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THE EXCLUSIONARY RULE: IMPEACHMENT EXCEPTION BROADENED TO INCLUDE STATEMENTS FIRST ELICITED UPON CROSS-EXAMINATION—

**UNITED STATES V. HAVENS**

The United States Constitution establishes an unequivocal prohibition against unreasonable searches and seizures.¹ To enforce this prohibition, the Supreme Court has prescribed an exclusionary rule which provides that evidence obtained through an unconstitutional search or seizure may not be used to establish guilt in criminal trials.² The rule was designed to discourage police misconduct in acquiring evidence³ and to preserve judicial integrity⁴ by refusing to implicitly sanction illegal police activity.

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1. The fourth amendment states:
   
   The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
   
   U.S. Const. amnd. IV.


   The fourth amendment exclusionary rule was promulgated under the Court's supervisory power over lower federal courts in Weeks v. United States, 232 U.S. 383 (1914). The Weeks Court explained:

   [T]he Fourth Amendment . . . put the courts of the United States and Federal Officials, in the exercise of their power and authority, under limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. . . .

   [T]he duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.

   *Id.* at 391-92. The exclusionary rule was applied to the states in Mapp v. Ohio, 367 U.S. 643 (1961).

3. Deterrence has evolved as the primary purpose of the exclusionary rule. See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (Burger, C.J., dissenting) (suppression of evidence imperative to deter impropriety in law enforcement); Terry v. Ohio, 392 U.S. 1, 12-14 (1968) (exclusionary rule is principal mode of discouraging police lawlessness); Linkletter v. Walker, 381 U.S. 618, 636-37 (1965) (Mapp exclusionary rule is only effective deterrent to lawless police actions); Mapp v. Ohio, 367 U.S. 643, 656 (1961) (purpose of exclusionary rule is to compel respect for constitutional guarantee by deterrence of unlawful police conduct in gathering evidence); Elkins v. United States, 364 U.S. 206, 217-18 (1960) (rule calculated to deter unlawful behavior by removing incentive to disregard it).

4. Justice Brandeis enunciated the judicial integrity rationale in Olmstead v. United States, 277 U.S. 438, 483-85 (1928) (Brandeis, J., dissenting). He reasoned that the courts should refuse to assist law enforcement authorities who themselves violated the law. *Id.* at 484. This rationale was later accepted by a majority of the Court in McNabb v. United States, 318 U.S. 332, 345 (1943), and was re-affirmed in Elkins v. United States, 364 U.S. 206, 222-23 (1960) (exclusionary rule needed to promote judicial integrity), Mapp v. Ohio, 367 U.S. 643, 659
The effectiveness of the exclusionary rule as a means of achieving these dual goals has, however, been questioned. The Supreme Court, noting the rule’s deficiencies and desiring to protect other interests, has recognized exceptions to the rule. One such exception permits the use of illegally seized evidence to impeach a defendant’s direct testimony. Recently, in United States v. Havens, a five justice majority expanded the scope of this exception. The Havens Court held that illegally seized evidence also may be used to impeach a defendant’s credibility during cross-examination, provided that the cross-examination eliciting the challenged statements was reasonably suggested by the defendant’s direct testimony.

Close examination of the Havens decision reveals that the Court departed from precedent to thwart the application of the exclusionary rule. Due to this departure, the Havens expansion of the impeachment exception could have a chilling effect both upon the willingness of defendants to testify and upon the deterrence of official lawlessness. Because the Court failed to prescribe an alternative to the exclusionary rule, it is suggested that the Supreme Court reemphasize the normative and factual considerations that originally necessitated the rule.

**Evolution of the Exclusionary Rule**

**Development of the Rule**

At common law, evidence procured unlawfully was not excluded. The first explicit enunciation of the exclusionary rule appeared in Weeks v. United States. The Weeks decision, pronounced under the Court’s supervisory power, held that evidence obtained in an unlawful search is not admissible to establish a defendant’s guilt in federal prosecutions.

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8. Id. at 627-28. The Federal Rules of Evidence limit the scope of cross-examination to the subject matter of the direct examination and to matters affecting credibility. Fed. R. Evid. 611.


10. 232 U.S. 383 (1914). Prior to Weeks, dictum in Boyd v. United States, 116 U.S. 616 (1886), suggested that evidence obtained in violation of the fourth amendment should be inadmissible at trial in federal courts. In Boyd, the Court held that reliable evidence probative of a defendant’s guilt was inadmissible because the government obtained it under a statute violative of the fourth amendment. Id. at 638.

11. See note 2 supra.

12. 232 U.S. at 398.
principle was soon extended to prohibit any use of evidence derived from illegal searches and seizures. 13

In Mapp v. Ohio, 14 the Supreme Court extended the exclusionary rule beyond an exercise of the Court’s supervisory power and held that the rule was a constitutional mandate of the fourth amendment. 15 In addition, the Mapp decision applied the rule to the states as an element of procedural due process. 16 After Mapp, the Court grafted the exclusionary rule onto fifth 17 and sixth 18 amendment violations as well.

