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CRIMINAL LAW

IMPEACHMENT WITH UNCONSTITUTIONALLY OBTAINED EVIDENCE: COMING TO GRIPS WITH THE PERJUROUS DEFENDANT*

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Of all the decisions of the Warren Court in the field of criminal law,[1] none has provoked more vocal controversy than *Miranda v. Arizona.*[2] In *Miranda*, the Court delineated the now well known system of warnings which must be administered to a suspect subjected to "custodial interrogation."[3] This system of warnings was required to dispel the compulsion which the Court found inherent in the atmosphere surrounding such interrogations.[4]

To insure adherence to its commands, *Miranda* announced a rule excluding from evidence any statements, whether inculpatory or exculpatory, obtained in the absence of warnings.[5] This exclusionary rule fashioned by the Court was to apply in situations where the government attempted to introduce illegally obtained evidence in its case-in-chief. It is not clear, however, whether that rule applies when the prosecution seeks to introduce such evidence to impeach a defendant who has taken the witness stand and, in his own direct examination, perjured himself.

Resolution of that question must take into account the Supreme Court's earlier decision in *Walder v. United States.*[6] In *Walder*, a prior narcotics indictment had been dismissed after the defendant had secured suppression of a heroin capsule obtained through an unlawful search and seizure. During his trial on a second narcotics offense committed two years later, the defendant voluntarily took the stand and, during his own direct examination, made a "sweeping denial" that he had ever had narcotics in his possession.

* See editor's note at p. 16 *infra.*

† B.S. J.D. (1968), Deputy Chief, Appellate Division, Office of the United States Attorney, Northern District of Illinois. The views expressed herein are the authors own and do not necessarily reflect those of the Department of Justice.

[1] *See* A. COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 71 *passim* (1968).

[2] 384 U.S. 436 (1966). Recently, Mr. Justice Clark observed that *Miranda* "has been publicized more widely than any opinion of the Court since Brown v. Board of Education...." United States v. Jackson, 429 F.2d 1368, 1372 (7th Cir. 1970) (Clark, J., by designation).

[3] The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. "This is what [the Court] meant in *Escobedo* v. *Illinois*, [378 U.S. 478 (1964)] when [it] spoke of an investigation which had focused on an accused." *Id.* at 444 n.4. Of course, where an interview or interrogation is non-custodial, compliance with the strictures of *Miranda* is not required. See *id.* at 477–478; United States v. Hall, 421 F.2d 540 (2nd Cir. 1969); United States v. Montos, 421 F.2d 215 (5th Cir. 1970); Posey v. United States, 416 F.2d 545, 549 (5th Cir. 1969); United States v. Manglona, 414 F.2d 642 (9th Ci-. 1969); Freije v. United States, 408 F.2d 100 (1st Cir. 1969); Lucas v. United States, 408 F.2d 835 (9th Cir. 1969).

[4] Prior to the initiation of any questioning, a suspect is entitled to be warned that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. *See* Miranda v. Arizona, 384 U.S. 436, 444, 467–75 (1966).

In evaluating the validity and sufficiency of a given warning, the appellate courts have consistently held that a literal reading of *Miranda* is improper, for, the words of *Miranda* do not constitute a ritualistic formula which must be repeated without variation to be effective. Words which convey the substance of the warning along with the required information are sufficient. *See* Sweeney v. United States, 408 F.2d 121 (9th Cir. 1969); United States v. Vanterpool, 394 F.2d 697 (2nd Cir. 1968); Green v. United States, 386 F.2d 953 (10th Cir. 1967). The test is whether the words in the context used, considering the age, background, and intelligence of the individual being interrogated, impart a clear understanding of all his rights. Pettyjohn v. United States, 419 F.2d 651 (D.C. Cir. 1969); Coyote v. United States, 380 F.2d 305 (10th Cir.), *cert. denied*, 389 U.S. 992 (1967). As curious as it may seem, this warning, now so necessary, was the basis on which a confession was once excluded by the English courts. *See* Regina v. Harris, 1 Cox C.C. 106 (1884); Regina v. Furley, 1 Cox C.C. 76 (1884).

[5] 384 U.S. at 476.

[6] 347 U.S. 62 (1954).

The prosecution was then permitted to introduce the evidence obtained from the earlier search and seizure solely to impeach the defendant's credibility. On certiorari, the Supreme Court affirmed the conviction.

Mr. Justice Frankfurter, speaking for the Court, dismissed the petitioner's contention that the introduction of illegally obtained evidence for impeachment purposes contravened the exclusionary rule of *Weeks v. United States*:[7]

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against the contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.[8]

The *Walder* rationale was eagerly embraced and expanded by the federal courts to cover cases involving the use for impeachment purposes of intangible evidence obtained in violation of the *McNabb-Mallory* doctrine.[9] However, with the coming of *Miranda*, doubts arose regarding the continued viability of *Walder*. Today the shadows of controversy are lengthening. While both the federal[10] and state[11] courts are divided on the issue, commentators have concluded that *Miranda* has sub silentio overruled *Walder*, or at least seriously brought its rationale into question.[12]

[7] 232 U.S. 383 (1914). In *Weeks*, the Court held that evidence seized during an illegal search in violation of the fourth amendment was inadmissible in a federal court. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), expanded the *Weeks* doctrine to prohibit the derivative use of evidence acquired during an illegal search and seizure.

[8] Walder v. United States, 347 U.S. 62, 65 (1954).

[9] United States v. Curry, 358 F.2d 904 (2nd Cir), *cert. denied*, 385 U.S. 873 (1966); Inge v. United States, 356 F.2d 345 (D.C. Cir. 1966); White v. United States, 349 F.2d 965 (D.C. Cir. 1965); Bailey v. United States, 328 F.2d 542 (D.C. Cir. 1964); Johnson v. United States, 344 F.2d 163 (D.C. Cir. 1964); Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960); Lockley v. United States, 270 F.2d 915 (D.C. Cir. 1959). Statements obtained in violation of the fifth or sixth amendments would appear to stand on no different footing than those obtained in violation of the *McNabb-Mallory* rule.

[10] Five Circuit Courts of Appeal have expressly held that *Walder* has been overruled by *Miranda* at least insofar as the former applies to *Miranda* violations: Bosley v. United States, 426 F.2d 1257 (D.C. Cir. 1970); Proctor v. United States, 404 F.2d 819 (D.C. Cir. 1968); Fox v. United States 403 F.2d 97 (2nd Cir. 1968); United States v. Pinto, 394 F.2d 470 (3rd Cir. 1968); Groshart v. United States, 392 F.2d 172 (9th Cir. 1968); Wheeler v. United States, 382 F.2d 998 (10th Cir. 1967) (dictum). *See also*, United States v. Birrell, 276 F. Supp. 798, 817 (S.D. N.Y, 1967) (dictum) (in which the court questions the vitality of *Walder* even in fourth amendment cases); United States v. Prebish, 290 F. Supp. 268 (S.D.Fla. 1968). *But compare* Proctor v. United States, 404 F.2d 819, 822 (D.C. Cir. 1968) (Tamm, J., dissenting); United States v. Fox, 403 F.2d 97, 105 (2nd Cir. 1968) (Moore, J., dissenting); Groshart v. United States, 392 F.2d 172, 180 (9th Cir. 1968) (Byrne, J., dissenting). Fernandez v. Delgado, 257 F.Supp. 673 (D.Puerto Rico 1966).

The Fifth Circuit, while not deciding the issue, has indicated in dictum that *Walder may* have been weakened by *Miranda:*

> Finally we point out that the testimony of the agents as to appellant's statement .... on the afternoon of the robbery is suspect for the same reasons as his prior explanation regarding the presence of the toy gun in his car. In determining their admissibility in the retrial, the judge should consider the continued validity of *Walder v. United States*, in light of the language in *Miranda*, as extremely questionable.

Agius v. United States, 413 F.2d 915, 920 (5th Cir. 1969). This statement must, however, be considered in conjunction with the same court's later decision in Lewis v. Insurance Co. of North America, 416 F.2d 1077, 1080 (5th Cir. 1969):

> We do not face and do not decide the question whether this statement, or any part of it, would be admissible for impeachment purposes in a criminal prosecution. This is a complicated question which *Miranda* has influenced but did not decide.

[11] Six states have applied *Walder* to *Miranda* situations: State v. Howard, 182 Neb. 411, 155 N.W.2d 339 (1967); Serrano v. State, 447 P.2d 497 (Nev. 1968); State v. Kimbrough, 109 N.J.Super. 57, 269 A.2d 232 (1970); People v. Brodie, 26 N.Y.2d 779, 257 N.E.2d 657, 309 N.Y.S.2d 212 (1970); People v. Harris, 25 N.Y.2d 175, 250 N.E.2d 349, 303 N.Y.S.2d 71 (1969); People v. Kulis, 18 N.Y.2d 318, 221 N.E.2d 541, 274 N.Y.S.2d 873 (1966); State v. Butler, 119 Ohio St.2d 55, 249 N.E.2d 818 (1969); State v. Brewster, 75 Wash.2d 137, 449 P.2d 685 (1969); State v. McClung, 66 Wash.2d 654, 404 P.2d 460 (1965) (en banc), *cert. denied*, 384 U.S. 1013 (1966). *Cf.* State v. Jackson, 201 Kan. 795, 443 P.2d 279, 282 (1968), *cert. denied*, 394 U.S. 908 (1969). *See also* People v. Marsh, 14 Mich.App. 518, 536, 65 N.W.2d 853, 863 (1968) (Sullivan, J., dissenting); State v. Brewton, 247 Ore. 241, 246, 422 P.2d 581, 583, *cert. denied*, 387 U.S. 943 (1967) (Perry, Holman, O'Donnell, J.J., dissenting).

The Illinois Supreme Court has expressed "no opinion as to the permissibility of the use of testimony volunteered by defendant [on his direct examination] and unrelated to the suppressed confession." People v. Luna, 37 Ill.2d 299, 308, 226 N.E.2d 586, 590 (1967). The Illinois Appellate Court has indicated that *Walder's* validity has not been eroded by *Miranda*. *See* People v. LaBatt, 108 Ill.App.2d 18, 246 N.E.2d 845 (1969).

