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Constitutional Law - Fourth Amendment - Search and Seizure - Impeachment - Cross-Examination

Francis C. Rapp Jr.

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Recent Decisions

CONSTITUTIONAL LAW—FOURTH AMENDMENT—SEARCH AND SEIZURE—IMPEACHMENT—CROSS-EXAMINATION—The United States Supreme Court has held that a defendant witness may be impeached on cross-examination by evidence which is unlawfully obtained and not admissible in the Government's case in chief provided that the questions on cross-examination are resasonably related to matters covered on direct examination.

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

J. Lee Havens and John Kenneth McLeroth arrived in Miami, Florida on October 2, 1977 on a flight from Lima, Peru. A search of McLeroth in Miami revealed that cocaine was sewed into makeshift pockets in a T-shirt that he was wearing under his outergarments. Thereupon, McLeroth implicated Havens. Havens' luggage was seized and searched without a warrant. Havens' luggage contained no drugs; however, a T-shirt was seized that contained holes that corresponded with the pieces which had been sewn to McLeroth's T-shirt.[1] The T-shirt was suppressed on a motion prior to trial. Havens was tried in the United States District Court for the Southern District of Florida, where McLeroth testified against him. McLeroth testified that Havens supplied him with the T-shirt and sewed the makeshift pockets shut. Havens, testifying in his defense, denied involvement in the cocaine smuggling scheme.[2] On cross-examination Havens denied involvement in the sewing of cotton swatches to make pockets and he also denied being in possession of the cut-up T-shirt.[3] Havens was convicted of con-

1. United States v. Havens, 446 U.S. 620, 621-22 (1980).

2. *Id.* at 622. On direct examination Havens testified as follows:

Q. And you heard Mr. McLeroth testify earlier as to something to the effect that this material was taped or draped around his body and so on, you heard that testimony?

A. Yes, I did.

Q. Did you ever engage in that kind of activity with Mr. McLeroth and Augusto or Mr. McLeroth and anyone else on that fourth visit to Lima, Peru?

Id. at 622-23.

3. On cross-examination Havens testified as follows:

Q. Now, on direct examination, sir, you testified that on the fourth trip you had absolutely nothing to do with the wrapping of any bandages or tee shirts or anything involving Mr. McLeroth; is that correct?

A. I don't—I said I had nothing to do with any wrapping or bandages or

spiring to import cocaine,[4] of importing cocaine,[5] and of knowingly and intentionally possessing cocaine with an intent to distribute.[6]

On appeal to the United States Court of Appeals for the Fifth Circuit, Havens contended that the district court erred in admitting the illegally seized T-shirts for the purpose of impeaching his testimony elicited on cross-examination.[7] The court of appeals, relying on *Agnello v. United States*[8] and *Walder v. United States*,[9] reversed the decision

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anything, yes. I had nothing to do with anything with McLeroth in connection with this cocaine matter.

Q. And your testimony is that you had nothing to do with the sewing of the cotton swatches to make pockets on that tee shirt?

A. Absolutely not.

Q. Sir, when you came through Customs, the Miami International Airport, on October 2, 1977, did you have in your suitcase Size 38-40 medium tee shirts? . . .

An objection to the latter question was overruled and questioning continued:

Q. On that day, sir, did you have in your luggage a Size 38-40 medium man's tee shirt with swatches of clothing missing from the tail of that tee shirt?

A. Not to my knowledge.

Q. Mr. Havens, I'm going to hand you what is Government's Exhibit 9 for identification and ask you if this tee shirt was in your luggage on October 2nd, 1975 [sic]?

A. Not to my knowledge. No.

Id. at 622-23 (citations omitted).

4. United States v. Havens, 592 F.2d 848, 849 n.1 (5th Cir. 1979), *rev'd*, 446 U.S. 620 (1980). *See* 21 U.S.C. §§ 952(a), 960(a)(1), 963 (1976).

5. 592 F.2d at 849 n.2. *See* 21 U.S.C. §§ 952(a), 960(a)(4) (1976); 18 U.S.C. § 2 (1976).

6. 592 F.2d at 849 n.2. *See* 21 U.S.C. § 841(a)(1) (1976); 18 U.S.C. § 2 (1976).

7. United States v. Havens, 592 F.2d 848, 849 (5th Cir. 1979), *rev'd*, 446 U.S. 620 (1980).

8. 269 U.S. 20 (1925). In *Agnello* the defendant was charged with conspiring to sell a package of cocaine. *Id.* at 28. On direct examination the defendant testified that he possessed the package but was ignorant of its contents. On cross-examination he denied ever having seen narcotics or a can of cocaine that was exhibited to him and that was unlawfully seized from his apartment. The Government was permitted to introduce the can of cocaine for purposes of rebutting the statements made on cross-examination. *Id.* at 29-30. The Supreme Court reversed Agnello's conviction noting that the defendant did not testify on direct examination concerning the can of cocaine. Because the matter was first raised on cross-examination, the defendant did nothing to waive his constitutional protection or to justify cross-examination regarding the can of cocaine and, therefore, the Court held that the impeaching evidence was improperly admitted. *Id.* at 35.

