thoroughgoing commitment to an economic analysis" of constitutional law "could avoid the 'apples' and 'oranges' problem"). Accordingly, the analysis in this article assumes that the benefits to truth-seeking and deterrence can theoretically be measured in common coin, but questions whether such a conception rationally informs decisions about the scope of the exception. For more on the difference between the internal critique developed here and an external critique, see note 9 *supra* and accompanying text.

75. For ease of reference, this article attributes the *James* Court's analysis to Justice Brennan, the author of the majority opinion. I recognize that the need to maintain a majority made it impossible for Justice Brennan to express his preferred analysis. In a footnote, Justice Brennan noted that he personally rejected the policy-based analysis of the impeachment exception that he employed in *James*. *James*, 493 U.S. at 312 n.1. *See generally* WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 37-90 (1964) (describing how "marshalling the Court" to achieve desired results often requires a Justice writing the Court's opinion to compromise his analysis). Thus, the reader should understand the criticism of Justice Brennan's opinion in *James* to be part of the critique of the policy-based approach, rather than a critique of Justice Brennan's preferred, principle-based approach to the impeachment exception. The critique of *that* approach—exemplified by Justice Brennan's claim that principle can justify the limited impeachment exception created in *Walder*, *see* Harris v. New York, 401 U.S. 222, 231-32 (1971) (Brennan, J., dissenting)—is developed in Part III *infra*.

76. *James*, 493 U.S. at 314.

77. *Id.* at 315.

78. *Id.*

that which is offered, the prosecution would have "little to lose and much to gain" by obtaining it.[79] In contrast, Justice Brennan argued, the existing incentive to gather evidence with which to impeach the defendant is weak because it relies on the unlikely predictions that the defendant will testify and then inadvertently open the door to illegally obtained evidence.[80] With respect to defense witnesses, however, the "vastly increase[d] . . . number of occasions on which such evidence could be used" would lead the police to "recognize that obtaining evidence through illegal means stacks the deck heavily in the prosecution's favor."[81] This added incentive, together with the "chilling effect . . . deter[ring] defendants from calling witnesses in the first place, thereby keeping from the jury much probative exculpatory evidence," led to the conclusion that applying the exception to defense witnesses would reduce deterrence to a degree uncompensated by any related increase in truth-seeking.[82]

Justice Brennan's arguments, however, did not adequately support his conclusion. First, while it is true that a criminal defendant is more likely to lie than a disinterested witness, Justice Brennan ignored the fact that a jury is also less likely to believe a defendant's false testimony.[83] A testifying defendant's credibility is impeached by his interest in the trial's outcome even before he utters a word. Prosecutors are routinely entitled to an instruction reminding the jury to consider the defendant's unique interest in the trial's outcome when evaluating his testimony.[84] Even where such an instruction is not allowed, an acceptable argument to the factfinder can make the same telling point.[85]

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79. *Id.* at 318-19.

80. *Id.* at 317-18.

81. *Id.* at 318.

82. *Id.*

83. In more formal terms, the risk of an erroneous finding at trial comprises both the risk that false testimony will occur *and* the risk that it will not be detected. The majority opinion, by focusing on the reduced risk of error in defense witness testimony but ignoring the related increase in detection risk, failed to address the true issue—the *net* effect on trial accuracy of impeaching defense witnesses.

84. *See* 1 LEONARD B. SAND, JOHN P. SIFFERT, WALTER P. LOUGHLIN & STEVEN A. REISS, MODERN FEDERAL JURY INSTRUCTIONS: CRIMINAL, ¶ 7.01, at 7-12 (1991) (Instruction 7-4). This article will frequently refer to jury instructions as the best evidence available of existing beliefs about the significance of different kinds of evidence in a criminal trial. These beliefs are often inconsistent with those underlying the Court's reasoning about the appropriate scope of the impeachment exception. Although frequently overlooked in the theoretical law review literature, jury instructions are a rich source of evidence reflecting trial lawyers' and judges' views about the kinds of assumptions jurors are likely to bring to the evaluation of proof.

85. Judge Sand, in his excellent analysis of jury instructions, notes that some circuits prefer no separate instruction on the defendant's interest. Instead, they rely on an instruction referring generally to all interested witnesses. *Id.* at 7-12 to 7-13. But the reason that they do so is further evidence of the defendant's automatic impeachment. These courts refuse a separate instruction because the defendant's interest in the outcome of the case is *so* obvious that there is no need to highlight it for the jury, which perhaps would prejudice the defendant. Thus, the courts agree upon the obvious and unique impeachment of a defendant's testimony by his interest in the outcome. They disagree only about the best way to remind the jury of that impeachment because of its possibly overwhelming character.

Note that Judge Sand himself prefers the specific instruction because it contains balancing language particularly tailored to the defendant. This balancing language should prevent the jury from

Ironically, Justice Brennan's argument that defendants are far more likely to lie itself assumed that a common sense evaluation of the defendant's testimony would subject it to heightened scrutiny. If factfinders share his less suspicious attitude toward defense witness testimony, assumed to be a product of common sense—and there is no reason to suspect that the Court has a monopoly on common sense—the lesser incentive to defense witness perjury should also entail an increased likelihood that the unimpeached testimony of a defense witness will be erroneously credited, even if it is false. By disregarding the defendant's reduced credibility, Justice Brennan's opinion also contradicted prior precedent. In previous impeachment exception cases, the Court had consistently assumed defendant perjury if suppressed evidence contradicted his testimony, demonstrating the skepticism one might routinely expect with respect to a defendant's exculpatory testimony. Although the *James* Court went out of its way to say that "nothing in the record suggests that . . . [the defense witness] intentionally committed perjury,"[86] the same thing could have been said of the defendant's testimony in the earlier impeachment exception cases. Even if the illegally obtained evidence admitted in those cases was credible and the defendant's testimony was not, the discrepancies were as amenable to innocent explanations as those in *James*. The Court's different attitudes reflect an evaluation of the relative credibility of a defendant and a defense witness, rather than anything "in the record."

Indeed, Justice Stevens's concurring opinion in *James* emphasized that the factfinder should not assume that suppressed evidence impeaching a defense witness's testimony implies either inaccuracy or perjury.[87] This view directly contradicted the assumption of intentional falsity that permeates the Court's analysis when a defendant's testimony is similarly impeached.[88]

Given the defense witness's greater credibility, one can even question Justice Brennan's initial assumption that defense witnesses are less likely to commit perjury than defendants. While having less incentive to perjure himself, a defense witness also has less expectation of detection and punishment. Investigators, prosecutors, and grand jurors will likely share the Court's more benign view toward a defense witness's contradicted testimony. Also, rules permitting courts to take perjury into account at sentencing at least partly counteract the defendant's comparatively greater temptation to perjure himself. A defendant, unlike a defense witness, can be punished for perjury without indictment and trial.[89] In addition, if the Court's attitude is any indicator, trial courts will likely conclude that a defendant committed perjury from the simple confluence of a jury's guilty verdict and the defend-

understanding the general interested witness charge as "an indication that the defendant's testimony should be rejected since he or she has the strongest interest in the outcome of the case." *Id.* at 7-11.

86. *James*, 493 U.S. at 314 n.4.

87. *Id.* at 320-21 (Stevens, J., concurring).

88. *Cf. id.* at 314 n.4; text accompanying note 86 *supra.*

89. *See* United States v. Grayson, 438 U.S. 41, 53-55 (1978).

ant's exculpatory testimony. A defense witness on trial for perjury does not face this automatic disadvantage.

Just as Justice Brennan's discussion of the relative likelihood of perjury failed to demonstrate why impeachment of a defense witness's testimony is less important to truth-seeking than impeachment of a defendant's testimony, it highlighted the tenuous connection between preventing perjury—that is, intentionally false testimony—and promoting truth-seeking. Even if a court can distinguish perjured from merely false testimony, justifying the impeachment exception as preventing or punishing perjured testimony is simply not the same as justifying it as promoting truth-seeking. Honest errors in testimony are an equal or greater impediment than perjury to discovering the truth. Defense witnesses are an equally likely source of such errors and should be equally impeachable on that basis. Any special concern about perjured testimony, therefore, must respond to considerations apart from the truth-seeking/deterrence balance.[90]

Justice Brennan's second truth-seeking argument fared no better. He argued that applying the exception to defense witnesses would deter defense counsel from presenting "truthful and favorable testimony" for fear that such testimony might invite introduction of suppressed proof.[91] He contended that this fear would not apply to defendant testimony because counsel can coach the defendant to avert "opening the door to impeachment by carefully avoiding any statements that directly contradict the suppressed evidence."[92] But the argument failed to establish any connection between the impeachment exception's "deterrence" of truthful testimony and the overall accuracy of the factfinding process.

The argument failed to explain its premise that applying the exception to defendants does not also deter truthful and favorable testimony because only suppressed proof that "directly contradict[s]" the defendant's testimony would be admitted.[93] Justice Brennan apparently intended the "direct contradiction" requirement to express the requisite for a defendant's impeachment after *Havens*. However, this proposition did not appear in *Havens*. In that case, the Court permitted the prosecutor to establish a direct contradiction through cross-examination reasonably related to the defendant's direct testimony rather than requiring the defendant's direct testimony to directly contradict the suppressed proof.[94] Cross-examination would either elicit an admission by the defendant or lay the predicate for admitting the evidence.[95] In the alternative, had the defendant "carefully avoided" opening the door to the suppressed proof by saying nothing in "direct contradiction" with it,

90. These considerations are discussed in Part III. *See* text accompanying notes 209-267 *infra.*

91. *James,* 493 U.S. at 315.

92. *Id.* at 314.

93. *Id.* (arguing that applying impeachment exception to defendants "discourages perjured testimony without discouraging truthful testimony").

94. United States v. Havens, 446 U.S. 620, 626-27 (1980).

95. According to Justice Brennan's dissent in *Havens,* the reasonable relationship test would routinely permit prosecutors to lay the predicate for admitting any relevant evidence. *Id.* at 631-32 (Brennan, J., dissenting).

then indeed he would have been deterred from testifying to (what may be) truthful and favorable evidence as effectively as he would have been deterred from offering that proof by calling a witness.[96]

Justice Brennan's assumption that defense witnesses are more likely than defendants to be discouraged from offering truthful testimony is also questionable, considering the substantial costs that the Court has imposed upon defendants' testimony in other contexts. In *Luce v. United States*,[97] the Court did not allow a nontestifying defendant to appeal a trial court's in limine ruling, which would have permitted his impeachment with prior convictions, had he testified. *Luce* is far more likely to deter truthful testimony than any version of the impeachment exception. Thus, if one were to choose the more likely victim of this deterrence, one might choose the defendant's testimony over that of his witness. Already subject to damaging impeachment by his interest in the outcome and, perhaps, by prior convictions, the defendant might more likely perceive the prospect of his additional impeachment with suppressed proof as the marginal difference.

Even conceding Justice Brennan his premise that some truthful, probative defense witness testimony might be deterred, his argument nonetheless failed to establish the necessary connection between the deterrence of that testimony and the accuracy of factfinding. He offered no reason why the combined effect of excluding the prosecution's proof and deterring the defendant's proof would occasion a *net* loss in the accuracy of factfinding. The impeachment exception only deters defense testimony if the defendant and his counsel conclude that the costs of introducing the suppressed proof outweigh the benefits of the favorable testimony. Thus, the proposition that deterred testimony ultimately impedes truth-seeking follows only from a further assumption that the truth would be better served by considering the favorable testimony and excluding the suppressed proof. This assumption lacks foundation.

When the costs of admitting evidence to impeach a witness outweigh the benefits of his favorable testimony, the resulting failure to call the witness indicates that evidentiary processes are performing their truth-seeking function exactly as they should within the context of the adversary system. They are encouraging the parties themselves to weigh inculpatory against exculpa-

96. For example, if Havens's direct testimony denying his assistance with the smuggling pockets was only "indirectly" contradicted by the presence of the matching T-shirts in his luggage, then *Havens* held that cross-examination about his possession of the T-shirts was permissible. That cross-examination would have elicited either a denial of the T-shirts' presence sufficient to justify admission of the proof or an equally probative admission of their presence. On Justice Brennan's reading, Havens might have been able to avoid opening the door to the proof by limiting his direct testimony to a general denial of the charge. But this strategy would have prevented him from offering potentially probative and truthful evidence, as was the case with respect to the defendant in *James*, who might have been deterred from offering his witness's testimony about his hair color. As it turned out, Havens testified that the T-shirts were in his suitcase without his knowledge. Accordingly, the exception in Havens's case permitted his impeachment with the T-shirts and could easily be construed as deterring his potentially probative and truthful testimony that he had "nothing to do" with the creation or use of the smuggling pockets.

97. 469 U.S. 38, 41-43 (1984).

tory proof. The defendant may suffer if a witness offering exculpatory testimony also may invite impeachment with inculpatory suppressed evidence; obviously he would be in a much better strategic position had the witness presented no such liability. Although the operation of the exception in such an instance may impair the defendant's ability to present a better defense, it can hardly be blamed for impeding truth-seeking. After all, if impeachment evidence is damning enough to deter witness testimony, that testimony is probably false and the trial is better off without it. The adversarial system and the rules of evidence are presumptively sufficient to ensure that the truth prevails, without Justice Brennan's "tinkering."[98]

Similarly, Justice Brennan's attempt to revive the "direct contradiction" requirement for impeachment of *defendant* testimony[99] bears no real relation to truth-seeking.[100] There is no reason to believe that carefully tailored testimony, if offered by a defendant or his witness, furthers truth-seeking when it is admitted without the benefit of excluded proof that even indirectly contradicts the testimony. "Indirectly contradicting" proof will deter exculpatory evidence only where it is more probative than the evidence foregone. If the suppressed proof is less probative because it contradicts only "indirectly," defense counsel will obviously not forego the witness's more probative exculpatory testimony in order to avoid the less probative contradictory evidence. If the suppressed evidence is more probative, the decision to forego the exculpatory proof for fear of opening the door to suppressed proof again demonstrates that the adversarial factfinding process is working properly. Counsel's choice to forego the evidence to avoid even indirectly contradicting proof is presumptively explained by the comparative probative value of each. The relative value of the exculpatory and the contradicting proof, not the direct or indirect relationship between the two, is the only factor relevant to the accuracy of the factfinding process.[101]

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98. In the language of economics, the "free market" of the adversary system, established by evidentiary rules, already promotes the truth, and there is no need for regulatory intervention to achieve evidentiary goals.

99. *See* note 93 *supra* and accompanying text.

100. Justice Brennan is not the only victim ensnared by this trap. The same erroneous equation of illegally obtained proof and inaccurate factfinding seems also to have informed the suggested pre-*Havens* rule that impeachment of a defendant with illegally obtained proof be restricted to issues initiated by the defendant on direct examination, lest he be deterred from offering "all of the relevant evidence [that] is highly significant in accurate and just determinations." Volpicelli v. Salamack, 447 F. Supp. 652, 662 n.28 (S.D.N.Y.) (quoting 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 607[09], at 607-89 to 607-90 (1977)), *aff'd without op.*, 578 F.2d 1372 (2d Cir. 1978).

The framers of this rule were no better able to explain how accuracy resulted from freeing a defendant's or a defense witness's testimony from the deterring effect of reliable, contradicting proof only if it had been illegally obtained. The makers of the argument, like Justice Brennan in *James*, were proponents of the exclusionary rules, who, in light of the established doctrine, perhaps felt compelled to disguise, however transparently, a "justice" argument for limiting the impeachment exception's incursion into those rules as an argument for accurate factfinding.

101. For example, where the rules of evidence would permit Havens's impeachment with "indirectly contradicting" proof of the T-shirts in his suitcase, it is undoubtedly because introducing the proof is in the interest of accurate factfinding. Similarly, where evidentiary rules would permit the defense witness testimony about James's appearance to be impeached with James's directly contrary

Justice Brennan's opinion also failed to properly distinguish between the impeachment of defendants and defense witnesses from a deterrence perspective. First, its prediction that the incentive to gather evidence illegally would substantially increase because that evidence would be useful in discouraging or damaging defense witness testimony relied upon the faulty premise that the existing incentive to impeach or deter defendants' testimony is relatively weak.[102] Second, even assuming Justice Brennan's conclusion that applying the exception to defense witnesses would increase the police incentive to gather evidence unlawfully, his argument did not demonstrate a relationship between this increased incentive and the resulting, but supposedly minimal, gain to the accuracy of the truth-seeking process.

Justice Brennan's argument assumed that law enforcement officials would refrain from illegal actions specifically because they would know that any resulting evidence could be used only to impeach a defendant and not a defense witness. But the likelihood that this knowledge would play a substantial role in police decisionmaking is exceedingly remote. The anticipation that illegally obtained proof can impeach the defendant's testimony already provides sufficient incentive to obtain such proof routinely. Justice Brennan portrayed this incentive as "weak" by arguing that the prosecution would discount the anticipated utility of the proof by the unlikelihood that a defendant would both testify and open the door to admission of the proof. However, as his own analysis of defense witness testimony illustrated, illegally obtained proof is useful to deter defense evidence even where it is not admitted. That argument applies with equal force to a defendant's testimony, and provides the prosecution with ample incentive to obtain impeaching proof routinely.[103]

Moreover, the prosecution's incentive to acquire impeachment proof does not depend upon its prediction of the defendant's defense strategy. Instead, the requirement that the prosecution prove guilt beyond a reasonable doubt at trial governs its accumulation of evidence.[104] However the prosecution contemplates the defendant's potential strategy, the need to anticipate those possibilities and to gather evidence sufficient to counter them is largely

admission, they again promote accurate factfinding. Had the evidence been lawfully obtained, it would not have been blamed for impeding the search for truth by dissuading defense counsel from presenting proof that was less probative than the impeaching evidence. The illegal nature of evidence or whether it directly or indirectly contradicts the defense, is irrelevant to factfinding accuracy.

102. *See* James v. Illinois, 493 U.S. 307, 318 (1990).

103. Moreover, there is no reason to suspect that deterring the defendant's testimony will further truth-seeking, while deterring the defense witnesses' testimony will impede it.

104. Anyone who has participated in the criminal trial process, as an attorney, investigator, juror, or observer should recognize this process immediately. Indeed, the goal of a criminal investigation is to produce the evidence on which persuasive argument and ultimately the desired verdict can be based, all with an eye to eliminating reasonable possibilities other than that of the guilt of the defendant. *Cf.* ROGER FISHER, INTERNATIONAL CONFLICT FOR BEGINNERS 1-26 (1969) (noting that effective persuasion requires an advocate first to understand the choices facing decisionmakers as they understand them and then to change those choices in a fashion that makes it easier for them to choose the desired alternative).

the same.[105] The prosecution may contemplate that defense counsel will exploit gaps in the prosecution's proof without presenting any defense evidence, or will present evidence in the form of a defendant's or a defense witness's testimony, or will mount a defense via cross-examination of prosecution witnesses. Anticipating how the defense will present its case, however, is less important than anticipating the potential defense itself and gathering evidence to defeat it. Accordingly, any distinctions in the incentive to unlawful evidence-gathering which depend upon predictions about the precise means the defendant will use to present his defense, rather than the substance of the defense itself, are likely to be de minimis.

The structure of a criminal trial assures that the prosecution will anticipate all reasonable defenses[106] that might be advanced, rather than assume an advantage from the defendant's failure to offer independent proof. The courts must caution juries against drawing any inferences from a defendant's failure to offer an explanation for the prosecution's proof,[107] and prohibit prosecutors from making adverse comments in response to such failures.[108] A competent prosecutor or police officer would be aware of such cautionary instructions, and thus would not fail to accumulate evidence disproving anticipated defenses, including one based entirely on the prosecution's failure to overcome the presumption of innocence. The potential importance that evidence has for obtaining a conviction will likely determine the prosecution's incentive to obtain it.

The need to anticipate the substance of the defense dwarfs any prediction of the means by which the defendant will present that defense as a result of additional features of a criminal trial. In virtually all cases, the prosecution will not know how the defendant will present his defense until the trial unfolds. Some disclosure requirements preclude the use of certain defenses or defense witnesses if not revealed shortly prior to trial,[109] but the prosecution is unlikely to await that disclosure before gathering proof. Moreover, the defendant does not waive his right to present any other permissible defenses

105. I should note here that violations giving rise to exclusion are not the exclusive province of the police, although for ease of reference the article will sometimes refer to "police" as well as "prosecution" violations. Of course, the police will operate in a variety of supervised and unsupervised settings. The degree and type of supervision will itself be partially a function of the scope of the exclusionary rules and the impeachment exception. Thus, the argument in the text generally refers to the prosecution in order to encompass all of these situations.

Anyone who has ever participated in preparing a prosecution will likely recognize the relative insignificance of anticipating the precise way in which the defense will be presented. Investigation and trial preparation can be described as a conversation structured around questions such as: "What is our answer, in proof and/or argument, if he or she says this?" Prosecutors pay relatively little attention to whether the unidentified "he or she" saying these posited things is the defendant, defense counsel, or a defense witness, unless all three contingencies are specifically planned for.

106. I use the term "defenses" in its nontechnical sense to refer to any innocent explanations of the prosecution's proof.

107. *See* Carter v. Kentucky, 450 U.S. 288 (1981); *see also* Taylor v. Kentucky, 436 U.S. 478 (1978) (holding that the trial court's refusal to give the defendant's requested instruction on the presumption of innocence resulted in a violation of the defendant's right to a fair trial).

108. *See* Griffin v. Illinois, 380 U.S. 609 (1965).

109. *See, e.g.*, FED. R. CRIM. P. 12(b)(1), 12(b)(2).

or witnesses without disclosure.[110] In addition, although revealing the identities of defense witnesses is required in some jurisdictions, disclosing the substance of their anticipated testimony is not.[111]

Of course, the prosecution may plan for alternative presentation strategies in addition to planning for the defense itself. However, because prosecutors rarely know the identity of defense witnesses in advance, they can only anticipate the testimony of the defendant. He is the person most likely to be present at trial, and he has the greatest interest in its outcome. Moreover, it is the rare defense that can be presented only by the testimony of a defense witness. Most, if not all, defenses can also be established by the defendant's testimony alone. By anticipating the defendant's possible testimony, the prosecution already anticipates any other defense evidence, including the testimony of defense witnesses. Any additional deterrence gained by not applying the impeachment exception to defense witnesses must therefore be insignificant, considering the existing incentives to obtain proof to contradict or foreclose any defenses available by way of argument, cross-examination, or defendant testimony.