Ten state courts have refused to follow *Walder* in cases involving *Miranda* violations: People v. Gardner, 71 Cal. Rptr. 568, 266 Cal. App.2d 19 (1968); Velande v. People, —Colo.—, 466 P.2d 919 (1970); State v. Galasso, 217 So. 326 (Fla. 1968); Franklin v. State, 6 Md. App. 572, 252 A.2d 487 (1969); People v. Marsh, 14 Mich. App. 518, 65 N.W.2d 853 (1968); State v. Catrett, 276 N.C. 86, 171 S.E.2d 398 (1970); State v. Brewton, 247 Ore. 241, 422 P.2d 581, *cert. denied*, 387 U.S. 943 (1967); Commonwealth v. Padgett, 428 Pa.

Objections to extending the *Walder* rationale to embrace situations in which violations of *Miranda* are involved have been predicated on three grounds: (1) the exclusionary rule fashioned by *Miranda* expressly forbids the use of statements obtained in violation of its commands for impeachment purposes as well as case-in-chief purposes; (2) the *Walder* principle will encourage police officers to violate *Miranda* in order to obtain evidence for impeachment purposes and thus runs afoul of *Miranda's* deterrence purpose; and (3) *Walder* unconstitutionally inhibits defendants from taking the stand and testifying in their own behalf.

While even the slightest departure from *Miranda's* edicts will render the evidence so obtained inadmissible in the government's case-in-chief,[13] it is submitted that considerations of policy and justice demand that the exclusionary rule of *Miranda*, like its fourth amendment counterpart,[14] admit of an impeachment exception in those instances where a defendant takes the stand in his own behalf and, under direct examination, commits perjury.[15] In such a case, the prosecution should be allowed to impeach the testimony even with improperly obtained evidence so long as it is voluntary, reliable,[16] and related only collaterally[17] to the case.

229, 237 A.2d 209 (1968); Cardwell v. Commonwealth, 209 Va. 412, 164 S.E.2d 699 (1968); Gaertner v. State, 35 Wis.2d 159, 150 N.W.2d 370 (1967).

The United States Court of Military Appeals has held that statements obtained in violation of *Miranda* are not available for impeachment purposes. United States v. Lincoln, 17 U.S.M.A. 330, 38 C.M.R.128 (1967).

[12] Pitler, *"The Fruit of the Poisonous Tree" Revised and Shepardized*, 56 CALIF. L. REV. 579, 630 (1968); Comment, *The Collateral Use Doctrine from Walder to Miranda*, 62 NW. U.L. REV. 912 (1968); Comment, *The Impeachment Exception to the Exclusionary Rules*, 34 U. CHI. L. REV. 939 (1967); Kent, *Miranda v. Arizona—The Use of Inadmissible Evidence for Impeachment Purposes*, 18 WESTERN RES. L.REV. 1177 (1967); Note, *New York's Decision to Allow Impeachment in Order to Find Truth*, 13 N.Y.L.F. 148 (1967).

[13] 384 U.S. at 476. However, where a suspect is known to have an attorney or to have ample funds to secure one, failure to tell a suspect that if he is indigent, a lawyer will be appointed free of charge to represent him will not require application of *Miranda's* exclusionary rule. 384 U.S. at 473 n. 43.

[14] See note 47 *infra*.

[15] It is essential that the defendant initiate the perjury in his direct examination. The prosecution, on cross-examination, cannot ask a leading question designed to elicit a statement contrary to that made to the police. Such a question is improper, and the prosecution cannot thereafter impeach with the illegally obtained evidence. Agnello v. United States, 269 U.S. 20 (1925). Nor can the prosecution go beyond the scope of the direct examination and attempt to elicit statements at variance with those given at the interrogation stage of the proceedings. *See* United States v. Pinto, 394 F.2d 470, 475 (3rd Cir. 1968); People v. Rahming, 26 N.Y.2d 411, 259 N.E.2d 727 311 N.Y.S.2d 292 (1970); People v. Miles, 23 N.Y.2d 527, 245 N.E.2d 688, 297 N.Y.S.2d 913 (1969).

[16] The degree of reliability of the evidence is of salient importance in determining whether or not the prosecution should be allowed to use the tainted evidence to impeach. Certainly, tangible evidence obtained in violation of the fourth amendment is irrefragably reliable. Thus, not to allow such evidence for impeachment would allow and encourage perjury by the defendant. The "integrity" of our judicial system demands that this not be tolerated. Since intangible evidence clearly does not possess the same degree of reliability as tangible evidence, courts must take care to see that the impeaching evidence is, in fact, reliable:

> It is true that if a prior admission were found to be unconstitutionally coerced, the substantial probability that the admission is no more reliable than the contrary testimony of the accused at trial should lead a court to proceed with caution in permitting its use for impeachment purposes. [cite omitted] But where . . . there is no good reason to believe that a prior inconsistent statement was not accurate and voluntary, . . . the *Walder* principle [should be] controlling.

United States v. Curry, 358 F.2d 904, 912 (2nd Cir.), *cert. denied*, 385 U.S. 873 (1966).

Surely, not all statements obtained in violation of *Miranda* fail to possess the requisite degree of reliability and voluntariness so that they must be excluded from evidence when offered for impeachment rather than for case-in-chief purposes. Indeed, *Miranda* itself recognized that statements may, in fact, be voluntary although improperly obtained. *See* 384 U.S. at 457. *Cf.* Johnson v. New Jersey, 384 U.S. 719, 730 (1966). In Brady v. United States, 397 U.S. 742, 754 (1970), the Court recognized that the atmosphere of a police station is not necessarily coercive. *See also* R. TRAYNOR, THE DEVILS OF DUE PROCESS IN CRIMINAL DETECTION, DETENTION AND TRIAL 36 n.86 (1966).

The Fifth Circuit Court of Appeals has implicitly recognized the distinction between statements which are inadmissible because involuntarily and those which are inadmissible merely because obtained in violation of *Miranda:*

> We understand the trial judge's ruling [which excluded certain statements] to have been based solely upon the absence of warnings. If there were reason to suspect that the statement was otherwise defective, e.g., that it was involuntary, the case would present a different question than that with which we are faced here.

Lewis v. Insurance Co. of North America, 416 F.2d 1077, 1080 n.2 (5th Cir. 1969). *See also* Byrd v. Wainwright, 428 F.2d 1017, 1021 (5th Cir. 1970). *Cf.* United States v. Jaskiewicz, 433 F.2d 415, 417 (3rd Cir. 1970). Dimmick v. State, 75 Alaska Rep. 21, 473 P.2d 616 (1970). *But see* State v. Brewton, 247 Ore. 241, 244, 422 P.2d 581, 582, *cert. denied*, 387 U.S. 943 (1967). ("[T]his dichotomy does not appeal to us as constitutionally meaningful.")

Thus, a mere violation of *Miranda* does not mean that statements obtained are involuntary. The courts must examine the evidence to determine if it is voluntary and reliable. However, once determined to be so, it should be admissible for impeachment on "collateral" matters in order to prevent perjury. Admittedly, this will require the courts to undertake certain factual assessments which *Miranda* does not allow when the

MIRANDA DOES NOT REQUIRE TOTAL EXCLUSION OF EVIDENCE OBTAINED IN VIOLATION OF ITS RULES

Speaking for the majority in *Miranda*, Chief Justice Warren said:

> [N]o distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements 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.[18]

A literal parsing of that language does seem to support those courts which have felt themselves impelled to conclude that *Miranda* has sounded the death knell for *Walder*.[19] However, to paraphrase one of Mr. Justice Frankfurter's happy aphorisms, the notion that because the words of an opinion are plain, its meaning is also plain, is pernicious oversimplication,[20] for "[i]t is part of wisdom, particularly for judges, not to be victimized by words."[21] And since words acquire scope and function from the history of events which they summarize, courts must take care not to isolate a

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evidence is sought to be introduced in the case-in-chief. However, merely because *Miranda* sought to obviate the *ad hoc* determination of the voluntariness of statements given during custodial interrogation in one instance, it does not ineluctably follow that the same policy must be adopted in all others. It is one thing to exclude improperly obtained statements from the case-in-chief; it is quite another to exclude them when a defendant attempts to commit perjury, for the interests and considerations involved differ markedly.

Where a defendant takes the stand and asserts that his trial testimony does not vary from the statements he made to the police, almost all courts agree that the improperly obtained statements are admissible for impeachment purposes. *See* United States v. Fioravanti, 412 F.2d 407, 413 (3rd Cir. 1969); Fowle v. United States, 410 F.2d 48, 55 (9th Cir. 1969); United States v. Fox, 403 F.2d 697, 699, 700–01 (2nd Cir. 1968); United States v. Armetta, 378 F.2d 658 (2nd Cir. 1967); Hunt v. Cox, 312 F. Supp. 637, 641–42 (E.D.Va. 1970); People v. LaBatt, 108 Ill.App. 2d 18, 246 N.E.2d 845 (1969); State v. Kimbrough, 109 N.J.Super. 57, 269 A.2d 232 (1970), *Cf.* Brown v. United States, 356 U.S. 148, 154–55 (1957). *But see* People v. Marsh, 14 Mich. App. 518, 65 N.W.2d 853 (1968).

[17] It is essential that the impeaching testimony not be directly related to the case. Determination of what is collateral may not be easy for courts to make, but it does not present difficult theoretical problems. Nor can it be said that the distinction is "virtually unworkable." State v. Brewton, 247 Ore. 241, 246, 422 P.2d 581, 583, *cert. denied*, 387 U.S. 943 (1967). Indeed, it was not until *Miranda* that some courts found the distinction difficult to administer. Prior to *Miranda*, a number of cases had successfully dealt with the problem. In addition to the cases cited in note 9 *supra*, *see* Dillion v. United States, 391 F.2d 433 (10th Cir.), *cert. denied*, 393 U.S. 825 (1968).