9. 347 U.S. 62 (1954). In *Walder* the defendant was tried for illicit transactions involving narcotics. On a prior occasion he was indicted for possession of heroin. On that occasion, suppression of a heroin capsule resulted in dismissal of the criminal action. At his trial for the latter offense, the defendant testified on direct examination that he never possessed, sold, or purchased narcotics. *Id.* at 62-63. On cross-examination the defendant denied ever having narcotics taken from him, including a specific reference to the unlawfully seized heroin from the prior occassion. In order to impeach the defendant's statements made on direct and cross-examination, the prosecution put the officers who conducted the illegal search on the stand, along with the chemist who analyzed the heroin capsule. *Id.* at 64. The Court held that the defendant's denial on direct examination of

of the district court and held that illegally seized evidence may be used for impeachment only if the evidence contradicts a particular statement made by the defendant in the course of his direct examination.[10] After granting certiorari,[11] the United States Supreme Court reversed the decision of the circuit court and held that a defendant's statements made in response to cross-examination questions reasonably suggested by the defendant's direct testimony, are subject to impeachment by evidence obtained in violation of the fourth amendment.[12]

Writing for the majority,[13] Justice White rejected the lower court's reliance on *Agnello*, as well as its interpretation of *Walder* and its progeny.[14] Justice White stated that in *Agnello* the defendant was not asked nor did he testify about the illegally seized evidence on direct examination. He also emphasized that the Court has since repudiated the language of *Agnello* that articulated a blanket prohibition against the use of illegally obtained evidence.[15] The majority pointed out that subsequent cases such as *Walder*, *Harris v. New York*,[16] and *Oregon v. Hass*,[17] have sanctioned the use of unlawfully obtained evidence to im-

ever having possessed narcotics was sufficient to allow the Government to impeach his credibility by introducing testimony regarding the illegally seized heroin capsule. *Id.* at 65.

10. United States v. Havens, 592 F.2d at 851-52.

11. 444 U.S. 962 (1979).

12. 446 U.S. at 627-28.

13. Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist joined in Justice White's majority opinion. Justice Brennan filed a dissenting opinion in which Justice Marshall joined. Justices Stewart and Stevens joined in Part I of Justice Brennan's dissent.

14. 446 U.S. at 625.

15. *Id.* The language in *Agnello* that was later repudiated consisted of a quotation from an earlier case where the Court noted that the exclusionary rule not only required that evidence obtained in violation of the law, "shall not be used before the Court, but that it shall not be used at all." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), *quoted in* Agnello v. United States, 269 U.S. at 35.

16. 401 U.S. 222 (1971). In *Harris* the police took statements from the defendant shortly after his arrest for violation of drug laws. The statements were taken in violation of the defendant's fifth amendment *Miranda* rights. At trial, portions of the defendant's direct testimony conflicted with statements given to the police. *Id.* at 222-23. The Court, in deciding that these statements were admissible for purposes of impeaching the defendant's direct testimony, stated that "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances." *Id.* at 226. The *Harris* Court also stated that sufficient deterrence of proscribed police conduct flowed when the evidence was made unavailable to the Government in its case in chief. *Id.* at 225. According to the *Havens* majority, *Harris* also made clear that impeachment by otherwise inadmissible evidence is not limited to collateral matters. 446 U.S. at 625.

17. 420 U.S. 714 (1975). In *Hass* the Court reaffirmed the basic tenets of the *Harris* decision. *Id.* at 722. The *Hass* Court held that utterances made after a suspect is advised of his *Miranda* rights, but before he is counseled by a lawyer, are admissible to impeach a

peach the direct testimony of a criminal defendant, even though the evidence is inadmissible in the Government's case in chief.[18] The Court rejected the court of appeals' interpretation of these cases that unlawful evidence may not be used on rebuttal to impeach a defendant's credibility unless the evidence is offered to contradict a particular statement made by a defendant on his direct examination. The majority reasoned that a flat rule that would permit only statements made on direct examination to be impeached misapprehends the underlying rationale of *Walder, Harris*, and *Hass*.[19] The majority maintained that these cases repudiate *Agnello's* absolute bar on the admissibility of illegally seized evidence.[20] Furthermore, according to the majority, *Walder* implies that the cross-examination in *Agnello* was too tenuously connected with any subject opened up on direct examination to permit impeachment by tainted evidence.[21]