Even in the limiting case where the prosecution anticipates the testimony of a particular defense witness, knows the substance of that testimony, and illegally obtains evidence specifically to impeach that testimony, "standing" doctrine suppresses that evidence only if the illegal action violates the rights of the defendant.[112] It is extremely unlikely that the prospect of using evidence to impeach a defense witness would tip the scales in favor of violating a defendant's rights, because the police already have enough to gain by using illegal evidence to impeach the defendant. Consequently, extending the impeachment exception to defense witnesses would provide little additional incentive to gather proof unlawfully.

Even if there were an increased incentive to unlawful action, Justice Brennan failed to explain why this loss to deterrence would not be outweighed by the concomitant gain in factfinding accuracy. In fact, common sense suggests the opposite result. The most plausible explanation for any difference in the behavior of the prosecution, when permitted to impeach defense witnesses, as well as defendants, with illegal proof, is its realization that a defense witness's exculpatory testimony is far more damaging to its case than a defendant's exculpatory testimony. Suppose, for example, that the prosecution routinely refrained from obtaining illegal proof to contradict a defendant's anticipated testimony that he was not at the scene of the crime, but routinely obtained illegal contradicting proof when it anticipated that an alibi witness would establish the same defense. The presumptive explanation for the prosecution's behavior is the more probative character of the latter proof. Excluding impeachment evidence would thus impair factfinding ac-

110. *See* FED. R. CRIM. P. 12(b).

111. *See, e.g.*, ILL. ANN. STAT. ch. 110A, para. 413(d)(i) (Smith-Hurd 1985) (Supreme Court Rule 413).

112. *See* Brown v. United States, 411 U.S. 223 (1973); Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593 (1987).

curacy to a greater degree when the proof contradicts defense witness testimony, than when it contradicts defendant testimony. Any increased incentive resulting from the extension of the exception to defense witnesses would occur precisely because juries are more likely to believe the testimony of defense witnesses, in the absence of the contradicting proof, than the testimony of the defendant. Consequently, the factfinding costs of not extending the exception would exceed any imagined benefits to deterrence.

In sum, Justice Brennan failed to demonstrate that the lost deterrence that results from extending the impeachment exception to defense witnesses would outweigh the gain to truth-seeking. His contention that defense witnesses are less likely to lie overlooked the reality that, since a defense witness's false testimony is more likely to be believed, its impeachment is more important to truth-seeking. His argument that the impeachment of defense witnesses, but not defendants, would deter probative defense evidence failed to explain why defendants are not similarly deterred from testifying, or how the admission of otherwise legitimate proof that was illegally obtained, would impair truth-seeking. His argument that extending the exception would substantially increase the incentive to gather evidence illegally ignored existing incentives to gather proof to impeach defendants. Finally, Justice Brennan's argument that this reduced deterrence outweighs the related increase in accurate factfinding ignored the fact that any increased incentive for illegal evidence-gathering would result precisely from its greater contribution to truth-seeking.

2. *The dissent.*

Justice Kennedy's dissenting opinion concluded that the benefits to "the truth-seeking function of the criminal trial" of applying the exception to defense witnesses outweigh any costs to Fourth Amendment protections.[113] On the truth-seeking side of the balance, he correctly observed that a defense witness's lack of interest gives his testimony "greater potential to deceive" than a defendant's, and that courts cannot realistically rely on the threat of a perjury prosecution to prevent such deceit.[114] He also realized that "[t]he damage to the truth-seeking process . . . is certain to be great whether the testimony is perjured or merely false."[115] Moreover, the prosecution's silence in the face of exculpatory defense witness testimony is likely to bolster that testimony because "[j]urors will assume that if the prosecution had any proof the statement was false, it would make the proof known."[116]

Notwithstanding these substantial benefits to truth-seeking, Justice Kennedy only partially endorsed the extended application of the impeachment exception to defense witnesses. He conceded that deterrence would be inadequate if "a single slip of the tongue by any defense witness will open the

113. James v. Illinois, 493 U.S. 307, 322 (1990) (Kennedy, J., dissenting).
114. *Id.* at 325, 326-27 (Kennedy, J., dissenting).
115. *Id.* at 327 (Kennedy, J., dissenting).
116. *Id.* at 325 (Kennedy, J., dissenting).

door to any suppressed evidence at the prosecutor's disposal."[117] To avoid this result, Justice Kennedy proposed that the exception apply to defense witnesses only in "situations where there is direct conflict, which is to say where, within reason, the witness' testimony and the excluded testimony cannot both be true."[118] He also suggested that it might be necessary to permit only the contradiction of the witness's direct testimony to avoid the possibility that the prosecution would use clever cross-examination to introduce excluded evidence.[119] Only applied with these restrictions, Justice Kennedy concluded, would the gains to truth-seeking occasioned by the extended exception justify the related loss to deterrence.[120]

Justice Kennedy was as unsuccessful as the majority in distinguishing the impeachment of defense witnesses from that of defendants. Although he argued that limitations on the impeachment of defense witnesses were necessary to confine the incentive to gather proof illegally to an acceptable level, Justice Kennedy was unable to explain why identical restrictions should not also be applied to the impeachment of defendants. Alternatively, if the impeachment of defendants should not be restricted, then such restrictions are similarly unnecessary to protect defense witnesses. As a result, Justice Kennedy could not demonstrate that extending the exception as he proposed would effect net gains, just as the majority could not demonstrate that its result would effect net losses when both truth-seeking and deterrence costs were tallied.

Justice Kennedy's argument that restrictions were uniquely necessary to the impeachment of defense witnesses must have conceded that no such restrictions applied to the impeachment of defendants. Otherwise, his proposals would have been superfluous. He thus must have recognized that the *Havens* Court, by permitting impeachment of any cross-examination "reasonably suggested" by direct testimony,[121] effectively eliminated any requirement of a direct contradiction between the defendant's testimony and the prosecution's suppressed proof.[122] Recognizing that the exception already permitted the impeachment of defendants' testimony with illegally obtained evidence merely in tension with that testimony, Justice Kennedy had to explain why this lenient approach should not also apply to defense witnesses. However, neither his truth-seeking nor his deterrence arguments supported more restrictive rules for impeaching defense witnesses; if anything, they argued for more leniency.

Justice Kennedy's truth-seeking analysis contended that contradiction of defense witness testimony is particularly important because juries are more likely to believe such testimony.[123] If it is more important to the accu-

117. *Id.* at 328-29 (Kennedy, J., dissenting).
118. *Id.* at 325 (Kennedy, J., dissenting).
119. *Id.* at 328 (Kennedy, J., dissenting).
120. *Id.* at 329 (Kennedy, J., dissenting).
121. *See* United States v. Havens, 446 U.S. 620, 627-28 (1980).
122. *See* text accompanying notes 56-58 *supra.*
123. *James,* 493 U.S. at 324-25 (Kennedy, J., dissenting).

racy of the factfinding process, witness testimony should be more readily impeached than that of defendants. Accordingly, the rules for witness impeachment should be more lenient, not more restrictive, than those applied to a defendant's testimony.

Justice Kennedy's deterrence argument was equally unenlightening. It is more important to restrict the prosecution's ability to contradict a defendant's testimony than that of a defense witness, because the defendant's testimony is more likely to be anticipated. Moreover, if the prosecution anticipates possible defenses, rather than the testimony of a specific witness, then the notion that the prosecution has different incentives to obtain evidence contradicting the testimony of defendants and defense witnesses cannot be justified. In either event, Justice Kennedy could not justify, for deterrence reasons rather than truth-seeking reasons, rules that protect defense witnesses' testimony more than defendants' testimony.

Rather than make any arguments of his own to support a stricter standard for impeachment of defense witnesses, Justice Kennedy implicitly conceded the majority's points at the same time as he explicitly rebutted them. Accordingly, each of the central points of his opinion contradicted itself. To justify his proposed limitations, Justice Kennedy implicitly accepted the majority's claim that defense counsel exercises less control over a defense witness's testimony than over the defendant's.[124] Consequently, because a witness's "slip of the tongue" during cross-examination, or testimony in mere tension with suppressed proof, might open the door to illegally obtained evidence, the defense is less likely to call that witness.[125] But Justice Kennedy then discounted the effect of lack of control over defense witness testimony on deterrence, claiming that a police officer "certainly will not know anything about potential defense witnesses, much less what the content of their testimony might be."[126]

However, this argument proved too much. Having established the slim likelihood of anticipating a particular defense witness's testimony, Justice Kennedy could hardly depict that likelihood as a substantial additional incentive to violate the defendant's rights. Moreover, if that additional incentive is minimal, it cannot overcome the effect of exclusion on factfinding accuracy to the extent necessary to justify unique restrictions on the impeachment of defense witness testimony.

Justice Kennedy's deterrence analysis thus did not support his limitations on the impeachment of defense witnesses. To avoid the implications of that conclusion, he had to rely on a truth-seeking argument and conceive of impeachment of defense witnesses as less important to truth-seeking than impeachment of defendants. In so doing, he had to concede the majority's argument that defense witness testimony would more likely be truthful than that of the defendant. But this concession contradicted his earlier argument

124. *Id.* at 328 (Kennedy, J., dissenting).
125. *Id.* (Kennedy, J., dissenting).
126. *Id.* at 329 (Kennedy, J., dissenting).

for the special importance of impeaching defense witnesses; that is, whether perjured or merely false, unrebutted witness testimony is far more likely to be believed than the testimony of the defendant.[127]

Justice Kennedy was no more able than the majority to rationalize the feared loss to truth-seeking if the impeachment exception discourages the defendant from presenting his witnesses.[128] If defense counsel does not call a witness because she believes that the witness's testimony would result in the admission of more probative inculpatory evidence than probative exculpatory evidence, the failure to call the witness would occasion no net loss to truth-seeking, except insofar as the exclusionary rules and the adversary system deny the prosecution its more probative contradicting proof. Although the ability to present exculpatory proof free from the threat of the introduction of more probative contradicting evidence might be desirable to the defendant, it no more serves truth-seeking in Justice Kennedy's analysis than it does in that of Justice Brennan.

Because truth-seeking would be substantially advanced even without Justice Kennedy's proposed limitations on the contradiction of defense witness testimony, he could not explain why the minimal loss to deterrence was not clearly outweighed by the gain to accurate factfinding. The police were no more thinking about specifically deterring the potential testimony of defense witnesses than they were thinking about obtaining evidence specifically to contradict it. Moreover, even if Justice Kennedy had attempted to explain the deterrent effect of his proposed limitations, his analysis would not have permitted him to do so. If the police were thinking about illegally obtaining proof to contradict or deter anticipated defense witness testimony, their rational response to a requirement that the proof be "directly contradictory" would be to obtain more such evidence. The more illegal evidence obtained for potential impeachment, the more likely it is that some of it will directly contradict the defense case and thus be admissible. Similarly, the more extensive the impeachment evidence available, the more likely it is to benefit the prosecution by deterring the presentation of defense evidence.

Justice Kennedy's direct contradiction requirement resulted less from the logic of truth-seeking and deterrence than from the implications of the

127. Similarly, Justice Kennedy's response to the Court's claim that the threat of prosecution would deter defense witnesses from engaging in perjury was self-contradictory. On the one hand, Justice Kennedy complained that the threat of prosecution was ineffective because of the difficulty in prosecuting perjury. *Id.* at 326-27 (Kennedy, J., dissenting). But on the other hand, if the prosecutor could impeach defense witnesses with only directly contradicting proof, as Justice Kennedy suggested, defense counsel might be able to assure that the witness testifies to matters only "indirectly" contradicted by the proof. Prohibiting the defense witness from being cross-examined under oath about evidence that is "in tension" with, but not directly contradictory to, his testimony will make perjury prosecutions of defense witnesses virtually impossible. Accordingly, Justice Kennedy's approach would have increased the likelihood of perjured defense witness testimony, while proceeding on the assumption that existing disincentives to offering such testimony were inadequate. Also, if Justice Kennedy thought that the "direct contradiction" requirement would permit only false, but not perjured defense witness testimony, his own analysis established that nothing from the perspective of truth-seeking could possibly support the admission of false testimony from witnesses whose uncontradicted, less-interested testimony is likely to be credited.

128. *See* notes 99-101 *supra* and accompanying text.

Court's cumulative extension of the exception. Dismissing the "majority's fear that allowing the jury to know the whole truth will chill defendants from putting on any defense" as speculative,[129] Justice Kennedy ignored whether the balancing test developed by the Court might properly urge such a result. Justice Kennedy's limitations on defense witness impeachment connected just as tenuously to truth-seeking as the majority connected truth-seeking to the prevention of knowingly false testimony.

Justice Kennedy's proposed limitations may have been at least partly motivated by the majority's concern that impeachment of defense witnesses might foreclose all potential defenses.[130] But he could not explain why even the absolute foreclosure of a meaningful defense case was not perfectly consistent with the theory that the impeachment exception preserves the proper balance between truth-seeking and deterrence. Suppose that a defendant could not present a meaningful defense without opening the door to illegally obtained evidence, because there is an abundance of probative evidence against the defendant that would be perfectly admissible under the impeachment exception. Truth-seeking analysis suggests no reason to permit the defendant to present any false defenses.[131] Thus, absolute foreclosure does not appear to be any less appropriate than the partial foreclosure of only some false defenses. The only difference is that in the former situation, there is more probative evidence against the defendant. Truth-seeking does not distinguish among false defenses with respect to whether they leave the defendant an equally false alternative.

Similarly, the assumption that the exclusionary rules will have a sufficient deterrent effect despite the impeachment exception—because the prosecution still must obtain evidence for its case-in-chief—does not indicate that absolute foreclosure of defenses is inconsistent with appropriate deterrence. The prosecution always has an incentive to eliminate all potential defenses, even though it cannot establish its case-in-chief with unlawfully obtained evidence. Thus, adequate deterrence, as depicted by both the Court and Justice Kennedy, does not depend upon whether a potential defense is likely to be successful if not foreclosed or contradicted. The possibility of absolute foreclosure arises because the exception protects accurate factfinding and the prosecution possesses proof that effectively contradicts potential defenses, not because of any improper sacrifice of deterrence to truth-seeking.

The attempts by both the Court and Justice Kennedy to apply the balancing analysis to the impeachment of defense witnesses were, therefore, utterly indeterminate. Every argument that supported the extension, by depicting the extension's gain to truth-seeking as relatively large and the loss to deterrence as relatively small, generated an opposite argument that reversed its conclusion. This reversal occurred because the same arguments that established a large gain to truth-seeking in fact also established an

129. *James*, 493 U.S. at 325 (Kennedy, J., dissenting).

130. *See id.* at 328 (Kennedy, J., dissenting).

131. *See id.* at 313-19 (confusing defendant's right to present "best" or "any" defense with right to present it without fear of contradiction by probative, reliable evidence).

equally large loss to deterrence. Similarly, the same arguments that suggested a small loss to deterrence actually established an equally small gain to truth-seeking. To manipulate their analyses to yield a result at all, the majority and the dissent selectively ignored the implications of their most important arguments. Both the Brennan and Kennedy opinions, therefore, emerge as studies in self-contradiction.

B. *The Incoherence of the Truth-Seeking/Deterrence Balance: The Court's Evidentiary Approach*

The opinions in *James* failed to offer consistent arguments supporting their respective answers to the question of how extending the impeachment exception to defense witnesses would influence the truth-seeking/deterrence balance. That failure results from the inadequacy of the analysis, rather than from any unique difficulty in applying the analysis to that particular issue. The critical question raised by alternatives for defining the boundaries of the exception is whether adopting those boundaries yields net gains to truth-seeking or deterrence, considering that the scope of the exception affects values on both sides of the balance. To resolve any boundary issue, the balancing analysis must encompass a theory of how the effect on deterrence of admitting illegally obtained evidence varies independently from the related effect on truth-seeking.

Without a theory of how the variables in the balance vary independently, the degree of deterrence accomplished will always be inversely proportionate to the degree of truth-seeking achieved. Just as the extent to which the exception promotes truth-seeking will be measured by the extent to which it permits the use of illegally obtained evidence, the extent to which the exclusionary rules deter will be measured by the extent to which they prohibit the use of illegally obtained evidence. Hence, absent a theory of independent variation, truth-seeking and deterrence will *always* be in equipoise; the notion of a balance between truth-seeking and deterrence will describe every point on the continuum between complete admission and complete exclusion. However, this notion of the balance will not differentiate among definitions of the scope of the impeachment exception with respect to net gains to truth-seeking or to deterrence. Consequently, this analysis will not provide a framework for choosing among the different points on the continuum, each of which could accurately be described as reflecting a balance between truth-seeking and deterrence.[132]

As demonstrated by the internally inconsistent arguments in *James*, the

132. The point can be put in economic terms as follows: Even assuming the Court's starting point on the scale of truth-seeking and deterrence can be expressed by cardinal numbers, its analysis failed to provide a means of identifying whether a given change in the balance effects an efficient alteration in the status quo, regardless of the criterion adopted to measure efficiency (Pareto-superiority, Kaldor-Hicks, etc.). The Court's approach failed to provide the analysis necessary to express the ordinal relationship between the two measures. The defect in the analysis, therefore, cannot be cured by justifying a starting point. Thus, this article's critique of the balancing approach differs from that often applied generally to efforts to justify legal rules by the efficiency criterion. *Cf.* note 139 *infra.*

Court has been unable to offer a coherent theory of how extending the impeachment exception will impose costs and benefits that do not vary in inverse proportion to each other. Analyzing the exception's costs to deterrence in light of the incentive to obtain proof illegally, both opinions in *James* failed to demonstrate why that incentive will not be defined by the probative value of the anticipated proof. The probative value of the illegally obtained evidence will, therefore, define *both* its contribution to truth-seeking and the prosecution's incentive to obtain it. Although the prosecution will not have perfect knowledge of the evidence that unlawful investigative efforts might produce, its estimate of the probative value of that proof will determine its incentive to obtain it. If the evidence is less probative than anticipated, or no evidence is obtained at all, then exclusion imposes no cost other than the prosecution's inability to use it in its case-in-chief. Assuming prosecutors to be informed, rational actors, the decision to make the illegal search or seizure reflects a determination that the risk of losing the proof with respect to the prosecution's case-in-chief is insufficient reason either to forego the illegal procedure entirely or to conduct a completely lawful investigation.[133]

Prior to *James*, the starting point for the Court's analysis of the incentive to obtain proof illegally was its claim that "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief."[134] But that claim does not explain how the incentive created by the exception to gather proof illegally varies independently from the probative value of the anticipated proof. Rather, it is only one point of many on the truth-seeking/deterrence continuum. At best, it provides a foundation for an analysis of the issue in *James* that, by purely circular reasoning, would conclude that the exclusionary rules would unduly sacrifice truth-seeking to deterrence[135] by preventing anything other than the prosecution's use of ille-

133. This determination also may be made *in gross* in decisions relating to the training of law enforcement personnel and administrative penalties for violation of constitutional criminal procedure.

134. Harris v. New York, 401 U.S. 222, 225 (1971).

135. *See* Comment, *The Supreme Court, 1989 Term: Leading Cases,* 104 HARV. L. REV. 43, 159-68 (1990). The comment's author fell precisely into the trap laid by the Court's analysis. The author argued that the result in *James* could be attacked for purportedly departing from "precedent." *Id.* at 166. On analysis, however, the precedent consists of the "theme" that "excluding illegally obtained evidence from the prosecution's case-in-chief adequately deters police misconduct." *Id.* at 165. The author later acknowledged, however, that this "theme" serves to establish that the "*incremental* loss in deterrence" from extending the exception to defense witnesses is de minimis only if one concedes that the pre-existing boundaries of the exception owe nothing to deterrence since "officers *already* confront opportunities to violate the fourth amendment when they have little to lose." *Id.* at 166. Thus, the precedent can establish no guiding "theme" unless it merely assumes without explanation that the exception should be extended for some other reason. Moreover, the dissenters' conclusion has nothing to do with consistency of precedent. One can just as easily have concluded with the majority that the relevant "theme" of the earlier cases limited impeachment only to a defendant's testimony for deterrence reasons. Using that "theme" as a starting point, the "incremental loss in deterrence" in extending the exception to defense witnesses can be perceived as that which makes all the difference in official conduct.

More generally, it is impossible to fall back onto a conception of what it means to prohibit the use of evidence on the prosecution's case-in-chief without asking what that prohibition should mean

gally obtained evidence to establish a legally sufficient case.[136]

Such a result would reduce the truth-seeking/deterrence balance to mere language expressing conclusions about the scope of the exception's boundaries, rather than an analysis employed to reason about those boundaries. Thankfully, the Court seems genuinely interested in avoiding that result, as both *James* opinions rejected the "case-in-chief" starting point. The opinions agree that excluding illegally-obtained evidence from the prosecution's case-in-chief provides insufficient deterrence.[137] As both the majority and dissenting opinions demonstrate, the Court is not prepared to accept the consequences of that approach because it would permit the prosecution both to anticipate the utility of illegally obtained proof to deter or contradict defense evidence and to capitalize on that proof in every respect short of relying on it to establish the sufficiency of its case.[138]

Rather than simply rely on the assumption of "sufficient deterrence" in circular fashion, the Court has sought to establish boundaries capable of more extensive deterrence—whether by prohibiting any use of the exception to impeach defense witnesses or by limiting the impeachment of such witnesses to directly contradictory proof of matters stated on direct examination—and has sought to justify those boundaries as consistent with the appropriate balance between truth-seeking and deterrence. While the Court's motives are commendable, its analysis is nonetheless misguided because it does not offer a theory of the independent variation of truth-seeking and deterrence. Because neither Justice Brennan nor Justice Kennedy put forth such a theory, their *James* opinions can be described as merely proposing different balances between exclusion's costs to the truth and admission's costs to deterrence. In fact, every result between the extremes of complete exclusion and of admission for any purpose other than establishing the sufficiency of the prosecution's case qualifies as a "balance" under their analyses. By rejecting the case-in-chief analysis of past decisions, the Court has only limited the range of possible outcomes. Where the incentive to obtain proof illegally is directly proportional to its probative value, and its probative value defines its contribution to truth-seeking, the incentive analysis cannot inform the choice of the proper point within that range.[139]

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in this context and thus implicating the question of how the analysis makes ordinal judgments about truth-seeking and deterrence. For example, the author of the comment assumed without discussion that the prohibition does not foreclose the use of the evidence to rebut misleading cross-examination or argument, regardless of whether the defendant presents any evidence at all. Simultaneously, however, the author appeared to endorse, by negative implication, the *James* dissenters' conclusion as uniquely consistent with the theme of establishing a consistent prohibition against use of the evidence in the prosecution's case-in-chief. *Id.* at 165 n.56. This reliance on precedent to support these idiosyncratic and unexplained results illustrates the circularity of the analysis.