While a rule of automatic exclusion may eliminate difficulties and complications it scarcely accords with the principle that:

> The civilized conduct of criminal trials cannot be confined within mechanical rules. It necessarily demands the authority of limited direction entrusted to the judge presiding in Federal trials, including a well-established range of judicial discretion, subject to appropriate review on appeal, in ruling upon preliminary questions of fact. Such a system as ours must, within the limits here indicated, rely on the learning, good sense, fairness and courage of federal trial judges.

Nardone v. United States, 308 U.S. 338, 342 (1939). This view was reaffirmed in McNabb v. United States, 318 U.S. 332, 346–47 (1943).

Further, these objections, based as they are on grounds of expediency, must be rejected, for "[i]f justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try." O. W. HOLMES, THE COMMON LAW 48 (Howe ed. 1963). Indeed, the notion that *Walder* should be abolished because of the burden on the system contravenes the principle that the despatch of judicial business is less imperative than the protection of the public interest. Sorrells v. United States, 287 U.S. 435, 451 (1932); Insurance Group. Comm. v. Denver & R.G.W.R.R.. 329 U.S. 607, 631 (1947) (Frankfurter, J., dissenting), *Cf.* Groppi v. Leslie, —F.2d—(7th Cir. 1970), *aff'd. en banc*—F.2d— (1971).

Finally, the position taken by the court in Johnson v. United States, 344 F.2d 163, 165 n.3 (D.C. Cir. 1964), that the question of collateralness was not considered by *Walder*, must be rejected. The case was argued by Paul Porter of the prominent Washington firm of Arnold, Fortas, and Porter. An examination of his brief reveals that counsel indeed called the rule against impeachment on collateral matters to the Court's attention. Among the authorities cited in that brief was United States v. Klass, 166 F.2d 373 (3rd Cir. 1948) which held that "the answer of the witness on cross-examination with respect to a collateral matter introduced for impeachment purposes concluded the inquiry." *Id.* at 376–77. *Walder* clearly rejected this evidentiary argument. Moreover, invocation of the rule is a matter of discretion for the court. Socony Vacuum Oil Co. v. United States, 310 U.S. 150, 230 (1939).

[18] 384 U.S. at 476–77.

[19] *See* cases cited notes 10–11 *supra*.

[20] *See* United States v. Monia, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting). *See also*, Guiseppi v. Walling, 144 F.2d 608, 624 (2nd Cir. 1944) (L. Hand, J., concuring), *aff'd. sub nom.*, Gemsco, Inc. v. Walling, 324 U.S. 244 (1945). While these cases dealt with statutory construction, their underlying principles apply, *pari passu*, to the interpretation of judicial opinions.

[21] Shapiro v. United States, 335 U.S. 1, 56 (1948) (Frankfurter, J., dissenting). Mr. Justice Holmes once cautioned that "[w]e must think things not words. . . ." Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899).

few words from the underlying rationale of an opinion. In sum, the question presented is not what do the above cited words of *Miranda* say, but rather what do they mean.

Even from the most laconic reading of *Miranda*, it is clear that the question relating to the admissibility of illegally obtained evidence for impeachment purposes was not before the Court; and it is submitted that the Court did not pretend to deal with it.[22] The Chief Justice's single, oblique, loosely phrased reference to impeachment was designed to bolster an eradication of the difference between inculpatory and exculpatory statements; it was not designed to overrule *Walder* sub silentio.[23]

The statement of the Chief Justice that "[t]he warnings required and the waiver necessary in accordance with our opinion today are . . . prerequisites to the admissibility of any statement made by a defendant,"[24] does, perhaps, lend plausibility to the claim that prior inconsistent statements illegally obtained cannot be used even for impeachment purposes. An equally unequivocal statement was made years earlier in *Silverthorne Lumber Co. v. United States*,[25] where Mr. Justice Holmes stated that

> the essence of a provision forbidding acquisition of evidence in a certain way is not merely that evidence so acquired shall not be used before the Court but that it shall not be used at all.[26]

The *Walder* Court found *Silverthorne's* words a prophecy to inspire rather than an immutable command to be slavishly obeyed without regard to the attendent circumstances. Hence, it modified the rule in accordance with the lessons of experience.[27] If *Silverthorne's* seemingly irrecrusable statement admits of exceptions, there is every reason to suppose that the Chief Justice's statement in *Miranda* does so as well.

In fact, such a supposition mirrors the oft-repeated and consistently followed principle of constitutional adjudication that the Court does "not formulate a rule of constitutional law broader than is required by the precise facts presented in the record."[28] Indeed, Chief Justice Warren himself has warned against gratuitous innuendos and expressions of opinion on matters not before the Court. He has expressed, on more than one occasion, his awareness that the experience of centuries is behind the wisdom of not deciding, either explicitly or by "atmospheric pressure," matters that do not come to the Court with the impact of necessity.[29]

[22] Prior to *Miranda*, a disturbingly large number of cases had come before the Court dramatically revealing the evils that can arise from unsupervised incommunicado interrogation. *See, e.g.*, Culombe v. Connecticut, 367 U.S. 568 (1961); Leyra v. Denno, 347 U.S. 556 (1954); Haley v. Ohio, 332 U.S. 596 (1947); Malinski v. New York, 324 U.S. 401 (1945); Ashcraft v. Tennessee, 322 U.S. 143 (1944); White v. Texas, 310 U.S. 530 (1940); Brown v. Mississippi, 297 U.S. 278 (1936). *See also* Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943). It was against this background that *Miranda* came to the Court. Certiorari was granted in *Miranda* "in order to further explore some facets of the problems thus exposed by *Escobedo v. Illinois* . . . of applying the privilege against self-incrimination to in-custody interrogation. . . ." 384 U.S. at 441. The Court was concerned with the "interrogation atmosphere and the evils it can bring." *Id.* at 456. It sought to find "a protective device to dispel the compelling atmosphere of the interrogation", and it attempted to advance "proper limitation[s] on custodial interrogation" in order to insure that "protracted questioning incommunicado in order to extort confessions" and other practices of that nature would be eliminated. *Id.* at 446-65.

Egalitarianism also seemed to play a part in the decision. The Court stressed that not only the cases before it, but the vast majority of confession cases with which it had dealt in the past involved those unable to retain counsel. Thus, to implement the fifth amendment's guarantee, *Miranda* required counsel for the indigent suspect. In this way, the Court attempted to insure that the fifth amendment's application to the poor would be more than "a promise to the ear to be broken to the hope, a teasing illusion like a munificient bequest in a pauper's will." Edwards v. California, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

[23] Had the majority intended to make inroads on *Walder*, it is unlikely that the four dissenters, (one of whom, Clark, J., was in the majority in *Walder*) would have made no protest. And it is unlikely that the Chief Justice, who was in the majority in *Walder*, would have been so cavalier in laying to rest one of his own offspring.

[24] 384 U.S. at 476.

[25] 251 U.S. 385 (1920).

[26] *Id.* at 392.

[27] *See* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 952-53 (1965).

[28] Wainwright v. City of New Orleans, 392 U.S. 598, 603 (1968) (Warren, C. J., dissenting).

[29] *See* Culombe v. Connecticut, 367 U.S. 568, 635-36 (1961) (Warren, C. J., concurring):

> It has not been the custom of the Court, in deciding the cases which come before it, to write lengthy and abstract dissertations upon questions which are neither presented by the record nor necessary to a proper disposition of the issue raised.
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> * * *
>
> . . . I would prefer not to write on many of the difficult questions which the opinion discussed until the facts of a particular case make such writing necessary. In my view, the reasons which have compelled the Court to develop the law on a case-by-case approach, to declare legal principles *only* in the context of specific factual situations, and *to avoid expounding more than is necessary for the decision of a case* are persuasive.

(emphasis added). *See also* Grosso v. United States, 390

The Court's sensitivity to these principles is illustrated by two significant cases. In *Roth v. United States*,[30] the Court declared, seemingly without qualification, that obscenity is not protected by the first amendment. Looking solely to the language of the case, it would appear that a state can lawfully punish private possession of obscene matter. In *Stanley v. Georgia*,[31] the validity of a statute penalizing such possession was challenged on first amendment grounds. The Court's analysis is instructive here:

> It is true that *Roth* does declare, seemingly without qualification, that obscenity is not protected by the First Amendment. That statement has been repeated in various forms in subsequent cases.... However, neither Roth nor any subsequent decision of this Court dealt with the precise problem involved in the present case....
>
> None of the statements cited by the Court in *Roth* for the proposition that this Court has always assumed that obscenity is not protected by the freedoms of speech and press were made in the context of a statute punishing mere prevate possession of obscene material.... Indeed, with one exception, we have been unable to discover any case in which the issue in the present case has been fully considered.
>
> In this context, we do not believe that this case can be decided simply by citing *Roth*.[32]

In *Johnson v. New Jersey*,[33] the Court determined that *Miranda* should not be applied retroactively. Looking solely to the language in *Johnson*, the federal appellate courts asserted that *Miranda* must be applied to retrials as well as original trials.[34] The issue finally came before the Supreme Court in *Jenkins v. Delaware*.[35] The Court rejected the holdings of the lower courts, saying that, "in [*Johnson*] we did not consider the applicability of *Miranda* to retrials. The issue simply was not presented."[36]

What emerges with unmistakable clarity is an injunction against the "tyranny of literalness."[37] For, by yielding to this "tyranny," courts create their own verbal prisons.[38] Care must be taken to avoid applying a given fact situation to a rule without regard to the reasons that brought the rule into existence.[39] It is unfortunate that those courts which have found the language of *Miranda* so imperious did not more fully consider that the rules laid down by the Court were wrought under the pressure of a particular factual setting which was in no way related to the doctrinal underpinnings of *Walder*.[40]

Finally, the most cogent evidence that *Miranda* did not *pro tanto* overrule *Walder* appears in *Harrison v. United States*.[41] In his dissent, Mr. Justice

U.S. 62, 83(1968) (Warren, C.J., dissenting); Sherman v. United States, 356 U.S. 369, 376 (1957) (Warren, C.J.)

