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Criminal Law - Statement Inadmissable Against a Defendant in the Prosecution's Case in Chief Because of Lack of the Procedural Safeguards Required by *Miranda v. Arizona*, May, if Its Trustworthiness Satisfies Legal Standards, Be Used for Impeachment Purposes to Attack the Credibility of the Defendant's Trial Testimony

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CRIMINAL LAW—Statement Inadmissible Against a Defendant in the Prosecution's Case in Chief Because of Lack of the Procedural Safeguards Required by Miranda v. Arizona, May, if Its Trustworthiness Satisfies Legal Standards, Be Used for Impeachment Purposes to Attack the Credibility of the Defendant's Trial Testimony.

Viven Harris was charged, in a two count indictment, with selling heroin to a New York City undercover police officer on January 4 and 6, 1966. Following his arrest on January 7 and in the course of an interrogation in the office of the Assistant District Attorney, without being advised of his right to appointed counsel as prescribed by *Escobedo v. Illinois*[1] and *Miranda v. Arizona*,[2] Harris made several incriminating statements.

At his trial the defendant, Harris, took the stand and on direct examination denied a sale of narcotics to the undercover agent on January 4. Harris did admit making a sale of the contents of a glassine bag to the officer on January 6; however, Harris claimed that he was attempting to defraud the purchaser since baking soda, not heroin, was contained in the bag.

Over the defense counsel's objection the court permitted the prosecution to question the defendant, on cross examination, as to whether on January 7, following his arrest, he had made certain statements to the District Attorney, statements which partially contradicted his previous testimony on direct questioning.[3] In the course of this cross questioning the prosecution read to Harris, seriatim, his statement of January 7. The trial judge carefully instructed the jury that the statement attributed to Harris by the prosecution could be considered only in passing on Harris' *credibility* as a witness. (It was conceded by the prosecution that the *Miranda* decision made Viven Harris' statement of January 7,

1. 378 U.S. 478 (1964).
2. 384 U.S. 436 (1966).
3. At the pre-trial interrogation, Harris stated that: 1) On January 4, 1966 he acted as the undercover police officer's agent in obtaining narcotics, and 2) On January 6, 1966 he obtained narcotics from an unknown person outside a bar and then sold the drugs to the undercover agent in a bar. These pre-trial statements were contradicted by Harris' trial testimony.

inadmissible in the case in chief.) The jury disagreed as to the count relating to January 4, 1966, but found Harris guilty of the second count, and the court sentenced him to 6-8 years in prison. The New York Supreme Court, Appellate Division,[4] and the New York Court of Appeals subsequently affirmed the conviction.[5]

On Harris' petition, the United States Supreme Court granted certiorari[6] to consider whether a confession acquired without the benefit of the "*Miranda* warnings" may be used for the purpose of impeaching the defendant-witness' credibility. In *Harris v. New York*,[7] the Supreme Court, in a five to four decision, answered this question affirmatively.[8]

This comment, in addition to recounting the principal points developed within the majority and dissenting opinions in *Harris*, will briefly sketch the dominant stages in the development, prior to *Harris*, of the exclusionary rule and the rule's impeachment exception. The comment then will take up a dicussion of what effects are likely to follow from the *Harris* decision.

The Majority's Opinion

Mr. Chief Justice Burger, writing for the majority in *Harris*, develops within his opinion principally three points, to wit: 1) that *Miranda v. Arizona* is not controlling of the issue in *Harris*; 2) that *Walder v. United States*,[9] although factually distinguishable, nevertheless, announces the applicable principle of law for the *Harris* case; and 3) that the privilege afforded an accused person, to testify in his own defense, does not include the privilege to commit perjury.

The *Harris* majority interpreted as dicta the language contained in the *Miranda* opinion, suggesting that a confession acquired without the benefit of the "*Miranda* warnings" may not be used for impeachment purposes at trial;[10] accordingly, it was determined that the *Miranda*

4. People v. Harris, 31 App. Div. 2d 828, 298 N.Y.S.2d 245 (1969). While a majority of the court believed that impeachment should be permitted only on collateral matters, they nevertheless found the error to have been harmless. Two judges dissented, rejecting the harmless error conclusion. Two other judges, in a separate opinion, believed that such impeachment should be permitted as to both collateral and direct matters.