136. The difficulties in establishing what it means to prohibit the use of evidence on the prosecution's case-in-chief and the reason why such a prohibition amounts only to prohibiting the use of the evidence to establish a legally sufficient case is discussed at text accompanying notes 229-267 *infra.*

137. James v. Illinois, 493 U.S. 307, 318 (1990); *see id.* at 324 (Kennedy, J., dissenting).

138. *Id.* at 318; *see id.* at 324 (Kennedy, J., dissenting).

139. I do not mean to argue that truth-seeking and deterrence are necessarily inversely proportionate to each other. Rather, I use the notion of inverse proportionality only to criticize the Court's

Apparently attempting to remedy this deficiency, the Court tried to rely on traditional evidentiary limitations as a source of inspiration. The Court assumed that an appropriate conception of the limited evidentiary use of the proof, in addition to its prohibition on the prosecution's case-in-chief, will determine when the exception will yield a net gain to truth-seeking or deterrence. Within the framework provided by this shared assumption, the Court has differed about the appropriate analogy between illegally obtained proof and proof whose use is limited by evidentiary principles.

For example, in addition to selectively manipulating the truth-seeking/deterrence balance, the majority and the dissent in *James* disputed the proper understanding of the scope of the impeachment exception by drawing analogies to different evidentiary concepts. Both sides used these analogies to avoid confronting the incoherence of their balancing analysis. For the majority, Justice Brennan noted that the Court had insisted in the past that "evidence that has been illegally obtained . . . is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt."[140] Quoting language from *Havens*, *Walder*, *Harris*, and *Hass* that suggests the Court approves illegally obtained "impeachment" evidence for "impeachment" purposes only, Justice Brennan implicitly argued that this limitation helps define when the exception generates net gains to truth-seeking or deterrence.[141]

In contrast, the dissenters rejected the familiar characterization of the exception as an "impeachment" exception in favor of the claim that the Court's "consistent rule has been that a defendant's testimony is subject to rebuttal by contradicting evidence that otherwise would be excluded."[142] Although Justice Kennedy did not directly address the majority's assertion that evidence admitted pursuant to the exception could not be used as "substantive evidence of guilt," he chose to recast the exception as a rebuttal, rather than an impeachment, exception to highlight his rejection of the defendant's "impeachment-only" interpretation of that limitation. James had argued that prohibiting substantive use of illegally obtained proof while allowing its use for impeachment dictated that only a defendant's testimony

efforts to reach conclusions about the scope of the impeachment exception by analyzing the incentives to gather proof created by different definitions of the exception derived from the principles of evidence. Those efforts amount to unsuccessful attempts to demonstrate that truth-seeking and deterrence are not inversely proportionate because of the limited evidentiary context in which illegal proof may be used. Whether truth-seeking and deterrence are so related is ultimately a question of the actual behavioral effects of the rules and the exception that cannot be answered by the rationalist analysis of incentives. On the limits of rationalist inquiry in general and incentive analysis in particular, see Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); Mario J. Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641 (1980). For a discussion of whether the empirical debate about deterrence can rationally inform the balance between truth-seeking and deterrence that the exception claims to create, see text accompanying notes 268-281 *infra*.

140. *James*, 493 U.S. at 313 (quoting United States v. Havens, 446 U.S. 620, 628 (1980)).

141. *Id.* at 311-13.

142. *Id.* at 323 (Kennedy, J., dissenting).

could be contradicted with illegally obtained evidence.[143] Only when used to impeach the defendant would the proof demonstrate "self-contradiction" and thus impeach "by means of the contradiction itself; the substantive truth or falsity of the suppressed evidence . . . [being] irrelevant."[144] In other words, using illegally obtained evidence to contradict the testimony of a defense witness is not true "impeachment" because it requires the factfinder to evaluate the evidence's "substantive truth."

Although implicitly conceding that this conception of impeachment proof would be sensible were the previous impeachment exception cases limited to evidence of a defendant's inconsistent statements, Justice Kennedy properly noted that the cases also admitted evidence which contradicted a defendant's testimony only if the jury believed in the substantive truth of the fact suggested by the proof.[145] In *Walder* and *Havens*, the illegally obtained evidence consisted of unlawfully seized physical evidence used to contradict the defendants' claims that they had not knowingly possessed the evidence. Thus, the prohibition on using illegally obtained evidence as "substantive proof of guilt" did not prevent the factfinder from considering those inferences that did follow from a belief in the "substantive truth" of the facts established by the proof.

Justice Kennedy then analogized the issue of the exception's proper boundaries to the evidentiary question of the appropriate scope of rebuttal evidence. He urged the requirement of a "direct contradiction" between the illegally obtained proof and defense witness testimony, with perhaps a limitation to impeachment of the witness's direct testimony. Justice Kennedy compared these requirements to the familiar inquiry of defining the proper scope of rebuttal, "a task that trial judges can be expected to perform without difficulty."[146] Accordingly, the dissenters relied on the concept of rebuttal use of illegally obtained evidence, just as the majority relied on the notion of impeachment use of illegally obtained evidence, to define the proper scope of the exception. By confining use of the evidence to circumstances in which that evidence falls within the scope of appropriate rebuttal, the dissent hoped to reduce the incentive to obtain evidence illegally and to permit its use only when it could generate a net gain on the truth-seeking side of the balance.

James was not the first case to note that the opposing analogies to the concepts of impeachment or rebuttal might be useful in deciding whether to extend the impeachment exception to defense witnesses. The question had already emerged in the lower courts.[147] But the dispute about defining the

143. *See id.* (Kennedy, J., dissenting).

144. *Id.* (Kennedy, J., dissenting).

145. *Id.* at 324 (Kennedy, J., dissenting).

146. *Id.* at 325 n.1 (Kennedy, J., dissenting). Justice Kennedy continued by drawing an analogy between such a determination and a decision about whether a statement is inconsistent for purposes of applying the rules regulating impeachment use of inconsistent statements. *Id.* The analogy further demonstrates the overlap between impeachment and rebuttal proof. *See* note 148 *infra* and accompanying text.

147. *See, e.g.*, United States v. Hinckley, 672 F.2d 115, 134 (D.C. Cir. 1982) (footnote omitted):

exception as informed by impeachment or rebuttal analogies reveals that labels can be misleading. The ambiguous concept of impeachment, as applied to proof contradicting an opposing party's evidence, can easily accommodate all rebuttal evidence.

Impeachment is employed in several different ways. It sometimes applies only to self-contradiction: witness statements or conduct suggesting facts contrary to the witness's testimony. When impeachment is defined in that fashion, the category of rebuttal proof is reserved for all evidence, apart from a witness's own statements or conduct, that can nonetheless refute an adversary's case.

However, the concept of impeachment is most often stretched to encompass all contradicting proof, not just an adverse witness's inconsistent statements or conduct. Because it suggests facts which contradict the opposing party's proof, it necessarily reflects on the credibility of that proof. This broader sense of impeachment evidence, typically characterized as impeachment-by-contradiction evidence, includes all rebuttal proof that, by refuting an adversary's evidence, suggests its lack of credibility.

The choice of a definition of impeachment depends upon the purpose served by making the classification. No uniform definition of impeachment or rebuttal proof applies in every context, but two contexts are particularly important for unravelling the confusion surrounding the scope of the impeachment exception. The first is the hearsay context, in which impeachment evidence is exempt from the hearsay bar. Here, impeachment proof is distinguished from substantive proof by its ability to reflect on the credibility of a witness's testimony, regardless of the "truth of the matter asserted" by the evidence. In this context, therefore, impeachment-by-contradiction proof would be excluded from the rubric of impeachment.

The second context is in determining the appropriate scope of rebuttal proof. In the rebuttal proof area, the proof must refute the opposing party's case enough to justify its admission where it would not otherwise be admissible. The truth of the matter limitation is irrelevant. Since all rebuttal evidence will necessarily be impeachment proof because it bears on the credibility of the opposing party's proof, impeachment-by-contradiction evidence is admissible. Under this approach, classifying evidence as rebuttal or impeachment proof is simply a matter of labelling, rather than substance.[148]

Since it has been held permissible to use illegally obtained evidence to *impeach* testimony by the defendant, the government argues that it should also be possible to use the same testimony to *rebut* the expert psychiatric witnesses. . . . Although it is indeed true that if a defendant takes the stand and testifies in a manner contradicted by illegally obtained evidence, that evidence can be used for the limited purpose of impeachment, there is as yet no basis in law for converting this limited exception into a general license to use illegally obtained evidence for rebuttal purposes.

148. There is one instance in which impeachment-by-contradiction evidence may not overlap entirely with the concept of rebuttal proof. Impeachment-by-contradiction evidence will generally not be defined to include proof admitted to contradict misleading cross-examination or argument, because there is no adverse witness being contradicted. Thus, such proof may mistakenly be considered rebuttal rather than impeachment-by-contradiction evidence. The categorization is insignificant to the argument, however, because such proof nonetheless may easily be thought of as

With these analogies in mind, the conflict in *James* becomes clear. While claiming to characterize the exception as an impeachment exception, the defendant in *James* really employed the narrower hearsay-derived definition of impeachment proof. Thus, he argued for limiting the exception to impeachment by "self-contradiction."[149] Meanwhile, claiming to restyle the exception as a rebuttal exception, the dissenters advocated the broader rebuttal-derived definition of impeachment, as accentuated by their willingness to concede the term, although there was no need to do so. Finally, the majority appeared to adopt the defendant's narrow, "impeachment only" definition, but failed to address the dissenters' criticism of James's argument.

The ultimate significance of the dispute over the proper evidentiary conception of the exception was, of course, not evidentiary at all. The point was to ascertain which evidentiary analogy would define the scope of the exception in a fashion to assure net gains to truth-seeking. The concepts of impeachment proof or rebuttal proof, like all legal concepts, can only be defined contextually.[150] In the end, the proof is in the pudding: We must evaluate those concepts according to whether they can render a coherent notion of how different definitions of the scope of the exception can generate net gains or losses in the truth-seeking/deterrence balance, not according to their past successes as traditional principles of evidence.

The next two subsections evaluate the evidentiary concepts of impeachment and rebuttal proof, as they have been employed to discover the independent variation of truth-seeking and deterrence that is necessary to render a coherent method of determining the scope of the exception. These subsections will dispel the notion that the evidentiary concepts of impeachment and rebuttal proof can provide a framework for identifying appropriate boundaries of the exception. When removed from their purely evidentiary context and transplanted into constitutional criminal procedure, the concepts of impeachment and rebuttal proof cannot avoid the problem of the inversely proportional relationship between deterrence and truth-seeking. The indeterminacy of the analysis in *James*, therefore, demonstrates how these evidentiary concepts reproduce, rather than resolve, the underlying incoherence of the truth-seeking/deterrence balance.

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impeachment-by-contradiction evidence. Cross-examination elicits evidence, albeit from a witness not adverse to the prosecution, that defense counsel will use in the same way as evidence elicited from a defense witness. Moreover, the Federal Rules of Evidence specifically permit impeachment of one's own witness. *See* FED. R. EVID. 607. Thus, the prosecution's contradiction of a prosecution witness's cross-examination can easily be thought of as impeachment-by-contradiction. Argument, while eliciting no evidence per se, helps to clarify the inferences that counsel would have the jury draw from the proof, and the contradiction of such inferences is equivalent to the contradiction of the proof itself. Indeed, for present purposes, the permissible inferences that may be drawn from the proof are the evidence.

149. *See James*, 493 U.S. at 323 (Kennedy, J., dissenting); *see also* text accompanying notes 143-144 *supra*.

150. *See* R.M. UNGER, *supra* note 6, at 31-33 (noting modern view of the nature of concepts, including legal concepts); *see also* EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY 3-94 (1973); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924).

1. *Impeachment.*

Defining the boundary of the exception by analogy to impeachment evidence limits the factual inferences properly drawn from illegally obtained proof. Its implicit model is the distinction between the hearsay and nonhearsay uses of inconsistent statements by nonparty witnesses. That model distinguishes between evidence used impermissibly to establish the "truth of the matter asserted" and evidence used permissibly to demonstrate self-contradiction. This distinction appears in James's argument, as well as in the Court's approval of instructions in *Walder*, *Harris*, and *Hass* that limited the factfinder's use of the proof to credibility purposes only.[151] Such instructions, also given by countless lower courts which admitted evidence pursuant to the impeachment exception, were borrowed from the hearsay-derived jury instruction, which warns the jury not to consider the proof for the "truth of the matter asserted."[152]

The hearsay model, however, is inappropriate for several reasons. First, it only applies coherently to illegally obtained proof of "statements" as defined in the context of hearsay evidence. Yet the impeachment exception has never been limited to statement evidence, and neither truth-seeking nor deterrence considerations demand such a limitation. Second, when faced with statement proof at a criminal jury trial, the Court has recognized the futility of distinguishing between impeachment and substantive uses of incriminating statements or otherwise limiting the inferential use of defendants' statements.[153] Thus, any instruction requiring the limited use of statement proof is, by the Court's own analysis, presumptively ineffective. Finally, the distinction between substantive and impeachment uses of evidence, drawn in the context of applying the hearsay rule, is fundamentally inappropriate in

151. *See James*, 493 U.S. at 313 n.3 (citing limiting instructions given in *Hass*, *Harris*, and *Walder* as evidence that "impeachment" had been defined to forbid using the evidence as "substantive" proof of guilt).

152. *See, e.g.*, United States v. Curry, 358 F.2d 904, 912 (2d Cir.) (noting that limiting instruction informing jury to use evidence for "impeachment purposes only" should be given at defense counsel's request), *cert. denied*, 385 U.S. 873 (1966); Inge v. United States, 356 F.2d 345, 349 (D.C. Cir. 1966) (permitting use of defendant's statements to impeach his credibility); Mitchell v. Wyrick, 536 F. Supp. 395, 399 (E.D. Mo. 1982) (equating impeachment use of defendant's prior statement with inconsistent statement proof), *aff'd*, 698 F.2d 940 (8th Cir.), *cert. denied*, 462 U.S. 1135 (1983); Vargas v. Brown, 512 F. Supp. 271, 279-80 (D.R.I. 1981) (holding that since defendant's prior statement was "to be used only for the limited purpose of impeachment," it was error for the trial court to allow the prosecutor to ask the jury "to regard it as 'true' "); United States *ex rel.* Dixon v. Cavell, 284 F. Supp. 535, 539-40 (E.D. Pa. 1968) (interpreting *Walder* as holding "that the prosecution may make use of unlawfully obtained evidence . . . in the form of testimony for the purpose of *impeaching* the credibility of a defendant" and noting that "the trial judge very adequately cautioned the jury that the prior inconsistent statement may not be considered substantive evidence but may only be used to impeach the defendants as witnesses"); Lassoff v. Gray, 207 F. Supp. 843, 848 (W.D. Ky. 1962) (holding that illegally seized evidence showing bookmaking activity that is "inadmissible for the purpose of showing that the plaintiffs were engaged in the business of accepting wagers" is "admissible to impeach plaintiffs' testimony that they were not engaged in that business"); *see also* James B. Haddad, *Post-*Bruton *Developments: A Reconsideration of the Confrontation Rationale, and A Proposal for A Due Process Evaluation of Limiting Instructions*, 18 AM. CRIM. L. REV. 1, 42 n.230 (1980) (noting that courts consistently give limiting instruction appropriate for out-of-court statements of nonparty witness when unlawfully obtained evidence is admitted).

153. *See* Bruton v. United States, 391 U.S. 123, 129-35 (1968).

the constitutional context. That distinction is designed to ensure the reliability of proof, a concern that is not present for evidence admitted pursuant to the impeachment exception. According to the Court, evidence admitted pursuant to the exception is problematic *only* because it was illegally obtained. Otherwise, the evidence's admissibility in furtherance of truth-seeking would be a foregone conclusion.[154] Thus, the distinction that the hearsay-derived definition of impeachment draws between permissible and impermissible uses of illegally obtained proof fails to identify net gains to truth-seeking or deterrence.

Because the hearsay-derived definition of impeachment proof applies only to "statement" evidence, the immediate problem with borrowing that definition to set the scope of the impeachment exception is accommodating *Walder* and *Havens*, the cases in which physical evidence impeached the defendant's testimony. James attempted to solve this problem by defining "impeachment" as proof of self-contradiction. He argued that such proof included physical evidence that contradicted a testifying defendant, because the proof could be conceived as impeaching the defendant's testimony, irrespective of the truth of the matter asserted by the evidence. James's position found implicit support in the Court's unexplained statement in *Havens* that "evidence that has been illegally obtained . . . is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt"[155] and explicit support in Justice Brennan's *Havens* dissent. In *Havens*, Justice Brennan elided evidence of a witness's prior inconsistent conduct and statements and suggested that both types of proof were potentially subject to limited inferential use on the hearsay model. According to Justice Brennan, a defendant/witness's inconsistent conduct and statements logically impeach his testimony by establishing merely that the defendant/witness has contradicted himself, regardless of which proof is true.[156]

Nonetheless, only statement evidence impeaches irrespective of the "truth of the matter asserted." For this purpose, "statement" may be defined narrowly, as it is in the Federal Rules of Evidence, to exclude verbal and nonverbal conduct not intended as an assertion and to exclude assertive verbal conduct when offered for other than its asserted inference.[157] It also may be defined more broadly, as at common law, to include all assertive conduct whether the assertion be intended or implied from the declarant's belief as to the matter asserted.[158] Neither definition of "statement" evi-

154. *Cf.* Mincey v. Arizona, 437 U.S. 385, 397-98 (1978) (prohibiting, on due process grounds, the use of involuntary statements to impeach a defendant because of the unreliability of such statements). The impeachment exception applies to evidence only if "the trustworthiness of the evidence satisfies legal standards." Harris v. New York, 401 U.S. 222, 224 (1971).

155. United States v. Havens, 446 U.S. 620, 628 (1980).

156. *Id.* at 632 n.2 (Brennan, J., dissenting).

157. *See* FED. R. EVID. 801(a) & advisory committee's note.

158. For modern examples of the broader definitions, see Michael H. Graham, *"Stickperson Hearsay": A Simplified Approach to Understanding the Rule Against Hearsay,* 1982 U. ILL. L. REV. 887, 900-02 (1982); Olin Guy Wellborn III, *The Definition of Hearsay in the Federal Rules of Evidence,* 61 TEX. L. REV. 49, 92 n.191 (1982).

dence is broad enough to include all nonassertive conduct that contradicts the defendant/witness's testimony. Such evidence can never be analogous to hearsay proof.

Havens is a perfect example. The incriminating T-shirts in Havens's luggage had no assertive aspect to prompt an analogy to hearsay proof. Whether the evidence served to impeach depended upon the truth of the facts proved. In order to be considered inconsistent with Havens's testimony, the T-shirts had to be substantive proof that he had assisted his coventurer with the smuggling, despite his denials. Inconsistent statements prove that the witness has made at least one false statement; but inconsistent physical evidence only proves that the witness stated falsely if the jury chooses to believe the physical evidence over the witness's testimony. A witness's prior inconsistent conduct properly qualifies as "impeachment by self-contradiction" only when its assertive quality implicates the witness's testimonial capacities.[159] Much highly probative evidence of a defendant-witness's conduct will contradict his testimony without falling under any definition of a hearsay statement.[160]

The concept of "impeachment by self-contradiction," applied to nonstatement evidence, limits the inferences that may properly be drawn from that evidence no more than any other contradicting proof. For purposes of analytic clarity, this article rejects the ambiguous designation of "self-contradiction" and distinguishes between "impeachment by inconsistent statement proof" and "impeachment-by-contradiction evidence." The former includes all evidence of a witness's conduct, verbal or nonverbal, the "asser-

159. *See* EDWARD W. CLEARY, MCCORMICK ON EVIDENCE §§ 34, 47 (3d ed. 1984).

160. *See id.* § 34, at 73-74; *see also* Jacks v. Duckworth, 486 F. Supp. 1366, 1369-70 (N.D. Ind. 1980) (noting that it is proper to use statements obtained through illegal wiretaps to impeach testimony of defendant and defense witness about existence of various telephone calls), *aff'd,* 651 F.2d 480 (7th Cir. 1981), *cert. denied,* 454 U.S. 1147 (1982); United States v. Carrasquillo, 412 F. Supp. 289, 291-92 (E.D. Pa. 1976) (holding evidence that defendant possessed marked bills which had been used in heroin transaction admissible to impeach the credibility of his assertion that the money came from elsewhere). Nor will such proof necessarily be limited to physical evidence. In Oregon v. Hass, 420 U.S. 714, 716-17 (1975), for example, the defendant's testimony that he did not know the houses from which two bicycles had been stolen was impeached by evidence that he had correctly pointed out the houses to the police after his arrest. Substantial authority supports the proposition that the act of pointing out the correct houses is "conduct" proof establishing circumstantial evidence of knowledge, rather than mere "statement" proof subject to a limiting instruction requiring the factfinder to ignore the "truth of the matter asserted" by the statement; under that view, the significance of the evidence as conduct *revealing* and not *asserting* the knowledge in the hearsay sense is so overwhelming as to exempt it from the hearsay bar. *See, e.g.,* Bridges v. State, 247 Wis. 350, 19 N.W.2d 529 (1945); RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES 362 (2d ed. 1982). Thus conceived, the proof would impeach by contradiction and not by inconsistent statement. The relative power of the proof as circumstantial evidence of knowledge is revealed by the *Hass* Court's approval of the introduction of evidence that the defendant had correctly pointed out the houses, rather than limiting the prosecution to the use of an earlier statement made by the defendant to the police. *See Hass,* 420 U.S. at 717. In the earlier statement, Hass simply asserted that he knew which houses the bicycles had been stolen from. Thus, the Court went out of its way to permit the introduction of the impeachment-by-contradiction proof, for which an instruction prohibiting its use to prove "the truth of the matter asserted" would be insufficient. *Id.* at 717-18. Such proof was also the most damaging precisely because its probative value did not depend, in any significant sense, on its assertive quality.

tive" aspect of which may define it as a "statement" in the hearsay context. The latter includes all evidence of a witness's conduct the probative value of which is independent of its assertive aspect.