The Court maintained that the court of appeals failed to consider how closely the cross-examination was related to matters explored on direct examination. According to the majority, if the questions put to Havens on cross would have been suggested to a reasonably competent cross-examiner by Haven's direct testimony, they were not "smuggled in."[22] Additionally, the Court maintained that forbidding the Government to impeach the answers fails to take into account precedent such as *Harris* and *Hass*.[23] In both of these cases, the Court stressed the importance of truth in criminal trials,[24] and held that the deterrent function of excluding evidence is sufficiently served by denying its use in

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defendant's direct testimony which contradicts those statements. *Id.* at 723-24. The Court noted that the testimony was elicited from the defendant after he knew that the contradictory statements previously given to the police were ruled inadmissible in the Government's case in chief. Thus, according to the Court, *Hass* was an example of a defendant using exclusion as a license to commit perjury. *Id.* at 722.

18. 446 U.S. at 624.

19. *Id.* at 625. *See* notes 8, 9, 16, 17 *supra.*

20. *See* note 15 *supra.*

21. 446 U.S. at 625.

22. The term "smuggled in" was used by the Court in *Walder* to describe the Government's activity in *Agnello* which amounted to questioning the accused on cross-examination about subjects never opened up on direct and then impeaching the expected response with the illegally obtained evidence. Thus, the Government was able to do indirectly what it could not do directly, *i.e.*, put the unlawfully obtained evidence into the case. *See* Walder v. United States, 347 U.S. at 66. *See also* 446 U.S. at 630 (Brennan, J., dissenting).

23. 446 U.S. at 626.

24. The majority stated that these cases emphasized the importance of arriving at the truth in criminal matters, as well as the defendant's obligation to speak the truth in response to proper questioning. *Id. See* Oregon v. Hass, 420 U.S. at 722; Harris v. New York, 401 U.S. at 225.

the Government's case in chief.[25] According to the Court, there is only a speculative possibility that deterrence would be furthered by making the evidence inadmissible for all purposes.[26]

Although recognizing that neither *Harris* nor *Hass* involved the impeachment of assertedly false testimony first given on cross-examination, the majority maintained that the reasoning of those cases controlled *Havens*.[27] Because arriving at the truth is a fundamental goal of our legal system,[28] the *Havens* Court deemed it essential to the proper functioning of the adversary system to allow the Government proper and effective cross-examination to elicit the truth.[29] Therefore, the majority concluded that for purposes of impeaching a defendant's seeming false testimony, there is no difference of constitutional significance between a defendant's statements on direct examination and his answers to questions put to him on cross-examination.[30] The majority also noted that the policies of the exclusionary rule are adequately implemented by barring the use of the evidence in the Government's case in chief. Any incremental furthering of the deterrence function of the exclusionary rule is outweighed by the need to protect the integrity of the factfinding goals of the criminal trial.[31]

Finally, the majority rejected Havens' contention that because of the illegal search and seizure, the Government's questions were improper cross-examination in the first instance.[32] According to the majority, the court of appeals did not suggest that the cross-examination questions nor the impeachment of Havens' testimony would have been improper absent the use of illegally seized evidence. The Court, in reviewing the testimony of Havens,[33] concluded that the cross-examination was proper because it grew out of his direct testimony. Therefore, the ensuing impeachment did not violate Havens' constitutional rights.[34]

Writing for the dissent,[35] Justice Brennan maintained that the ma-

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25. 446 U.S. at 626. *See* Oregon v. Hass, 420 U.S. at 722; Harris v. New York, 401 U.S. at 225. *See generally* McCORMICK, THE LAW OF EVIDENCE § 166 (2d ed. 1972) [hereinafter cited as McCORMICK].

26. 446 U.S. at 626. *See* Oregon v. Hass, 420 U.S. at 723; Harris v. New York, 401 U.S. at 225.

27. 446 U.S. at 626.

28. *Id.*

29. *Id.* at 627.

30. *Id.*

31. *Id.*

32. *Id.* at 628.

33. *See* notes 2 & 3 *supra.*

34. 446 U.S. at 628.

35. Justice Marshall joined in Justice Brennan's dissenting opinion. Justices Stewart and Stevens joined in Part I of Justice Brennan's opinion in which he contended that the majority's holding is a break from precedent.

jority had taken from criminal defendants their unfettered right to elect whether to take the stand in their own behalf.[36] He viewed the decision not only as an unwarranted departure from precedent, but also an another case in a trend to deprecate constitutional protections of the criminally accused.[37]