In designing the exclusionary rule, the Court relied upon both normative and factual justifications. 19 The normative rationale emphasizes the “imperative of judicial integrity.” 20 Justice Brandeis, in Olmstead v. United States, 21

13. See Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). The Court in Silverthorne stated: “The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.” Id. at 392.
14. 367 U.S. 643 (1961). The Mapp decision overruled Wolf v. Colorado, 338 U.S. 25 (1949). In Wolf, the Court held that although the fourth amendment, as applied to the states, restricted state officials from violating the constitutional rights incorporated through the due process clause of the fourteenth amendment, the fourth amendment did not require state courts to exclude illegally obtained evidence. Id. at 33.
15. Prior to Mapp, the Court recognized the rule in its supervisory function. See note 2 supra. In Mapp, the Court reasoned that: “[O]ur holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense.” 367 U.S. at 657. See generally Note, Impeachment by Unconstitutionally Obtained Evidence—The Erosion of the Exclusionary Rule, 34 Ohio St. L.J. 706 (1973) [hereinafter cited as Note].
16. 367 U.S. at 657.
18. See United States v. Wade, 388 U.S. 218 (1967) (in-court identification excluded if tainted by pre-trial confrontation where accused was denied right to presence of counsel); Escobedo v. Illinois, 378 U.S. 478 (1964) (statements elicited from suspect in police custody who was refused opportunity to consult with counsel may not be used against him at trial).
19. For an in-depth discussion of the policy rationales underlying the exclusionary rule, see Oaks, supra note 5; Comment, The Exclusionary Rule in Context, 50 N.C. L. Rev. 1049 (1972) [hereinafter cited as Comment].
21. 277 U.S. 438 (1928) (Brandeis, J., dissenting). Justice Brandeis, in his frequently quoted dissent, stated:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. 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 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.
stressed the need to “preserve the judicial process from contamination” by excluding illegally obtained evidence. He reasoned that this exclusion would maintain respect for the law and promote public confidence in the administration of justice.

The factual justification for the rule suggests that by excluding illegally obtained evidence, courts will deter law enforcement officials from behaving illegally when performing criminal investigations. The deterrence rationale has predominated over the imperative of judicial integrity in most Supreme Court decisions. On this basis, the Court has characterized the rule as the only effective method of ensuring respect for the fourth amendment.

Creation of the Impeachment Exception

Despite the rule against the introduction of illegally seized evidence, the Supreme Court has permitted the use of such evidence at trial solely for purposes of impeaching a defendant’s credibility. In an early decision, Agnello v. United States, the Court refused to allow illegally seized evidence directly relating to the crime charged to be introduced for the purpose of impeaching testimony first elicited on cross-examination. Agnello, charged with conspiracy to sell narcotics, testified on direct examination that he had received packages from another defendant but was unaware they contained cocaine. At this point in the cross-examination, the prosecutor was permitted to introduce in rebuttal a can of cocaine illegally seized from Agnello’s room to impeach Agnello’s credibility. A unanimous Court reversed Agnello’s conviction and ruled that the evidence was not admissible for impeachment under these circumstances.

22. Id. at 484 (Brandeis, J., dissenting).
23. Id.
25. See notes 3 & 4 supra.
26. In Elkins v. United States, 364 U.S. 206, 217 (1960), the Court proclaimed that the only effective way to compel respect for the fourth amendment was to remove the incentive to disregard it. Thus, in Mapp v. Ohio, 367 U.S. 643, 648 (1961), the Court classified the exclusionary rule as a “deterrent safeguard, without insistence upon which the Fourth Amendment would have been reduced to a ‘form of words.’"
27. 269 U.S. 20 (1925).
28. Id. at 35.
29. Id. at 29.
30. Id. at 30.
31. Id.
32. Id. at 35. The Court, reversing Agnello’s conviction, stated:

In his direct examination, Agnello was not asked and did not testify concerning the can of cocaine. In cross-examination, in answer to a question permitted over his
Almost 30 years later, however, the Court in *Walder v. United States* recognized an exception to the exclusionary rule for the impeachment of testimony elicited on *direct* examination. The *Walder* defendant was charged with the unlawful sale of narcotics but asserted upon direct examination, and reiterated upon cross-examination, that he had never possessed or sold narcotics. The Court upheld the collateral use of illegally seized evidence to impeach the defendant’s credibility. The Court reasoned that the defendant’s testimony extended beyond a mere denial of involvement in the crimes in question and his “sweeping claims” offered during direct testimony “opened the door” to impeachment during cross-examination by unconstitutionally obtained evidence. The *Walder* Court was careful to distinguish its decision from *Agnello*, and emphasized the difference between the impeachment of statements first elicited on cross-examination and impeachment of testimony volunteered during direct examination. The Court noted that in *Agnello* the prosecution, after failing in its efforts to introduce the tainted evidence in its case in chief, attempted to smuggle it in on cross-examination.