In the cases in which the Court permitted an illegally obtained inconsistent statement to impeach a defendant, it suggested that such evidence was properly admitted only for its limited "nonhearsay" purpose. But *James* made clear that this limited admissibility could not define the scope of the exception because the Court also permitted a defendant's impeachment with impeachment-by-contradiction evidence.[161] Consequently, the fact that James admitted his hair was red at the time of the crime could not impeach his witness's contrary testimony unless the jury credited the truth of the matter asserted by the admission, but it could still properly be used to contradict his witness's testimony. The evidentiary analogy to impeachment proof does not consider the admission differently from the other impeachment-by-contradiction evidence that the Court has routinely admitted to contradict defendant testimony.

The recognition that the impeachment exception encompasses impeachment-by-contradiction evidence raises the question of what the Court intends by prohibiting its use as "substantive evidence of guilt." Further, one must ask if there is an intelligible way of conveying what the Court means by the nonsubstantive, or "credibility-only," use of impeachment-by-contradiction evidence. A limiting instruction derived from hearsay principles is clearly inapplicable because the impeachment value of the proof is unrelated to its assertive aspect. A general instruction to consider the evidence only for its credibility inferences would also be ineffective, because the credibility use of impeachment-by-contradiction evidence, unlike inconsistent statement proof, *presupposes* that the jury will believe it to be credible "substantive proof of guilt." Thus, it is impossible for a jury to separate out the permissible from the impermissible inferences that may be drawn from the proof.[162]

When the rules of evidence rely on a limiting instruction to distinguish between inferences that may or may not be drawn from proof, the factfinder's use of the evidence for permitted (here credibility) purposes does not presuppose its use for prohibited (here substantive) purposes. For example, when courts admit evidence of prior felony convictions or acts of untruthfulness on the issue of the defendant's credibility, but not to establish a criminal propensity, the probative value of the evidence as proof of credibility does not presuppose the jury's finding it valuable proof of the existence of the propensity.[163] The examples may be multiplied,[164] but the point remains

161. *See* James v. Illinois, 493 U.S. 307, 312-13 (1990).

162. It is therefore not surprising that the courts which perceive the scope of the exception as defined by the concept of impeachment would use the "truth of the matter" instruction, although occasionally sensing that it was obviously inapplicable to nonstatement proof. *See* Haddad, *supra* note 152, at 42.

163. *See* FED. R. EVID. 404, 608, 609.

164. *See* FED. R. EVID. 407, 408.

the same: The jury cannot draw separate inferences of credibility and substance from impeachment-by-contradiction proof because the distinction itself is confused in that context. For example, the T-shirts in *Havens* reflected on the credibility of Havens's denial if and only if the jury understood that the presence of the T-shirts was incriminating—that is, substantive evidence of guilt—and therefore contradictory of his exculpatory testimony. One need not even discuss the practical reality that juries are notoriously unable to follow even coherent instructions.[165]

Past history also demonstrates that instruction would not ensure that the jury could distinguish between the inferences to be drawn even from illegal proof of inconsistent statements. In *Jackson v. Denno*,[166] the Court invalidated a New York procedure which relied heavily on an instruction that the jury should disregard a defendant's admission.[167] It reached that conclusion despite the fact that the jury also would have heard evidence that the statement was involuntary and had been suppressed by the court.[168] Similarly, the Court in *Bruton v. United States*[169] held presumptively ineffective an instruction telling a jury to disregard out-of-court statements made by a nontestifying co-defendant.[170] It is even less plausible to assume that a jury will disregard reliable, inculpatory statements made by the defendant himself.[171]

Even when impeaching statements are not obviously inculpatory, attempts to limit the jury's inferences are equally doomed to fail. All false exculpatory statements imply a guilty conscience. The hearsay analogy does not help distinguish a false exculpatory statement's credibility use from its substantive use, since false exculpatory statements are not offered for the "truth of the matter asserted." Prior to *Harris*, which extended the impeachment exception to "noncollateral" statements obtained in violation of

165. Justice Brennan's criticism of the effectiveness of the limiting instruction offered in the impeachment exception cases was understated. He erroneously presupposed a coherent way of distinguishing the substantive and credibility inferences of impeachment-by-contradiction evidence, arguing only that "it is unrealistic to assume that limiting instructions will afford the defendant significant protection." United States v. Havens, 446 U.S. 620, 632 n.2 (1980) (Brennan, J., dissenting).

166. 378 U.S. 368 (1964).

167. *See id.* at 377-91; *cf.* Wilson v. United States, 162 U.S. 613, 622 (1896) (stating that a confession is "the strongest evidence against the party making it that can be given of the facts stated in such confession").

168. *See Jackson*, 378 U.S. at 377-78.

169. 391 U.S. 123 (1968).

170. *Id.* at 137.

171. *See* Haddad, *supra* note 152, at 42. Indeed, Justice White dissented in *Bruton* precisely because of the relative likelihood that the jury would disregard the inculpatory statements of a co-defendant, compared with the certainty that they would not disregard inculpatory statements of the defendant himself. *See Bruton*, 391 U.S. at 139-40 (White, J., dissenting). The Court more recently has expressed some doubt about the wisdom of *Bruton*. *See* Cruz v. New York, 481 U.S. 186, 191 (1987). However, it has not questioned the holding of *Jackson v. Denno*, which has since been incorporated into the Federal Rules of Evidence. *See* FED. R. EVID. 104(c) & advisory committee's note. Also, it is noteworthy that the Court transmitted the Federal Rules of Evidence to Congress in a form that would have permitted substantive use of all prior statements of testifying witnesses subject to cross-examination concerning the statements, in part because of the belief that, notwithstanding any limiting instruction, such statements would inevitably be considered substantive proof. *See* FED. R. EVID. at 801(d)(1)(A) & advisory committee's note; Haddad, *supra* note 152, at 38.

Miranda, some cases permitted the use of false exculpatory statements, but not admissions, on the theory that "the truth of the impeaching statement does not itself tend to establish guilt."[172] But this circumstance has nothing to do with limiting the use of the statement to its "credibility" inferences, because a false exculpatory statement provides powerful substantive evidence of guilt.[173] The only distinction between the inculpatory admission and the false exculpatory statement is that the former provides direct, and the latter circumstantial, evidence of guilt. Neither is necessarily more probative than the other.[174]

The futile attempts of the lower courts in *James* to apply *Havens*, which required that impeachment-by-contradiction evidence be treated as "impeachment" proof and not as "substantive" evidence of guilt, also illustrate the confusion resulting from the hearsay analogy. The trial court admitted the illegally obtained statements, instructing the jury that the evidence was offered "to refute and rebut," as well as to "impeach" the defense witness.[175] In concluding that the proof should have been excluded, the Illinois Court of Appeals criticized the trial judge for admitting the evidence, but also noted that the court had "failed to instruct the jury properly on the use to be made of this evidence."[176] Instead of giving such a limiting instruction, the appellate court noted, the trial court had allowed the State in effect to make substantive use of the defendant's suppressed statements.[177] Notwithstanding all this criticism, the appellate court never explained how the defendant's statement that his hair was red could impeach the credibility of the defense witness who said that it was black, unless the jury considered the statement a

172. Inge v. United States, 356 F.2d 345, 349 (D.C. Cir. 1966); *see also* Johnson v. United States, 344 F.2d 163, 166 (D.C. Cir. 1964); *cf.* Lockley v. United States, 270 F.2d 915, 920-21 (D.C. Cir. 1959) (Burger, J., dissenting) (distinguishing between admission of the crime itself and other "true" impeachment).

173. *See* Miranda v. Arizona, 384 U.S. 436, 477 (1966) ("In fact, statements merely intended to be exculpatory by the defendant are often used . . . to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication."); United States v. Fox, 403 F.2d 97, 102-03 (2d Cir. 1968) (that false exculpatory statements are powerful evidence of guilty knowledge demonstrates unworkable character of *Walder*'s requirement that impeachment proof be related to collateral matters); United States *ex rel.* Hill v. Pinto, 394 F.2d 470, 475-76 (3d Cir. 1968) (holding that a test distinguishing between collateral and noncollateral statements based on whether statements are exculpatory on their face was "too artificial to be acceptable").

174. *See* 1 L. SAND ET AL., *supra* note 84, ¶ 5.01, at 5-6; *see also* Michalic v. Cleveland Tankers, 364 U.S. 325, 330 (1960) (stating that circumstantial proof may be "more certain, satisfying and persuasive than direct evidence"); United States v. Holland, 348 U.S. 121, 139-40 (1954) (holding that circumstantial proof is no different from direct evidence in that the jury must "weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference"); United States v. Young, 568 F.2d 588, 589 (8th Cir. 1978) ("circumstantial evidence . . . is intrinsically as probative as direct evidence"); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS 60 (1988) (noting that "circumstantial evidence is not necessarily inferior" and thus the Federal Rules of Evidence "draw no distinction between direct and circumstantial evidence").

175. *See* People v. James, 153 Ill App. 3d 131, 505 N.E.2d 1118, 1121 (Ill. Ct. App. 1987), *rev'd*, 123 Ill. 2d 523, 528 N.E.2d 723 (1988), *rev'd*, 493 U.S. 307 (1990).

176. *Id.*

177. *Id.*

probative admission "rebutting and refuting" the defense witness's testimony.

In concluding that the proof had properly been admitted, the Illinois Supreme Court probed further into the question of the appropriate use of the evidence, but ultimately found that any possible error in the jury instructions or argument of counsel was harmless.[178] It properly recognized that the trial court's pattern instruction on impeachment evidence "does not fit the situation in this case, because the instruction refers to a prior statement by a witness which contradicts the evidence given by that witness at trial."[179] It assumed that the trial court should have granted the instruction requested by the defense, which told the jury that the defendant's statement could be used by the jury "only as it may affect the believability of [the defense witness]" and not "as evidence of the commission of any of the crimes charged."[180] The Illinois Supreme Court also concluded that the trial court erred in instructing the jury to consider the statement as proof that the defendant's hair "was not black but . . . red at the point the officer said the defendant told him it was red."[181] Still, the Illinois Supreme Court did not explain how the jury could possibly evaluate how the defendant's statement affected the believability of the defense witness's claim that the defendant's hair was black, without considering it as proof that the defendant's hair was red. Indeed, the court itself could not distinguish between use of the statement as credibility proof or as evidence of the crimes charged. After criticizing the trial court for telling the jury that it could consider the defendant's statement as proof that his hair was red, it inconsistently noted that the prosecutor properly argued that the statement was an admission by James of his hair color because the comment helped the jury to decide whether the defense witness would lie for the defendant![182]

Because hearsay analogies cannot be applied to nonstatement evidence, and because they require limitations on inferential use that are impossible to achieve in this area of law, they cannot provide an answer to the truth-seeking/deterrence riddle. No one should be surprised by this result because hearsay law was never meant to address that question: It has no impact on deterrence *or* truth-seeking.

By circumscribing the inferential use of impeachment-by-contradiction proof, the Court has not meaningfully reduced the prosecution's incentive to

178. People v. James, 123 Ill. 2d 523, 528 N.E.2d 723 (1988), *rev'd,* 493 U.S. 307 (1990).

179. *Id.* at 730-31.

180. *See id.* at 730.

181. *Id.*

182. *Id.* at 731. The dissenting Justices were equally confused. Justice Ward asserted that the hearsay-derived definition of impeachment must apply to illegally obtained proof. *Id.* at 731 (Ward, J., dissenting). Justice Ward was simply assuming his own conclusion that the exception should not be extended to include impeachment of the testimony of defense witnesses.

Justice Clark correctly noted that "the prosecution, the defense counsel, and the court all stumbled . . . badly over the question of instructing the jury." *Id.* at 734 (Clark, J., dissenting). Yet he too "stumbled" into relying on the hearsay analogy when he suggested that "the use of the defendant's statement to rebut . . . [the defense witness's] testimony is not impeachment as traditionally understood." *Id.* (Clark, J., dissenting).

obtain such proof. The prosecution knows those limits cannot be maintained in theory or practice, so impeachment-by-contradiction proof is just as tempting as it would be absent limiting instructions. In addition, since the prosecution will not know until trial whether its evidence will be used to impeach by contradiction or by inconsistent statement, the distinction does not affect its incentive to obtain the proof. The use of James's suppressed statement, for example, was impeachment-by-contradiction evidence because it contradicted the testimony of a defense witness. Had James himself testified to the same facts, the Court might have conceived the very same statement as inconsistent statement impeachment and admitted it subject to the hearsay-derived limiting instruction. But in that event, the Court's own analysis suggests that a jury inevitably would use inconsistent statement impeachment as substantive evidence of guilt. Thus, the prospect of limiting instruction will have no effect on the prosecution's incentive to obtain inconsistent statement evidence, either.

Reliance on the hearsay analogy to define the boundaries of the exception is as fundamentally misconceived from the perspective of truth-seeking as it is from that of deterrence. The hearsay rule does not exclude statements of a party opponent because those statements supposedly contribute to the adversarial truth-seeking process.[183] Ordinary conceptions of truth-seeking permit the use of the proof "for its truth," and since the Court has limited the exception to illegally obtained evidence *the reliability of which is not suspect*,[184] there is no reason to pretend that the proof is unreliable hearsay.

By the same token, the proof need not be hearsay in order to further deterrence relative to truth-seeking. Despite the Court's suggestion otherwise, impeachment-by-contradiction and inconsistent statement evidence cannot be limited, since analysis establishes that the use of both forms of proof as substantive evidence of guilt is equally inevitable. Therefore, the meaningful alternatives are either completely excluding the proof in the interest of deterrence or accepting substantive use of the evidence in the interest of truth-seeking. The hearsay analogy cannot provide a framework for identifying when the exception can be expected to effect net gains to truth-seeking or deterrence.

In sum, the analogy between the scope of the impeachment exception and the limited inferential use of inconsistent statement impeachment evidence is fundamentally confused. The analogy misapplies the hearsay-derived concept of impeachment evidence, designed to address the reliability of a particular type of proof, in a context in which it has no coherent application. Consequently, rather than suggesting boundaries to the exception rationally related to the goals of truth-seeking or deterrence, the analogy to impeachment evidence suggests arbitrary limitations on the scope of the exception. As a result, the Court's decision in *James* could not derive rational boundaries, and was reduced to reaffirming the empty limitation on infer-

183. *See* FED. R. EVID. 801(d)(2).

184. *See* note 154 *supra.*

ences that properly could be drawn from illegally obtained evidence. It could not explain how that limitation would assure that the exception's truth-seeking benefits would outweigh its deterrence costs.

2. *Rebuttal.*

As an alternative to the hearsay approach, the analogy to rebuttal evidence recognizes that proof will be used to infer guilt and to assess credibility. This approach, therefore, does not attempt to limit the factual inferences that may be drawn from illegally obtained proof. Instead, it equates the impeachment exception with the admission of rebuttal evidence, implicitly assuming that illegally obtained evidence may qualify as appropriate rebuttal when evaluated in the context of the defenses raised at trial. This assumption influenced Justice Kennedy's suggestion in *James* that impeachment of defense witnesses be limited to testimony "directly contradicted" by illegal proof, and also influenced the related discussions in *James* and *Havens* about limiting the exception to impeach only direct testimony.[185]

Although avoiding the patent errors of the impeachment approach, the rebuttal approach is also fatally flawed. In the end, it reproduces, rather than resolves, the problem of deciding when the exception will effect net gains to truth-seeking or deterrence. That result occurs because the concept of rebuttal proof is also inappropriately applied outside its evidentiary context. The Court's attempts to remedy that flaw succeed only in imposing equally indefensible limitations on the exception.

Traditionally, the issue of what constitutes appropriate rebuttal proof arises when the contribution of evidence to the truth-seeking process at a criminal trial is *itself* problematic. The proof must have a potentially prejudicial effect on the jury.[186] Determinations about whether the defense has opened the door to otherwise inadmissible rebuttal evidence concern the shifting balance of probative value and prejudicial effect on the truth-seeking process itself.

Illegally obtained evidence, however, poses no such problem for truth-

185. This approach has also prompted countless discussions in lower court cases about similar restrictions intended to define what was required to "open the door" to illegally obtained evidence. *See, e.g.*, United States v. Mariani, 539 F.2d 915, 922-24 (2d Cir. 1976) (holding that contradiction with direct examination required); United States v. Trejo, 501 F.2d 138, 144 n.4 (9th Cir. 1974) (although illegal statements and tangible evidence may differ "in their relative values for impeachment and evidentiary functions," courts should limit use of both kinds of illegal evidence by requiring that it directly contradict testimony given on direct examination); United States v. Tweed, 503 F.2d 1127, 1129-30 (7th Cir. 1974) (direct contradiction required); United States v. Caron, 474 F.2d 506 (5th Cir. 1973) (same); United States *ex rel.* Wright v. LaVallee, 471 F.2d 123 (2d Cir. 1972) (same), *cert denied,* 414 U.S. 867 (1973); Volpicelli v. Salamack, 447 F. Supp. 652, 660-61 (S.D.N.Y.) (notwithstanding *Harris,* illegally obtained inconsistent statements of a defendant are admissible "only where the defendant's testimony on *direct* examination specifically initiates the issue to which the inconsistent statements are directed," while a "general denial of the commission of the offense is not sufficient to 'open the door' to use the impeaching testimony"), *aff'd without op.,* 578 F.2d 1372 (2d Cir. 1978); People v. Taylor, 8 Cal. 3d 174, 104 Cal. Rptr. 350, 501 P.2d 918 (1972) (contradiction with direct examination required), *cert. denied,* 414 U.S. 863 (1973).

186. *See* FED. R. EVID. 403.

seeking. The Court has limited the impeachment exception's reach to evidence that, but for its illegal origins, *would* be admissible in furtherance of the truth-seeking process under ordinary evidentiary principles.[187] If the evidence were not otherwise admissible, there would be no need to consider at all the effect on the truth-seeking process of its exclusion by rules of constitutional criminal procedure. Because the proof's only "prejudicial" effect is its cost to deterrence, the rebuttal analogy simply restates the question of the effect of admission of the evidence on truth-seeking and deterrence.

The impropriety of the analogy between the impeachment exception and evidentiary rebuttal can be illustrated by comparing the considerations that govern both determinations. Consider first the question whether the prosecution may use similar act evidence.[188] Such proof has both permissible and impermissible uses that define its probative value and its prejudicial effect. To be admissible as rebuttal proof, its probative value must not be substantially exceeded by the likelihood that it will be used for impermissible purposes, thus prejudicing the factfinding determination. However, the defendant can still control whether the proof is ultimately admitted by choosing not to contest the issues on which the similar act proof is admissible.

However, when applied to the case of illegally obtained evidence, weighing the evidence's probative value against its "prejudicial" effect requires a prior resolution of the truth-seeking/deterrence dilemma. Consequently, the analogy simply restates the question without shedding light on the answer. Furthermore, the caveat that the defendant may avoid the proof by not contesting the issues on which it is admissible is also inappropriate. When the defendant chooses not to contest the issues on which similar act evidence is permissible proof, the prosecution benefits from the proof and the defendant avoids its prejudicial effect, because its probative value and its prejudicial effect are separable. There is no similar resolution possible in the case of illegally obtained proof, because its probative value and its prejudicial effect are realized *regardless* of whether the proof is ultimately admitted or serves only to deter the presentation of a defense.[189] By not contesting the issues on which illegally obtained proof may be introduced, the defendant assures the prosecution the benefit of its illegally obtained proof and thereby assures that future victims of unlawful investigation will suffer the costs to deterrence imposed by the evidence's use at trial.

The analogy to evidentiary rebuttal is not merely a harmless exercise in futility; it also undermines the Court's starting point, the exclusion of illegal evidence from the prosecution's "case-in-chief."[190] A rebuttal case should

187. *See* text accompanying note 154 *supra.*

188. *See* FED. R. EVID. 404(b).

189. Indeed, in the absence of a theory of how truth-seeking varies independently from deterrence, its probative value (for truth-seeking) *is* its prejudicial effect (on deterrence).

190. I am assuming for the moment that the Court means something more than excluding the evidence from judicial review of the sufficiency of the prosecution's case when it asserts that exclusion of the evidence on the prosecution's case-in-chief provides sufficient deterrence. The assumption is justified by the Court's repeated attempts to limit the factfinder's ultimate use of illegally

not be confused with rebuttal proof. The admission of evidentiary rebuttal proof is justified by issues contested at trial—whether they are contested by defense evidence, by cross-examination, or by relying only on the absence of the prosecution's proof. The courts routinely and properly recognize that defenses can be established—and thus be subject to rebuttal—without the defendant's introducing any evidence.[191] Thus, the courts that have employed a rebuttal standard have held that a defendant may open the door to illegally obtained proof through cross-examination or by making an argument that is considered "misleading" unless the suppressed proof is admitted.[192]

By accepting those arguments, the cases have indicated that a true evidentiary rebuttal test will inevitably admit all illegally obtained evidence relevant to contested issues, regardless of how those issues are contested, and will only ban such evidence when it has already served its purpose by deterring the presentation of a defense. Counsel in *James*, for example, could easily have raised the "misidentification-by-hair-color" defense by cross-examining the prosecution's witnesses,[193] by express argument,[194] or by implicitly relying on the prosecution's failure to meet its burden of proof.[195] In fact, because the jury may properly use the absence of proof to draw inferences as to the nonexistence of facts, evidentiary rebuttal could easily allow relevant, excluded proof to rebut those inferences.[196] Once we take this step, there will be nothing left to stop the prosecution from using illegal evidence even in its case-in-chief.[197]

In an attempt to avoid this result, the Court has injected arbitrary rules,

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obtained proof. *See* text accompanying notes 229-267 *infra* for a discussion of the Court's attempts to prevent the affirmative use of illegally obtained evidence.

191. Rebuttal proof is routinely admitted during the prosecution's case-in-chief when the door is opened by cross-examination or argument. *See, e.g.*, United States v. Carter, 801 F.2d 78 (2d Cir.), *cert. denied*, 479 U.S. 1012 (1986). Moreover, such proof is also routinely admitted on cross-examination of a defense witness when: (1) his direct testimony opens the door to it; (2) the witness is an appropriate one to introduce the proof; and (3) the witness ultimately cooperates. For example, in *James* it was a pure fortuity that the prosecution was required to offer its proof on its rebuttal case. Had the suppressed contradicting evidence consisted of an authenticated photograph of the defendant showing his hair color at or about the time of the crime, then the proof may well have been admitted on cross-examination. Similarly, had Walder, Havens, Harris, Hass, or even James's witness acknowledged the facts indicated by the suppressed proof on cross-examination, there would have been no occasion for a rebuttal case on this point at all.