It has been noted that "Warren can put out a principle as broad as all outdoors, and then disregard it in the next case, as soon as one touch of phrasing proves uncomfortable." *See* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 387 (1960). Thus, it is not without ironic significance that the Chief Justice in *Culombe* was chiding Justice Frankfurter, the Court's staunchest supporter of "Judicial Restraint."

[30] 354 U.S. 476, 485 (1957).

[31] 394 U.S. 557, 559 (1969).

[32] *Id.* at 560-63 (footnotes omitted).

[33] 384 U.S. 719, 721 (1966).

[34] United States v. Phillips, 401 F.2d 301, 306 (7th Cir. 1968); United States v. Young, 388 F.2d 675 (9th Cir. 1968); Virgin Islands v. Lovell, 378 F.2d 799, 802 n. 4 (3rd Cir. 1967).

[35] U.S. 213 (1969).

[36] *Id.* at 216.

[37] United States v. Witkovich, 353 U.S. 194, 199 (1957).

[38] *See* Sullivan v. Behimer, 363 U.S. 335, 358 (1960) (Frankfurter, J., dissenting).

[39] *See* Snyder v. Massachusetts, 291 U.S. 97, 114 (1934). (Cardozo, J.) *Cf.* Mr. Chief Justice Marshall's commentary in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821):

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expression are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

[40] The foregoing argument has assumed that the majority's reference to impeachment in *Miranda* was not dictum. The contention is not that the Court went beyond the facts of the case in announcing a principle; but rather that, when considered in context, the reference to impeachment takes on a different complexion than it does when isolated. Assuming, arguendo, that the reference is dictum, it must still be rejected, for the distinction between decision and dicta is a *sine qua non* of constitutional adjudication. Distinguishing between dicta and decision, between what was said and what was done, is nothing less than distinguishing between ratiocination on the one hand and naked conclusions on the other. *See* Duncan v. Louisiana, 391 U.S. 145, 155 (1968); Bisso v. Inland Waterway Corp., 349 U.S. 85, 100 (1955) (Frankfurter, J., dissenting); United Gas Co. v. Texas, 303 U.S. 123, 144 (1938); Dayton Power and Light Co. v. Public Utilities Comm'n. of Ohio, 292 U.S. 290, 302 (1934); Washington v. Dawson & Co., 264 U.S. 219, 228, 236 (1924) (Brandeis, J., dissenting). *See generally* B. CARDOZO, THE GROWTH OF THE LAW, 138 (1924); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 29-30 (1921).

[41] 392 U.S. 219 (1968).

White expressed concern over *Harrison's* potential effect upon the use of unlawfully obtained evidence for impeachment purposes:

> And, as a final consequence, today's decision would seem to bar the use of confessions defective under *Miranda* or *Mallory* from being used for impeachment when a defendant takes the stand and deliberately lies.[42]

Justice Stewart, speaking for the majority, responded:

> And, contrary to the suggestion made in a dissenting opinion today, . . . we decide here only a case in which the prosecution illegally introduced the defendant's confession in evidence against him at trial in its case-in-chief.[43]

By necessary implication, *Harrison* demonstrated that the Court did not consider its decision in *Miranda* to have affected the *Walder* exception to the exclusionary rules. Of the arguments which have relied so heavily on *Miranda*, no clearer refutation can be envisaged.

THE IMPEACHMENT EXCEPTION TO THE EXCLUSIONARY RULES WILL NOT ENCOURAGE POLICE MISCONDUCT

"Liability," Dewey tells us, "is the beginning of responsibility. . . . The individual is held accountable for what he has done in order that he may be responsive in what he is going to do."[44] Only thus do people gradually "learn by dramatic imitation to hold themselves accountable, and liability becomes a voluntary deliberate acknowledgment that deeds are our own, that their consequences come from us."[45]

Echoes and applications of this salutary rule of morals are also found in the law. Indeed, in the context of the criminal law, experience seems to have taught that the rule excluding evidence seized in violation of the fourth and fifth amendments[46] is the only effective deterrent to police misconduct.[47] By removing the incentive to disregard these constitutional guarantees, the exclu-

[42] *Id.* at 234

[43] *Id.* at 223 n. 9.

[44] J. DEWEY, *Morals and Conduct*, in J. CUMMINS & R. LINSCOTT, MAN AND MAN: THE SOCIAL PHILOSOPHERS 484–85 (1954).

[45] *Id.* at 484–85

[46] *See* Davis v. Mississippi, 394 U.S. 721, 724 (1969); Terry v. Ohio, 392 U.S. 1, 12 (1968); Harrison v. United States, 392 U.S. 219, 224 n. 10 (1968); Linkletter v. Walker, 381 U.S. 618 (1965); Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206, 217 (1960); Walder v. United States, 347 U.S. 62, 64–65 (1954); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Weeks v. United States, 232 U.S. 383, 391–93 (1914). *See generally* J. MAGUIRE, EVIDENCE OF GUILT 167 *passim* (1959).

Unlike the rule excluding evidence seized in violation of the fourth amendment, the rule excluding involuntary confessions was not from its inception recognized as the principal mode of discouraging lawless police conduct. Involuntary confessions were originally excluded because their intrinsic trustworthiness was suspect. 3 J. WIGMORE, EVIDENCE §822 (3rd ed. 1940). Gradually, however, the emphasis shifted from the trustworthiness of the confession to the methods by which it was obtained. Spano v. New York, 360 U.S. 315 (1959); Ashcraft v. Tennessee, 322 U.S. 143 (1944). Illinois Supreme Court Justice Walter Schaeffer noted:

> The confession case culminated in *Rogers v. Richmond*, [365 U.S. 534 (1961)], in which the Court rejected the traditional concern for trustworthiness and held that an involuntary confession is excluded to deter undesirable police behavior and to maintain the accusatorial nature of our judicial system.

W. SCHAEFFER, THE SUSPECT AND SOCIETY 15 (1966). *See also* Mapp v. Ohio, 367 U.S. 643, 657 (1961).

While the rule excluding "involuntary" confessions is, in light of *Miranda*, now predicated upon the fifth amendment, its *raison d'être* does not appear to differ from that announced in the later confession cases. Prior to *Miranda*, the rule excluding such confessions did not trace its lineage to the fifth amendment. That the rule and the privilege had wholly distinct origins was demonstrated by Wigmore. *See* 3 J. WIGMORE, EVIDENCE §2266 (McNaughton ed. 1961); Miranda v. Arizona, 384 U.S. 436, 504 (1966) (Harlan, Stewart, White, JJ., dissenting). Indeed both *Miranda* and Johnson v. New Jersey, 384 U.S. 719 (1966) indicated that *Miranda* was chiefly concerned with proscribing interrogation practices which the Court found to be "destructive of human dignity," and "at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself." 384 U.S. at 457–58. Since the majority believed that " '[T]he quality of a nation's civilization can be largely measured by the methods it used in the enforcement of its criminal law,' " it was convinced that unsupervised and unregulated interrogations were inconsistent with the boast that ours in an accusatorial and not an inquisitional system. *Id.* at 480.

In conclusion, *Miranda* sought to advance "proper limitation[s] upon custodial interrogation" to insure that "protracted questioning incommunicado in order to extort confessions" and other "practices of this sort will be eradicated in the foreseeable future." *Id.* at 446–47. Thus it is submitted that *Miranda's* exclusionary rule, like its antecedent and its fourth amendment counterpart is designed to discourage official misconduct by depriving the government of the fruits of its lawlessness.

[47] The California Supreme Court expressed this view in People v. Cahan, 44 Cal.2d 434, 445, 282 P.2d 905, 911–912 (1955):

> Despite the persuasive force of the foregoing arguments [in support of the traditional common law admitting evidence even though illegally obtained], we have concluded . . . that evidence obtained in violation of constitutional guarantees is inadmissible. . . . We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the

sionary rule seeks to discourage pernicious police practices which are obnoxious to a free society.

Those who contend that *Walder* should be overruled, or at least not extended to *Miranda* situations, have sought comfort in the philosophy of the exclusionary rule. They contend that police misconduct will be encouraged if statements obtained in violation of *Miranda* are admissible to impeach the testimony of a perjurous defendant. The argument rests on the assumption that the police will consciously violate *Miranda* in an attempt to obtain incriminating statements which the prosecution can use for impeachment notwithstanding their knowledge that these statements will be inadmissible in the case-in-chief. Illustrative is the Oregon Supreme Court's decision in *State v. Brewton*:[48]

> If we should today adopt a restrictive application of the exclusionary rule, the result could be a major step backward. This court would, in effect, be saying to the overzealous that police officers will be free in the future to interrogate suspects secretly, at arms length, without counsel, and without advice, so long as they use means consistent with threat-or-promise voluntariness, and so long as they understand that they may file the information only for use to keep the defendant honest. Thus, the police could, at their option, take a calculated risk: By giving up the possibility of using the suspect's statements in the state's case, they could obtain by unconstitutional means and store away evidence to use if the defendant should elect upon trial to take the stand.

As will be seen, *Brewton* is a classic example of what can happen when a court eschews careful analysis in the mistaken assumption that its conclusions are self-evident and self-authenticating. And it amply confirms the wisdom of Mr. Justice Frankfurter's observation that the reasoning which justifies a conclusion should be made manifest in the judicial opinion in which it is announced.[49]

Brewton boldly assumes that police might gamble. They might refrain from offering a suspect the *Miranda* warnings and thereby surrender the possibility of using subsequent statements in the prosecution's case-in-chief in order to obtain such statements for impeachment purposes should the defendant elect upon trial to take the stand.[50]

The *Brewton* court's assertion is speculative in the extreme, and it is a commonplace that tendentious speculations will not solve problems with intractable variables such as arise under the exclusionary rule. It will not do merely to say that police officers might be encouraged to violate *Miranda*, or that they could take a "calculated risk." The focus of the inquiry must be more critical and discerning if the facts are to bear a necessarily close relation to reality.[51] Thus, before the exclusionary rule can come into play, it must be shown that there exists a substantial likelihood that by extending *Walder* police will take the calculated risk of which *Brewton* speaks. Mere possibilities based on refined speculation will not suffice.[52]

attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.