In *Harris v. New York*, the Court extended the *Walder* impeachment exception to include fifth amendment violations, and ruled that pretrial statements, inadmissible in the prosecution’s case in chief, may be used to impeach the defendant’s direct testimony. In *Harris*, the defendant was

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34. In an effort to impeach Walder’s credibility, the prosecution was permitted to question Walder about heroin seized from his home two years earlier. *Id.* at 64.
35. The Court limited use of the *Walder* exception to those situations in which a defendant’s direct testimony exceeds denial of the crime charged and includes collateral matters. The Court declared: “[T]he Constitution guarantees a defendant the fullest opportunity to meet the accusation against him ... without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief.” *Id.* at 65.
36. *Id.*
37. *Id.* at 64.
38. The Court observed that the impeachment exception would discourage defendants from consciously resorting to perjurious testimony when they take the stand in reliance on the Government’s inability to challenge their credibility. *Id.* at 65.
39. *Id.* at 66. The *Walder* Court distinguished its holding from *Agnello* on an additional ground; in *Agnello*, the impeaching evidence was pertinent to the crime charged, while in *Walder* the evidence was collateral to the elements of the crime charged. *Id.* See generally 3 LAFAVÉ, supra note 2, at 701-02.
40. 347 U.S. at 66.
41. 401 U.S. 222 (1971).
42. *Id.* at 225-26.
asked on cross-examination whether he had made specific statements to the police immediately following his arrest. In response to this cross-examination, Harris testified that he could not remember any of the questions or answers elicited during his interrogation. Following the cross-examination, the prosecutor was permitted to impeach the defendant by reading excerpts from inconsistent pretrial statements otherwise inadmissible because of police failure to give Miranda warnings. The Court, relying on the principles set forth in Walder, reasoned that the benefits of the impeachment process should not be lost due to the speculative possibility that impermissible police misconduct will be encouraged. The Harris Court opined that police malfeasance will be discouraged when the evidence in question is unavailable for the prosecution to use in its case in chief. The Harris decision, by abandoning the materiality distinction whereby impeachment was permitted only of testimonial matters collateral to the crime for which the defendant was charged, has had a further impact on the continuing vitality of the Agnello-Walder rule.

Prior to Havens, the scope of the Walder exception to the exclusionary

43. See Miranda v. Arizona, 384 U.S. 436 (1966). In Miranda, the Court indicated that pretrial statements obtained in violation of the fifth amendment's privilege against self-incrimination could not be offered into evidence, even collaterally, to impeach a defendant's credibility. The Court reasoned that statements by the defendant which are intended to be exculpatory but are used to impeach his testimony are incriminatory and therefore may not be used without full warnings and effective waiver. Id. at 476-77.

44. There were, however, important differences between Walder and Harris. In Walder, the defendant was impeached by evidence obtained in violation of the fourth amendment regarding matters unrelated to the crime for which he was charged. 347 U.S. at 65. On the other hand, in Harris the defendant was impeached by pretrial statements obtained in violation of the fifth amendment regarding matters bearing more directly on the crime in question. 401 U.S. at 225. The Harris Court maintained that it was following the general rule set forth in Walder and extending it slightly to apply to the facts in Harris. The Harris Court, however, quoted Walder in a highly selective manner, omitting any reference to the Walder principle that a defendant "must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it..." 347 U.S. at 65.

45. 401 U.S. at 225 (citing Walder v. United States, 347 U.S. 62 (1954)).

46. Id. The Harris decision was re-affirmed by the Burger Court in Oregon v. Hass, 420 U.S. 714 (1975), in which the Court held that the defendant's direct testimony could be impeached by a prior inconsistent statement otherwise inadmissible.


48. See Dershowitz & Ely, supra note 47, at 1214; The Supreme Court, 1970 Term, supra note 47, at 48.
rule was limited to impeachment of testimony first elicited on direct examination. The Harris Court, while extending the Walder rule to include fifth amendment violations, did not address the issue of whether the impeachment exception should be broadened to encompass testimony first elicited on cross-examination. Lower federal courts have recognized a clear distinction between impeachment of direct examination and cross-examination testimony and have restricted the use of unlawfully acquired evidence to impeachment of testimony first offered during direct examination. These courts have maintained that in factual situations similar to Agnello it is impermissible for the prosecution, by use of evidence inadmissible in its case in chief, to rebut testimony extracted from the defendant only on cross-examination. The restriction to direct examination testimony avoids the problem, confronted by the Court in Agnello, of prosecutorial “smuggling in” of tainted evidence.

THE HAVENS DECISION

Factual Background and Holding

J. Lee Havens and John McLeroth, both attorneys from Fort Wayne, Indiana, arrived at the Miami Airport on a flight from Lima, Peru. In Miami, McLeroth underwent a customs search that revealed cocaine sewed into makeshift pockets in a T-shirt he was wearing. McLeroth told the customs officials that Havens was traveling with him, thereby implicating Havens in the importation of cocaine. Following Havens' arrest, his luggage was seized and searched without a warrant by customs agents.

49. See, e.g., United States v. Hickey, 596 F.2d 1082 (1st Cir.) (where defendant has not testified as to subject matter during direct examination, suppressed evidence may not be used to impeach statements elicited upon cross-examination), cert. denied, 444 U.S. 853 (1979); United States v. Whitson, 587 F.2d 948 (9th Cir. 1978) (where defendant presents case on direct without raising issues open to impeachment, and Government cross-examines to elicit impeachable statements, it is error to permit Government to impeach statements it induced with inadmissible evidence); United States v. Mariani, 539 F.2d 915 (2d Cir. 1976) (topic elicited solely by Government’s cross-examination may not be rebutted by evidence which is inadmissible in Government’s case in chief); United States v. Trejo, 501 F.2d 138 (9th Cir. 1974) (impeachment of defendant by illegally obtained evidence is erroneous where evidence does not focus on truthfulness of direct testimony). See also People v. Taylor, 8 Cal. 3d 174, 501 P.2d 918, 104 Cal. Rptr. 350 (1972) (harmful constitutional error to permit impeachment of witness’ statement elicited on cross-examination by illegally seized evidence where defendant had not referred to these matters in direct testimony), cert. denied, 414 U.S. 863 (1973).