According to Justice Brennan, the *Agnello* holding controls the *Havens* case, and subsequent decisions, including *Walder*, *Harris*, and *Hass*, have left *Agnello* undisturbed.[38] Justice Brennan pointed out that although *Walder* allowed introduction of unlawfully seized evidence to impeach an accused's false assertions about prior conduct offered during *direct* examination, the *Walder* Court went to great lenghts to distinguish its holding from *Agnello*. The *Walder* opinion, Justice Brennan continued, was distinguished from *Agnello* on the ground that in *Agnello* the Government attempted to smuggle the evidence in on cross-examination.[39] Justice Brennan also contended that neither the *Harris* and *Hass* decisions indicated that *Agnello* had lost vitality, nor that the distinction between direct and cross-examination testimony that the *Walder* Court perceived as vital had been effaced.[40] The actual principle of *Agnello*, as discerned by *Walder*, is that the Government is not permitted to introduce suppressed evidence based on cross-examination testimony unless such introduction is warranted by the defendant's statements on direct questioning. This principle, according to Justice Brennan, is not inconsistent with the Court's later cases forbidding a defendant to take advantage of suppression to advance perjurous claims in his direct case. Justice Brennan also maintained that *Agnello* does not turn upon the tenuity of the link between the cross-examination questions and the subject matter covered on direct examination.[41] According to Justice Brennan, the cross-examination of the defendant in *Agnello* was reasonably related to his direct testimony. Therefore, the constitutional flaw in *Agnello* was that the introduction of the tainted evidence had been prompted by statements of the accused

36. 446 U.S. at 629 (Brennan, J., dissenting).

37. *Id.*

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

39. *Id.* In *Walder* the defendant went beyond a general denial of complicity in the crimes charged and made sweeping statements on direct examination that he never purchased, sold, or possessed narcotics. In so doing, the defendant relied on the Government's inability to use the suppressed evidence. In contrast, Agnello made no reference to the suppressed evidence. It was first mentioned by the prosecutor on cross-examination. *Id. See* notes 3, 9, 22 *supra.*

40. 446 U.S. at 630 (Brennan, J., dissenting). Justice Brennan emphasized that both *Harris* and *Hass* involved impeachment by the use of unlawfully obtained evidence of statements made on direct examination by a criminal defendant. *Id. See* notes 16 & 17 *supra.*

41. 446 U.S. at 630 (Brennan, J., dissenting).

first elicited on cross-examination. Because Justice Brennan believed that *Agnello* was so read by the Court in *Walder*, he was impelled to the conclusion that *Walder* required as a prerequisite for introduction of the tainted evidence direct testimony by the accused which relies on the Government's disability to challenge his credibility.[42] According to Justice Brennan, the majority's interpretation of *Agnello* and *Walder* trivialized the fourth amendment holdings of those decisions into nothing more than a constitutional reflection of the common law rule of relevance.[43]

Justice Brennan also pointed out that although the narrow exception to the exclusionary rule established by *Harris* and *Hass* may be easily cabined if defense counsel foregoes certain areas of questioning on direct examination, the majority opinion passed control of the exception to the Government. A prosecutor can lay the foundation for admission of otherwise inadmissible evidence with his own questioning.[44] Therefore, a criminal defendant will be forced to forego testifying on his own behalf to prevent the introduction of the suppressed evidence.[45]

Part II of Justice Brennan's dissent is grounded in a more fundamental difference with the majority than interpretation of prior case law. Justice Brennan stated that the approach taken by the Court in *Harris, Hass,* and now in *Havens*, severely undercuts the constitutional canon that convictions cannot be obtained by governmental lawbreaking.[46] For Justice Brennan, the most troubling aspect of the decision

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42. *Id.* at 631 (Brennan, J., dissenting).

43. *Id.* at 631 (Brennan, J., dissenting). Justice Brennan pointed out that the *Walder* Court emphasized the importance of permitting a defendant to deny the crimes charged without permitting the prosecution to put the unlawfully obtained evidence into the case on rebuttal. *Id. See* Walder v. United States, 347 U.S. 62 (1954). Because the law of evidence permits the cross-examination of a defendant about his denial of complicity in the crime charged, *Walder* must be read as imposing the additional requirement that the accused make a contradictory statement on direct examination. 446 U.S. at 631 (Brennan, J., dissenting).

44. 446 U.S. at 631 (Brennan, J., dissenting). Justice Brennan also noted that traditional evidentiary principles allow wide latitude in cross-examination. *See* MCCORMICK, *supra* note 25, at §§ 21-24.

45. 446 U.S. at 632 (Brennan, J., dissenting). Justice Brennan quoted the *Walder* opinion noting that "the Constitution guarantees a defendant the fullest opportunity to meet the accusations against him." *Id.* at 632 (Brennan, J., dissenting) (quoting Walder v. United States, 347 U.S. at 65).