See also United States v. Pugliese, 153 F.2d 497, 499 (2nd Cir. 1945) (L. Hand, J.); Nuelstein v. District of Columbia, 115 F.2d 690, 695 (D.C. Cir. 1940). The fourth amendment exclusionary rule was ultimately imposed upon the states in Mapp v. Ohio, 367 U.S. 643 (1961). The deterrence argument, however, is not universally accepted. For an exhaustive empirical study of the efficacy of the exclusionary rule, *see*, Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

[48] 247 Ore. 241, 245, 422 P.2d 581, 583, *cert. denied*, 387 U.S. 943 (1967). *See also* Groshart v. United States, 392 F.2d 172, 180 (9th Cir. 1968); United States v. Prebish, 290 F.Supp. 268 (S.D.Fla. 1968).

[49] Darr v. Burford, 339, U.S. 200, 255 (1949).

> Another safeguard [against the courts injecting their unconscious predilections into a decision] is craftsmanship—the careful articulation of the grounds of decision and a re-examination from time to time of the assumptions on which rules and doctrines rest. If the unexamined life is not worth living, the unexamined premise is not worth its implication.

Freund, *Mr. Justice Frankfurter*, *in* W. MENDELSON, FELIX FRANKFURTER: A TRIBUTE 161 (1964).

[50] A thorough canvass of the reported cases belies this assumption and reveals that the police have, for the most part, lived up to *Miranda's* strictures. Furthermore, in light of the vast number of confessions that occur subsequent to the receipt of the *Miranda* warnings, it is manifest that the officers' fidelity to *Miranda* has not been rewarded with a pall of silence. Indeed, Mr. Justice Clark has observed that "[c]ompliance with *Miranda* does not result in the suspect 'clamming up'." United States v. Jackson, 429 F.2d 1368, 1372 (7th Cir. 1970) (Clark, J. by designation). Moreover, *Miranda* itself intimated that the experience of the F.B.I. militated against the notion that silence was the inevitable consequence of warning. *See also* Study, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519(1967). Thus, the very foundation upon which *Brewton* rests is defective because, given the fact that the police are likely to receive post-warning information, it is highly doubtful that they would be willing to take *Brewton's* "calculated risk."

[51] *Cf.* Appalachian Coals v. United States, 288 U.S. 344, 360 (1933); McCardle v. Indianapolis Water Co., 272 U.S. 400, 424 (1926) (Brandeis and Stone, JJ., dissenting).

[52] *Cf.* United States v. United States Steel Corp., 251 U.S. 417, 448 (1919); Wright v. Denn, 23 U.S. (10 Wheat.) 204, 239 (1825).

Indeed, the court did not, in any reasoned way, deal with the various factors which a police officer must evaluate and weigh prior to making the decision whether to inform a suspect of his rights; it merely announced a conclusion which on the surface appears plausible. Whether the police will take the "calculated risk" and forego the opportunity to obtain case-in-chief evidence in order to get impeaching evidence depends upon the officers' rational assessment of the total situation.

It follows that police must assess the possibility that information obtained, if any, in the absence of warnings will actually be available for use at trial for impeachment purposes.[53] That will depend upon whether five factors ultimately coalesce at trial: (1) the defendant takes the stand: (2) the defendant, in his direct examination, goes beyond a mere denial of complicity in the crime; (3) the prosecution decides to use the statements; (4) the court determines that the statements do not bear directly on the offense charged; and (5) the court determines that the evidence is more probative than prejudicial. Since any decision to consciously seek impeachment evidence must take account of all these factors, the cognitive process which must be employed is not as facile as *Brewton* would lead one to believe.

Theoretically, it appears that the police will take the "calculated risk" only where they can rationally assume that the chances of the five aforementioned factors coalescing at trial exceed the chances that the suspect will stand mute if given *Miranda* warnings. Police are not so legally sophisticated that they could actually engage in such a cognitive process. However, *Brewton's* entire argument rests on the presumption, clearly through implicitly expressed, that the police are so knowledgeable. Indeed, the *Brewton* rationale necessitated that assumption, for if the police do not actually possess the acumen attributed to them, the entire deterrence argument crumbles under its own weight.

The likelihood that the police will obtain a confession or admission from one whom they have warned is infinitely greater than the likelihood that statements obtained in the absence of warnings will actually be available for use at trial. Thus, it cannot realistically be supposed that a police officer, no matter how venal he may be, will refrain from giving *Miranda* warnings, thereby losing important case-in-chief evidence in the vain hope that in exchange he may obtain evidence bearing solely on credibility. The contrary argument blinks reality.

Judicial opinions are not fungible, each possessing equal intrinsic value. The worth of an opinion is proportionate to the degree to which it commends itself to reason and is consonant with the realities of life.[54] Measured against these principles, it is submitted that *Brewton* should not be followed. It is not, however, merely the fecklessness of of *Brewton's* arguments which cautions against restricting *Walder;* there are affirmative grounds upon which to justify *Walder's* application to *Miranda.*[55]

To determine whether the directive force of a precedent should be restricted, an analysis of its function must be entertained, for a world cannot be run on the principles of formal logic. The test of a rule's worth must be empirical in character. It is necessary to study the social consequences of the rule's application and deduce therefrom its logic.[56]

The seventeen year history of the *Walder* rule in cases involving violations of the fourth amendment represents a persuasive foundation for the claim that its application to *Miranda* will not encourage police misconduct. *Walder* has not diminished the vitality of the protections afforded by the fourth amendment's exclusionary rule. Nor has it motivated the police to violate the amendment's precepts in order to gain incriminating evidence for impeachment purposes. If *Walder* has not provided the impetus for law enforcement officials to violate the fourth amendment, it surely does not follow that it will now provide the motive force for viola-

[53] Of course, this presupposes that without the warnings the suspect would be cooperative. This presupposition has little intrinsic merit when the police are dealing with people who "know the ropes."

[54] "[T]hat which makes no sense to the common understanding surely is not required by any fictive notions of law or even by the more sentimental attitude toward criminals." Milanovich v. United States, 365 U.S. 551, 559-60 (1960) (Frankfurter, J., dissenting).

[55] The arguments against *Walder* which have relied on the deterrence rationale bear a similarity to arguments of an earlier day which sought to persuade the courts that anything even remotely connected with police illegality was "tainted." Insofar as it represents the Supreme Court's attitude towards excessively strained casuistic arguments, Nardone v. United States, 308 U.S. 338, 341 (1939), is pertinent:

> Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.

See also Brady v. United States, 397 U.S. 742 (1970).

[56] *See* B. CARDOZO, *supra* note 39 at 112, 116.

tions of *Miranda*. Thus, the arguments based on the deterrence rationale which have prophesized dire consequences simply do not withstand the test of experience, of all teacher's the most dependable.

The Supreme Court has left no doubt that courts must look to such experience in determining the propriety of a proposed application of the exclusionary rule. In *Wolf v. Colorado*,[57] the Court held that the right of privacy, vouchsafed by the fourth amendment, was binding on the states through the due process clause of the fourteenth amendment. However, the federal exclusionary rule of *Weeks* was held not to be part of the fourth amendment and thus was not binding on the states. Only after experience had proven that all other means of protecting the right to privacy were worthless did the Court finally impose the federal exclusionary rule upon the states in *Mapp v. Ohio:*[58]

> [W]e note that the second basis elaborated in Wolf in support of its failure to enforce the exclusionary rule against the States was that 'other means of protection' have been afforded 'the Right to privacy.' *The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States.*

In *Schwartz v. Texas*,[59] the Court held that evidence obtained in violation of Section 605 of the Federal Communications Act[60] was admissible in state criminal proceedings. The hope was expressed that enforcement of the statutory prohibition in §605 could be achieved under the penal provisions of the Act. But after sixteen years experience proved that to be a vain hope, the federal exclusionary rule was made applicable to state criminal proceedings in *Lee v. Florida:*[61]

> Finally, *our decision today is counseled by experience.*... Research has failed to uncover a single reported prosecution of a law enforcement officer for violation of §605 since the statute was enacted. We conclude, as we concluded in Elkins and in Mapp, that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law in the only effective available way—by removing the incentive to disregard it.

In *Elkins v. United States*,[62] the issue before the Court was whether evidence obtained by state officers during a search, which if conducted by federal officers would have violated the fourth amendment's ban on unreasonable searches and seizures, was admissible in a federal criminal trial. Aware that resolution of the issues was not to be dictated by "[m]ere logical symmetry and abstract reasoning," [63] the Court examined the experience of the federal courts under the exclusionary rule enunciated in *Weeks v. United States*.[64] After considering the "impressive experience of the states" and exhaustively examining the considerations of federalism, the court held:

> These then are the considerations of reason and *experience* which point to the rejection of a doctrine that would freely admit in a federal trial evidence seized by state agents in violation of the defendant's constitutional rights.[65]

Finally, the Court's opinion in *Alderman v. United States*[66] underscores the salient role of experience in fashioning and applying exclusionary rules. There the Court answered the contention that the deterrence rationale logically dictates that all evidence seized in violation of the fourth amendment must be excluded regardless of whether the evidence was seized from the defendant or from another.