50. See note 32 and text accompanying notes 27-32 supra.

51. Id.

52. 446 U.S. at 621.

53. Id. at 621-22.

54. Id. at 622.

Although no controlled substance was discovered, agents found a T-shirt from which swatches corresponding to the size of McLeroth's makeshift pockets had been cut. At trial, the T-shirt and other evidence were suppressed because the search and seizure were illegal.

McLeroth testified for the government at Havens' trial and asserted that Havens had supplied him with the altered T-shirt and had sewn the makeshift pockets shut. Havens, testifying in his own defense, denied any involvement in smuggling cocaine. On cross-examination, the prosecutor asked Havens whether he had anything to do with sewing the makeshift pockets on McLeroth's T-shirt. Havens denied that he had. Additionally, the prosecutor asked Havens whether he had the seized T-shirt in his luggage. Havens again denied any knowledge about the T-shirt. After the defense rested, the customs agent was recalled as a rebuttal witness. Over an objection, the agent was permitted to testify that the cut T-shirt was found in Havens' suitcase. Subsequently, the illegally seized T-shirt was admit-

56. 446 U.S. at 622.
57. Id.
58. Id.
59. His direct testimony included the following:
   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?
   A. I did not.

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 anything, yes. I had nothing to do with anything with Mr. McLeroth in connection with this cocaine matter.
   Q. And your testimony is that you had nothing to do with the sewing of 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?
   A. Not to my knowledge.
   Q. Mr. Havens, I'm going to hand you what is Government 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.
60. Id. at 623.
61. The appellate court pointed out the trial court's previous ruling that if Havens admitted on cross-examination that the T-shirt was in his luggage, it could not be introduced into evi-
ted into evidence for impeachment purposes with appropriate instructions to the jury. Havens was convicted in federal district court of importing, conspiring to import, and intentionally possessing cocaine.

The Court of Appeals for the Fifth Circuit reversed Havens' conviction, holding 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 or her direct examination. The court of appeals stated that Agnello v. United States and Walder v. United States set forth two rules on the admissibility of illegally seized evidence. First, only statements elicited on a defendant's direct examination can predicate the use of illegally seized evidence for impeachment. Second, the evidence sought to be used must contradict a particular statement made by the defendant. The court observed that an arguable conflict with the defendant's denial of guilt does not meet this latter test. The United States Supreme Court reversed the court of appeals and remanded the case for further proceedings. In so doing, it distinguished Agnello and held that a defendant's statement made in response to proper cross-examination reasonably suggested by the defendant's direct testimony is subject to impeachment by evidence that has been illegally obtained.

The Court's Rationale

The controversial decision in Havens appears to be the outcome of the balancing of competing societal interests, such as protecting the public from unconstitutional searches and seizures, deterring police misconduct, preventing perjured testimony, preserving judicial integrity, and determining truth through the adversarial process.

dence. Because Havens denied it, the agent was allowed to testify to the contrary. United States v. Havens, 592 F.2d 848, 850 (5th Cir. 1979).

62. The jury was instructed that the illegally obtained evidence was to be considered only for impeaching Havens's credibility. Brief for Petitioner at 6.


64. United States v. Havens, 592 F.2d 848 (5th Cir. 1979).


66. Id.

67. 592 F.2d at 851.

68. 960(a)(1), 963 (1976)

69. Id.

70. Id. at 851.

71. Id.

72. See note 3 and accompanying text supra.

73. See note 38 and accompanying text supra.

74. See note 4 and accompanying text supra. For a general discussion of the societal interests weighed in the Court's balancing process, see Comment, Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule, 20 U.C.L.A. L. Rev. 1129 (1973). See also Comment, supra note 19.

Justice White, delivering the opinion for a five justice majority, recognized that earlier cases distinguished between impeachment of testimony first elicited on cross-examination and impeachment of testimony offered during direct examination. He viewed the distinction as erroneous and protested that a flat rule permitting only impeachment of direct examination testimony misinterpreted the underlying rationale of prior controlling cases. Relying upon Walder, the majority interpreted Agnello as holding that impeachment by tainted evidence will be impermissible only when cross-examination testimony has too tenuous a connection with any subject covered on direct. The Court then pointed out that the court of appeals, in reversing the district court decision, failed to consider how closely the cross-examination related to matters elicited on direct.

Despite the constitutional right of citizens to be free from unreasonable searches and seizures, the Court stated that the fundamental goal in criminal trials is discovering the truth. The majority insisted that when defendants take the witness stand, they must testify truthfully or suffer the consequences. Further, the majority emphasized that this obligation continues during cross-examination. In this regard, the Court maintained there was no difference between a defendant's statements on direct examina-

76. Justice White delivered the opinion of the Court, in which Chief Justice Burger and Justices Blackman, Powell, and Rehnquist joined.