46. 446 U.S. at 633. (Brennan, J., dissenting). *See* Oregon v. Hass, 420 U.S. at 724-25 (Brennan, J., dissenting); Harris v. New York, 401 U.S. at 232 (Brennan, J., dissenting). Justice Brandeis expressed this sentiment in his now famous dissent in Olmstead v. United States, 277 U.S. 438 (1928), when he stated:

> If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the

was the determination that the slight advancement of constitutional ends is not sufficient to exclude tainted evidence.[47] Justice Brennan emphasized that although the search for truth remains a fundamental goal of our legal system, the Constitution does not countenance police misbehavior. Accordingly, the search for truth must remain consonant with the protections enshrined in the Constitution.[48] The balance struck by the majority between the policies found in the Bill of Rights and the interest in accurate trial determinations was, according to Justice Brennan, freewheeling.[49] This approach does not apply criteria intrinsic to the fourth and fifth amendments, but rather, deters police misconduct by declaring that so much exclusion is enough. The ultimate effect of this balance is to obscure judicial and legislative policy making and to treat fourth and fifth amendment freedoms as mere incentive schemes, and thus denegrate their unique status as constitutional protections.[50]

The exclusionary rule has been recognized in fourth amendment jurisprudence since the Supreme Court's decision in *Weeks v. United States*.[51] The rule mandates that evidence that is procured by an unlawful search and seizure shall not be admissible as substantive evidence of guilt in a criminal prosecution against a party whose rights were violated.[52] That the rule is grounded in the fourth amendment is a view that from time to time has enjoyed the support of various members of the Court and several commentators.[53] Justifications for exclusion which are not based on constitutional grounds have also been advanced. These other justifications for the rule rest on the dual premises that exclusion maintains the integrity of the judiciary,[54] and

> administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Id. at 485 (Brandeis, J., dissenting).

47. 446 U.S. at 633 (Brennan, J., dissenting).

48. *Id.*

49. *Id.*

50. *Id.* at 634 (Brennan, J., dissenting).

51. 232 U.S. 383 (1914). The rule was made binding on the states through the due process clause of the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961).

52. *See* Weeks v. United States, 232 U.S. at 393.

53. *See* United States v. Calandra, 414 U.S. 338, 360 (1974) (Brennan, J., dissenting); Mapp v. Ohio, 367 U.S. at 657 (Black, J., concurring) (fourth and fifth amendments combine to compel the exclusionary rule as a matter of Constitutional law); Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974); Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L.C. 141 (1978).

54. This rationale supporting the exclusionary rule is grounded in the notion that courts that admit evidence obtained in violation of the Constitution acquiesce in that

also deters law enforcement officals from transgressing the guarantees which are afforded the citizenry by the fourth amendment.[55] The deterrence rationale has emerged as the sole justification for the continued existence of the exclusionary rule.[56] Accordingly, exclusion of unlawfully obtained evidence is constitutionally required only when the deterrence function is operating at a maximum.[57]

The Supreme Court has restricted the scope of the rule in accordance with this deterrence analysis. In *Alderman v. United States*[58] the Court restricted the applicability of the rule by holding that only those whose rights were violated by an unlawful search would be able to invoke the benefits of the rule.[59] In imposing this standing requirement, the Court reasoned that the deterrence provided by extending the rule to persons not personally aggrieved by the search did not justify its extension when balanced against the infringement of the public's interest in having those accused of crime prosecuted on all the evidence.[60] In *United States v. Calandra*[61] the Court refused to extend the rule to grand jury proceedings, holding that a witness may not refuse to answer questions because they are based on evidence obtained in an unlawful search.[62] The Court reasoned that the undue hardship placed upon grand jury proceedings could not be justified by the incremental deterrent effect which could be expected by such an extension.[63] The Court defined deterrence in terms of removing the incentive to violate the fourth amendment. Therefore, any incentive to violate the fourth amendment which would be removed by not allowing the derivative use of the evidence to obtain an indictment would be negated by the admissibility of the unlawfully seized evidence at the subsequent criminal trial of the search victim.[64] Consequently, the deterrent value of the

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violation and therefore are "accomplices in the willful disobedience of a Constitution they are sworn to uphold." Elkins v. United States, 364 U.S. 206, 223 (1960). Speaking for the majority in *Mapp v. Ohio*, Justice Clark expressed this view when he noted that "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." 367 U.S. at 659.

55. United States v. Janis, 428 U.S. 433, 446-47 (1976); Stone v. Powell, 428 U.S. 465, 484-85 (1976); Linkletter v. Walker, 381 U.S. 618, 637 (1965); Elkins v. United States, 364 U.S. 206, 217 (1960).

56. *See, e.g.*, United States v. Janis, 428 U.S. 433 (1976); Stone v. Powell, 428 U.S. 465 (1976); United States v. Peltier, 422 U.S. 531 (1975).

57. *See* Note, *The Fourth Amendment Exclusionary Rule: Past, Present, No Future*, 12 AM. CRIM. L. REV. 507, 517 (1975).

58. 394 U.S. 165 (1969).

59. *Id.* at 174.

60. *Id.* at 174-75.

