NOTE

IMPEACHMENT BY UNCONSTITUTIONALLY OBTAINED EVIDENCE: THE RULE OF HARRIS V. NEW YORK

I. INTRODUCTION

Any criminal justice system can appropriately be described as a kaleidescope of confrontations between individual and society. The rules governing the confrontation reflect two conflicting policies: the protection of the individual and the protection of society. That conflict was the focus of the recent Supreme Court decision, *Harris v. New York*.[1] Protection of the individual by exclusion of evidence obtained in violation of the criminal defendant's constitutional rights was weighed in the balance with the societal interest in maintaining the purity of the truth-testing processes of the adversary system. The Court admitted voluntarily given but unconstitutionally obtained statements to impeach the defendant's witness stand testimony. This result marks a retreat from the trend set by the Court in the last decade. The significance of this decision cannot be fully evaluated so soon after the event, but the policy considerations which will determine the future impact of *Harris* deserve examination. This note will examine the policies behind the conflicting rules, the case treatment of the specific issue in *Harris*, and an analysis of the case and the problems it leaves unresolved.

II. THE POLICIES AND PURPOSES

a. The Exclusionary Rule

Relevant and probative evidence was first declared inadmissible because of the manner in which it was obtained in *Weeks v. United States*.[2] The Court ruled that evidence obtained in violation of the fourth amendment must be excluded to make the Constitution meaningful to the individual. This objective would be fulfilled by deterring law enforcement officers from engaging in proscribed conduct as a means of

1. 401 U.S. 222 (1971).
2. 232 U.S. 383 (1914).

gathering evidence.[3] While the deterrence theory has been the most prominent basis for the exclusionary rule, other considerations supporting the doctrine have received considerable attention. For example, it has been said that the admission of unlawfully obtained evidence would undermine the integrity of the judicial process and create disrespect for law.[4] It has been maintained that the exclusion of such tainted evidence does no more than place the prosecution in the position it would have been in had its agents respected the constitutional rights of the defendant.[5]

Whatever justification for exclusion is used, the primary objective is clearly to deter unlawful police conduct.[6] It is equally clear "that civil and criminal remedies against the offending officer are as a practical matter ineffective, and hence the rule of exclusion is the only available remedy to protect society from the excesses which led to the constitutional right."[7]

3. *Id.* at 394. Mr. Justice Day said: "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."

4. "It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination." Olmstead v. United States, 277 U.S. 438, 484 (1928) (Mr. Justice Brandeis, dissenting). *See also* Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960).

5. *See, e.g.*, Harrison v. United States, 392 U.S. 219, 224 n. 10 (1968). *See also* Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?* 1963 WASH. U.L.Q. 279.

6. *See* analysis by Chief Justice Burger in Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., ___ U.S. ___, ___ (1971) (dissenting opinion). *See* notes 21-24 *infra* and accompanying text. There is one notable inconsistency in the operation of the exclusionary rules between policy and practice. None of the policy considerations enunciated in support of exclusion, with the single exception of making the language of the Constitution meaningful to the defendant, are directly related to a specific defendant. Yet, the only individual with standing to suppress such evidence is the person whose rights have been violated. *See* Jones v. United States, 362 U.S. 257 (1960). It is reasonable to ask whether deterrence would not be more effective; whether judicial integrity would not be equally maintained; whether the "contest" would not be fairer if *any* defendant could suppress *any* unconstitutionally obtained evidence sought to be used against him. *See* Simmons v. United States, 390 U.S. 377, 390 n. 12 (1968); Note, *Standing to Object to an Unlawful Search and Seizure*, 1965 WASH. U.L.Q. 488. *See also* 8 J. WIGMORE, EVIDENCE § 2175 (McNaughton rev. 1961), wherein Wigmore divides rules of "extrinsic policy" into two groups: absolute and optional. Evidence excluded because unlawfully obtained comes within the absolute group and the rules of privilege make up the optional class. *But see* C. MCCORMICK, EVIDENCE § 139 at 294 (1954) [hereinafter cited as MCCORMICK], who would class the right to object to evidence obtained in violation of a constitutional right as a privilege. If the statements involved in *Harris* had been "privileged", they would be inadmissible for impeachment unless the defendant waived the privilege. Exclusion is treated as a privilege on the issue of standing but not in determining admissibility to impeach.