> [No previous decisions of this Court] hold that anything which deters illegal searches is thereby commanded by the Fourth Amendment.... *Without experience showing the contrary,* we should not assume that this new statute [outlawing unauthorized electronic surveillance] will be cavalierly disregarded or will not be enforced against transgressors.[67]

Despite the improbability that *Walder* will encourage *Miranda* violations, concerned and chary voices caution against the admittance of any unconstitutionally obtained evidence on the ground

[57] 338 U.S. 25 (1949).
[58] 367 U.S. 643, 652–53 (1961) (emphasis added) (footnote omitted).
[59] 344 U.S. 199 (1952).
[60] 47 U.S.C. §605 (1964). This statute prohibits divulging the contents of any interstate or foreign communication by wire or radio to persons other than the addressee or his agent.
[61] 392 U.S. 378, 381 (1968) (emphasis added).
[62] 364 U.S. 206 (1960).
[63] *Id.* at 215–16.
[64] 232 U.S. 383 (1914).
[65] 364 U.S. at 222 (emphasis added).
[66] 394 U.S. 165 (1969). In substance, the *Alderman* defendants asserted an independent constitutional right to have evidence excluded because it was seized from another in violation of the fourth amandment. The Court reaffirmed its rules relating to standing and ruled that one cannot move to exclude evidence unless *his* fourth amendment rights have been violated. *See* Simmons v. United States, 390 U.S. 377 (1968); Jones v. United States, 362 U.S. 257 (1960).
[67] 394 U.S. at 174–75 (emphasis added).

that even "a slight incentive is apparently sufficient to encourage the police to engage in illegal conduct." [68] It is important to the welfare of society that in certain instances probative evidence, unconstitutionally obtained, be excluded in order to secure obedience to constitutional commands. It is no less vital, however, that criminals be brought to book,[69] and to that end, all available probative evidence should be employed.[70] In its attempts to come to grips with this antinomy, the Supreme Court has left no doubt that the solution lies not in the insensitive invocation of obdurate rules or tests mechanical, for both objects of desire can never be fully realized. Hence, some compromise is necessary lest "in the clash of jarring rivalries the pretending absolutes will destroy themselves and ordered freedom too." [71]

In the final analysis, one principle emerges from the cases: when the public interest in presenting all evidence which is relevant and probative is compelling and the deterrent function served by exclusion is minimal, the exclusionary rule should not be invoked. There is no adequate substitute for this balancing test, anathema though it be to many. To retreat from that delicate test in favor of a rule of automatic exclusion whenever there exists the slightest possibility of police misconduct would be folly. For "it scarcely helps to give so wide a berth to Charybdis' maw that one is in danger of being impaled upon Scylla's rocks." [72]

The Court had occasion to employ this test in *Alderman v. United States.*[73] It was there argued that the deterrence rationale logically dictates that all unconstitutionally obtained evidence be excluded from criminal trials without regard to whether the defendant had standing to complain of the illegal activity. After balancing the competing considerations, the Court refused to extend the exclusionary rule:

> The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.[74]

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[68] Comment, *The Collateral Use Doctrine: From Walder to Miranda*, 62 Nw. U. L. Rev. 912, 926–27 (1968):

> If, however, the impeaching evidence is related to the offense charged, the collateral use doctrine does undercut the policy in question by providing the police with an incentive to use illegal methods in order to acquire evidence against the defendant. In this regard it should be noted that a slight incentive is apparently sufficient to encourage the police to engage in illegal conduct.

This commentator contends that the collateral use doctrine furnishes the requisits incentive for police to violate *Miranda* in two ways:

> The doctrine permits . . . illegally obtained evidence to be used to discredit the defendant's testimony if he takes the stand. Alternatively, the availability of such evidence discourages the defendant from taking the stand.

Id. at 927. The first argument parallels that in *Brewton* and has previously been answered. *See* notes 48–55 *supra* and accompanying text. The second argument misses the mark, for the focus here is not on the dubious tendency of the evidence once obtained, but on the motivation of the police. Surely, one cannot realistically contend that the police will forego the opportunity to obtain an admissible confession in order to get collaterally impeaching evidence in the hope that the defendant will thereby be discouraged from taking the stand.

Another commentator has opted for a "complete prohibition against use of all unlawfully obtained evidence" in order to "remove all incentive for illegal police behavior. The announcement of an absolute rule may have psychological impact on the police, if nothing else." Comment, *The Impeachment Exception to the Exclusionary* Rules, 34 U. Chi. L. Rev. 939, 946 (1967). The author contended that:

> . . . to keep the [*Walder*] exception for just the limited situations where two prosecutions were involved and the defendant made an *unnecessarily broad denial* [as occurred in Walder] would burden the judicial system with the cost of administering *a minor distinction* in an area of law presently overburdened with such *technicalities*.

Id. at 946. (emphasis added). *See generally* the authorities collected in Justice Fortas' dissenting opinion in Alderman v. United States, 394 U.S. 165, 206.

It is not realistic to characterize the defendant's perjury in *Walder* as an "unnecessarily broad denial." Furthermore, one must possess the hardiest credulity to accept the Supreme Court's limitation on the exclusionary rule as a "minor distinction." Whatever one's view of the ultimate wisdom of *Walder's* determination that an extension of the *Weeks* doctrine to allow a defendant to affirmatively resort to perjurous testimony in reliance on the government's disability to challenge his credibility would be "a perversion of the Fourth Amendment," 347 U.S. at 65, few would deny that it is a good deal more than a "technicality."

[69] In the language of Mr. Justice Cardozo: "On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office." People v. Defore, 242 N.Y. 13, 24–25, 150 N.E. 585, 589 (1926).

[70] *See* Alderman v. United States, 394 U.S. 165 (1969); Elkins v. United States, 364 U.S. 206, 216 (1960).

[71] Cardozo, *Mr. Justice Holmes*, in F. Frankfurter, Mr. Justice Holmes 12 (1931).

[72] Bank and Trust Co. v. Commissioner, 159 F.2d 167 (2d Cir.), *cert. denied*, 331 U.S. 836 (1947) (L. Hand, J.).

[73] 394 U.S. 165 (1969).

[74] *Id.* at 174–75. *Cf.* Chapman v. California, 386

Thus, even if it is conceded that a restriction upon *Walder* will have some marginal deterrent effect, it does not follow that courts are compelled to adopt the rule of total exclusion advocated by *Brewton*. Whatever minimal degree of deterrence would be served by extending the exclusionary rule is insufficient to override or justify further encroachments upon the public interest in preventing those accused of crime from taking the stand and committing perjury. To deny the prosecution the use of a defendant's voluntary, reliable, prior inconsistent statements which relate only collaterally to the offense charged and which can be used only to impeach credibility is to trivialize the very meaning of the exclusionary rules.

While the major thrust of the exclusionary rules is a deterrent one, they have come to serve another vital function—the "imperative of judicial integrity":

> Courts which sit under our Constitution . . . will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.[75]

This doctrine received its explicit enunciation in *Elkins v. United States*;[76] however, its roots extend to Justice Holmes and Brandeis' dissents in *Olmstead v. United States*.[77] Relying on *Elkins*, it has been argued that *Walder* violates the imperative of judicial integrity.

The phrase "imperative of judicial integrity" is an excellent example of the extent to which uncritical reliance on tidy formulas bedevils the law. The phrase began in *Elkins* as a literary expression; its very felicity thereafter threatened to establish it as dogma. However, it is clear that the Court did not conceive of the cunningly wrought phrase as a shibboleth to be inflexibly applied as though it contained its own meaning.[78]

U.S. 18 (1967), where the Court promulgated a harmless constitutional error rule which recognized "that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of conviction." *Id.* at 22. However, once a constitutional infraction has been shown, the government must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24. The *Chapman* rule was designed to obviate reversal as a mandatory remedy in cases involving errors of constitutional dimension and to substitute judgment for the *a priori* application of a rule of automatic reversal which was but an unnecessary concession to technicality and thus wholly antithetical to a jurisprudence of conceptions.

Yet it has been argued that the "harmless" error violates the deterrence rationale. The proponents contended that some police would violate constitutional standards in the hope that the trial judge would erroneously admit the evidence obtained and that an appellate court will find the error harmless.

The decision in *Chapman* recognized that the increment to deterrence of improper police practices which would result from a rule of automatic reversal would be negligible, and, in any event, was far outweighed by the need for a harmless constitutional error rule.

[75] Terry v. Ohio, 392 U.S. 1, 12–13 (1968). *See also* Lee v. Florida, 392 U.S. 378, 385–86 (1968); Harrison v. United States, 392 U.S. 219, 224 n. 10 (1968); Mapp v. Ohio, 367 U.S. 643, 659 (1961); McNabb v. United States, 318 U.S. 321 (1942). *Compare* Zap v. United States, 328 U.S. 624, 630 (1946).

[76] 364 U.S. 206, 222 (1960)

[77] 277 U.S. 438, 469 (1928). Justice Holmes dissented on the non-constitutional ground that "the government ought not to use evidence obtained, and only obtainable, by a criminal act." *Id.* at 469–70. In the intimacy of the personal correspondence of Justice Holmes, there is a glimpse of some of the factors which shaped the dissent. On June 20, 1928, Holmes wrote to his revered friend, Sir Frederick Pollock:

> Beverly Farms, June 20, 1928
>
> My dear young Frederick:
>
> It is good to see your handwriting again and to welcome you back from your youthful larks—my time for them has gone by. The fatigue of Washington to Boston and Boston to Washington is enough for me, and I walk very little. I am interested by what you tell of Charybdis and the truant Scylla. I dissented in the case of tapping telephone wires. The C. J. who wrote the prevailing opinion, perhaps as a rhetorical device to obscure the difficulty, perhaps merely because he did not note the difference, which perhaps I should have emphasized more, spoke of the objection to the evidence as based on its being obtained by "unethical" means (horrid phrase), although he adds & by a misdemeanor under the laws of Washington. I said that the State of Washington had made it a crime and that the Government could not put itself in the position of offering to pay for a crime in order to get evidence of another crime. Brandeis wrote much more elaborately, but I didn't agree with all that he said. I should not have printed what I wrote, however, if he had asked me to.

HOLMES-POLLOCK LETTERS 222 (Howe ed. 1942) (editor's footnotes omitted). Justice Brandeis' "much more elaborate" dissent has been described by professor Paul Freund, law secretary to the justice during the 1927–28 term:

> It is obvious that the opinion grew in strength and eloquence as it hammered out and as it evolved, from a response to the unpleasantness in which Samuel Warren found himself, through the ethical principle of unclean hands to the ultimate philosophy of man's spiritual nature which Brandeis found embodied in our Constitution. The crescendo of feeling rises from stage to state—as Brandeis is driven to explore ever more deeply the foundations of individual society.