61. 414 U.S. 338 (1974).

62. *Id.* at 351-52.

63. *Id.* at 349-52.

64. *Id.* at 351.

rule was not operating at a maximum in this situation. In *Stone v. Powell*[65] the Court barred the consideration of search and seizure claims in federal habeas corpus proceedings where the litigant had an opportunity for full and fair litigation of the claim at the state court level.[66] Again, the Court concluded that the policies behind the exclusionary rule were not absolute.[67] Consequently, the increased cost to society in the form of dissatisfaction with a judicial system reviewing the same claim at least three times, outweighed any additional disincentive which might be achieved by application of the rule.[68] The Court has employed a similar balancing approach in the evolution of the impeachment exception to the exclusionary rule. This exception is of great moment because it restricts the operation of the rule at trial.[69]

United States v. Havens is the Court's most recent pronouncement on the use of evidence obtained in violation of the Constitution to impeach a defendant-witness. In *Agnello v. United States*[70] the Supreme Court held that evidence obtained in violation of the fourth amendment, and therefore not admissible in the Government's case in chief, could not be used to impeach testimony given by the defendant for the first time on cross-examination. By taking great care to distinguish the holding of *Agnello*,[71] the Court reaffirmed that decision in *Walder v. United States*.[72] *Walder* was interpreted as providing a limited exception to the general rule of *Agnello*,[73] allowing admission of illegally seized physical evidence to impeach perjurous testimony given on direct examination, provided, however, that the impeaching evidence, and the impeachment itself, went to matters that were collateral to the crime charged in the indictment.[74] Thus, *Walder* appeared to preserve

65. 428 U.S. 465 (1976).

66. *Id.* at 494-95.

67. *Id.* at 488.

68. *Id.* at 493.

69. The Supreme Court has also held that the rule should be invoked reluctantly where an unlawful search produces a live witness, as opposed to an inanimate object. United States v. Ceccolini, 435 U.S. 268, 278-79 (1978).

70. *See* note 8 *supra*.

71. *See* note 70 and accompanying text *supra*; People v. Taylor, 8 Cal. 3d 174, 178, 501 P.2d 918, 922, 104 Cal. Rptr. 350, 354 (1972), *cert. denied*, 414 U.S. 863 (1973).

72. *See* note 4 *supra*.

73. *See* W. LA FAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.6 (1978) [hereinafter cited as LA FAVE].

74. *See, e.g.*, Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960); Lockley v. United States, 270 F.2d 915, 919 (D.C. Cir. 1959) (Burger, J., dissenting). *See also* Kent, *Miranda v. Arizona, The use of Inadmissible Evidence For Impeachment Purposes*, 18 CASE W. RES. L. REV. 1177 (1967); LA FAVE *supra* note 73; Comment, *The Impeachment Exception: Decline of the Exclusionary Rule?* 8 IND. L. REV. 865, 882 (1975) [hereinafter cited as *Decline of the Exclusionary Rule*]; *The Supreme Court 1953 Term*, 68 HARV. L. REV. 104, 114 (1954); Note, 34 OHIO ST. L.J. 706, 709 (1973).

for the criminally accused the right to take the stand in their own behalf and deny the offenses charged without having illegally obtained evidence of a highly incriminating nature used against them for impeachment.[75] In practice, application of the *Walder* collateral impeachment rule proved extremely difficult. Courts were faced with the task of distinguishing between a defendant who merely denied the elements of the crime charged, and one who went beyond this and offered perjurous collateral testimony on direct examination, thus opening the door to impeachment.[76]

The problems of characterization posed by the *Walder* direct-collateral dichotomy were eliminated in *Harris v. New York*.[77] In *Harris* the statements used to impeach the defendant's direct testimony were incriminating with respect to the matters covered in the indictment.[78] *Harris* provoked comment to the effect that *Agnello* and *Walder* had been overruled, or at least substantially weakened.[79] Although *Harris* involved the use of statements obtained in violation of the fifth amendment *Miranda* guarantees[80] to impeach the defendant-witness, the impact of *Harris* on fourth amendment impeachment cases was obvious.[81] Language in the *Harris* opinion regarding the Court's view of the deterrence function of the exclusionary rule indicated that the decision was not limited to fifth amendment impeachment cases. *Harris* thus has been viewed correctly as an extension of the doctrine that unconstitutionally obtained evidence must be available to the pro-

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75. Walder v. United States, 347 U.S. at 65. *See also* Johnson v. United States, 344 F.2d 163 (D.C. Cir. 1964) (illegally obtained evidence which is not admissible in the prosecution's main case does not become admissible because the defendant takes the stand).