192. *See, e.g.*, United States *ex rel.* Castillo v. Fay, 350 F.2d 400, 402 (2d Cir. 1965), *cert. denied*, 382 U.S. 1019 (1966); People v. Payne, 98 Ill. 2d 45, 456 N.E.2d 44, 46 (1983), *cert. denied*, 465 U.S. 1036 (1984); Commonwealth v. Wright, 234 Pa. Super. 83, 87, 339 A.2d 103, 106 (1975).

193. Defense counsel might have done so by establishing that the eyewitnesses recognized James as the shooter only from his red hair.

194. Defense counsel might have done so by arguing that the prosecution had not established the validity of the identifications beyond a reasonable doubt because it failed to produce a non-accusing witness to describe James's hair color at the time of the crime.

195. Defense counsel might have done so by arguing that the prosecution had failed to produce a noninterested identification witness.

196. *Cf.* Stephen A. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated With the Absence of Evidence*, 66 CAL. L. REV. 1011, 1014-18 (1978) (noting importance of inferences from absence of proof in relevancy determinations).

197. Indeed, *all* the prosecution's proof is rebuttal evidence in the sense that it is used to rebut the presumption of innocence.

with no basis in either the rebuttal analogy or truth-seeking/deterrence analysis, to serve as boundaries for the impeachment exception. Consider, for example, the direct contradiction requirement suggested by Justice Kennedy. The lower courts in *James* had disputed the admissibility of the defendant's statement that he had gone to the beauty shop to "change his appearance" shortly after the crime.[198] Justice Kennedy seemed to agree that the statement had been improperly admitted, presumably because it only *indirectly* contradicted or rebutted the defense witness testimony.[199]

Excluding this proof of consciousness of guilt as only "indirectly" contradicting proof cannot be justified by the traditional analysis used in rebuttal cases. The validity of the eyewitnesses' identifications was certainly contested, and the defendant's concession that he had altered his appearance after the crime was probative on that issue. The proof had no prejudicial elements either, so it would have clearly met the rebuttal standard.

The most likely explanation for the direct contradiction requirement is that Justice Kennedy thought the proof should have been excluded because it was not as probative as the defendant's admission that his appearance matched the description given by the prosecution's eyewitnesses.[200] If so, the direct contradiction analysis amounts to a judgment about how much probative value the proof has in the context of the defense raised, not to a judgment about whether the proof has some value and is thus appropriate evidentiary rebuttal. Where the evidence does not prejudice the truth-seeking process, any probative value is sufficient to ensure its admission.[201]

Justice Kennedy's analogy between the direct contradiction requirement and determinations about the appropriate scope of evidentiary rebuttal that courts routinely make "without difficulty"[202] was, therefore, fundamentally misconceived.[203] However, his direct contradiction test is by no means the

198. *See* James v. Illinois, 493 U.S. 307, 330 (1990) (Kennedy, J., dissenting).

199. In light of his conclusion that the introduction of James's admission of his hair color had been proper, Justice Kennedy would have found the admission of James's consciousness of guilt, as evidenced by his decision to change his hair color, to be harmless error. *Id.*

200. If this were Justice Kennedy's intent, it would be inconsistent with any possible purpose for his proposed rebuttal test, a fact which further demonstrates how the test fails when applied outside the evidentiary context. Some courts applying FED. R. EVID. 404(b) have evaluated the prosecution's "need" for similar act evidence in light of its other proof on the issue to which it is relevant. *See, e.g.,* United States v. McMahon, 592 F.2d 871, 873-74 (5th Cir.), *cert. denied,* 442 U.S. 921 (1979); United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978) (citing FED. R. EVID. 404(b) advisory committee's note), *cert. denied,* 440 U.S. 920 (1979). That approach, in the present context, would expressly reward the prosecution for having obtained illegal proof precisely in those circumstances where exclusion has its maximum deterrent effect.

This explanation is consistent with Justice Kennedy's finding the "indirectly contradicting" proof's admission to be harmless error. *See* note 199 *supra* and accompanying text. Justice Kennedy's conclusion again relies on the discredited notion that it makes sense to generalize about the probative value of direct and circumstantial proof.

201. This recognition seems to be the foundation of Justice Brennan's complaint in *Havens* that the Court's test for the scope of contradiction of a defendant's testimony amounted to "nothing more than a constitutional reflection of the common-law evidentiary rule of relevance." United States v. Havens, 446 U.S. 620, 631 (1980) (Brennan, J., dissenting).

202. *James,* 493 U.S. at 325 n.1 (Kennedy, J., dissenting).

203. To salvage the analogy to evidentiary rebuttal, one might suggest that Justice Kennedy, in arguing that the prosecution's evidence was "unnecessary" to rebut the defense evidence of misiden-

Court's only failure. The same problems undermine every proposed test used in connection with the rebuttal analogy. Consider, for example, the Court's proposal to limit rebuttal to defense testimony elicited on direct examination or to testimony purposely elicited by the defense on cross-examination.[204] Like the direct contradiction requirement, these restrictions usually serve only as surrogates for measurements of the probative value of the rebuttal proof in the context of the case. Most defendants rely on direct or purposeful cross-examination, bringing them squarely within the Court's impeachment formula. For the rare defendant who relies on unplanned evidence as central to his defense, the Court's restrictions are merely an arbitrary add-on to the rebuttal analogy, because nothing in the concept of evidentiary rebuttal prevents the refutation of unplanned, but important, evidence. Rebuttal proof is admissible whenever the defendant contests an issue, whether he planned to do so or not. The defendant's lack of responsibility for initially raising the issue is irrelevant to the appropriateness of nonprejudicial rebuttal. The costs to truth-seeking of prohibiting its rebuttal are no less than if the defendant deliberately elicits the proof on direct examination.

Thus, the direct contradiction, direct examination, and purposely elicited requirements are not truly derived from the concept of evidentiary rebuttal; rather, they protect the defendant's control over the admission of suppressed proof, and thereby protect a value that is independent of the rebuttal analogy and the truth-seeking/deterrence balance.

That the tests obtain no guidance from the model provided by evidentiary rebuttal and instead implicitly respond to concerns outside the truth-

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tification, meant that its probative value as rebuttal evidence *on this issue* outweighed its prejudicial spillover effect on issues that the defendant had not contested. But the notion of prejudicial spillover is inappropriate to otherwise permissible proof in the context of a criminal trial. The prosecution's burden is to prove every element of the crime beyond a reasonable doubt, which means that every issue not conceded by the defendant is in fact contested.

Although the courts have differed on what is required to create an issue substantial enough to justify the admission of similar act proof in rebuttal, that dispute has reflected different sensitivities to the prejudicial effect of the proof, rather than a belief that every issue not conceded by a defendant is contested in a criminal trial. *See, e.g.*, United States v. Figueroa, 618 F.2d 934, 936-37 (2d Cir. 1980) (stating that trial judge should await conclusion of prosecution's case to determine "whether the issue sought to be proved by the evidence is really in dispute and, if so, to assess the probative worth of the evidence on this issue against its prejudicial effect"); *compare* United States v. Shackleford, 738 F.2d 776, 781 (7th Cir. 1984) (because of its prejudicial effect, similar act proof should be excluded when concerning "only a formal issue") *with* United States v. Wagoner, 713 F.2d 1371, 1375-76 (8th Cir. 1983) (similar act evidence should be allowed on any issue raised by plea of not guilty). Where there is doubt, the defendant may simply avoid the proof by stipulating to the relevant issue. *See Figueroa*, 618 F.2d at 941-42. More generally, the threshold question of whether "the issue sought to be proved is really in dispute" is itself a question of degree contingent upon the probative value and prejudicial effect of the evidence. *Cf.* Vaughn C. Ball, *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435 (1980) (distinction between logical and conditional relevancy is erroneous; all determinations of relevance are questions of degree requiring contextual estimations of probative value). Thus, the notion of a prejudicial spillover effect on uncontested issues is illogical where the proof has no prejudicial effect on truth-seeking.

204. *See* Comment, *supra* note 135, at 166-68. The Illinois Supreme Court similarly required that the impeached testimony be "purposely presented." People v. James, 528 N.E.2d 723, 729 (Ill. 1988), *rev'd*, 493 U.S. 307 (1990).

seeking/deterrence balance is also manifest in the cases that have permitted rebuttal of misleading cross-examination or argument. Unable to rationalize the admission of illegally obtained proof as the consequence of the defendant's introduction of his own evidence, the courts have rationalized it as a consequence of the defendant's having unfairly taken advantage of the fact of suppression.[205] But the rebuttal concept does not require unfairness in defense counsel's actions as a precondition for opening the door to rebuttal evidence.

In addition, the truth-seeking/deterrence balance cannot possibly justify the "unfair advantage" test. Nothing in the balance suggests that it is unfair for the defendant to leave the prosecution to suffer the adverse inferences that arise from the absence of the excluded proof. Indeed, only when the prosecution suffers those inferences can the exception ever operate as a deterrent at all.

Thus, the Court's attempts to inject fairness considerations into its impeachment analysis have no basis in the rebuttal analogy or the truth-seeking/deterrence balancing test. They also have no basis in reality. The cases permitting rebuttal of defense counsel's cross-examination and argument make clear that, in order to define the boundaries of the impeachment exception, the Court must choose between allowing the defendant to benefit from the absence of excluded proof, in the interest of deterrence, or allowing the prosecution to use the evidence, in the interest of truth-seeking. The inferences must be allocated to one side or another; there is no undistributed middle.

The question of what is proper evidentiary rebuttal does not aid the Court in making this choice. For example, in his *James* dissent, Justice Kennedy tried to clarify the difference between directly and indirectly contradicting proof by distinguishing between a jury's being "kept in the dark" and being "positively misled" by the absence of suppressed proof.[206] That distinction implies that the Court can play a neutral role by keeping the jury "in the dark," thus not allowing either the prosecution or the defense to benefit from the presence or absence of illegal proof. But no neutral role is possible; a criminal trial requires inferences to be drawn equally from the presence and absence of the prosecution's evidence.[207] Justice Kennedy is simply postponing the inevitable choice of which side the Court will choose. What inferences from the absence of the T-shirts suppressed in *Havens* would Justice Kennedy have the jury draw without permitting it to be affirmatively misled? Would Justice Kennedy approve of the jury acquitting

205. *See* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.6(b) (2d ed. 1987).

206. *James*, 493 U.S. at 324 (Kennedy, J., dissenting).

207. Standard jury charges instruct the jury to evaluate both the evidence and lack of evidence either expressly, or implicitly, through burden of proof and reasonable doubt instructions emphasizing the "clean slate" on which the Government begins its case. *See* 1 L. SAND ET AL., *supra* note 84, ¶ 4.01, at 4-2, 4-3 (jury instruction on the presumption of innocence and burden of proof and cited cases). Judge Sand indicates that the better practice is a specific charge to the jury to "consider all of the evidence or lack of evidence in reaching" its verdict. *Id.* ¶ 5.01, at 5-3 (jury instruction on marshalling evidence).

Havens because, as urged by counsel, the cooperating witness's testimony—that Havens assisted him by sewing pockets from the cloth—was uncorroborated? If he did approve, would he permit defense counsel to argue the point by reminding the jury that the contents of Havens's suitcase were never entered into evidence? Neither truth-seeking nor deterrence observes the distinction between a factfinder's being kept in the dark or being positively misled by the absence of the suppressed proof.[208]

In sum, it does not advance the analysis of truth-seeking and deterrence to recast the question of the appropriate scope of rebuttal with suppressed evidence as one of the fairness of inferences that may be drawn from the absence of the proof. Where this determination is analogous to the admission of evidentiary rebuttal, it assures only that more highly probative, illegally obtained proof will be admitted. The exclusion of James's statement was "affirmatively misleading" only because he sought to force the prosecution to suffer the inferences that normally flow from the absence of the proof. The rebuttal tests prohibit the defense from making effective use of its absence. As a result, the approach reinforces the inversely proportionate relationship between truth-seeking and deterrence and fails to resolve the ambiguity of the consequences that flow from that relationship.

Although avoiding the arbitrariness of the impeachment approach, the analogy to evidentiary rebuttal serves only to reproduce the question of how the inferences should be allocated. Moreover, it does so in a context in which the Court has offered no reason to believe that the probative value of suppressed evidence will not define both its benefit to truth-seeking and its cost to deterrence.

III. PRINCIPLES: PROHIBITING CONVICTION WITH ILLEGALLY OBTAINED PROOF VERSUS PREVENTING PERJURY

The principled approach to the exception's boundaries derives from the distinction drawn initially in *Walder* between the prosecution's "mak[ing] an affirmative use of evidence unlawfully obtained" and allowing the defendant to affirmatively resort to perjury by relying on the exclusionary rules as a shield against contradiction of his untruths.[209] Pursuant to this rationale, the Court conceived that the exclusionary rules were not concerned primar-

208. Justice Kennedy's analysis of the impact of the exclusion of James's statement on truth-seeking itself belied the distinction. He argued that failing to rebut the witness's testimony was positively misleading because, among other things, the jury would expect the prosecution to present rebuttal proof, if it had any. *James,* 493 U.S. at 325 (Kennedy, J., dissenting). In the absence of such proof, the jury would improperly conclude that no such proof existed and, thus, exclusion of the evidence would positively corroborate the witness's account, rather than simply keep the jury "in the dark." This argument proves too much; the absence of proof will always positively mislead in precisely this sense. *See* Saltzburg, *supra* note 196, at 1019-23. What could be more "positively misleading" than, to paraphrase Rule 10b-5, promulgated under the Securities Exchange Act of 1934, keeping the jury in the dark about probative evidence "necessary in order to make the . . . [evidence presented], in the light of the circumstances . . . not misleading?" 17 C.F.R. § 240.10b-5(b) (1991).

209. Walder v. United States, 347 U.S. 62, 65 (1954).

ily with deterring unlawful evidence-gathering. Instead, it viewed exclusion as a necessary response to violations of constitutional rules, in order to avoid becoming "participants" in the underlying violations.[210] But at the same time, the courts are comparably implicated when the defendant uses court-made exclusionary rules as a shield for perjury.[211] The scope of the exception was defined by principles, whose violation would tarnish judicial integrity, apart from the instrumental effects on deterrence or accurate factfinding.

Despite the Court's formal rejection of the judicial integrity rationale for the exclusionary rules and its acceptance of the truth-seeking/deterrence balance,[212] the principled approach continues to inform the exception's scope. Drawing on *Walder*'s language, the Court in *Harris* noted that "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury."[213] In *Havens*, the Court noted that "[t]he defendant's obligation to testify truthfully is fully binding on him when he is cross-examined," and further that "[h]e would unquestionably be subject to a perjury prosecution if he knowingly lies on cross-examination."[214] The majority in *James* used the special concern with perjured, as opposed to merely false, testimony to argue that the exception should not be extended to defense witnesses.[215] The analysis indicated that the Court's concern with being implicated in uncontradicted perjury was separate from its concern with the instrumental effects of false testimony on the accuracy of the factfinding process.[216] Finally, Justice Kennedy's dissent in *James* also argued that extending the exception to defense witnesses was consistent with the anti-perjury principle. It asserted that "[t]he perversion [of the exclusionary rules] is the same where the perjury is by proxy" as where the defendant offers perjured testimony himself.[217]

Harris, *Hass*, and *Havens* also reflected the competing concern that the exception not permit the prosecution to secure a conviction by making af-

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210. *See, e.g.*, Harris v. New York, 401 U.S. 222, 232 (1971) (Brennan, J., dissenting) (exclusionary rules are based not only on the assumption of deterrence but also on the proposition that admitting illegally obtained proof requires the courts to "aid or abet the law-breaking police officer"); *James*, 493 U.S. at 312 n.1 (noting that Justices Brennan, Marshall, and Stevens believe the exclusionary rules are "designed not merely to deter police misconduct but also to prevent courts from becoming parties to the constitutional violation by admitting illegally obtained evidence at trial").

211. *See, e.g.*, Michigan v. Harvey, 494 U.S. 344, 351-52 (1990) (arguing that application of the impeachment exception is especially appropriate when exclusion is a result of a violation of prophylactic rules of criminal procedure, rather than a direct denial of a defendant's constitutional rights). For a discussion of the exclusionary rules being judicially imposed rather than constitutionally compelled, see Monaghan, *supra* note 4, at 3-10.

212. In Stone v. Powell, 428 U.S. 465, 485 (1976), the Court rejected the judicial integrity rationale for the exclusionary rules only insofar as it had been used to suggest that there should be no limitations on exclusion at all.

213. *Harris*, 401 U.S. at 226; *see also* Oregon v. Hass, 420 U.S. 714, 722 (1975) (paraphrasing *Harris*).

214. United States v. Havens, 446 U.S. 620, 627 (1980).

215. *See* James v. Illinois, 493 U.S. 307, 314 (1990).

216. *See* text accompanying notes 83-90 *supra*.

217. *James*, 493 U.S. at 330 (Kennedy, J., dissenting).

firmative use of illegal proof. The language in *Walder*, *Harris*, and *Hass* indicating that the exception permits the use of illegally obtained evidence for credibility purposes only,[218] together with the *Havens* Court's injunction against using illegally obtained evidence as substantive proof of guilt,[219] all demonstrate the Court's continuing concern that the jury use illegally obtained evidence in a fashion designed to protect the defendant's right not to be convicted on the basis of illegally obtained evidence, while realizing the Court's desire to prevent perjury. Moreover, both opinions in *James* expressed the Court's fear that the cumulative effect of an unrestricted exception could eliminate all available defenses that a defendant might meaningfully present, reflecting a similar concern that the exception not permit conviction on the basis of illegally obtained evidence. Finally, the distinction suggested by Justice Kennedy's dissent between a jury's "being kept in the dark" and being "positively misled" by the exclusion of illegally obtained proof suggests a similar concern with limiting the use of the proof to a perjury-preventing function.[220]

Viewing the scope of the exception as the product of these principles, the Court's central task is to distinguish between the affirmative and negative uses of illegally obtained evidence. In so doing, the Court would define boundaries to the exception that would identify both perjury and the affirmative use of illegally obtained evidence as noninstrumental wrongs having equal impact upon the integrity of the criminal trial process.[221] Pursuant to this principled approach, the purpose of the exception is to eliminate jury reliance on defense perjury by "neutralizing" it, without allowing the prosecution to prove its affirmative case with illegally obtained evidence. Thus, the rules and the exception would allow the judiciary to avoid participating in violations of either principle.

A. *Preventing the Defense from Resorting to "Perjury"*

Unfortunately, the track record of the principled approach is as dismal as that of the policy approach. First, the Court has obtained little assistance from its anti-perjury rationale. The cases demonstrate that its implications for the scope of the exception are far too broad to provide meaningful gui-

218. In Harris v New York, 401 U.S. 222, 223 (1971), the Court noted that the "trial judge instructed the jury that the statements attributed to petitioner by the prosecution could be considered only in passing on petitioner's credibility and not as evidence of guilt." In Oregon v. Hass, 420 U.S. 714, 721 (1975), the Court noted that the "trial court instructed the jury that the statements attributed to . . . [defendant] could be used only in passing on his credibility and not as evidence of guilt." In Walder v. United States, 347 U.S. 62, 64 (1954), the Court noted that the "trial judge . . . carefully charged the jury that . . . [the evidence] was not to be used to determine whether the defendant had committed the crimes . . . charged, but solely for the purpose of impeaching the defendant's credibility."

219. *See* United States v. Havens, 446 U.S. 620, 627-28 (1980).

220. *See James,* 493 U.S. at 324 (Kennedy, J., dissenting); *see also* text accompanying note 206 *supra.*

221. *See, e.g.,* United States *ex rel.* Padgett v. Russell, 332 F. Supp. 41, 43 (E.D. Pa. 1971) (balancing "the right of a criminal defendant to be free from the effects of improper custodial interrogation and the right of society to counteract the effect of possibly perjured testimony").

dance. The *James* majority used the rationale to argue for limiting the exception to defendant testimony, because that testimony is more likely to be perjured. The *James* minority used the rationale to permit the contradiction of any perjured testimony, whatever its source. The concern with "perjury" in this context, however, is intended to prevent the courts from being implicated in a violation of the integrity of a criminal trial, and is not necessarily concerned with preventing the crime of giving knowingly false testimony. As a result, the anti-perjury rationale has not been helpful in choosing between these approaches. Moreover, any approach derived from the anti-perjury rationale requires a judge to sacrifice her impartiality by determining that a defense is false. Because of the difficulties in defining the "perjury" to which the exception should apply and in justifying the courts' necessary role in identifying it, the anti-perjury rationale has yielded arbitrary limitations on the exception.

The distinction between impeachment of defense witnesses and defendants is not easily accommodated by the anti-perjury principle.[222] The *James* majority attempted to do so by positing a correlation between a defendant's interest and the likelihood of intentionally false testimony. Assuming the correlation to exist, however, does not establish the commission of perjury in any given case, unless one concludes—contrary to instructions that courts routinely give to juries—that falsity, much less perjury, can be inferred from the defendant's interest alone.[223]

In addition, the practical application of the anti-perjury rationale would require courts to make a preliminary determination that the contradicted testimony was not only false, but intentionally false. Although some may favor this procedure because it permits the admission of more convincing contradicting proof, it contravenes the principle of judicial impartiality and subverts the defendant's presumption of innocence and his right to trial by jury.[224] As a result, even while relying upon the anti-perjury principle to justify the exception, the Court has disclaimed any judicial role in the perjury determination. Instead, the Court has claimed that the exception only enables the jury to make an informed credibility determination.[225] The obvious flaw in this scheme is that it is incapable of principled limitation: All impeachment proof would merit admission on that ground.