Freund, *Mr. Justice Brandeis*, in MR. JUSTICE 97, 117 (Dunham & Kurland ed. 1956).

[78] The Supreme Court has warned time and again

One need only compare the dissents of Holmes and Brandeis in *Olmstead* and *Burdeau v. McDowell*,[79] with the opinion in *Byars v. United States*,[80] to realize that they were aware that a complicated and subtle process of adjudication must necessarily precede and underlie the doctrine's application.[81]

Furthermore, one need go no further than *Alderman v. United States*[82] to demonstrate that the imperative of judicial integrity does not inexorably preclude the use of unlawfully obtained evidence. In *Alderman*, the Court refused to expand the rules relating to standing. The necessary effect was to allow the government to utilize evidence obtained in violation of the Constitution.[83] If the imperative of judicial integrity does not warrant exclusion of unconstitutionally obtained evidence offered in the case-in-chief to prove guilt, it can have no application when the evidence is used solely for impeachment on collateral matters.

USE OF UNCONSTITUTIONALLY OBTAINED EVIDENCE FOR IMPEACHMENT PURPOSES DOES NOT IMPEDE A DEFENDANT'S RIGHT TO TESTIFY

An objection to extension of the *Walder* doctrine to cases involving *Miranda* violations concerns the possible inhibitory effect on a defendant's exercise of his right to testify. It has been argued that the "ability of the prosecution to use portions of the statements illegally obtained from the defendant for impeachment purposes may . . . force the defendant to forego his right to testify in his own behalf." [84] However, a concession that a defendant may not take the witness stand because he is apprehensive that his testimony may be impeached by illegally obtained evidence does not settle the matter. This concession marks not the end but the beginning of a necessarily more discriminating analysis than has been undertaken by those courts which have subscribed to the infringement of the right to testify argument.

The source of the right to testify is ultimately to be found in the vague admonitory provisions of the fifth and fourteenth amendments.[85] That right is accorded a defendant in order that he may adequately present his version of a case to the jury. But it is a hoary platitude that no witness has the right to commit perjury. Thus, the right to testify

against uncritical reliance on and slavish adherence to labels, formulas, and generalizations. *See* Harris v. Nelson, 394 U.S. 286, 293-94 (1969); Dennis v. United States, 341 U.S. 494 (1951); United States v. Kahriger, 345 U.S. 22, 38 (1952) (Frankfurter, J., dissenting); McComb v. Jacksonville Paper Co., 336 U.S. 187, 197 (1949); Kovacs v. Cooper, 336 U.S. 77, 96 (1949) (Frankfurter, J., dissenting); Shapiro v. United States, 335 U.S. 1, 50 (1948) (Frankfurter, J., dissenting); Haley v. Ohio, 332 U.S. 596, 601 (1948); Tiller v. Atlantic Coast Lines, 318 U.S. 54, 68 (1943); Consolidated Rock Products Co. v. DuBois, 312 U.S. 510, 529 (1941); Wisconsin v. J. C. Penny Co., 311 U.S. 435, 449 (1940); Nardone v. United States, 308 U.S. 338, 341 (1939); Palko v. Connecticut, 302 U.S. 319, 323 (1937); Henneford v. Silas Moran Co., 300 U.S. 577, 586 (1937); Senior v. Braden, 295 U.S. 422, 429 (1935); Snyder v. Massachusetts, 291 U.S. 97, 114 (1934); Cooper v. Dasher, 290 U.S. 106, 110 (1933); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); United States v. U.S. Steel Corp., 251 U.S. 417, 448 (1920); Postal Telegraph Cable Co. v. Tonopah Tidewater Railroad Co., 248 U.S. 471, 475 (1919); Towne v. Eisner, 245 U.S. 418, 425 (1918); Hyde v. United States, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting); Donnell v. Herring Co., 208 U.S. 267, 273 (1907); Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting); Otis v. Packer, 187 U.S. 606 (1903). *See generally* Holmes, *supra* note 21 at 451-55, 460-61.

[79] 256 U.S. 465, 477 (1921).

[80] 273 U.S. 28 (1927). In *Byars*, a unanimous Court, on which sat both Holmes and Brandeis, upheld the right of the federal government to use evidence improperly seized by state officials acting entirely on their own account. *Byars* was later overruled in Elkins v. United States, 364 U.S. 206 (1960), which ironically relied on the *Olmstead* dissents.

[81] Mr. Justice Frankfurter's approach to the problem was equally flexible. *Compare* his opinion in McNabb v. United States, 318 U.S. 332 (1943) and Walder v. United States, 347 U.S. 628 (1954) *with* his dissenting opinion in Elkins v. United States, 364 U.S. 206, 233 (1960).

[82] 394 U.S. 165 (1969).

[83] The law is replete with instances in which illegally secured evidence is properly admitted, notwithstanding the "imperative of judicial integrity." *See* Olmstead v. United States, 277 U.S. 438 (1928); On Lee v. United States, 343 U.S. 747, 754-55 (1952); Lewis v. Insurance Co. of North America, 416 F.2d 1077 (5th Cir. 1969); United States v. Teller, 412 F.2d 374 (7th Cir. 1969); United States v. Scolnick, 392 F.2d 320 (3rd Cir. 1963); United States v. Martin, 372 F.2d 63, (7th Cir.), *cert. denied*, 387 U.S. 919 (1967). *Compare* Toohey v. United States, 404 F.2d 907 (9th Cir. 1968) *with* Bynum v. United States, 262 F.2d 465, 468-68 (D.C. Cir. 1958). *Cf.* Sperling v. Fitzpatrick, 426 F.2d 116 (2nd Cir. 1970) (exclusionary rule of fourth amendment does not apply to parole revocation proceedings). *Accord*, Lombardino v. Heyd, 318 F. Supp. 648 (E.D.La. 1970), *See also* In re Martinez, 1 Cal.-3d 641, 83 Cal. Rptr. 382, 463 P.2d 734 (1970) (exclusionary rules of *Miranda* and fourth amendment do not apply to parole revocation proceedings).

[84] Groshart v. United States, 392 F.2d 172, 180 (9th Cir. 1968). *See also* People v. Marsh, 14 Mich.App. 518, 165 N.W.2d 853 (1968); State v. Brewton, 247 Ore. 241, 422 P.2d 581, *cert. denied*, 387 U.S. 943 (1967). For purposes of argument, it will be assumed that a defendant has a constitutional right to take the stand in his own behalf. *See* Ferguson v. Georgia, 365 U.S. 570, 602 (1961) (Clark, J., concurring).

[85] In Napue v. United States, 431 F. 2d 1230 (7th Cir. 1970), the court recognized a sixth amendment right to testify in one's own behalf.

cannot be said to embrace a right to commit perjury, for "[a]s a witness, a defendant is no more to be . . . clothed with sanctity, simply because he is under accusation" than he is "to be visited with condemnation." [86] Consequently, to deny a defendant the opportunity to engage in conduct that is calculated to adversely affect the rights of public justice and the integrity of the fact finding process cannot be said to unconstitutionally-abridge his right to take the stand in his own behalf.[87] In sum, *Walder* deprives a defendant of nothing to which he is lawfully entitled; it merely denies him a license to commit perjury with impunity.

It is universally accepted that when a defendant takes the stand in his own behalf, he is subject to cross-examination and can be impeached in the same manner as any other witness. Furthermore, testimony given by a plaintiff for his own benefit in a civil suit is admissible against him in a subsequent criminal proceeding.[88] It seems obvious that a defendant who knows that his testimony may be impeached will be more reluctant to take the stand than if he were allowed to testify free from a searching investigation by the prosecutor. It is no less apparent that in a particular case, the knowledge that his testimony may later be used against him in a criminal proceeding may deter a plaintiff from presenting his claim. While in both instances a burden is imposed upon the right to testify, in neither is it impermissible.

Indeed, if lawfully obtained prior inconsistent statements can be used for impeachment without imposing an unconstitutional burden on a defendant's right to testify, it is difficult to perceive how the use of unlawfully obtained statements can impermissibly burden that right. Since the intrinsic nature of the evidence is the same regardless of the manner of acquisition, the burden, if there be any, must stem from the illegality of that acquisition.[89] Accordingly, the question is whether the illegality in the manner of acquisition imposes a burden on a defendant different either in kind or degree from that which would be imposed upon him had the evidence been obtained legally. In short, it must be determined whether a defendant would be more reluctant to testify in his own behalf when the evidence available for impeachment has been unlawfully obtained than he would be had it been lawfully acquired.

For illustrative purposes, assume that identical, voluntary and reliable statements were obtained from defendants X and Y. X's statement was obtained illegally while Y's was obtained legally. It may well be that defendant X will be somewhat reticent about taking the stand and perjuring himself. However, this hesitancy is different neither in kind nor degree from that which defendant Y experiences, for the evidence available for impeachment is identical in both cases. Indeed, it is manifest that the intrinsic nature of the evidence is unrelated to and unaffected by the manner in which it was secured. It is equally apparent that in determining whether to take the witness stand and risk impeachment, neither X nor Y will be concerned with how the evidence was obtained; their concern will properly center on its contents. Consequently, no greater burden is imposed on X's right to testify by virtue of the fact that the impeaching evidence was unlawfully acquired.

In sum, the legaility of the method of acquisition of the evidence has no legal bearing on the narrow question whether *Walder* will cause a defendant to forego his right to testify. The decision whether to exercise that right is unrelated, both legally and factually, to the manner in which the police gathered the evidence. Rather, the decision to testify depends upon a melange of imponderables which

[86] Allison v. United States, 360 U.S. 203, 210 (1965). When a defendant takes the stand in his own behalf, he is subject to cross-examination, and he can be impeached in the same manner as any other witness. Brown v. United States, 356 U.S. 148 (1957); Grunewald v. United States, 353 U.S. 391 (1957); Johnson v. United States, 318 U.S. 189 (1943); Raffel v. United States, 271 U.S. 494 (1926); Powers v. United States, 223 U.S. 303 (1912); Fitzpatrick v. United States, 178 U.S. 304 (1900); Reagon v. United States, 157 U.S. 301 (1895).