76. LOUISELL & MUELLER, FEDERAL EVIDENCE § 43 (1977) [hereinafter cited as LOUISELL & MUELLER]. This difficulty led one court to conclude that:

> The defendant's testimony will often be a chain of intimately connected events. Separation of the specifics of his testimony into one group of direct issues and one group of collateral issues, or separation according to one or the other supposedly simple distinctions, would ordinarily be an extremely difficult, if not impossible task.

Grosshart v. United States, 392 F.2d 172, 179 (9th Cir. 1968). *See also* State v. Brewton, 274 Or. 241 (1967), *cert. denied*, 423 U.S. 851 (1975).

77. *See* note 16 *supra*.

78. Harris v. New York, 401 U.S. at 222. *See also* Kent, *Harris v. New York: The Death Knell of Miranda & Walder*? 38 BROOKLYN L. REV. 357, 360-61 (1977) [hereinafter cited as Kent].

79. *See, e.g.*, MCCORMICK, *supra* note 25, at § 178; Dershowitz & Ely, *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1214 (1971) [hereinafter cited as Dershowitz & Ely]; Kent, *supra* note 78, at 365-66; Comment, *The Impeachment Exception to the Constitutional Exclusionary Rules*, 73 COLUM. L. REV. 1478, 1483 (1973).

80. Harris v. New York, 401 U.S. at 224. *See also* Dershowitz & Ely, *supra* note 79, at 1208-09.

81. See LOUISELL & MUELLER, note 76 *supra*.

secution to prevent the commission of perjury by the defendant-witnesses.[82] The emphasis in *Harris* on the need to prevent perjury when a defendant testifies suggested that the scope of the exception is not to be limited to perjurous testimony given on direct examination.[83] By permitting impeachment of statements first elicited on cross-examination, *Havens* has made this suggestion a reality.

In extending the impeachment exception to testimony first elicited on cross-examination, the *Havens* Court relies primarily upon *Harris* and the balancing approach found therein.[84] The truth-seeking and fact-finding goals of the criminal justice system are balanced against the deterrence that would result if use of the evidence was barred.[85] The Court in *Stone* and *Calandra* engaged in a similar balancing approach to restrict the operation of the rule.[86] In balancing the competing interests against the deterrent effects of the rule, the Court has not discussed the effect of their decisions upon the deterrence rationale to which they ostensibly subscribe.[87]

The exclusionary rule deters law enforcement officials from deliberate violations of the fourth amendment not by punishing them,[88] but rather by removing the inducement to violate the amendment.[89] In *United States v. Janis*[90] the Court concluded that empirical data demonstrating the deterrent effect of the rule was inconclusive at best.[91] However, because the pronouncements of *Weeks* and *Mapp* have not been overruled, the Court must believe that the rule operates as a deterrent of deliberate police misconduct.

Two possible theories of how the rule operates exist. The first assumes that policemen in gathering evidence make a conscious assessment of the uses for the evidence. Accordingly, the officer makes an illegal search only when evidence will be helpful because the exceptions to the exclusionary rule allow its use in some fashion, or because it may be helpful in turning up leads in an investigation. If this were the

82. *See* LAFAVE, note 73 *supra*.

83. LOUISELL & MUELLER, note 76 *supra*.

84. United States v. Havens, 446 U.S. at 626. *See* Harris v. New York, 401 U.S. at 225; Comment, *The Impeachment Exception to the Constitutional Exclusionary Rules*, 73 COLUM. L. REV. 1476, 1482 (1973).

85. 446 U.S. at 627.

86. *See* notes 61-69 and accompanying text *supra*.

87. *See* Stone v. Powell, 428 U.S. at 492.

88. United States v. Peltier, 422 U.S. 531, 556 (1975) (Brennan, J., dissenting).

89. *Id.* at 557 (Brennan, J., dissenting). *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 431 (1974); Dershowitz & Ely, *supra* note 79 at 1219.

90. 428 U.S. 433 (1976).

91. *Id.* at 453. For a collection of empirical studies on the deterrent effect of the exclusionary rule, see *id.* at 450 n.22.

theory accepted by the Court, the standing requirement[92] and impeachment exception would be without logical justification because these exceptions provide incentive for violation of the fourth amendment.[93]

A second theory of the operation of the rule assumes that the rule deters by creating in the minds of law enforcement officals a general impression that society does not tolerate the deliberate disregard of fourth amendment protections.[94] Acceptance of this theory is evidenced by language in the *Stone* opinion. There the Court in distinguishing between the immediate and long-term effects of exclusion noted that the long-term objective of the rule is to inculcate fourth amendment ideals into the value system of law enforcement officials.[95] A few exceptions to the rule will probably do no harm to this overall impression. The current members of the Court, however, have not evidenced a favorable disposition toward the exclusionary rule[96] and cases such as *Stone*, *Calandra*, *Harris*, and *Havens* are illustrative of Court's dissatisfaction with the rule as a vehicle for enforcing the fourth amendment. Accordingly, the current state of the rule is not limited to a few exceptions; rather the Court has restricted the reach of the rule

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92. *See* Alderman v. United States, 394 U.S. 165 (1969); text accompanying notes 58-60 *supra*.