77. 446 U.S. at 625. The majority placed major emphasis on four previous decisions. The first of these decisions, Agnello, prohibited the impeachment of testimony first brought out on cross-examination. The other three cases—Walder, Hass and Harris v. New York, 401 U.S. 222 (1971)—which were decided subsequent to Agnello, indicated that the impeachment exception would apply only where contradictory testimony was first offered on direct examination.

78. The majority stated that Walder, Harris and Hass repudiated the statement in Agnello that illegally obtained evidence may not be used at all. Id.

79. See notes 27-32 and accompanying text supra.

80. 446 U.S. at 625.

81. Id. For this reason, the case was remanded for further proceedings.

82. See note 1 supra.

83. 446 U.S. at 626.

84. Id. Here, the Court stated that "this is true even though a defendant is compelled to testify against his will." Id. Accord, Bryson v. United States, 396 U.S. 64 (1969) (one furnishing false information to Government cannot defend against prosecution for fraud by challenging the validity of requirement itself); United States v. Knox, 396 U.S. 77 (1969) (predicament of being forced to choose between incriminating truth and falsehood, as opposed to refusing to answer, does not justify perjury).

tion and his or her responses elicited on cross-examination plainly within the scope of direct testimony.\(^6\)

Although emphasizing the need to obtain the truth in criminal trials, the *Havens* decision still acknowledged the deterrence rationale that underlies the exclusionary rule.\(^7\) The Court observed that the policies promoted by the exclusionary rule no more barred impeachment in *Havens* than they did in previous decisions that recognized the impeachment exception for statements elicited on direct examination.\(^8\) In those decisions the Court maintained that perjurious testimony should not go unchallenged.\(^9\) The majority then concluded that the deterrence rationale was adequately served in *Havens* by denying the government use of the illegally seized evidence in its case in chief.\(^10\)

**The Dissenting Opinion**

The four dissenting justices\(^11\) characterized the *Havens* decision as an unwarranted departure from controlling case law.\(^12\) The *Havens* majority focused on general language in *Agnello*, concluding that the premise underlying *Agnello* was that illegally seized evidence should not be used at all during trial.\(^13\) Consequently, the majority understood *Agnello* to espouse an absolute prohibition against the use of illegally seized evidence, and viewed subsequent decisions that recognized exceptions to the rule as repudiations of the *Agnello* rationale.\(^14\)

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86. 446 U.S. at 627. See also 3 LaFave, *supra* note 2, at 703-05. But see note 49 and accompanying text *supra*.

87. See note 3 *supra*.


89. In *Walder*, the Court stated:

   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 contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of [it] . . . [T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.

347 U.S. at 65.

The Court in both *Harris* and *Hass*, relying on *Walder*, maintained that the shield provided by *Miranda* cannot be perverted into a license to offer perjurious testimony, free from confrontation with prior contradictory utterances. Oregon v. Hass, 420 U.S. at 722; Harris v. New York, 401 U.S. at 226.

90. 446 U.S. at 626.

91. Justice Brennan's dissent was joined by Justice Marshall and joined in part by Justices Stewart and Stevens.

92. 446 U.S. at 629 (Brennan, J., dissenting).

93. *Id.* at 624. More particularly, this principle was enunciated in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), and quoted by the Court in *Agnello*, 269 U.S. at 35.

94. 446 U.S. at 624.
The dissent construed Agnello more narrowly, and interpreted it as holding that the government may not employ the power of cross-examination to predicate the admission of illegally obtained evidence. The dissent argued that Agnello could be reconciled with later cases that recognized exceptions to the exclusionary rule. It noted that the Court's recent decisions in Harris and Hass, which allowed governmental use of inadmissible pretrial statements to impeach direct testimony, did not intimate that Agnello had lost its vitality. The dissenters further indicated that a meaningful distinction remained between a defendant's sweeping and untrue claims beyond a mere denial of involvement in the crimes charged and a prosecutorial attempt to smuggle in tainted evidence on cross-examination to elicit an expected denial. It is this distinction that underlies the Court's prior limitation of the impeachment exception to testimony first volunteered on direct examination.

The dissent also disagreed with the outcome of the majority's balancing process. While recognizing that the truth-finding function of a trial is important, the dissent placed greater emphasis upon the normative objective that trials be free from the implicit sanctioning of police impropriety. Additionally, the dissent challenged the majority position that official misconduct would be deterred adequately by merely denying the admissibility of tainted evidence in the prosecution's case in chief. Finally, the dissent attacked the analytical method employed by the Court as obscuring the difference between judicial decision-making and legislative policy-making. It claimed that the majority was depreciating constitutional rights by subjecting those rights to an ad hoc analysis rather than applying a firm exclusionary rule.