5. People v. Harris, 25 N.Y.2d 175, 250 N.E.2d 349, 303 N.Y.S.2d 71 (1969).

6. *Cert. granted*, 39 U.S. 937 (1970) (No. 1022).

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

8. Chief Justice Burger, who announced the majority opinion, was joined by Justices White, Harlan, Blackmun and Stewart. Justice Black dissented. Justice Brennan filed a dissenting opinion in which Justices Marshall and Douglas joined.

9. 347 U.S. 62 (1954).

10. *Miranda* stated that "statements merely intended to be exculpatory by the de-

holding did not proscribe the use of an otherwise inadmissible confession for the sole purpose of discrediting the defendant's integrity as a witness, provided "that the trustworthiness of the evidence satisfies legal standards."[11]

Upon refusing to accept *Miranda* as dispositive of the issue in *Harris*, the Court instead chose to adhere to a precedent established in *Walder v. United States*.[12] There the prosecution was permitted to use illegally seized physical evidence, which was *acquired* in a *previous* prosecution, to impeach the credibility of the defendant as to matters in his testimony, which were *collateral* to the case against him.[13]

However, unlike *Walder*, the essence of the testimony in *Harris*, which was the target of the impeachment weapon, pertained to matters which had a direct bearing upon elements of the crime with which the defendant was charged.[14] Yet this "collateral-direct" dissimilarity did not impress the *Harris* majority and was summarily dealt with:

> It is true that *Walder* was impeached as to *collateral matters* included in his direct examination, whereas petitioner here was impeached as to testimony bearing more directly upon the crimes charged. We are not persuaded that there is a difference in principle that warrants a result different from that reached by the court in *Walder*.[15]

Similar cursory consideration was given to the argument that any impeachment exception to the *Miranda* rule of exclusion would breed a number of illicit police interrogations designed solely to extract a possible confession for purposes of impeachment. In the words of the Chief Justice, "the benefits of the impeachment process should not be lost because of the speculative possibility that impermissible police conduct will be encouraged thereby."[16] The *Harris* majority felt that sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case-in-chief.

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fendant are often used to *impeach* his testimony at trial. . . . These statements are incriminating in any meaningful sense of the word and may not be used without full warnings and effective waiver required for any other statement." 384 U.S. at 477.

11. 401 U.S. at 224.

12. 347 U.S. 62 (1954).

13. WIGMORE ON EVIDENCE criticizes *Walder* both on constitutional grounds and for violating "the evidential rule prohibiting contradiction on a collateral matter." 1 WIGMORE ON EVIDENCE, Section 15, at 65 (3d ed. Supp. 1962). Apparently the question of collateralness was not considered by the Court. This objection, however, would not be applicable to *Harris* where the contradiction related to testimony on matters which had a direct bearing on an element of the crime.

14. Furthermore, in *Harris*, unlike in *Walder*, the impeachment evidence, viz. a confession, was acquired during the investigation of the very case then presently being tried. The Court apparently deemed this distinction insignificant since it was not dealt with by the *Harris* majority.

15. 401 U.S. at 225. (Emphasis added)

16. *Id.*

Chief Justice Burger's final remarks are revealing of the *Harris* majority's preeminent concern:

> [Although] [e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so . . . . [t]hat privilege cannot be construed to include the right to commit perjury . . . [Hence] [t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.[17]

THE DISSENT

Mr. Justice Brennan wrote the only dissenting opinion, predicating much of his dissent upon his reading of *Walder*, which he interprets as having a considerably narrower application than the one given it by the majority. Full weight was afforded by Mr. Justice Brennan to the fact that in *Walder* the defendant was impeached as to sweeping claims in his testimony, i.e. testimonial matters *collateral to the case* against him; whereas, in *Harris*, the defendant was impeached as to matters in his testimony which *directly* bore upon the *elements of the crime* with which he was charged. Furthermore, as pointed out by Justice Brennan, the evidence used for impeachment in *Walder* was related to an earlier 1950 prosecution and had no direct bearing on the elements of the case being tried in 1952. Justice Brennan believes these to be the crucial factors distinguishing *Harris* from *Walder*, distinctions of such substantive import as to compel a contrary holding in *Harris*.[18]

According to Mr. Justice Brennan, the fifth amendment's privilege against self-incrimination guarantees to the defendant:

> the right to remain silent unless he chooses to speak in the *unfettered* exercise of his own will. The choice of whether to testify in one's own defense must therefore be unfettered since that choice is an exercise of the constitutional privilege.[19]

It is Mr. Justice Brennan's contention that in light of the majority's holding, a future criminal defendant, when deciding whether or not to take the stand, will weigh heavily the risk of confrontation with his prior illegally secured confession. Burdened by the knowledge of the high risk that his testimony will be impeached by his prior illegally secured statement, the defendant's choice of whether or not to testify becomes appreciably "fettered". As a result, the fifth amendment's

17. 401 U.S. at 225, 226.
18. *Id.* at 227.
19. 401 U.S. at 230.

privilege is "cut down" by making its assertion costly; the corresponding effect being that the defendant is denied the "fullest" opportunity to meet the accusation against him.[20]

Justice Brennan not only regards the majority's holding as being constitutionally infirm, but further believes that the *Harris* decision will imperil significantly the viability of two objectives of the *Miranda* decision, viz. 1) the deterrence of proscribed police activity; and, even more importantly, 2) the safeguarding of the integrity of our adversary system:

> It is abiding truth that 'nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard for the charter of its existence'. . . . The Court today tells the police that they may freely interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of *Miranda* can't be used in the state's direct case, it may be introduced if the defendant has the temerity to testify in his own defense.[21]

THE GENESIS OF THE EXCLUSIONARY RULE

In any discussion of the exclusionary rule, i.e. the rule which prohibits the use of illegally obtained evidence in criminal trials, as it existed before its *Miranda* extension, it is necessary to distinguish between its two different applications: first, the rule as applied to involuntary confessions; and, second, the rule as applied to physical evidence seized in an illegal search and seizure.

Illegally Obtained Confessions

The rule, excluding from trials coerced or involuntary confessions, was initially promulgated in an English case, *The King v. Warickshall*[22] and was subsequently adopted in this country by the United States Supreme Court in *Hopt v. Utah*.[23] Generally referred to as the "confession rule", it was devised as an evidentiary safeguard for the integrity of the fact finding process, because of the belief commonly held that an induced or coerced confession was untrustworthy and hence unreliable as evidence.[24] Consequently, a confession was admissible in

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20. *Id.*
21. 401 U.S. at 232.
22. 1 Leach C.L. 263, 168 Eng. Rep. 234 (K.B. 1783).
23. 110 U.S. 574 (1884).
24. *See, Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 954-959 (1966).

evidence if it was made voluntarily i.e. free from influences which made it untrustworthy.

Subsequent to the adoption of the rule in this country, the objective which the United States Supreme Court sought to realize by imposing the confession rule's exclusionary sanction underwent a metamorphosis to the point where suppression of unreliable confessions became a secondary concern subordinate to the aim of barring any police procedure which "offends the community's sense of fair play and decency."[25]

Legal analysts began noting the merging similarity between the "confession rule" and the exclusionary rule which pertained to the physical products of an illegal search or seizure:

> The emphasis in cases such as *Rogers*[26] on presence in the record of claims of coercion has led many courts and commentators to interpret the exclusionary rule of the Supreme Court confession cases as analogous to the rule excluding the products of an unlawful search and seizure . . . . The exclusionary rule for confessions, like that in search and seizure cases, is thought to provide an effective remedy for victims of improper conduct and to deter improper interrogations by removing any incentive to engage in them.[27]

Then, in *Malloy v. Hogan*,[28] a state "due process" case, the Supreme Court in dicta rephrased the voluntariness test into an inquiry of whether the defendant was "compelled" to give a confession. According to the Court's opinion in *Malloy*, whenever the question arose whether a confession is competent as evidence because involuntary, the issue is controlled by the self-incrimination portion of the fifth amendment. This decision prompted one writer to describe *Malloy* as a "shotgun wedding of the privilege [against self-incrimination] to the confessions rule."[29]

Yet *Malloy*, as it turns out, was a prelude to the formal marriage ceremony which was performed by the Court in *Miranda*, which held that:

> [T]he prosecution may not use *statements*, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination . . . [viz. that the defendant was informed of his right to remain silent and to the presence of retained or appointed counsel and warned that

25. Rochin v. California, 342 U.S. 165, 173 (1952).
26. Rogers v. Richmond, 365 U.S. 534 (1961).
27. *Supra*, note 24 at 969.
28. 378 U.S. 1 (1964).
29. Herman, "The Supreme Court and Restrictions on Police Interrogation", 25 OHIO ST. L.J. 449, 465 (1964).