In addition to being unable to reconcile preliminary determinations of

222. For example, although the Court in *James* depicted the issue as the "extension" of the exception to defense witnesses, there was no necessary reason to do so. Many lower courts had already assumed that the application of the exception to defense witnesses, as suggested by the *James* minority, followed from *Walder*'s anti-perjury rationale. *See, e.g.*, United States *ex rel.* Castillo v. Fay, 350 F.2d 400, 402 (2d Cir. 1965), *cert. denied*, 382 U.S. 1019 (1966); Hendrickson v. State, 290 Ark. 319, 719 S.W.2d 420, 424 (1986); People v. Payne, 98 Ill. 2d 45, 456 N.E.2d 44, 46 (1983), *cert. denied*, 465 U.S. 1036 (1984); Commonwealth v. Wright, 234 Pa. Super. 83, 87, 339 A.2d 103, 106 (1975).

223. *See* 1 L. SAND ET AL., *supra* note 84, ¶ 7.01, at 7-11.

224. Although the courts make findings of defendant perjury for sentencing purposes, those findings follow a jury's deliberation and decision.

225. *See* Harris v. New York, 401 U.S. 222, 225-26 (1971); *see also Padgett*, 332 F. Supp. at 43 (noting that the exception permits contradiction of "*possibly* perjured testimony") (emphasis added).

perjury with the judicial role in a criminal trial, the Court has been unable to explain why perjured testimony is the only threat to the integrity of a criminal trial. We can all agree that perjury is a crime, but the applicable criminal penalties exist to punish and prevent that crime. The exception purports to prevent judicial participation in violations of the integrity of the trial process, not to supplement criminal penalties. If the integrity of that process is violated only by a defendant's perjury, and requires only that intentionally false testimony be contradicted, then why should James, for instance, suffer a murder conviction for resorting to perjury?[226] If integrity is violated by any falsehood, regardless of whether a witness has committed perjury, then why should the exception not extend to "perjury by proxy" (as Justice Kennedy described the testimony of James's defense witness)? Moreover, should the exception not extend equally to false inferences created by defense counsel's cross-examination or argument? Who is more the defendant's proxy than his counsel? In short, if the Court is concerned with perjury's *effect* on the integrity of the criminal trial, rather than on the unexposed commission of the crime, then it should evaluate whether the *defense*, however presented, is knowingly false, without limiting itself to any specific witness's testimony.[227]

Due to the difficulties in defining "perjury" in this context, and in justifying a judicial finding of perjury, however defined, the Court has been unable to employ the anti-perjury rationale consistently. At most, it has noted that the exception prevents the defendant from using the "shield" of the exclusionary rules to resort to perjurious testimony. It does so simply by subjecting that testimony to normal evidentiary processes. The Court has relied on the anti-perjury rationale to argue that without an impeachment exception, perjury may go uncontradicted. Presumably, one is then supposed to conclude that because nobody could defend perjury, nobody could oppose an impeachment exception in principle. But this argument says nothing about whether the rationale yields justifiable limitations on the exception's application or, indeed, any limitations at all. Moreover, the cases belie the argument that the specter of perjury requires the exception as a matter of principle. Insofar as *Walder* permitted a defendant's impeachment only with evidence relating to collateral matters, it tolerated the possibility of perjury by a defendant on those matters that were most important to the trial—the denial of "all the elements of the case against him."[228]

226. Some courts have held that *Walder* permits the use of illegally obtained evidence in a subsequent perjury prosecution. *See* 4 W. LAFAVE, *supra* note 205, § 11.6(c), at 498-99, and cases cited therein. Nonetheless, those courts have not considered why the impeachment exception is not entirely redundant. *See, e.g.*, United States v. Raftery, 534 F.2d 854, 857-58 (9th Cir.), *cert. denied*, 429 U.S. 862 (1976).

227. After all, although perjury by a defendant or defense witness is at least potentially subject to criminal penalty, perjury by proxy—the presentation of a knowingly false defense—is virtually immune from such liability.

228. Walder v. United States, 347 U.S. 62, 65 (1954).

B. *Prohibiting Conviction with Illegally Obtained Proof: The Court's Evidentiary Approach*

Because the anti-perjury principle fails to define adequate boundaries to the exception, the Court's principled perspective has focused upon distinguishing between affirmative and negative uses of illegally obtained proof, using evidentiary analogies to prohibit the former and to permit the latter. In the current approach, the Court relies entirely on limiting instructions to restrict the factfinder's use of illegally obtained proof. These instructions purport to permit the jury to use the proof only to contradict the defendant's case and not to further that of the prosecution. This approach thus draws an analogy between the affirmative use of the evidence and its role in fulfilling the prosecution's ultimate burden of proof. In a previous approach, the Court permitted the prosecution to impeach the defendant only on collateral matters, permitting the defendant to deny the elements of the prosecution's case-in-chief without risking impeachment with illegally obtained proof. This approach drew an analogy between the negative use of illegally obtained proof and the collateral evidence rule, which governs impeachment of defense evidence with extrinsic proof. The following sections analyze these approaches and argue that both are incapable of establishing a distinction between affirmative and negative uses of illegally obtained proof capable of supplying a coherent analysis of the boundaries of the exception.

1. *The burden of proof.*

In its current distinction between affirmative and negative uses of illegally obtained proof, the Court uses limiting instructions to assure that the jury uses illegally obtained evidence only to neutralize possible defense perjury, not to compromise the prosecution's burden of proving guilt beyond a reasonable doubt with lawful evidence. These instructions reflect the typical jury instruction on witness credibility, which charges the jury (at most) to disregard the testimony of a witness known to have intentionally given false testimony, but does not suggest that it draw any affirmative inferences from the fact that the witness lied.[229] Accordingly, the Court relies on an analogy between the permissible "negative" use of illegally obtained evidence in exposing defense perjury and its use only for credibility purposes. It apparently expects the factfinder, at most, to discount the defense evidence entirely, but not to consider any affirmative inferences from the perjury that would relieve the prosecution from establishing its burden of proving guilt with lawful evidence.

Consequently, the ideal instruction on illegal proof would advise the jury to consider that proof if and only if it finds: (1) that the prosecution's case, considered alone, establishes guilt beyond a reasonable doubt; and (2) that the defense case, if believed, establishes a reasonable doubt.[230] The jury would then consider illegally obtained evidence only to evaluate the credibil-

229. *See, e.g.*, 1 L. SAND ET AL., *supra* note 84, ¶ 7.01, at 7-69 (instruction on trial perjury).
230. I am indebted to my colleague Mike Martin for this formulation.

ity of defense evidence. Thus, any role the illegal evidence might play in securing a conviction would be justified by the perceived need to prevent the defendant from using the exclusionary rules as a shield for perjury.

Notwithstanding the analogy to the burden of proof, no instruction could cause the factfinder to evaluate the prosecution's case independently without also considering it in light of the defense evidence presented. In turn, that evidence can only be evaluated in light of the illegally obtained contradicting proof. The law of evidence provides no analogous model for a deliberation of this kind.[231] The only available analogue is the distinction between affirmative and negative proof applied by judges in deciding the legal *sufficiency* of the prosecution's case. But that model is inappropriate. Sufficiency determinations do not require decisions about the credibility of the prosecution's proof. Instead, the court construes all reasonable inferences against the defendant. Thus, there is no basis for applying this analysis to decisionmaking by an ultimate factfinder. Unlike a court making a sufficiency determination, the factfinder must evaluate the credibility of, and factual inferences from, the evidence as a whole, not make judgments about the evidence in isolation.

The courts' persistent resort to the inapt "truth of the matter asserted" instruction to limit a jury's use of illegally obtained evidence further indicates that it is inappropriate to interject a sufficiency determination into the deliberations of the ultimate factfinder. That instruction, which limits the factual inferences that may be drawn from the proof, attempts to approximate the ideal deliberation insofar as it may be reconciled with the jury's factfinding function. However, the instruction is no more successful at effecting the ideal deliberation than it is at identifying the limited factual inferences that may be drawn from the proof. Moreover, no acceptable instruction exists that is consistent with the jury's factfinding function.[232]

231. Nor do judges make a clearly analogous determination about the legal sufficiency of the prosecution's case standing alone once the defendant has presented proof. Some courts have held that by presenting proof after denial of a motion for acquittal, the defendant waives his right to challenge the sufficiency of the prosecution's proof standing alone. *See, e.g.*, United States v. Maniego, 710 F.2d 24, 28 (2d Cir. 1983); United States v. Pui Kan Lam, 483 F.2d 1202, 1208 n.7 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974). This rule of "waiver" is explicable only by a different assumption about the distinction between affirmative and negative uses of proof depending upon whether the issue is one of legal sufficiency or factfinding. The rule that the defendant waives sufficiency challenges by presenting evidence presupposes that a jury may make affirmative use of the defendant's presentation of false evidence. If the jury were prohibited from drawing any affirmative inferences from the falsity of the defendant's proof and were permitted at most to disregard it, the decisions on the sufficiency of the evidence at the close of the prosecution's case, and at the close of all the evidence, *would necessarily be made on precisely the same record.* Thus, the defendant would waive nothing by presenting a case. The "waiver" rule applied at trial, therefore, acknowledges that permissibly treating the defendant's evidence as a fabrication is unlike merely discounting that evidence.

232. The one commentator who noted early on that the hearsay-derived instruction was inappropriate, for example, was able to propose no acceptable alternative. He implicitly suggested that courts should simply instruct the jury to use illegally obtained evidence for credibility purposes only and then reinforce the point by telling it the reasons why its consideration of the proof need be restricted. *See* Haddad, *supra* note 152, at 42. Such an instruction, however, does nothing to assist the jury in deciding what using the evidence for credibility purposes only means in this context. On

The Supreme Court has been unable to distinguish negative and affirmative uses of illegally obtained evidence by isolating its use only for credibility purposes. In *Loper v. Beto*,[233] for instance, it established a clear preference for admitting illegally obtained evidence that impeaches a defendant's *specific* credibility, by contradicting particular exculpatory factual assertions in his testimony.[234] At the same time, the Court refuses to admit unlawfully obtained *general* credibility evidence, such as proof of prior convictions or specific acts of conduct probative of character for untruthfulness.[235] This preference clearly contradicts the Court's "credibility only" doctrine. Specific credibility evidence may often be used as affirmative proof of guilt, with only a tangential effect on credibility determinations. Meanwhile, general credibility evidence can *only* be used to neutralize perjury; the rules of evidence *themselves* prohibit any affirmative use. If the Court were truly distinguishing between affirmative and negative uses of proof according to whether the factfinder is likely to use it for credibility inferences only, the preference would be reversed in favor of admitting general credibility proof.[236]

It is not surprising that the analogy to witness credibility instructions cannot support the Court's "negative-use only" doctrine. Although the typical witness credibility instruction does not invite the factfinder to draw affirmative inferences of facts from perjured testimony, evidentiary principles do allow some affirmative uses for proof of perjury. Classic jury instructions invite the factfinder to use, as affirmative proof of the defendant's consciousness of guilt, perjury[237] or falsification of evidence[238] by a defendant. In

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the other hand, such an instruction gives the jury a dangerous opportunity to improperly consider the exclusionary rules and defendants who use the rules to their advantage.

233. 405 U.S. 473 (1972).

234. *See id.* at 482 n.11 (distinguishing illegally obtained evidence "rebutting a specific false statement made from the witness stand" from evidence "blackening [the witness's] character and thus damaging his general credibility in the eyes of the jury" and implying that only the former should be permitted under the impeachment exception); White, *supra* note 29, at 1496, and cases cited therein ("the Supreme Court [has] made it quite clear that specific credibility decisions such as *Walder* and *Harris* are irrelevant to general credibility problems").

235. *See* FED. R. EVID. 608, 609.

236. One commentator has endorsed the Court's restrictive attitude toward admitting general credibility proof, claiming that such proof, in contrast to specific credibility proof, "exposes no lies." White, *supra* note 29, at 1497. If taken to mean that general credibility proof provides no evidence of perjury at all, then the claim implies that all general credibility proof should be excluded regardless of whether it is illegally obtained. Its evidentiary value as proof of perjury *is* its sole justification under the rules of evidence. If taken to mean that general credibility proof is less persuasive evidence of perjury than specific credibility proof—which is assuredly what the commentator meant and what the Court implies by its exclusion of general credibility proof—then the claim belies the meaningfulness of the distinction between affirmative and negative uses of specific credibility evidence. Specific credibility evidence is more persuasive proof of perjury than general credibility evidence precisely because it affirmatively proves the existence of a fact that exposes the lie in testimony denying that fact.

237. *See* 1 L. SAND ET AL., *supra* note 84, ¶ 6.05, at 6-35 (false exculpatory statements are such powerful evidence of guilt that an instruction is necessary to highlight that the proof shows at most defendant's *belief* that he was guilty and to caution the jury that it "may not . . . infer on [that] . . . basis . . . alone, that the defendant is, in fact, guilty of the crime for which he is charged"); *cf.* United States v. Owens, 460 F.2d 467, 470 (5th Cir. 1972). *Owens* illustrates that limitations on the use of evidence showing consciousness of guilt are not derived from a distinction between affirmative

addition, the jury is likely to view proof of a knowingly false defense argument or intentionally misleading cross-examination as the functional equivalent of perjury advanced on the defendant's behalf.[239] Any suggestion of perjury in any fashion connected to the defense is powerful affirmative proof. Indeed, the suggestion of consciousness of guilt is powerful enough proof to warrant a balancing instruction cautioning the jury that the proof does not necessarily establish guilt.[240]

Therefore, it is impossible to use jury instructions to assure that illegally obtained proof will be used only to evaluate the credibility of the defendant's case. As a practical matter, the principle prohibiting affirmative use of proof is, at most, an assurance that a court will not consider such proof in determining the legal sufficiency of the prosecution's case. Yet, the Court's efforts to limit the use of the proof by the factfinder clearly demonstrate its belief that a sufficiency determination is inadequate to prevent conviction with illegal proof. There is an enormous gap between a merely sufficient criminal case and one that proves the defendant's guilt beyond a reasonable doubt. The protection provided by the reasonable doubt standard is among the most fundamental principles defining the integrity of the criminal process.[241] Moreover, the difference between a sufficient and a successful criminal prosecution also includes the protection afforded a defendant by his constitutional right to trial by jury. Where is the protection against conviction with illegally obtained evidence when a judge ascertains only that the prosecution's lawfully obtained evidence meets the mere threshold test of sufficiency?

Finally, the notion of protecting the defendant's right not to be convicted with illegally obtained proof through judicial review of the sufficiency of the prosecution's lawful evidence fails to address the cases in which illegally obtained proof has been used to rebut misleading cross-examination or argument. Is such proof part of the prosecution's affirmative case for purposes of assessing its sufficiency? If so,[242] that result appears to conflict with the

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and negative uses of such proof. *Id.* Instead, these limitations flow from the belief that such proof is not probative at all of certain technical elements. *Id.* Thus, where it is the *only* proof purporting to establish the technical elements, evidence of consciousness of guilt is insufficient to prove the prosecution's case. *Id.* at 470-71.

238. *See* 1 L. SAND ET AL., *supra* note 84, ¶ 6.05, at 6-38 (defendant's falsification of evidence, presumably including the procuring of false defense witness testimony, is such powerful proof of consciousness of guilt that an instruction is necessary to caution the jury against inferring, on the basis of such proof alone, that the defendant is guilty of the crime charged).

239. The point is illustrated by the time-proven rhetorical technique of discrediting an opposing party's case by treating his counsel's cross-examination or argument as the equivalent of a false exculpatory statement or the knowing presentation of false evidence.

240. *See* notes 237-238 *supra* and accompanying text.

241. *See In re* Winship, 397 U.S. 358, 362-63, 367-68 (1970) (citing Supreme Court precedents indicating that the reasonable doubt standard is constitutionally required, and holding that proof beyond a reasonable doubt is required during the adjudicatory stage of a juvenile delinquency proceeding).

242. Ironically, these cases have attracted support among commentators otherwise hostile to the exception. *See, e.g.*, 4 W. LAFAVE, *supra* note 205, § 11.6(b). Moreover, commentators sympathetic to extending the exception to defense witnesses have supported the extension, in part, to preserve the exception's application to cross-examination and argument. *See, e.g.*, Comment, *supra* note 135, at 165 n.56.

principled goal purportedly accomplished by requiring a sufficient case of lawful evidence. If not, it is unrealistic to expect a judge to ignore proof that she has ruled is necessary to rebut misleading cross-examination or argument and thereby dismiss the case to protect the defendant from conviction with the illegal evidence.

In sum, limiting instructions cannot restrict the factfinder from assessing the prosecution's case through affirmative use of proof admitted by way of the impeachment exception. They also hopelessly confuse the appropriate roles of the jury and the trial court. The imagined instructions capable of communicating the distinction between the affirmative and negative uses of illegally obtained proof are inappropriate with respect to the ultimate factfinder, whose task respects no such distinction. At the same time, the continuing quest for the appropriate instructions reveals that the principled rationale for the exception's boundaries collapses without some means of denying the decisive effect of illegal proof in a criminal trial.

2. *The collateral use doctrine.*

Before the Supreme Court began to rely exclusively on limiting instructions to prevent the affirmative use of illegal proof, the lower courts attempted to serve this goal by excluding entirely all illegal proof that was not "collateral" to the crimes charged.[243] They derived the collateral use doctrine from the *Walder* Court's explanation of why Walder had been appropriately impeached with illegally obtained proof while Agnello had not. According to the *Walder* Court, "the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him" by leaving him "free to deny all the elements of the case against him without thereby giving leave to the Government to introduce . . . evidence illegally secured."[244] Walder was thus free to deny that he had possessed heroin on the occasions for which he was on trial—as Agnello had denied knowing possession of cocaine on the occasion for which he was charged—without incurring the admission of illegal evidence of prior possession. Unlike Agnello, however, Walder "[o]f his own accord . . . went beyond a mere denial of complicity in the crimes . . . charged" and claimed to have *never* possessed heroin.[245] Therefore, it was proper to admit the evidence of Walder's prior heroin possession to challenge the credibility of that assertion because the proof was collateral to the issue of guilt.[246]

The collateral use doctrine was inspired by the evidentiary concept of collateral evidence employed in the rule prohibiting impeachment on collateral matters. That analogy also proved to be inappropriate and failed to define rationally the scope of the impeachment exception. Even before the

243. *See The Impeachment Exception to the Exclusionary Rules,* 34 U. CHI. L. REV. 939, 942 n.16 (1967); White, *supra* note 29, at 1479; Note, *supra* note 29, at 923-25.

244. Walder v. United States, 347 U.S. 62, 65 (1954).

245. *Id.*

246. *See also* Harris v. New York, 401 U.S. 222, 228-30 (1971) (Brennan, J., dissenting) (relying on the collateral use doctrine).

Harris Court overruled the collateral use doctrine in favor of limiting instructions prohibiting the affirmative use of illegal proof, many lower courts had rejected the distinction between collateral and noncollateral uses of the evidence.

The collateral evidence rule generally prohibits extrinsic proof, the sole purpose of which is to establish the existence of a contradiction.[247] For impeachment purposes, courts generally define collateral evidence as contradicting proof that is not relevant to issues in the case, apart from simply impeaching a witness's credibility.[248] Independently relevant impeachment is not considered collateral, and would therefore not be admissible under the impeachment exception. Accordingly, by drawing an analogy between illegally obtained impeachment proof admissible under *Walder* and collateral impeachment evidence, the courts attempted to construe *Walder* as permitting the prosecution to use only "negative" illegal proof that merely contradicted the defendant's evidence, but not "affirmative" proof that established the elements of its case. Therefore, the impeachment exception would permit such proof only to discredit the defendant's evidence and thus expose possible perjury.

Walder's unique evidentiary context furthered the notion that the exception permitted the introduction of collateral evidence. The proof admitted in *Walder* was character evidence, proved by specific acts of the defendant's conduct, the use of which as "affirmative" evidence of an element of the prosecution's case was problematic under the rules of evidence. Thus, it was possible to interpret *Walder* as only permitting the introduction of illegally obtained proof that had no permissible affirmative use under the rules of evidence and was, thus, collateral.[249]

To begin with, had Walder not volunteered his prior nonpossession, the rules of evidence would have prohibited the prosecution from introducing the proof regardless of whether it was obtained illegally; unlike other illegally obtained proof, the prosecution's character evidence is permissible only as evidentiary rebuttal and not as part of the prosecution's case-in-chief.[250]

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247. E. CLEARY, *supra* note 159, § 47, at 109-10. It is now generally acknowledged that the collateral evidence rule finds expression in FED. R. EVID. 403. *See, e.g.*, C. MUELLER & L. KIRKPATRICK, *supra* note 174, at 681.

248. If the contradicting evidence is relevant to the credibility of the witness apart from simply establishing the contradiction, then the extrinsic proof is not collateral. Furthermore, contradicting proof that is central to the witness's testimony is not collateral if it is impossible that the witness's account is merely mistaken in the contradicted particular if the contradicting proof be true. It is often said that such proof calls into question the trustworthiness of the witness's entire testimony. *See* MICHAEL H. GRAHAM, EVIDENCE: TEXT, RULES, ILLUSTRATIONS & PROBLEMS 454-57 (2d ed. 1988).

249. Commentators sympathetic to the exclusionary rules uniformly made this assumption about *Walder* in arguing that the evidence was properly admitted in that case only because it was not probative of Walder's guilt. *See The Impeachment Exception to the Exclusionary Rules, supra* note 243, at 941 (evidence in *Walder* "could not have influenced the jury on the question of guilt"); White, *supra* note 29, at 1482 n.44 (evidence in *Walder* unlikely to be "misused" as "direct" evidence of guilt because it was related to a prior offense and not the present charge); Note, *supra* note 29, at 916 (evidence in *Walder* "had no bearing on the issues central to the case before the Court").

250. *See* FED. R. EVID. 404(a)(1).