**Criticism and Impact**

Havens represents the highwater mark in the trend of Burger Court decisions that undermine the exclusionary rule as a device to safeguard constitu-

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95. Id. at 630 (Brennan, J., dissenting). See text accompanying note 28 supra.
96. 446 U.S. at 630 (Brennan, J., dissenting).
97. See notes 36 & 37 and accompanying text supra.
98. See note 39 supra.
99. 446 U.S. at 633 (Brennan, J., dissenting). Justice Brennan hoped that "the Court would not . . . acquiesce in torture or other police conduct that 'shocks the conscience' even if it demonstrably advanced the factfinding process." Id. (source of quotation omitted from original).
100. The majority relied on the rationale underlying Harris and Hass to support its application of the impeachment exception to Havens. The Harris Court asserted: "The benefits of this process should not be lost . . . because of the speculative possibility that impermissible police conduct will be encouraged. . . . [S]ufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." 401 U.S. at 225. Accord, Oregon v. Hass, 420 U.S. 714, 721 (1974).
101. 446 U.S. at 634 (Brennan, J., dissenting).
102. Id.
Due to the Court's apparent dissatisfaction with the rule, recent decisions indicate movement away from the normative and factual justifications which gave rise to the rule. Significant dissenting opinions have vigorously lampooned this departure, emphasizing instead the continuing importance of judicial integrity and deterrence of police misconduct. The Havens majority, however, narrowed the scope of the exclusionary rule by extending the impeachment exception to cover matters first elicited on cross-examination.

Although the exclusionary rule safeguards individual freedom from convictions based on unlawfully gathered evidence, this protection must be balanced against the public's interest in discovering the truth in criminal trials. The Court's recent decisions have expanded the impeachment exception to advance the truth-seeking objective. Each expansion, however,

103. The Burger Court's dissatisfaction with the exclusionary rule is made apparent by its decisions that expand the impeachment exception and thereby authorize the additional use of unconstitutionally seized evidence. See Oregon v. Hass, 420 U.S. 714 (1974); Harris v. New York, 401 U.S. 222 (1971). The Court's present strategy, to gradually chip away at citizens' rights to be free from unlawful searches and seizures, is elucidated in the dissenting opinions in recent Supreme Court decisions. For reference to these opinions, see note 105 infra.

104. The movement away from the policies necessitating the exclusionary rule in the Court's recent decisions has been a topic of interest to many commentators. See, e.g., Dershowitz & Ely, supra note 47; Comment, The Impeachment Exception to the Constitutional Rules, 73 COLUM. L. REV. 1476 (1973); The Supreme Court, 1970 Term, supra note 47; Comment, The Impeachment Exception: Decline of the Exclusionary Rule?, 5 IND. L. REV. 865 (1975).


106. 446 U.S. at 627-28.


108. The exclusionary rule often prohibits the use of evidence probative of a defendant's guilt. The Government, in its brief before the Supreme Court, stated: "The determination of truth at trial is the fundamental objective of our legal system, but . . . [exceptions must sometimes be made from [that goal] to give effect to other values deemed even more important." Brief for Petitioner at 28.

109. The Court in Harris extended the impeachment exception mandated by Walder v. United States, 367 U.S. 62 (1954), to include fifth amendment violations. See notes 41-46 and accompanying text supra. The Harris Court reasoned:

Every criminal defendant is privileged to testify in his own defense or refuse to do so. But that privilege cannot be construed to include the right to commit perjury. Having voluntarily taken the stand, this petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.

401 U.S. at 225 (citations omitted).

The Hass Court, finding no valid distinction between its decision and Harris, stated: "[W]e are, after all, always engaged in a search for truth in a criminal case so long as the search is
has resulted in the threat of more frequent use of illegally obtained evidence to secure convictions." The Havens decision overemphasized the defendant's obligation to testify truthfully, while it disregarded the officer's responsibility to act within the confines of the law. Prior to Havens, when the impeachment exception was more narrowly restricted, a police officer had greater incentive to gather evidence through legal searches due to the likelihood that evidence probative of guilt would be forever lost if illegally procured. The impact of Havens, however, may be to encourage a conscious disregard of constitutional restrictions by police due to the increased likelihood that illegally seized evidence may be introduced at any trial in which the accused testifies. This likelihood arises because prosecutors are no longer required to wait for the defendant to provide contradictory statements during direct and cross-examinations before tainted evidence is admissible.

Furthermore, the Havens decision nullifies the distinction traditionally drawn between impeachment of direct examination and of cross-examination testimony. Prior to Havens, the scope of testimony subject to impeachment by illegally seized evidence was narrowly confined to statements offered during direct examination. There are two logical bases for such a

surrounded with the safeguards provided by our Constitution." 420 U.S. at 722. Consequently, the Court indicated that the protections guaranteed by Miranda are not to be perverted into a license to testify falsely. As a result, the Court declared that "[i]nadmissibility would pervert the constitutional right into a right to falsify free from embarrassment of impeachment evidence from the defendant's own mouth." Id. at 723.

110. Recent commentators have projected this result from previous decisions expanding the impeachment exception. See Dershowitz & Ely, supra note 47, at 1219. See also 3 LAFAVE, supra note 2 at 703-705.

111. See notes 84 & 85 and accompanying text supra.

112. As the Court observed in Mapp: "The criminal goes free, if he must, but it is the law that set him free. Nothing 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. See generally Allen, supra note 107; LaFave, Improving Police Performance Through the Exclusionary Rule, 30 Mo. L. Rev. 391 (1965); Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J. Crim. L.C. & P.S. 255 (1961).