> anything he says may be used against him in a court of law] . . . . The defendant may waive effectuation of [his] rights, provided the waiver is made voluntarily, knowingly, and intelligently.[30]

Physical Evidence Obtained in an Illegal Search

The case of *Weeks v. United States*[31] is most frequently cited as the initial enunciation by the Supreme Court of the rule of exclusion relating to physical products of an unlawful search and seizure. The *Weeks* rule was *principally* aimed at deterring illegal and objectionable police activity while protecting the fourth amendment right of privacy.[32]

In 1920 the Supreme Court extended the *Weeks* holding and held that physical evidence which was *derivatively* obtained through clues furnished by the original products of the illegal search, must also be excluded from trial.[33]

It was not until 1961 in *Mapp v. Ohio*[34] that the Supreme Court interpreted the fourteenth amendment's due process clause as requiring the *Weeks* exclusionary rule to be employed in state criminal proceedings. Writing for the majority in *Mapp*, Mr. Justice Clark called the *Weeks* suppression doctrine a "constitutionally required . . . deterrent safeguard without insistence upon which the fourth amendment would have been reduced to a form of words."[35]

An Exception to the Rule

The exclusionary rule, as thus extended, has been subject to one exception, which was fashioned by the United States Supreme Court in *Walder v. United States*.[36] In *Walder*, the Court upheld a conviction where the products of an illegal search had been used to impeach the defendant's credibility as a witness. The defendant, Walder, was indicted in 1952 for the unlawful trafficking in narcotics. At trial Walder testified on *direct* examination that *he had never sold narcotics* to any-

30. 384 U.S. 444; "It may be conceded that in time of origin the confession-rule and the self-incrimination rule were widely separated . . . Nevertheless, the kinship of the two rules is too apparent for denial." C. MCCORMICK, HANDBOOK LAW OF EVIDENCE, Sec. 75, at 155 (1954).
31. 232 U.S. 383 (1914).
32. *See* 42 N.Y.U.L. REV. 772, 774-75 (1967); *See generally* 25 COL. L. REV. 11 (1925). In *Weeks* the court apparently deemed unnecessary the question of the evidence's reliability believing that real proof was not attended by the untrustworthiness associated with a coerced confession.
33. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).
34. 367 U.S. 643 (1961).
35. *Id.* at 648.
36. 347 U.S. 62 (1954).

one in his life *nor had he ever illegally possessed narcotics.* Over the defendant's objection the prosecution then questioned Walder about a heroin capsule unlawfully seized from his home, several years earlier. (Walder had been indicted for this possession, but his motion to suppress the heroin as seized in violation of the fourth amendment had been granted and the case was thus dismissed.) The prosecution then introduced the testimony of an officer who had participated in the unlawful search and seizure of the heroin involved in the earlier proceeding and the chemist who had analyzed it. The evidence obtained by the original unconstitutional search was introduced solely for the purpose of impeaching Walder's credibility and *not* for the purpose of rebuttal.

The *Walder* Court stated that where the defendant of his own accord, *goes beyond* a mere denial *of complicity in the crimes for which* he is charged and *makes sweeping claims,* then his credibility may be impeached by evidence inadmissible in the prosecution's case-in-chief.[37]

However, it should be noted that the physical evidence employed for impeachment purposes in *Walder* was related to an earlier prosecution and had no *direct* bearing on the elements of the *case* being tried in 1952; furthermore, Walder was impeached as to "sweeping claims in his testimony," i.e. testimonial matter collateral to the *case* before the court.

Notwithstanding, most lower courts subsequent to *Walder* allowed impeachment by illegally obtained evidence, even as to testimonial matters related to the case before the court, and tended to disallow impeachment *only* where the defendant's testimony related *directly* to matters within the narrow definition of "essential elements of the crime."[38] Such an application of *Walder* enlarged appreciably the scope of the impeachment exception while concurrently limiting the area shielded from the impeachment sword.