Thus, one could characterize the proof as falling outside the prosecution's affirmative case. Second, the rules are silent about whether character rebuttal can be used only to negate the defendant's exculpatory character inference or also affirmatively to establish an inculpatory character inference on which the factfinder might properly rely.[251] Although it is hard to envision how such proof might rebut an exculpatory character inference without establishing an inculpatory one, the character rules are especially wary of a factfinder's use of an inculpatory inference from character proof in deciding the issue of guilt.[252]

Finally, not only was the evidence at issue in *Walder* character rebuttal, whose status as affirmative evidence is already problematic, but it was also proved by specific acts of the defendant's conduct. Even where evidentiary rules permit character rebuttal, they limit it to the weaker form of opinion or reputation testimony,[253] unless a defendant testifies to specific instances of conduct. In that case, courts ordinarily will permit the prosecution to respond in kind with proof of the defendant's conduct.[254] But as a quid pro quo, courts will minimize prejudice to the defendant by only admitting the proof subject to an instruction limiting its use to the issue of the defendant's credibility.[255] Thus, even if the rules permit the factfinder to draw an inculpatory propensity inference from character rebuttal established by opinion or reputation testimony, that inference would nonetheless be prohibited where the prosecution was allowed to rebut the defendant's character evidence with the more powerful proof of specific instances of the defendant's conduct.[256] For these reasons, unique to the evidentiary context, the Court may have thought Walder's impeachment justified because the type of impeachment proof admitted did not provide affirmative proof of guilt. By permitting the prosecution to respond with its character rebuttal proof, the Court had not admitted proof with a permissible affirmative use. Also, Walder had opened an "entire subject which . . . [evidence] law has kept

251. *McCormick on Evidence* contradicts itself on this score, claiming on one hand that the prosecution's character rebuttal properly is "circumstantial evidence of whether . . . [the defendant] committed the act charged," E. CLEARY, *supra* note 159, § 191, at 568, and on the other that such proof can be used affirmatively only to prove "whether he committed the act charged with the requisite state of mind," *id.* The treatise asserts both propositions without acknowledging any contradiction between them. The latter approach contemplates that the proof might be used affirmatively, but only for a purpose permitted by FED. R. EVID. 404(b), that is, one other than to establish the prohibited action-in-conformity-with-character inference, even though the evidence could properly be used to rebut the propensity inference that the defendant would have the jury draw from an exculpatory character trait. Since nothing in *Walder* suggested that the proof was admitted for any permissible purpose recognized under FED. R. EVID. 404(b), it was not implausible to perceive it as having no permissible affirmative purpose whatsoever.

252. *See* note 251 *supra.*

253. FED. R. EVID. 405(a). Rule 405(a) codified the existing common law prohibition on proving character by specific acts. *See* C. MUELLER & L. KIRKPATRICK, *supra* note 174, at 489.

254. *See, e.g.*, Walder v. United States, 347 U.S. 62, 64 (1954) (defendant's testimony allowed prosecution to bring up prior drug-related acts in rebuttal).

255. *See* United States v. Sanders, 929 F.2d 1466, 1469 n.1 (10th Cir.) *cert. denied,* 112 S. Ct. 143 (1991); *cf.* United States v. Giese, 597 F.2d 1170 (9th Cir.), *cert. denied,* 444 U.S. 979 (1979).

256. *See, e.g., Sanders*, 929 F.2d at 1469 n.1.

closed for his benefit."[257]

The analogy between impeachment evidence admitted under *Walder* and collateral evidence, however, was beset by a basic contradiction. The collateral evidence rule prohibits only *extrinsic*, not *intrinsic*, proof of collateral impeachment. Thus, reading *Walder* narrowly as permitting the admission of collateral impeachment proof with no permissible affirmative evidentiary purpose is inconsistent with the anti-perjury principle. Such a reading would leave the defendant free to deny the illegally obtained proof without fear of contradiction by extrinsic evidence. Assuming that defendants do not routinely "confess" to illegally obtained proof when confronted with it on cross-examination, the exception would facilitate, rather than discourage, perjury. The collateral evidence doctrine tolerates false testimony on a collateral matter in order to avoid confusion of the issues, undue consumption of time, and unfair prejudice that might result from the extrinsic proof of collateral matters.[258] The anti-perjury principle does not knowingly tolerate false testimony of any kind.

On the other hand, a broader reading of *Walder* suggested either an exception to the collateral evidence rule, particularly created to promote the admission of illegal proof against a criminal defendant, or an acknowledgement that the collateral use doctrine permitted illegal noncollateral impeachment proof. The first alternative was highly implausible. The latter alternative was more likely, but it highlighted the inappropriateness of the evidentiary analogy and offered the courts little guidance as to the exception's boundaries. One could read *Walder* as permitting noncollateral extrinsic proof of impeachment evidence with no permissible affirmative purpose. That reading, however, would suggest that *Walder* was virtually sui generis. Only infrequently will proof with no permissible evidentiary purpose besides contradicting a defendant's testimony be permitted to be proved extrinsically by the collateral evidence rule. Assuming *Walder* was not limited to impeachment proof that is "collateral" in its evidentiary sense, and thus admitted relevant evidence that is normally admitted on the prosecution's affirmative case, it offered little guidance on how to construe its holding that a defendant's testimony denying the "elements of the prosecution's case" was protected from contradiction.

Walder, therefore, postponed rather than resolved the question of the appropriate scope of the exception. Several lower courts completed the analogy between the exception and collateral impeachment evidence by prohibiting illegally obtained extrinsic proof of contradicting facts after the defendant denied those facts on cross-examination.[259] Considering the ex-

257. *See* Michelson v. United States, 335 U.S. 469, 479 (1948).

258. *See* C. MUELLER & L. KIRKPATRICK, *supra* note 174, at 681 (stating that the "concerns which lead to exclusion of counterproof which contradicts on collateral points are very much the concerns which find expression in FRE 403 and 611").

259. *See, e.g.*, United States v. Batts, 558 F.2d 513, 516-18 (9th Cir. 1977); Johnson v. United States, 344 F.2d 163, 165 n.3 (D.C. Cir. 1964); United States v. Birrell, 276 F. Supp. 798, 817 n.23 (S.D.N.Y. 1967); *see also* JOHN HENRY WIGMORE, 1 EVIDENCE § 15, at 70 (3d ed. Supp. 1964); *The Impeachment Exception to the Exclusionary Rules*, *supra* note 243, at 947; Note, *supra* note 29, at

ception's anti-perjury rationale, such a result was inconsistent with *Walder*. Although construing *Walder* to permit the prosecution to use illegally obtained evidence on cross-examination, those courts refused to take the next logical step by permitting the evidence to be proved extrinsically when perjury was most likely to be exposed. In *Walder* itself, for example, application of the collateral evidence rule would have barred the prosecution from introducing the heroin obtained in the illegal search, after the impeachment exception permitted the prosecution to inquire about it on cross-examination and Walder specifically denied its possession. Similarly, if *Walder* involved a virtually unique circumstance in which evidentiary principles would permit extrinsic proof of impeachment evidence allowed by the exception, then, as several commentators noted, the exception was hardly worth its administrative costs.[260] To read *Walder* narrowly was to justify its reversal or to render it largely irrelevant; to read it more broadly was to venture into uncharted territory.

Stripped of the analogy to collateral evidence, most courts attempted to define the collateral use of illegal proof based on its probative value as proof of the crime charged, which conceded that evidence admitted under the exception had permissible affirmative uses under the rules of evidence, and thus differed radically from the meaning of "collateral" in its analogous evidentiary context.[261] The lower courts' interpretations of collateral use ranged (sometimes within the same opinions) from the requirement that the proof be "unrelated to the crime charged,"[262] to a requirement that it only be "indirectly related to the crime charged,"[263] to a requirement that it only not be "per se" inculpatory.[264] But once the courts recognized that the evidence permitted under the exception could be affirmative proof of the prosecution's case—and indeed typically *had* to be such proof in order to evade

919 (noting that the collateral use doctrine applied by the courts to determine when illegally obtained evidence may be admitted pursuant to the impeachment exception "violates the 'collateral matters' rule" and arguing that *Walder* was wrongly decided on that basis).

260. *See, e.g.*, Haddad, *supra* note 152, at 30; *The Impeachment Exception to the Exclusionary Rules, supra* note 243, at 947; Note, *supra* note 29, at 919.

261. *See, e.g.*, Note, *supra* note 29, at 916-17 (noting that while some courts had required contradicting proof to be unrelated to the "elements of the *case*" in order to be "collateral," others had required it to be unrelated to the "elements of the *crime*," and arguing that both definitions were broader than the definition of collateral evidence required by *Walder*).

262. *Recent Cases*, 24 VAND. L. REV. 843, 844 (1971) (describing *Walder* as permitting impeachment of defendant's testimony on issue unrelated to pending charges); *see also* Tate v. United States, 283 F.2d 377, 380 (D.C. Cir. 1960) (admitting evidence of "lawful proper acts").

263. *Recent Cases, supra* note 262, at 845 n.14; *see also* Johnson v United States, 344 F.2d 163, 166 (D.C. Cir. 1964) (reversing convictions because prosecution had introduced illegally obtained statements bearing *directly* on defendant's guilt or innocence); Bailey v. United States, 328 F.2d 542, 543 (D.C. Cir.) (allowing admission of impeachment on "minor points"), *cert. denied*, 377 U.S. 972 (1964); United States *ex rel.* Dixon v. Cavell, 284 F. Supp. 535, 540 (E.D. Pa. 1968) (admitting evidence not directly pertaining to the elements of the crime).

264. *Recent Cases, supra* note 262, at 845 n.13; *see also* United States v. Curry, 358 F.2d 904, 910 n.3 (2d Cir. 1965) (inculpatory statement can be used to impeach defendant so long as it is not a "confession to the crime for which he . . . [is] being tried"), *cert. denied*, 385 U.S. 873 (1966); *Tate*, 283 F.2d at 380 (jury entitled to hear illegally obtained statement of testifying defendant so long as not "*per se* inculpatory"); *Cavell*, 284 F. Supp. at 540 (statement proof collateral so long as it does not "admit the very acts that are essential elements of the crime charged").

the traditional bar on collateral evidence—they could no longer justify the proper scope of the exception by reference to the underlying principles of preventing perjury and prohibiting conviction with illegally obtained proof. To the extent that the proposed tests distinguished degrees of probative value of admittedly affirmative proof, they were hardly consistent with the notion that any conviction based on illegally obtained proof entails judicial participation in the underlying illegality.

By the time the Court decided *Harris*, the lower courts had criticized the collateral use doctrine as meaningless. Those courts, liberated from *Walder*'s precedent by the dictum in *Miranda v. Arizona* (suggesting that use of statements taken in violation of *Miranda*'s required warnings amounted to self-incrimination *even if the statement was exculpatory*) argued that *Miranda* implicitly overruled the impeachment exception. They asserted that *Miranda* recognized what the lower courts had already learned in applying the collateral use doctrine—that the use of illegally obtained evidence as proof of guilt has no meaningful correlation with the question of whether relevant evidence can be labelled as collateral to the crime charged.[265] Overruling the collateral use requirement, the Court in *Harris* adopted the fiction of effective limiting instructions to claim that the exception was consistent with principles preventing both perjury and conviction with illegal proof, despite the admission of noncollateral impeachment.[266] But as the lower courts' experience with the collateral use doctrine demonstrates, the Court was asking a jury to draw a distinction between the affirmative and negative uses of illegally obtained proof that judges had already concluded could not prevent the defendant's conviction with illegal proof. Meanwhile, the *Harris* dissenters also ignored the experience of the lower courts and endorsed the collateral use doctrine, claiming that proper restrictions on the evidentiary uses of unlawful proof can prevent judicial participation in governmental illegality and defense perjury.[267]

In sum, viewing the scope of the impeachment exception to reflect principles prohibiting both defense perjury and conviction with illegal proof, rather than policies of truth-seeking and deterrence, is equally inadequate in defining coherent boundaries to the exception. Unlike the evidentiary principles of burden of proof or collateral impeachment evidence, the criminal trial process does not distinguish between affirmative and negative proof of guilt. As a result, the principled approach degenerates into an ungoverned judicial balance between competing principles and reproduces, rather than resolves, the problem of choosing among alternative boundaries to the exception. Nonetheless, the Court continues to perpetuate the fiction that the ex-

265. *See* Groshart v. United States, 392 F.2d 172, 179 (9th Cir. 1968) (evidence can be of lawful proper acts, relate to a minor point, and be collateral to the principal issues in the case but nonetheless be directly related to the defendant's defense; thus, distinctions used to determine when evidence is permissible under *Walder* are "essentially meaningless"); United States v. Fox, 403 F.2d 97, 103 (2d Cir. 1968) (same).

266. *See* text accompanying notes 30-32 *supra.*

267. *See* note 290 *infra* and accompanying text.

ception is consistent with both principles. It claims that the exception prohibits the prosecution from using illegal evidence affirmatively, while it permits its use only to neutralize potential defense perjury, however that term may be defined. The principles prohibiting conviction with illegally obtained proof on the one hand, and defense perjury on the other, are inconsistent in practice, but the notion that they may be equally respected by the judiciary buttresses the truth-seeking/deterrence balance, preventing it from eliminating either the exclusionary rules or the impeachment exception entirely. Although the principled approach fails to generate boundary doctrines consistent with its premises, it legitimizes the notion of compromising constitutional criminal procedure and the principles of evidence, and thus assures the continued existence of the impeachment exception.

IV. THE POLITICS OF THE IMPEACHMENT EXCEPTION

A. *The Illusion of Neutrality*

The impeachment exception represents a compromise between evidentiary principles and constitutional criminal procedure. Its legitimacy is based on the belief that it is possible to accommodate both within a neutral framework. That framework, however, has continually failed to provide a coherent application of the exclusionary rules or the impeachment exception. Whether viewing the exception as a principled limitation on the scope of the exclusionary rules or as a concession to a competing policy, the Court has been unable to formulate boundaries to the exception that can accomplish the goals of both the rules and the exception. Until limitations on the rules are rooted in their underlying purposes, rather than in competing principles or policies, the boundaries to the exception will remain arbitrary.

One need look no further than the exception's present boundaries to appreciate that arbitrariness. If a defendant testifies, the courts will admit virtually any relevant unlawful evidence in response, on the pretense that the proof will not be used "substantively" or "affirmatively" to establish guilt. In *Michigan v. Harvey*, for example, the defendant's testimony was "impeached" with evidence that he had merely omitted a fact from a previously suppressed statement to police.[268] On the other hand, *James* establishes that if a defense *witness* testifies, the courts will not admit any unlawful proof in response.

Meanwhile, the courts routinely dismiss cases that require illegal proof in order to be legally sufficient, despite the fact that dismissal represents perhaps the greatest affront to truth-seeking. They also virtually guarantee the conviction of defendants whose cases contain enough lawful evidence to be legally sufficient, but, considering both lawful and unlawful evidence, comprise proof beyond a reasonable doubt, unless those defendants are able to mount a defense with the testimony of defense witnesses, rather than their

268. Michigan v. Harvey, 494 U.S. 344, 347 (1990). The impeachment use of the omission presupposed that it was an admission by silence and, hence, powerful proof of guilt.

own.[269]

The doctrine thus alternately favors truth-seeking or deterrence while accomplishing neither, and celebrates the inconsistency as a form of balance, rather than the political compromise it really is. The Court itself in *Cruz v. New York*[270] provided the most devastating critique of such an approach, noting that "[t]he law cannot command respect if . . . an inexplicable exception to a supposed constitutional imperative is adopted."[271]

This conclusion does not assert that there is something in the nature or logic of the exception that requires that its boundaries be incoherent or that there is something inherently wrong with compromising the exclusionary rules with evidentiary principles. Indeed, this article employs an internal critique of the Court's efforts to develop boundary doctrines capable of accomplishing its asserted goals precisely to avoid any such prejudgment. It may well be unfortunate that the exclusion of evidence from a criminal trial cannot achieve adequate deterrence without sacrificing truth-seeking.

The reason underlying this failure is that the Court conceives of the criminal process as bifurcated into investigative and trial components; these components are characterized by differing norms, which can be weighed or balanced against each other. This conception, however, ignores the overlap between investigation and trial within the criminal process in both empirical practice and normative theory.[272]

In the policy approach, the separation of investigative and trial norms manifests itself in the inevitable trade-off between truth-seeking and deterrence. But in order to offer a rational method for resolving the trade-off in favor of truth-seeking or deterrence, the Court has denied that the goals are always contradictory in direct proportion to each other. It has thus claimed that the boundary of the exception lies at the point at which its costs to deterrence outweigh its benefits to truth-seeking.

The usual critique of this balance has focused on the inability to compare these costs and benefits because they are "incommensurate."[273] The analysis presented here yields the opposite conclusion. The Court's attempts to achieve net gains to truth-seeking or deterrence have failed because the two goals are, in fact, commensurate. The incentive to obtain proof illegally will

269. We might ask why the integrity of the criminal process requires application of the exclusionary rules and the impeachment exception alternatively to remove a case from the factfinder entirely (by dismissal, if lawful proof is insufficient) and to assure conviction of a defendant about whom the prosecution has not only sufficient lawful evidence, but proof beyond a reasonable doubt, considering the defenses foreclosed or contradicted by illegal proof.

270. 481 U.S. 186 (1987).

271. *Id.* at 193 (rejecting an exception to *Bruton*'s exclusionary rule for codefendants' "interlocking" confessions).

272. For an excellent description of how the principles of proof do (and should, where they do not) structure the tasks of gathering evidence before trial *and* presenting the evidence at trial, see TERENCE ANDERSON & WILLIAM TWINING, ANALYSIS OF EVIDENCE: HOW TO DO THINGS WITH FACTS BASED ON WIGMORE'S SCIENCE OF JUDICIAL PROOF (1991); *see also* James L. Kainen, *The Rationalist Tradition at Trial,* 60 FORD. L. REV. 1085, 1093-95 (1992) (book review) (extending Anderson and Twining's approach to the rules of evidence as well as to the principles of proof).

273. *See* note 74 *supra.*

be determined by the probative value of the proof, a measure that also will determine the proof's contribution to truth-seeking. Thus, defining the scope of the exception will always be undermined by the realization that broadening (narrowing) the exception will enhance (detract from) truth-seeking at the same rate at which it detracts from (enhances) deterrence. The balancing analysis thus reproduces, rather than resolves, the contradiction between the two goals.

In addition to analyzing the theoretical incentive to unlawful action created by the exception, the Court has occasionally recognized that deterrence ultimately depends upon the actual behavioral effects of the rules and not the logic of incentives. Those occasional references to the rules' empirical bases have spawned an immense literature about how, or whether, the exclusionary rules actually "deter" illegal conduct.[274]

274. The Court, unlike various commentators, has studiously avoided entering into the debate about the behavioral effect of the exclusionary rules in practice because of the difficulties of proof and the ambiguity of the policy implications of that debate. *Compare* Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases,* 57 WASH. L. REV. 635 (1982) (arguing that empirical research can inform judgments about "efficient" level of constitutional violations) *with* Arval A. Morris, *The Exclusionary Rule, Deterrence and Posner's Economic Analysis of Law,* 57 WASH. L. REV. 647 (1982) (no research design suggested by Posner's analysis can answer question of efficient level of violations); *see also* Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule,* 86 MICH. L. REV. 1, 36 n.151 (1987) (discussing "costs" of the Fourth Amendment); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665 (1970). Different conceptions of the empirical "deterrence" question proliferate at a rate far exceeding our ability to generate empirical evidence, such that it is always possible to argue persuasively that the available research answers the wrong question. Kamisar, for example, argues persuasively that the exclusionary rules have been in place for so long now that the relevant behavioral question is the effect that reversal of the rules would have on a law enforcement community whose attitudes are conditioned by those rules—a question that can only be answered by attitudinal surveys eliciting hypothetical reactions. Kamisar, *supra,* at 21-23, 33-38. As might be expected, such surveys show that reversal of the exclusionary rules would tend to cause police to take the constitutional rights of defendants less seriously. *Id.* (discussing studies). Kamisar concedes that the purportedly empirical deterrence debate rests upon which side is allocated the burden of persuasion. Kamisar, *supra* note 33, at 645. He is open to using these attitudinal surveys as a means of allocating the burden of persuasion to the rules' opponents to show that eliminating the rules would not increase the frequency of rule violations, even marginally. *Id.*

Implicit in his assignment of this burden is the notion that the rules can *never* impose "excessive" costs because, ideally, the prosecution would obey the rules of constitutional criminal procedure. Although evidence may be foregone as a result, that fact should be recognized to be an unavoidable consequence of constitutional criminal procedure rather than an avoidable cost of the exclusionary rules. *See id.* at 621. Although reached by different routes, my conclusion and Kamisar's are similar in that we both conceive the choice between truth-seeking and deterrence as the wrong way of thinking about the exclusionary rules. The difference is that I view the debate as not scientific at all. In equating "deterrence" with eliminating incentives for noncompliance with the rules, for example, I follow the Court's own analysis. Kamisar, on the other hand, argues that the analyses of deterrence and incentives are not the same thing. *See, e.g., id.* at 597 n.204, 636-38; Kamisar, *supra,* at 47. He asserts that although the exclusionary rules may remove incentives to gather evidence unlawfully, the rules do not really "deter" because they impose no penalty for noncompliance. *Id.* The distinction is insignificant, however, since the costs imposed by the rules include the opportunity costs associated with noncompliance. The rules may be seen as deterrents because the imposition of such costs amounts to a penalty.

Although Kamisar would have the Court analyze deterrence as if the rules imposed no opportunity costs at all, even steadfast opponents of the impeachment exception admit the existence of such costs. *See, e.g.,* Oregon v. Hass, 420 U.S. 714, 724-25 (1975) (Brennan, J., dissenting) (implicitly arguing that applying impeachment exception on the facts in *Harris* did not eliminate opportunity

Nonetheless, even the best empirical research on the actual behavioral effects of the exclusionary rules and the impeachment exception is unhelpful in effectively defining the scope of either in terms of the truth-seeking/deterrence balance. Suppose, for example, that such research indicated that different institutional goals influence police and prosecutorial behavior, quite apart from the incentives created by the exception, and that these goals account for the frequency of violations. The opinions in *James* briefly ventured into this territory. Justice Kennedy suggested that the police generally stop investigating after having obtained "sufficient evidence to present proof of guilt beyond a reasonable doubt in the case in chief" and, therefore, have few occasions to act on the incentive to obtain impeachment proof.[275] Acceptance of this view would explain why, for example, the Court has argued that the prosecution might not continue interrogation in circumstances in which it has "little to lose and much to gain."[276]

Assuming that research verifies Justice Kennedy's perception of reality, what normative goals would incorporate that fact into the truth-seeking/deterrence balance? Implicitly, Justice Kennedy made an argument that neither he, nor any other proponent of the impeachment exception, would accept if its implications were made explicit. He implied that the prosecution routinely does less than an ideal investigation would require, and that we should reward this behavior by admitting illegal proof. The proof may be admitted without undue cost to deterrence because the police do not routinely obtain similar proof. Ironically, Justice Kennedy urged this result in the interest of "truth-seeking," even though the costs to the truth-seeking process of insufficient or inadequate prosecutorial investigations are likely far to outweigh any costs incurred by not having an impeachment exception. If the prosecution does not routinely anticipate all innocent explanations for

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costs to police in failing to give *Miranda* warnings); Alan M. Dershowitz & John Hart Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 YALE L.J. 1198, 1218-21 (1971) (arguing that the need to eliminate "all significant incentives" to gather evidence unlawfully applies to "deliberate" violations when the police subjectively perceive they "could not secure the evidence by lawful means" and thus implicitly conceding that opportunity costs in cases of violations committed under different conditions deter violations that would otherwise occur). Thus, given that some deterrence is achieved, the question is the extent to which it should weigh in the balance. This determination is incoherent for reasons far more fundamental than the existence of limited knowledge about the effect of opportunity costs on official behavior. The question in the debate is not simply how to allocate the burden of persuasion, but rather how to decide what the participants should be attempting to prove.