[87] From the emanations of various Supreme Court opinions, there emerges with unmistakable clarity a tacit recognition of the oft-forgotten truth that in criminal prosecutions there are "rights of public justice" which must be protected. *Cf.* United States v. Ewell, 383 U.S. 116, 120 (1966); Beavers v. Haubert, 198 U.S. 77. 87 (1905); Thompson v. United States, 155 U.S. 271, 274 (1894). *See also* Duplex P. P. Co. v. Deering, 254 U.S. 443, 488 (1920) (Brandeis, Holmes, and Clark, J.J., dissenting): "Above all rights rises duty to the community" for, "justice though due to the accused is due to the accusser also." Snyder v. Massachusetts, 291 U.S. 97, 122 (1933) *see also* Williams v. Florida, 399 U.S. 78 (1970); North Carolina v. Pierce, 395 U.S. 711, 721 n. 18 (1969); Stein v. New York, 346 U.S. 156, 197 (1952); Mattox v. United States, 156 U.S. 237, 243 (1894); Groppi v. Leslie, —F.2d— (7th Cir. 1970); United States v. Tijerina, 412 F.2d 661, 666 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969).

[88] Simmons v. United States, 390 U.S. 377, 394 n. 23 (1968).

[89] This presupposes, of course, that the illegality of acquisition was not such as to render subject the voluntariness and reliability of the statements.

are loosely classified under the generic heading of trial strategy.

Those who have championed the right to testify argument have incorrectly assumed that the burden imposed on that right stemmed from the manner in which the evidence was acquired. Reasoning from this faulty premise, they necessarily arrived at the incorrect conclusion that *Walder* imposed an impermissible burden on a defendant's right to testify in his own behalf.[90]

Their assertion that *Walder* might force a defendant to forego his right to testify has been predicated upon *Simmons v. United States*.[91] It was there held that statements given by a defendant at a suppression hearing could not be used by the government at trial in its case-in-chief. The Court was sensitive to the Hobson's choice faced by a defendant who wishes to assert his fourth amendment right but realizes that the price for such assertion may be the relinquishment of his fifth amendment rights:

> It seems obvious that a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim.... [W]e find it intollerable that one constitutional right should have to be surrendered in order to assert another.[92]

Relying on *Simmons*, it has been argued that sanctioning the use of unconstitutionally obtained evidence for impeachment forces a defendant to choose between exercising his constitutional right to suppress such evidence and his constitutional right to take the stand.[93] So stated, the argument is insiduously persuasive. However, its similarity to *Simmons* is semantic only, and its appeal, as well as its flaw, lies in the delusive exactness of its premises.

The difficulty with this thesis is that it begins not with an inquiry but with an answer, thereby avoiding the very question to be decided. It starts with the broad assumption that a defendant has the right to have unconstitutionally obtained evidence suppressed. Doubts as to the applicability of that proposition to the factual situation envisioned by *Walder* and its progeny are lulled by studied avoidance of reference to that concrete setting. However, "rights must be judged in their context and not *in vacuo*." [94]

Thus, the threshold question is whether a defendant who takes the stand in his own behalf and commits perjury has the right to suppress unconstitutionally obtained evidence offered for impeachment. In the initial resolution of this question, the rationale of *Simmons* has no bearing. Indeed, it cannot be determined whether *Walder* violates *Simmons* by requiring a defendant, desiring to suppress unconstitutionally obtained evidence, to forfeit his right to testify until it has first been established that he has that right in a *Walder*-type setting.

If *Simmons* does not preclude the use of evidence offered at a suppression hearing to impeach a defendant who later takes the stand at trial and commits perjury, then it cannot bar the use of unconstitutionally obtained evidence to impeach a perjurous defendant. For, if impeachment does not create an unconstitutional burden in the former

[90] In People v. Marsh, 14 Mich.App. 518, 165 N.W.-2d 853 (1968), the court approved the right to testify argument. However, it acknowledged that a defendant who commits perjury could later be tried for that offense and, that, at the subsequent trial, improperly obtained statements would be admissible. There are four serious difficulties with this approach. First, it would needlessly crowd court calendars thereby exacerbating an already desperate problem. Second, if threat of impeachment would force a defendant to relinquish his right to testify, then the threat of future prosecution for perjury would have an even more devastating effect. Third, in cases where severe penalties may be imposed, a defendant could choose to take the stand and lie, since the speculative risks of a subsequent perjury trial are far outweighed by the more immediate threat posed by conviction for a serious offense. *Cf.* Illinois v. Allen, 397 U.S. 337 (1970). Finally, experience has taught that juries are generally unwilling to convict a defendant of perjury. Consequently, prosecutors are loathe to bring such prosecutions since the chances of success are minimal.

[91] 390 U.S. 337 (1968).

[92] *Id.* at 394.

[93] *See, e.g.*, Groshart v. United States, 392 F.2d 172 (9th Cir. 1968); People v. Marsh, 14 Mich.App. 518, 165 N.W.2d 853 (1968); State v. Brewton, 247 Ore. 241, 422 P.2d 581, *cert. denied*, 387 U.S. 943 (1967).

[94] Bridges v. California, 314 U.S. 252, 303 (1941) (Frankfurter, J., dissenting). *Cf.* Schenck v. United States, 249 U.S. 47, 52 (1919).

Whether *Walder* will have an impact on a defendant's decision to take the stand cannot be considered in the abstract. *See* United States v. Hart, 407 F.2d 1087 (2nd Cir.), *cert. denied*, 395 U.S. 916 (1969). The possibility of undue prejudice resulting from collateral impeachment is an important consideration in determining whether *Walder* should be followed in a given case. However, as in cases of impeachment by prior convictions, it is a relevant consideration only after the need for the defendant's testimony free from collateral impeachment has been demonstrated. *Compare* United States v. Cox, 428 F.2d 638, 689 n.4 (7th Cir. 1970); United States v. Costa, 425 F.2d 950 (2nd Cir. 1969), *cert. denied*, 398 U.S. 938 (1970); United States v. Cacchillo, 416 F.2d 231 (2nd Cir. 1969); Evans v. United States, 397 F.2d 675 (D.C. Cir. 1968).

instance, by simple parity of reasoning it cannot do so in the latter.

A careful reading of *Simmons* lends the distinct impression that it permits the prosecution to impeach a defendant with evidence given at a suppression hearing. The Court took pains to point out that its holding precluded only the use of suppression hearing evidence on the issue of guilt.[95]

The Judicial Conference Standing Committee on Rules of Practice and Procedure has incorporated this holding in its preliminary draft of *The Proposed Rules of Evidence for United States District Courts and Magistrates.*[96] Under Proposed Rule 1-04(d), "[t]estimony given by [a defendant] is not admissible against him on the *issue of guilt* at the trial." [97] The Committee's advisory notes sustain the contention that *Simmons* does not preclude impeachment by resort to evidence given at the suppression hearing:

> The inadmissibility of the testimony of the accused is based on *Simmons v. United States.* ... It removes obstacles in the way of enforcing constitutional right.... *Inadmissibility is, however, limited to the issue of guilt. Use of the testimony for purposes of impeachment is not precluded in the event the accused testifies at the trial inconsistently with his testimony at the hearing.* See *Walder v. United States.* ... The limitation on cross-examination is similarly based.[98]

When viewed in proper perspective, the right to testify argument is not impressive. In future examinations of the question, courts might do well to keep before them as a living faith Mr. Justice Holmes' subtle admonition: "The word 'right' is one of the most deceptive of pitfalls; it is easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified." [99]

CONCLUSION

The application of *Walder to Miranda* situations neither runs afoul of the deterrence rationale nor the "imperative of judicial integrity." The desiderata underlying the exclusionary rules are not violated by allowing impeachment of a perjurous defendant. However, by interpreting those rules to demand that unconstitutionally seized, though reliable, evidence be inadmissible for impeachment, perjury would be condoned thereby seriously jeopardizing the integrity of the federal judiciary and the fact-finding process itself.

Criminal defendants ought not to be allowed to take the stand and commit perjury with impunity while courts stand helplessly by, fettered by a rule of their own making, a rule which is neither demanded by the Constitution nor by any sound principle of justice. *Walder* achieved a workable accommodation between the rule of total exclusion and that which would authorize unlimited admittance of evidence; it must not be abandoned.

[95] Note the meticulous language employed by the Court in restricting its holding:

> Finally, it is contended that it was reversible error to allow the Government to use against Garret *on the issue of guilt* the testimony given by him upon his ... motion to suppress....
>
> * * *
>
> [H]e contends that testimony given by a defendant to meet such requirements should not be admissible against him *on the question of guilt and innocence.* We agree.
>
> * * *
>
> We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not be admitted against him at trial *on the issue of guilt* unless he makes no objection.

Simmons v. United States, 390 U.S. 377, 389-394 (1968) (emphasis added).

[96] 46 F.R.D. 161 (1969).

[97] *Id.* at 187 (emphasis added).

[98] *Id.* at 191 (emphasis added). The distinction is no mere quiddity. *See* Sharp v. United States, 410 F.2d 969 (5th Cir. 1969). *Cf.* Gordon v. United States, 383 F.2d 936, 941 (D.C. Cir. 1967).

[99] American Bank and Trust Co. v. Federal Bank, 256 U.S. 350, 358 (1921).

Editor's Note

As this issue went to press, the Supreme Court decided *Harris v. New York,*__U.S.__ (2/24/71). In *Harris,* Chief Justice Burger, writing for a 5-4 majority, found that "trustworthy" statements procured in violation of *Miranda* are admissible for impeachment purposes even if more than collaterally related to the crime charged. It is felt that this article answers many of the questions left unresolved by *Harris* and will be a useful guide to the implementation of that decision.