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37. *Id.* at 65. Since impeachment of the defendant's *direct* testimony was at issue in *Walder,* the *Walder* Court reasoned that *Agnello v. United States,* 269 U.S. 20 (1925), which held that the prosecution could not introduce evidence to rebut a defendant's *response on cross-examination,* was distinguishable. Thus, *Walder* recognizes a distinction between impeachment and rebuttal, i.e. impeachment is the act of discrediting a party's integrity as a witness; whereas, rebuttal is the act of introducing evidence to disprove facts testified to by the adverse party.

38. Elements of the crime consist only of the prescribed act or acts and intent or knowledge, and such matters as motive or presence at the scene of the crime do not constitute elements. See e.g. Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960); United States v. Curry, 358 F.2d 904 (2d Cir. 1966). It is ironical that Chief Justice Burger, while a judge on the D.C. Circuit urged that an illegally obtained pre-trial statement only be allowed to impeach the defendant's testimony relating to matters *collateral* to the "elements of the crime". *See* the opinion of Judge (now Chief Justice) Burger in Tate v. United States, *supra.*

Similarly, although *Walder* involved evidence acquired in a search relating to a separate prosecution, lower courts prior to *Harris* generally held that evidence obtained in an investigation of, and directly relating to, the offense presently being tried may also be used to impeach testimony as to collateral matters.[39]

The other notable extension of the *Walder* impeachment exception occurred in connection with pre-trial confessions. In *Tate v. United States*,[40] a statement made to police in a period of "unnecessary delay" between arrest and preliminary hearing, and thus inadmissible in the prosecution's case-in-chief[41] was permitted on authority of *Walder*, to be used to impeach the defendant's credibility as a witness, as to testimonial matters *collateral* to elements of the crime.

When in 1966 the Supreme Court in *Miranda* held that a confession taken by police in a custodial interrogation was inadmissible unless the accused was advised of his constitutional rights prior to interrogation, the question arose whether the *Walder* impeachment exception applied to such a confession.

Most of the state and lower federal courts which faced this issue concluded that the impeachment exception was not applicable to a confession obtained without the benefit of the *Miranda* warnings.[42] Yet this interpretation lacked unanimous appeal and several courts insisted that the *Walder* impeachment exception, applying to collateral testimony, was as applicable to confessions excluded from the main case by *Miranda* as it was to other types of "suppressed evidence."[43]

These contrary holdings perhaps motivated the Supreme Court to consider the question in *Harris*, where it determined that a confession, otherwise inadmissible on the authority of *Miranda*, could constitutionally be utilized to discredit the defendant's credibility even as to testimony *directly* related to elements of the crime (provided that the confession's trustworthiness satisfies legal standards).

Harris AND THE FIFTH AMENDMENT

In *Miranda* the Supreme Court asserted that compulsion was inher-

39. *See* 283 F.2d 377.
40. 283 F.2d 377.
41. *See* Rule 5(a), Fed. R. Crim. P., 18 U.S.C.A.
42. *See, e.g.*, Groshart v. United States, 392 F.2d 172 (9th Cir. 1968); and State v. Brewton, 247 Ore. 241, 422 P.2d 581 (1967).
43. *See, e.g.*, People v. Kulis, 18 N.Y.2d 318, 221 N.E.2d 541, 274 N.Y.S.2d 873 (1966); State v. Kimbrough, 109 N.J. Super. 57, 262 A.2d 232 (1970); Acuff v. United States, 410 F.2d 463 (6th Cir. 1969).

ent in custodial surroundings and determined that *no statement* obtained from the accused "*can truly be the product of his free choice*" unless he was first warned that he has the right to remain silent, that anything he says may be used against him, that he has the right to presence of counsel, and then elected to waive these rights.[44] That is to say, the *Miranda* Court deemed all statements made by an accused without having first been informed of his rights to have been "compelled".[45] Accordingly, *Miranda* held that a confession so obtained must be excluded from trial since the fifth amendment provides that no person "shall be compelled to be a witness against himself."

Accepting the validity of *Miranda's* reasoning, *arguendo,* it would logically follow that the use for impeachment purposes of a confession obtained without the benefit of the "*Miranda* warnings" should be as constitutionally infirm as when used in the proscution's case-in-chief, for in each situation the defendant is "compelled" (as the word is interpreted by *Miranda*) to be a witness against himself.