113. Prior Supreme Court decisions confined the impeachment exception to direct examination testimony. See notes 114-116 and accompanying text infra.

114. In Walder, the Court mandated use of illegally obtained physical evidence to impeach the defendant's direct testimony. See note 35 and accompanying text supra. Both Harris and Hass authorized impeachment of a defendant's direct testimony by a prior inconsistent statement obtained in violation of Miranda. See notes 41-46 and accompanying text supra.

Due to the extension of the impeachment exception in Havens, illegally obtained evidence will be admitted with greater frequency in all criminal trials. Police and prosecutors can plan to disregard constitutional rights when obtaining evidence due to the high probability that such evidence will be heard by the jury if the defendant testifies. The possibility of this type of police conduct has been recognized and counsels the limitation of the scope of the impeachment exception to direct examination testimony. See generally 3 LAFAVE, supra note 2, at 705; Note, supra note 15, at 717.

In addition, as the Fifth Circuit in Havens clearly pointed out, extending the impeachment exception to include matters first volunteered on cross-examination would subject the defendant to impeachment no matter how he responded to the question posed. The court declared:
limitation. First, the waiver doctrine, that a defendant waives his or her constitutional right not to have illegally seized evidence admitted at trial to impeach his or her credibility when he or she affirmatively resorts to perjurious testimony, is not clearly applicable when a defendant lies on cross-examination in response to leading, and often delicate, questions propounded by the prosecution. That is, in the environment of cross-examination, the elements of the waiver doctrine—that the defendant intelligently and willingly relinquish a known right—are in most cases not satisfied. Second, the deterrent objectives underpinning the rule require limiting the impeachment exception to direct testimony.

The Court should have retained the rule limiting the impeachment exception to direct testimony not only because it deters illegal police behavior but also because under this rule the courts do not have to make the additional judgment of what constitutes “reasonable suggestion” between direct and cross-examination. This additional judgment will only make the administration of the exclusionary rule more difficult and the results more inconsistent. The Havens Court misconceived the meaningful distinction between impeachment of testimony offered on direct and that offered on cross-examination and impliedly overruled Agnello v. United States.

According to the view of the trial judge and prosecutor, defendant could be asked on cross-examination, a question, which answered affirmatively would admit the incriminating tendencies of the illegal evidence, and, answered negatively would allow the subsequent introduction of the illegal evidence for purposes of impeachment. Such a view extends beyond the reach of Walder, Harris, and Hass. 592 F.2d at 852.

This doctrine was espoused in Walder to admit the illegally seized evidence for impeachment purposes. See Walder v. United States, 347 U.S. 62 (1954).

Answers offered by the defendant would seem to be less intelligently, knowingly, and willingly made when the person posing the questions is the prosecutor rather than defense counsel, with whom the testimony was probably rehearsed. See generally 3 LaFave, supra note 2, at 704; Note, supra note 15, at 719.

If the impeachment exception also operated on cross-examination, prosecutors would not be compelled to wait for the defendant to offer perjurious testimony on direct examination before tainted evidence would be admissible. In any criminal case in which the defendant took the stand, the prosecution could elicit contradictory testimony and thus lay the groundwork for impeachment. Illegally obtained evidence would be admitted with greater frequency in all criminal trials and any deterrent effect that the exclusionary rule might have would be greatly diminished. See Comment, Impeachment by Unconstitutionally Obtained Evidence—The Erosion of the Exclusionary Rule, 34 Ohio St. L.J. 706 (1973). See also 3 LaFave, supra note 2, at 794-95. However, in Harris, 401 U.S. at 225, and Hass, 420 U.S. at 723, the Court indicated that the benefits of the impeachment process should not be lost due to the “speculative possibility” that impermissible police conduct will be encouraged. Both Harris and Hass have been criticized severely for this argument. See generally Dershowitz & Ely, supra note 47; The Supreme Court, 1970 Term, supra note 47.

The Court in Havens, while distinguishing its holding from Agnello, implicitly overruled the Agnello decision. Despite the factual similarities between Havens and Agnello, the Court focused on minor distinctions between the two to justify a decision contrary
A third deficiency in the *Havens* decision is that it may chill the willingness of defendants to testify. After *Havens*, a defendant will be extremely hesitant to take the stand if illegally procured evidence is available to contradict any of the inferences that might flow from his or her declarations. Further, the accused may be inhibited by fear that the fact-finder will ignore limiting instructions and consider otherwise inadmissible evidence as probative of guilt. These concerns are not idle speculations, because the Court's expansion of the scope of cross-examination to include matters reasonably suggested by the defendant's direct testimony authorizes the prosecutor to introduce improperly procured evidence under the guise of "proper" cross-examination.

Another disturbing aspect of the *Havens* decision is that a future court may extend the *Havens* rationale to permit impeachment of statements elicited on cross-examination by pretrial statements obtained in violation of *Miranda.* Due to the questionable trustworthiness of statements procured to the one reached in *Agnello.* In both decisions, however, the Court addressed the issue of whether it was permissible to admit unconstitutionally obtained evidence to rebut a defendant's response to a matter first raised during cross-examination.