It is, of course, plausible to assume that the behavioral effects of the exception are not accurately predicted by the exception's boundaries. Indeed, the Court has made such an assumption in applying the impeachment exception to circumstances, such as those in *Hass* and *Harvey,* in which the prosecution would seem to have *little* to lose and *everything* to gain from engaging in the violation. Its approval of the application of the exception, irrespective of this fact, indicates that the Court understands the actual behavioral effects of the rules to be far more complex than its analysis of the incentives alone would indicate.

275. James v. Illinois, 493 U.S. 307, 329 (1990) (Kennedy, J. dissenting). In contrast, Justice Brennan suggested that the police would frequently continue to investigate after having established a prima facie case and, thus, would often overstep constitutional bounds because of the impeachment exception. *See id.* at 318-19.

276. *See* text accompanying note 79 *supra.*

its proof, and does not obtain whatever proof it can to prove those possibilities false, we should expect it to do so in the interest of truth-seeking and adequate law-enforcement.

Even if Justice Kennedy's view incorporates empirical reality, we should not seek an approach that merely reflects reality. Instead, we must choose which aspects of that reality are to be changed and which are to be accepted as consistent with our instrumental goals. Even supporters of the impeachment exception are likely to see its truth-seeking benefits as few if it tolerates inadequate investigations. Rather than assuming the existence of inadequate investigations, the doctrine *should* assume the ideal—that proper investigations will routinely be made. The instrumental approach to the exclusionary rules purports to be concerned with changing reality to comply with constitutional rules of criminal procedure. If the ideal situation includes complete investigations by the prosecution using *lawful* means, then there is no instrumental justification for the impeachment exception.

Moreover, accepting that the prosecution's behavior is not determined by the anticipated use of evidence at trial is inconsistent with the deterrence rationale of the exclusionary rules. That rationale is built on the premise that the police will be sufficiently concerned with obtaining convictions to incorporate trial norms into their routine practice. If this were not the case, prohibiting the use of evidence at trial would be an illogical means of encouraging compliance with constitutional guarantees. Although the compliance achieved may be less than ideal, proof of nondeterrence is as likely to reflect the fact that trial norms are insufficiently incorporated into investigative decisions, as it is to suggest that the exclusionary rules exact excessive costs.[277]

Similarly, the distinction between trial and investigative norms undermines the incorporation of the anti-perjury principle into the judicial integrity rationale for the exclusionary rules. An ex post review of illegally obtained proof may expose defense "perjury" just as effectively as it exposes erroneous factfinding. But as in the case of the truth-seeking/deterrence balance, weighing factfinding against fact-gathering norms is misguided. To play a meaningful role in defining the integrity of the criminal process, courts must realize that norms governing fact-gathering also define the integrity of the factfinding process. The Court's analysis itself belies the distinction between admitting illegally obtained proof into evidence and using it for impeachment purposes. The impeachment exception assures that illegally

277. This article thus denies the existence of any conceptual boundary between investigation and trial preparation. *Cf.* Michigan v. Harvey, 494 U.S. 344, 365-67 & nn.9, 10, 12 (1990) (Stevens, J., dissenting) (making explicit the dependence of the deterrence analysis on the distinction between investigation and trial preparation, and noting that it is supportable only if different substantive standards govern prosecutorial behavior before and after criminal charges are filed). As a normative matter, investigation and trial preparation are identical. In practice, the two may diverge because of lack of training, poor supervision, and the existence of bureaucratic structures and incentives that interfere with the normative ideal. But there is no reason to suppose that the practical distinction is a given that varies independently of the exclusionary rules, one of whose primary goals is to educate the law enforcement community to the point that the distinction no longer exists. In any event, it makes no sense to premise the impeachment exception on an empirical reality that the exclusionary rules are designed to eliminate.

obtained evidence will be used, as surely as if it is admitted, in assisting the prosecution to establish guilt. Thus, despite the Court's apparent view that the impeachment exception is required to foster separate norms governing investigation and trial, separating those norms subjects the prosecution to contradictory standards. The judge who feels implicated in both unlawful evidence-gathering and defense perjury may intervene to resolve that conflict in a particular case, but that solution confuses the integrity of a criminal trial with the personal integrity of the judge presiding over it. The integrity of the criminal process is defined by the values, including those of constitutional criminal procedure, that legitimize outcomes in light of the procedures used to attain them.

Taken together, the critiques of the impeachment exception as a matter of policy, or as a matter of principle, question whether the integrity of the criminal process is served by the Court's distinction between evidence that is unlawfully obtained and that which is unlawfully used. The Court uses this distinction to justify applying the impeachment exception only to the former.[278] It has not applied the impeachment exception to rules of criminal procedure that prohibit the use of evidence itself.[279] This distinction fails to construct meaningful boundaries precisely because it is conceptually impossible for evidence to be illegally obtained, but nonetheless lawfully used at trial. The distinction perpetuates the illusion that it is possible to strike a compromise between evidentiary values and values of constitutional criminal procedure—and thus to have it both ways—while nonetheless denying that the conflict between the two requires a compromise at all.

The impeachment exception is, therefore, inconsistent with instrumental and noninstrumental rationales for the exclusionary rules insofar as they assist in preserving the integrity of the criminal process. Its continued existence results from a political compromise within the Court that undermines the accepted goals of the exclusionary rules. The Court's justification for the exception—the limited need for deterrence and the possibility that defense perjury may be prevented without convicting the defendant with illegally obtained proof—conceals unavoidable judgments about the desirability of constitutional criminal protections in the guise of evidence law.

The status quo, perhaps, furthers the strategic agendas of both the proponents and opponents of the exclusionary rules by alternatively demonstrating that the evidentiary costs of those rules are high or that their costs are much

278. *See id.* (impeachment exception applies to evidence obtained in violation of prophylactic rule protecting Sixth Amendment rights announced in Michigan v. Jackson, 475 U.S. 625 (1986)); Oregon v. Hass, 420 U.S. 714 (1975) (impeachment exception applies to evidence obtained in violation of prophylactic rules protecting Fifth Amendment rights announced in Miranda v. Arizona, 384 U.S. 436 (1964)); Harris v. New York, 401 U.S. 222 (1971) (same); *cf.* Oregon v. Elstad, 470 U.S. 298 (1985) (*Miranda* warnings and related protections not rights protected by the Constitution, but rather measures to insure protection of right against compulsory self-incrimination).

279. The use of immunized or involuntary statements against the maker would amount to compelled self-incrimination. *See* New Jersey v. Portash, 440 U.S. 450 (1979) (prohibiting use of statements obtained pursuant to grant of use immunity to impeach defendant); Mincey v. Arizona, 437 U.S. 385 (1978) (prohibiting use of involuntary statements to impeach defendant).

overstated. Most importantly, however, determinations about the scope of the exception—and the fact that there is an evidentiary-based exception at all—highlight the Court's belief that even accepted constitutional rules of criminal procedure are sometimes not worth their evidentiary costs. Despite the Court's claim, the boundary doctrines intended to provide a coherent way of identifying those occasions are far from neutral.

The most serious consequence of the impeachment exception is that it allows opponents of the exclusionary rules to blame the courts for the occurrence of crime, even though our criminal justice system is the most efficient in the world at putting people in prison.[280] The exception legitimates complaints about the evidentiary costs of the exclusionary rules and thus assists the attempt to hold those rules responsible for failures in law enforcement. These complaints deny the far more serious social problems that impede efforts to prevent crime. These social problems affect the victims of crime to a degree that renders the costs of the exclusionary rules trivial.[281] The victims of crime observe the capricious and perpetually unstable protection provided by the exclusionary rules and misunderstand the courts to be the source of the problem, rather than an institution whose constitutional mission is to assure that the cure is not worse than the disease. If the impeachment exception teaches us anything, it is that succumbing to the temptation to qualify the exclusionary rules according to their evidentiary costs in particular cases will routinely undermine the Court's authority to define the constitutional integrity of the criminal process.

B. *Eliminating the Impeachment Exception*

Eliminating the impeachment exception and returning to *Agnello* would acknowledge that the limits of the exclusionary rules are best analyzed in terms of constitutional criminal procedure rather than the rules of evidence. Although the *Agnello* Court implied that there were narrow circumstances in which a defendant might waive his right to exclude illegally obtained evidence, it recognized that appropriate limitations on exclusion do not depend upon evidentiary considerations. It did not distinguish between exclusionary

280. *See U.S. Has Highest Rate of Imprisonment in World,* N.Y. TIMES, Jan. 7, 1991, at A14. In the United States, 426 of every 100,000 males are in prison; in South Africa, the country with the second highest rate of imprisonment, 333 of every 100,000 males are incarcerated. *Id.* Without reliable evidence of comparative crime rates making it possible to hold this factor constant, it is imprecise to equate the highest rate of imprisonment in the world with the most efficient system of incarceration. Nonetheless, the rate of imprisonment in the United States is so much higher than that of all other countries that it is difficult to imagine that the efficiency of the American criminal justice system is not a primary factor contributing to the disparity. For an interesting account of the persistent belief in the inefficiency of American criminal justice despite compelling empirical evidence to the contrary, see John H. Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience,* 28 BUFF. L. REV. 459, 504 (1979).

281. Regardless of one's view of the immediate legal implications of evidence suggesting the existence of biological and environmental determinants of crime, that evidence clearly suggests that meaningful approaches to the problem of crime can hardly be limited to reforming aspects of the criminal justice system. *See* Deborah W. Denno, *Human Biology and Criminal Responsibility: Free Will or Free Ride?,* 137 U. PA. L. REV. 615, 619-49 (1988) (reviewing research results on the impact of environmental and biological factors on criminality).

rules prohibiting illegally obtained evidence and those rules prohibiting evidence from being illegally used. Instead, it viewed the exclusionary rules as establishing an immunity against the use of illegally obtained evidence. This immunity could be waived only when exclusion no longer served its substantive purposes.[282]

Specifically, the *Agnello* Court held that Agnello had done nothing to justify the introduction of the suppressed can of cocaine because he had not mentioned it.[283] Agnello had only claimed lack of knowledge about the packets of cocaine with which he was caught. From an evidentiary perspective, the *Agnello* holding makes no sense at all: One cannot imagine why Agnello would mention the can of cocaine, while he hardly could have raised a defense to which the can of cocaine would have been more appropriate and probative rebuttal. From the perspective of criminal procedure, however, the holding makes sense. It requires that the defendant surrender the constitutional right which exclusion is designed to protect before the proof can be admitted. In *Agnello* itself, for example, the Court required that the defendant waive the privacy interest guaranteed by the Fourth Amendment's condemnation of the search of his home. Whether he "opened the door" to the contents of his house depends upon whether he waived his protected privacy interest and not upon whether he raised a defense to which the evidence was probative rebuttal.[284]

Returning to *Agnello* thus would hold the exclusionary rules inapplicable only where they no longer served their underlying substantive purpose in a particular case.[285] Although this approach would reverse each of the

282. The term immunity is used here as the opposite of liability and the correlative of disability. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,* 23 YALE L.J. 16, 30 (1913). The Court's concept of the exclusionary rule as creating an immunity against the use of evidence followed from its elision of the Fourth and Fifth Amendments rather than from the analysis of the trial process offered in this article. *See* Agnello v. United States, 269 U.S. 20, 33-34 (1925) (noting that "[i]t is well settled that, when properly invoked, the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment"); *see also* Weeks v. United States, 232 U.S. 383 (1914); Boyd v. United States, 116 U.S. 616 (1886). In Fisher v. United States, 425 U.S. 391, 407-09 (1976), the Court appeared to overrule *Boyd* insofar as it confused substantive rights protected by the Fourth and Fifth Amendments. The *Fisher* Court, however, did not distinguish between illegally used and illegally obtained evidence in the context of applying the exclusionary rules. At most, therefore, *Fisher* established that the *Agnello* Court reached the right result for the wrong reasons.

283. *Agnello,* 269 U.S. at 35.

284. That is not to say that a waiver doctrine would not have its own problems. In interpreting the scope of the Fifth Amendment's privilege against self-incrimination, the Court has frequently discussed the scope of the appropriate waiver in light of its evidentiary consequences. *See, e.g.,* Brown v. United States, 356 U.S. 148 (1958); Johnson v. United States, 318 U.S. 189 (1943). Under the approach suggested here, a finding of waiver would have to be justified by the values underlying the substantive right protected by exclusion rather than its evidentiary consequences.

285. *See* Aleinikoff, *supra* note 5, at 1000 & n.314 (distinguishing between exceptions to constitutional norms that are " 'internal' to the theory of the constitutional provision under review" and those that arise from " 'external' limits imposed on constitutional provisions"). Aleinikoff seems to associate internal exceptions exclusively with the principle-based approach to constitutional adjudication. For example, he is able to support the result in Home Bldg & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (upholding mortgage moratorium despite the contract clause), only because it properly identified a role for balancing in the "extreme and rare case" where instrumental needs can

Court's cases applying the exception, it would be consistent with several lower court decisions. For example, in those cases where the defendant has deliberately introduced the fruits of an illegal search or of an unlawful police interrogation, courts have held that the substantive values secured by the rules prohibiting the interrogation or search were no longer served by exclusion, because the defendant had waived his privilege against the use of the evidence.[286] This approach draws on existing notions that the defendant should control the use of illegally obtained evidence, but removes the issue from the context of evidentiary considerations.[287] That Havens, for example, could employ all inferences stemming from the absence in evidence of the contents of his suitcase does not necessarily mean that he should be permitted to establish, by his own proof, cross-examination, or argument,[288] that the suitcase did not contain the T-shirts without waiving his right to

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properly override constitutional provisions. *Id.* at 1000. Chief Justice Hughes's central argument in *Blaisdell,* however, aptly illustrates how internal exceptions can be fully consistent with instrumental justifications for constitutional provisions. *See Blaisdell,* 290 U.S. at 442-43 (arguing that the "statement that what the Constitution meant at the time of its adoption it means to-day . . . carries its own refutation" and, thus, "the use of reasonable means to safeguard the economic structure upon which the good of all depends" is consistent with the contract clause). The argument for internal limitations in the text applies both to instrumental and noninstrumental approaches to the exclusionary rules.

286. *See, e.g.,* Hunt v. Cox, 312 F. Supp. 637, 641-43 (E.D. Va. 1970) (holding defendant's post-arrest silence admissible to rebut defendant's testimony that he had offered an alibi to police at the time of his arrest); Groshart v. United States, 392 F.2d 172, 178 n.4 (9th Cir. 1968) (implying in dicta that even the prohibition on impeachment use of illegal statements yields "where the defendant's testimony puts in issue the very question of what he told the police") (quoting United States v. Armetta, 378 F.2d 658, 662 (2d Cir. 1967)). The Court unsuccessfully attempted an evidentiary explanation of a similar result in Doyle v. Ohio, 426 U.S. 610 (1976). Despite disallowing the impeachment use of a defendant's post-*Miranda* silence, the Court claimed in dicta that such use would be allowed if the defendant claimed "to have told the police the same version upon arrest [as that offered at trial]" because "the fact of the earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest." *Id.* at 619 n.11. This conception of limited use, however, is false because neither the defendant's claim of offering his alibi to police nor the prosecution's challenge to that testimony is at all relevant unless it yields inferences concerning the truth of the alibi offered at trial. If *Doyle* should yield in such a circumstance, it should do so because its purpose is not served by exclusion in that instance, not because of any limited evidentiary use of the defendant's silence.

287. The suggested tests for permitting rebuttal with illegal evidence all argue for regulating the use of illegal evidence with a meaningful waiver requirement. Removed from the evidentiary context, these tests can be used as a starting point for evaluating waiver as a constitutional, rather than an evidentiary, matter.

288. Where the question of waiver is properly understood as a constitutional, rather than an evidentiary matter, the means by which constitutional protections are waived is not dispositive. A defendant might surrender his immunity from the use of illegal evidence by cross-examination or argument, as well as by the introduction of his own proof. The dispositive question is whether a finding that the immunity is waived is consistent with the purposes of the underlying substantive constitutional protection. Thus, where the prosecution elicits that "something" was found during an illegal search in order to establish that inculpatory evidence was found, cross-examination by defense counsel rebutting that inference should not effect a waiver of a defendant's privacy interest. On the other hand, where the defense elicits the existence of an illegal search, but not its fruits, in order to establish that nothing inculpatory was found, the defendant's privacy interest may properly be deemed waived. *See* People v. Payne, 98 Ill. 2d 45, 49-50, 456 N.E.2d 44, 46 (1983), *cert. denied,* 465 U.S. 1036 (1984). The question is not whether the defense misrepresents to the jury the "actual" facts of the case, but rather whether continued exclusion serves the privacy interest that the Fourth Amendment seeks to protect.

privacy in the contents. The defendant's privacy interest is no longer served if he has deliberately chosen to focus public scrutiny on its contents.

This approach thus recasts the scope of exclusion at trial in light of its consequences for the substantive values served by the exclusionary rules. The Court understood the issue in these terms until its decision in *Walder* confused the question of waiving an evidentiary privilege against admission of character proof with the separate issue of waiving a constitutional privilege against use of illegally obtained evidence at trial. The Court concluded that because Walder had waived his evidentiary protection, he had waived his constitutional protection as well.[289] This holding was erroneous, however, because the latter has nothing to do with the former. It was irrelevant that Walder did not have to raise the issue of his character in mounting a defense, or otherwise deny all the elements of the case against him.

Unfortunately, the error of *Walder* was perpetuated not only by the exception's proponents, but also by its opponents. They conceded that the exception could be reconciled with the exclusionary rules because, properly limited, it would not undermine the necessary deterrence nor contribute to conviction with illegal proof.[290] Having failed to challenge *Walder*, those opposing the growth of the exception were forced to draw the kinds of evidentiary distinctions that strengthened it. They, too, suggested that these distinctions can provide a neutral framework in which the Court can properly claim to have realized the benefits of the exclusionary rules without their evidentiary costs. Reversing *Walder* would return the issue to its proper context—one concerned with the integrity of the criminal process. A vision of that integrity requires difficult choices about the goals of constitutional criminal procedure. It is better to confront those issues, however, than to adhere to an empty neutrality that begets an incoherent analysis capable only of confusing wisdom with arbitrary compromise. By confronting those issues, the Court would remind us that constitutional criminal procedure necessarily embodies a normative conception of the integrity of the criminal process whose worth belies the claim that it may be attained without evidentiary cost.

CONCLUSION

The debate over the exclusionary rules has been dominated by the discussion about whether those rules should reflect policies or principles.[291] The internal critique of the impeachment exception, however, shows that this emphasis is misplaced. Whether the impeachment exception represents a policy or principle to be balanced against constitutional criminal procedure is less significant than the belief that the appropriate evidentiary boundary

289. Walder v. United States, 347 U.S. 62, 65 (1954).

290. *See, e.g.*, Harris v. New York, 401 U.S. 222, 231-32 (1971) (Brennan, J., dissenting) (suggesting that "collateral use" doctrine implied by *Walder* defines proper scope of the impeachment exception).

291. *See generally* Kamisar, *supra* note 33; United States v. Leon, 468 U.S. 897, 929-44 (1984) (Brennan, J., dissenting).

doctrine can conform the exception to the purposes of the exclusionary rules, however conceived. While the principle and policy approaches can help conceptualize the problem, it is the boundary doctrine that ultimately bears the burden of proving illusory the inevitable conflicts between values within each approach and transforming competing principles or policies into coherent limitations on the exception. Thus, the Court's failed attempts to serve conflicting values in practice may teach us more than our efforts to reason from prior adherence to an instrumentalist or noninstrumentalist conception of constitutional rights.

The analysis of the impeachment exception provides a case in point. The debate about instrumental and noninstrumental justifications for the exclusionary rules has served to obscure, rather than to enlighten, the value judgments embodied in the exception. Both the deterrence and judicial integrity rationales have erroneously assumed that appropriate use of unlawful evidence is consistent with constitutional norms that determine that such evidence was illegally obtained. Justice Brennan, for example, while attacking the Court's instrumental analysis as a methodological error certain to compromise constitutional rights, nonetheless failed to challenge the *Walder* Court's admission of "collateral" evidence as inconsistent with his vision of judicial integrity.[292]

Yet, the Court's perceptions of judicial integrity are undoubtedly as responsible for the development and continuation of the exception as any sincere estimation of the "sufficiency" of deterrence. Ironically, Justice Brennan wrote the *James* opinion, in which application of the instrumental analysis halted nearly forty years of the exception's expansion, while simultaneously noting his previous support for the judicial integrity rationale for evidentiary exclusion.[293] In the debate over principles and policies, however, the Court did not draw from the lower courts' experience and thus wrongly conceived of the integrity of the investigative and trial components of the criminal process as separate. That experience, however, provides the most powerful argument for recognizing that the scope of the exclusionary rules, whether perceived instrumentally or not, raises meaningful normative questions about the constitutional integrity of the criminal process and not the unavoidable evidentiary costs of that integrity. Our system of criminal justice defines the integrity of factfinding at trial in light of constitutional values, rather than predetermined outcomes. Our rules of criminal procedure must reflect that integrity or they will surely undermine it.

292. United States v. Havens, 446 U.S. 620, 633-34 (1980) (Brennan, J. dissenting); *see also* Dershowitz & Ely, *supra* note 274, at 1212 (arguing that *Walder* created a "limited exception responsive to the particular—and unfair—trial tactic of the defendant" with no attempt to explain why the presentation of Walder's chosen defense was any more "unfair" than that at issue in *Agnello*).

293. James v. Illinois, 493 U.S. 307, 311, 312 n.1 (1990).