93. *See* Comment, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 Nw. U.L. Rev. 740, 782-83 (1974); Dershowitz & Ely, note 79 *supra*, at 1221 n.93.

94. *See* Stone v. Powell, 428 U.S. at 492.

95. *Id.* More specifically, Justice Powell wrote that:

> Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.

Id. (footnotes omited).

96. *See, e.g.*, United States v. Ceccolini, 435 U.S. 268 (1978) (exclusion is not always mandated when the product of an illegal search is a live witness); Stone v. Powell, 428 U.S. 465 (1976) (when opportunity exists for full and fair litigation of search and seizure claim in state court, such claim is not cognizable in federal habeas corpus proceeding); United States v. Janis, 428 U.S. 433 (1976) (evidence unlawfully obtained by state criminal law enforcement officials is admissible in civil tax assessment proceeding conducted by the federal government); United States v. Peltier, 422 U.S. 531 (1975) (standards for border searches delineated in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), are not to receive retroactive application because the policies of the exclusionary rule do not require such an application); United States v. Calandra, 414 U.S. 338 (1973) (grand jury witness may not refuse to answer questions because they are based upon evidence which was unlawfully obtained). *See generally* Burger, *Who Will Watch the Watchman?* 14 Am. U.L. Rev. 1 (1964).

at every opportunity.[97] It seems that repeated restrictions of the rule will give law enforcement officials the general impression that exclusion of evidence is the exception rather than the rule.[98] *Havens*, when viewed alone, may have an innocuous effect on the deterrence function of the rule. However, when viewed in the context of other cases, it will help to destroy the impression that the rule was intended to create, and it may very well encourage illegal searches.

The *Havens* Court has implemented a test which examines the scope of the direct testimony of a defendant to determine when a defendant may be impeached on cross-examination by the use of illegally seized evidence.[99] The Court's test is similar to the approach of rule 611(B) of the Federal Rules of Evidence for determining the permissible scope of cross-examination.[100] The Court stated that there is no difference of constitutional magnitude between questions answered on direct and those questions which are reasonably related to the direct examination but are asked for the first time on cross-examination.[101] Accordingly, it is clear that the permissible scope of cross-examination is not to be limited by the presence of fourth amendment considerations in a particular case. It is likely, therefore, that the analysis employed by federal courts in resolving rule 611(B) issues will serve as a benchmark for the resolution of future disputes involving the impeachment exception. Rule 611(B) has been accorded a broad interpretation by the courts, possibly because of the inherent difficulty with a standard which purports to delineate the confines of what a witness said on direct examination.[102] Thus, a real possibility exists that impeachment

97. *See* Schlesinger & Wilson, *Property, Privacy and Deterrence: The Exclusionary Rule in Search of a Rationale*, 18 Duq. L. Rev. 225, 238 (1980).

98. Dershowitz & Ely, note 79 *supra*, at 1221 n.93. *See* Comment, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 Nw. U.L. Rev. 740, 784 (1974).

99. The Court noted that the proper scope of cross-examination should be limited to questions which are either "plainly within the scope of the direct examination," or are "reasonably suggested" by the defendant's direct examination. 446 U.S. at 627.

100. The Federal Rules of Evidence provide in relevant part that "cross examination should be limited to the subject matter of the direct examination . . . ." Fed. R. Evid. 611(B).

101. *See* 446 U.S. at 627.

102. *See* United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (implicit in rule 611(B) is that all evidence relevant to the subject matter of direct is within the scope of cross examination), *cert. denied*, 440 U.S. 920 (1979); United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977) (focus is not on what was actually said on direct but rather if the cross examination is reasonably related to what was said on direct), *cert. denied*, 435 U.S. 1000 (1978); United States v. Segal, 534 F.2d 578 (3d Cir. 1976) (scope of direct is to be measured by its subject matter not by the specific exhibits introduced at that time).

admissibility will depend not on what the defendant said on direct, but rather that he elected to say anything at all.[103]

The *Havens* Court has alleviated the danger that a defendant witness will use suppression as a shield for half-truths.[104] They have, however, created another danger—that a liberal interpretation of *Havens* may erode the deterrence function of the exclusionary rule.

Francis C. Rapp, Jr.

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103. *See* 446 U.S. at 632 (Brennan, J., dissenting). *See also* LOUISELL & MEULLER, FEDERAL EVIDENCE § 43 (1980 Supp.) (if the *Havens* test means anything at all it will require the drawing of difficult distinctions to determine what is within and without the scope of direct).

104. 446 U.S. at 626. *See* Harris v. New York, 401 U.S. at 226.