Notwithstanding, the Supreme Court's position in *Harris* appears to be that, regardless of whether the *Miranda* warnings were issued, if the confession is given "voluntarily," in the *traditional* sense of the term,[46] then use of such a confession for purposes of *impeachment* is *not* tantamount to *compelling* the accused to be a witness against himself; therefore, such use is not prohibited by the fifth amendment's mandate.[47]

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44. 384 U.S. at 458.

45. According to Justice Harlan in his *Miranda* dissent, "the aim in short is toward voluntariness in a utopian sense, or to view it from a different angle, voluntariness with a vengeance." 384 U.S. at 505.

46. A confession may be admitted for purposes of impeachment according to *Harris,* if it meets legal standards of trustworthiness. Since the conventional view is that only a "voluntary" confession is able to muster up to legal standards of trustworthiness, by implication the requirement of voluntariness is retained for admissibility under the impeachment exception. However, in this context, it is perfectly clear, after *Harris,* that the voluntariness question need not be answered by using the objective criteria as set forth in *Miranda. See* Alesi v. Craven, 440 F.2d 975 (9th Cir. 1971), a case decided subsequent to *Harris* where the court used the pre-*Miranda* "totality of the circumstances—voluntariness" test for determining the admissibility of a confession under the impeachment exception.

47. Title II of the Omnibus Crime Control and Safe Streets Act of 1968 amends existing legislation by adding 18 U.S.C. Sec. 3501, which purports to "repeal" *Miranda* in federal prosecutions. The Act states that a confession is admissible in the federal courts if voluntarily given, and that whether the defendant was advised of his right to remain silent or his right to counsel and whether he was without counsel when he confessed are merely to be taken into consideration as circumstances bearing on the issue of voluntariness. If viewed as a total "repeal" of *Miranda,* this statute is quite clearly unconstitutional, for rights derived from the Constitution cannot be repealed by legislation. However, in support of this legislation it has been noted that the *Miranda* Court indicated Congress might devise equally effective safeguards for protecting the privilege, and the argument is made that Title II does this by a less rigid formula than *Miranda,* permitting a confession to be used where a less than perfect warning was

As noted by one commentator, *Harris* thus creates an anomalous "double standard of admissibility" for confessions.[48] Before a confession may be used in the prosecution's case-in-chief, even after the *Harris* decision, it would still be necessary for the prosecution to demonstrate that the interrogation which produced the confession was held in compliance with the criteria set forth in *Miranda*, viz. that the defendant was informed of his rights prior to interrogation and that he elected to waive them.

But when determining the admissibility of a confession under the impeachment exception, apparently courts may revert back to using the pre-*Miranda* test which considers the "totality of the circumstances" surrounding the confession to determine whether it was made voluntarily.

Although not constitutionally required, a two-tier test for determining "voluntariness" under the fifth amendment may be viewed as a judicial compromise to the total exclusion of statements acquired without the *Miranda* warnings; a safeguard which prevents the defendant from affirmatively resorting to perjurious testimony in reliance on the government's disability to challenge his credibility.

Unlike the objective criteria for determining "voluntariness" which *Miranda* announced, the "totality of the circumstances-voluntariness" test will necessitate a laborious case-by-case scrutiny of the facts in order to determine whether or not the confession is admissible. As pointed out by one observer, this case-by-case determination of the reliability-voluntariness question in cases where the prosecution takes advantage of the impeachment exception "immerses the courts in the very task which *Miranda* was designed to obviate."[49]

However, according to Justice Harlan in his *Miranda* dissent such an approach to admissibility is highly commendatory:

> With over 25 years of precedent the Court has developed an elaborate, sophisticated, and sensitive approach to admissibility of confessions. It is "judicial" in its treatment of one case at a time . . . flexible in its ability to respond to the endless mutations of fact presented, and even more familiar to the lower courts.[50]

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given or a less than conclusive waiver was obtained. Since the *Harris* Court has retreated from *Miranda's* rigid test with respect to admissibility under the impeachment exception speculation arises regarding *Miranda's* future in light of the Omnibus Crime legislation.

48. 11 SANTA CLARA LAW R. 440, 445 (1971).

49. *See "The Impeachment Exception to the Exclusionary Rules"*, 34 U. CHI. L. REV. 939, 948 (1967).