The reasoning employed by the Court in *Havens* appears similar to the approach the Burger Court used to reverse the Warren Court determination that the first amendment protected speech in shopping centers. In *Marsh v. Alabama*, 326 U.S. 501, 502-03 (1946), the Court held that the proprietor of a company town was restricted by the first amendment's freedom of speech provision because operation of a municipality was a "public function." Relying on *Marsh*, the Warren Court, in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 318 (1968), held that because a shopping center was functionally equivalent to a public business district, speech in shopping centers was also protected by the first amendment. Four years later, however, the Burger Court upheld a restriction upon the distribution of leaflets at a shopping center in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). The Court in *Lloyd* did not overrule *Logan Valley* but distinguished it on the ground that the picketing in *Logan Valley* related to store practices while the picketing in *Lloyd* did not. *Id.* at 560-61. In *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Court explained that the rationale in *Lloyd* was irreconcilable with that of *Logan Valley* and, therefore, precedent required that *Logan Valley* be overruled.

By distinguishing *Lloyd* from *Logan Valley* and later recognizing that the cases were conceptually indistinguishable, the Court was able to reverse *Logan Valley* while maintaining that it was nevertheless following precedent. A similar fate may befall *Agnello.* The *Havens* majority attempted to distinguish *Agnello*, and did not, therefore, explicitly overrule it. See text accompanying note 70 *supra.* Later decisions, however, may recognize that the cases are factually almost identical, and expressly overrule the *Agnello* decision.

120. Although evidence of prior inconsistent statements may be permitted into evidence merely to attack a defendant's credibility, admission of such evidence may enhance the affirming elements of the prosecution's case in chief. *Cf.* *Bruton v. United States*, 391 U.S. 123 (1968) (limiting instructions to jury provide inadequate substitute for constitutional rights because jurors have difficulty disregarding evidence to establish guilt). In addition, several commentators have expressed doubt as to the effectiveness of limiting instructions to the jury about proper use of such evidence. See generally *H. Kalven & H. Zeisel, The American Jury* 171-90 (1966); *McCormick, supra* note 2, § 59, at 136; Note, *The Limiting Instruction—Its Effectiveness and Effect*, 51 MINN. L. REV. 264 (1967).

121. 446 U.S. at 627-28.

122. See note 43 *supra.*
contrary to fifth amendment proscriptions, the breadth of Havens should be limited to impeachment by unconstitutionally obtained physical evidence.

Finally, the Havens decision casts doubt on the probity of the judicial system by upholding convictions procured through government lawbreaking. The potential for joint police-court action undermines one of the fundamental policies giving rise to the exclusionary rule—the imperative of judicial integrity. The Court’s expansion of the impeachment exception condones illegal police behavior in gathering evidence by permitting the use of this evidence in criminal trials. Due to this expansion, doubt is cast upon the integrity of the judicial system.

### A Suggested Approach

The normative and factual justifications for the exclusionary rule enunciated more than 60 years ago remain vital justifications for the rule today. Recent Supreme Court decisions eroding the exclusionary rule provide no alternative to ensure the constitutional guarantees left unprotected by these decisions. Replacement of the exclusionary rule with nonconstitutional remedies has been attempted. These substitutions, however, have proven inadequate. Chief Justice Burger, an outspoken opponent of the rule, has suggested that the rule be retained until an effective replacement can be developed.

123. For an in-depth discussion of the policy rationales underlying the fifth amendment exclusionary rule, see Miranda v. Arizona, 384 U.S. 436 (1966).

124. See Olmstead v. United States, 277 U.S. 438, 485 (1927) (Brandeis, J., dissenting); note 21 supra.

125. See note 4 and accompanying text supra.

126. See notes 19-26 and accompanying text supra.


The Supreme Court, rather than emasculate the rule by further indirect attacks, should re-emphasize the normative and factual justifications for the rule. If constitutional rights are to be more than naked privileges, measurable consequences must be attached to their violation. Further, it is imperative that the Court employ a pragmatic procedure to enforce consistently constitutional mandates. Until an effective alternative to the rule is developed, the doctrine should not be eroded.

CONCLUSION

With United States v. Havens, control of the exclusionary rule passes into the prosecutor's hands in cases in which the accused testifies. The Havens Court departed from precedent by extending the impeachment exception to include testimony first elicited during cross-examination. As a result, a defendant who takes the stand will be subject to impeachment by a multitude of inferences flowing from his or her direct testimony. Additionally, the decision weakens police incentive to gather evidence in accordance with constitutional dictates. Moreover, a defendant will be compelled to refrain from testifying on his or her own behalf to avoid being convicted on the basis of unlawfully seized evidence.

The impact of Havens will be a reduction in the effectiveness of the exclusionary rule, as well as a diminution of the constitutional protections guaranteed the criminally accused. It is urged that rather than erode the rule by further indirect attacks, the Supreme Court re-emphasize the policy rationales that necessitated the rule. Only then will the Court arrive at the proper balance of competing societal interests which were safeguarded by the exclusionary rule.

Davi Lynn Hirsch

130. Professor Oaks, supra note 5, at 756, recommended that:

The exclusionary rule should not be abolished until there is something to take its place and perform its two essential functions. If constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must be attached to their violation... It is [i]mperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights... The exclusionary rule... provides an occasion for judicial review, and gives credibility to the constitutional guarantees.

131. See Oaks, supra note 5, at 756.