50. 384 U.S. at 508; *But see* Kamisar, *"A Dissent from the Miranda Dissents:*

As to Mr. Justice Brennan's contention in *Harris*, that use by the prosecution of a tainted statement to impeach the accused who has the "temerity" to take the stand "cuts down on the constitutional privilege [to testify in one's own defense] by making its assertion costly,"[51] the Chief Justice counters:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege *cannot* be construed to include the right to commit perjury.[52]

This admonition by the Chief Justice was quoted with favor by the Court of Appeals for the Fifth Circuit in *United States v. Ramirez*.[53] There the defendant, Ramirez, had taken the stand and on direct examination told that he was coerced into selling heroin by strangers from Mexico who kept him and his family under constant threat of harm.

On the authority of *Harris*, the court of appeals upheld the prosecution's right on cross-examination to impeach the credibility of the defendant's story by questioning the defendant about remaining silent during his arrest, i.e. if actually under duress and fearful for his family's safety, why did he, Ramirez, not inform the police of such a dangerous situation upon being apprehended?

The propriety of such an extension of *Harris* is, indeed, questionable since the viability of the constitutional privilege to remain silent after arrest is unlikely if a penalty is to be imposed on those individuals who choose to exercise the privilege. Nevertheless, the Fifth Circuit's application of *Harris* in the *Ramirez* case apparently did not "shock" the Supreme Court since certiorari was denied.[54]

How *Harris* Affects the Police

Mr. Justice Brennan, in dissent, further criticised the *Harris* decision for "undoing much of the progress made in conforming police methods to the constitution."[55] Justice Brennan was fearful that an impeachment exception to the *Miranda* rule of exclusion would seriously undermine the objective of deterring police practices in disregard of the constitution. He reasoned that police would first illegally question the accused in the hopes of obtaining impeachment evidence. Only

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Some Comments on the 'New' Fifth Amendment and the Old 'Voluntariness' Test", 65 Mich. L. Rev. 59 (1967).

51. 401 U.S. at 230.
52. *Id.* at 225.
53. 441 F.2d 950 (5th Cir. 1971).
54. 40 U.S. Law Week 3166 (1971).
55. 401 U.S. at 232.

after illiciting such a confession would they then administer the *Miranda* warnings, in the hopes of gaining a second confession which may be admissible in the prosecution's case-in-chief. Such chicanery was predicted not only by Justice Brennan in *Harris*, but prior to the *Harris* decision by the Ninth Circuit Court of Appeals.[56] According to Judge Ely of the Ninth Circuit, "if authorized to do so, [police] could not fairly be criticized for conducting unconstitutional interrogations designed to elicit possible impeachment evidence."[57]

The *Harris* majority viewed the matter differently, however, and was of the opinion that the "benefits of the [impeachment] process should not be lost . . . because of the speculative possibility that impermissible police conduct will be encouraged thereby."[58]

Implicit in such language is an abjuration by the Court of what Justice White had once referred to as "a deep-seated distrust of law enforcement officers, everywhere."[59] Thus, *Harris* may forecast a more "amiable" relationship for the future between the Court and the police.

THE JURY'S USE OF IMPEACHMENT EVIDENCE

After the *Harris* decision, if the defendant chooses to take the stand and testify in his own defense, the prosecution may then read to the jury those portions of an illegally elicited confession, made to police prior to the trial, which contradict testimony[60] of the defendant's (provided, of course, that the confession was made voluntarily). The defendant is entitled to an instruction by the court informing the jury that they must consider the confession only for the purpose of determining the defendant-witness' credibility and not for the purpose of deciding either the issue of the defendant's guilt or the truth of a fact as to which the defendant has testified.

In remarking on this facet of the *Harris* decision, the *Wall Street Journal* noted:

> Such distinctions may be meaningful to lawyers and judges, but it's likely to mean little to juries, no matter how well instructed by the courts.[61]

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56. *See* Groshart v. United States, 392 F.2d 172, 180 (9th Cir. 1960).
57. *Id.*
58. 401 U.S. at 225.
59. Escobedo v. Illinois, 378 U.S. at 498 (1964) (White dissenting).
60. *See* People v. Johnson, 27 N.Y.2d 119, 261 N.E.2d 644, 313 N.Y.S.2d 728 (1970), where the court held it proper for the prosecution to refer to matters in the prior statement to which the defendant had not testified during direct examination. The court stated that if the defendant's testimony developed his "version" of the events dealt with in the prior statement, then the prosecution was free to use such statement to impeach him.
61. The Wall Street Journal, Mar. 2, 1971.

The practical result may very well be that evidence, though theoretically inadmissible on the issue of the defendant's guilt or the truth of a particular fact, sneaks in through the back door which is held ajar by the impeachment exception and is employed by juries for these very proscribed purposes.[62]

Harris' IMPACT ON *Walder*

It would be possible to confine the *Harris* holding to its own narrow factual situation, i.e., to where a confession is obtained without advising the accused of his right to appointed counsel. However, such a limited application of *Harris* is not warranted by any language in Chief Justice Burger's opinion, and it therefore seems improbable that such a restrictive interpretation will follow. It is more likely that the courts will expend their energies answering the question, whether the *Harris* holding, while in the process of revitalizing the *Walder* decision has in fact enlarged the scope of that decision.

It should be recalled that Walder was impeached as to "collateral matters" in his direct testimony by impeachment evidence acquired in a search relating to an earlier separate prosecution; whereas, in *Harris* the impeachment evidence, viz. a confession, was obtained during the investigation of the very case being tried, and the confession was used to impeach Harris as to testimony which directly related to an essential element of the crime. However, these distinctions did not persuade the *Harris* majority that a different principle was involved and accordingly, *Walder* was cited as controlling.[63] If, as the *Harris* Court implies, the collateral-direct distinction creates no difference in principle, one may surmise that *Walder* and *Harris* taken together are now authority for the proposition that real proof obtained in the investigation of the very case being tried, either immediately in an illegal search and seizure, or derivatively from the clues furnished by the original products of the illegal search, may be utilized to impeach testimony on matters directly related to elements of the crime with which the defendant is charged. Yet, when used to impeach the defendant's testimony, physical evidence, owing to its tangibility, is more likely to leave a prejudicial impression upon the minds of jurors than a prior confession and it is highly improbable that a curative instruction can expunge the prejudicial effect or limit the jury's consideration of such

62. *See* C. MCCORMICK *supra,* note 30, Sec. 39 at 77; *See generally* 133 A.L.R. 1454, 1466 (1941).
63. 401 U.S. at 224.

evidence to the issue of credibility.[64] It seems that such an extension of the impeachment exception as it pertains to physical evidence may so undermine the fourth amendment's suppression doctrine as to nearly render moot Chief Justice Burger's suggestion that it be overturned.[65] The practical effect, of course, is that defendants will shy away from the witness stand as a precaution against being impeached.[66]

CONCLUSION

As expressed by one analyst:

> In balancing the desirability of insuring that perjury does not go unimpeached against maintaining absolute deterrence and governmental integrity, no clear cut conclusion appears.[67]

On one side of the scale is the interest society has in ascertaining the truth of the charges against the defendant. On the other side are the constitutional rights and privileges which are guaranteed to the criminally accused and the "social need that law shall not be flouted by the insolence of officers."[68]

The Court in *Harris* perhaps believed that a striking of the balance between the interests of society and the rights of the accused required a holding that a confession which meets legal standards of trustworthiness be admissible for purposes of impeachment, and that a contrary position would, to paraphrase Justice Cardozo, "give protection to the rights of an individual while causing a disproportionate loss of protection for society."[69]

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64. See text accompanying note 65. Physical evidence would have little difficulty meeting *Harris* standards for admissibility under the impeachment exception, i.e. does the evidence meet legal standards of trustworthiness? *See* n.32.

65. *See* Bivens v. Six Unknown of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). (Burger dissenting). In the words of the Chief Justice, "Instead of continuing to enforce the Suppression Doctrine, inflexibly, rigidly, and mechanically, we should view it as one of the great experimental steps in the Common Law and acknowledge its shortcomings. But in the same spirit we should be prepared to discontinue what the experience of over half a century has shown neither deters errant officers nor affords a remedy to the totally innocent victims of official misconduct." *See also* Burger, *Who Will Watch the Watchman?* 14 A.M.U. L. REV. 1, 11-12 (1964).

66. *See* 501 U.S. at 230.

67. *Supra*, note 49.

68. People v. Defore, 242 N.Y. 13, 150 N.E. 585, 589 (1926).

69. *Id.*