7. Eleuteri v. Richman, 26 N.J. 506, 512, 141 A.2d 46, 49 (Weintraub, C.J.), *cert. denied*, 358 U.S. 843 (1958).

The *Weeks* doctrine was refined,[8] although it was not deemed to be required by the Constitution until 1961, when *Mapp v. Ohio*[9] specifically overruled *Wolf v. Colorado*.[10] *Wolf* had held the fourth amendment applicable to the states but found the exclusionary rule only an optional enforcement procedure. *Mapp* eliminated the optional nature of the rule, stating: "Nothing can destroy a government more quickly that its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[11]

Miranda v. Arizona[12] adopted an exclusionary rule for evidence obtained in violation of the fifth amendment's privilege against self-incrimination. While the policy considerations behind *Miranda* appear to be the same as those considerations in *Bram v. United States*,[13] it is clear that *Bram* lacked the specificity necessary to stand as precedent for a rule of absolute exclusion. In that case, decided prior to *Weeks*, the Court ruled that the admissibility of confessions was controlled by the fifth amendment; but *Bram* was severely weakened by its inaccurate analysis of the history of both the confession doctrine and the privilege against self-incrimination.[14] *Miranda*, while incorporating the arguments from *Bram*, left no doubt what police and prosecutors must

8. *See, e.g.*, Agnello v. United States, 269 U.S. 20 (1925); Amos v. United States, 255 U.S. 313 (1921); Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). *See also* FED. R. CRIM. P. 41(e), Advisory Committee Notes.

9. 367 U.S. 643 (1961).

10. 338 U.S. 25 (1949).

11. Mapp v. Ohio, 367 U.S. 643, 659 (1961).

12. 384 U.S. 436 (1966).

13. 168 U.S. 532 (1897).

14. *Bram* is a curious case. Some of the language used would appear to have made *Miranda* unnecessary and repetitious:

> In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the 5th Amendment to the Constitution of the United States commanding that no person "shall be compelled in any criminal case to be a witness against himself.

168 U.S. at 542. Mr. Justice White, writing for the Court, extensively analyzed the history of the confession rule and the development of the privilege against self-incrimination, concluding:

> A brief consideration of the reasons which gave rise to the adoption of the 5th Amendment, of the wrongs which it was intended to prevent, and of the safeguards which it was its purpose unalterably to secure, will make it clear that the generic language of the amendment was but a crystalization of the doctrine as to confessions, well settled when the amendment was adopted . . . .

Id. Even scholars sympathetic to the objectives of *Bram* conceded the inaccuracy of this statement. *See, e.g.*, Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 18 (1949). *See also* MCCORMICK § 75(b) at 155 ("historical blunder); 3 J. WIGMORE, EVIDENCE § 823 at 250 n.5 (3rd ed. 1940) ("no assertions could be more unfounded.") Thus, the significance of the case is extremely difficult to evaluate. The objectives of *Bram* were approved by the Court in *Miranda* and

do to protect the individual's fifth amendment rights.[15] The primary objective of *Miranda* was to make the protection of the fifth amendment meaningful to the individual by invoking what the Court considered the only effective deterrent available: exclusion.[16]

The *Weeks* exclusionary rule has been the subject of controversy since its inception,[17] and its fifth amendment counterpart has received similar criticism. Although Congress adopted the *Weeks* doctrine when the Federal Rules of Criminal Procedure were promulgated,[18] it refused to accept the *Miranda* holding. Section 3501 of Title 18, U.S.C. was a clear attempt to limit the absolute exclusion required by *Miranda* and was in direct conflict with the Court's interpretation of the Constitution.[19] This legislation has yet to be ruled on by the Court, but there are signs favoring the drafters' prognostication that "by the time the issue of

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it is arguable that the *Weeks* doctrine was established to provide consistency between the fourth amendment and a misconceived exclusionary rule, established by *Bram*, under the fifth amendment. *Compare* the Court's treatment of *Bram* in *Weeks with* its discussion of Boyd v. United States, 116 U.S. 616 (1886) in *Bram*. Meaningful analysis of the interrelationship of these three cases would be an interesting study, but would be purely academic after *Miranda*.

Even if one of the objectives of *Weeks* was to create consistency between the two amendments, a reverse application of this effort has never been fully achieved even though the attempt has been made. *See* notes 30-36 *infra* and accompanying text. *But see Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts* 12(c), 41(e)&(f), 48 F.R.D. 547, 580, 627-28 (1970). For an excellent example of the type of problems involved in creating procedural consistency between the two constitutional provisions, *see* the opinions of Judges Jerome Frank, Learned Hand and Augustus Hand in *In re* Fried, 161 F.2d 453 (1947); Note *The Pre-Indictment Suppression of Illegally Obtained Confessions*, 1971 WASH. U.L.Q. 73.

15. Miranda v. Arizona, 384 U.S. 436, 444 (1966):

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

16. *Id.*

17. Wigmore was vehement in his criticism: "[T]he heretical influence of Weeks v. United States spread, and evoked a contagion of sentimentality in some of the State Courts, inducing them to break loose from long-settled fundamentals." 8 J. WIGMORE, EVIDENCE § 2184 (3d ed. 1940). The most frequently quoted line criticizing the rule was provided by Judge Cardozo in People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (N.Y.Ct. App. 1926); "The criminal is to go free because the constable has blundered." It is this simple logic that is at the core of the critics' attack. *See* Chief Justice Burger's dissenting opinion in Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narc., 91 S.Ct. 1999, 2012 (1971), discussed *infra*. *See also* Burns, *Mapp v. Ohio: An All-American Mistake*, 19 DEPAUL L. REV. 80 (1969); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

18. FED. R. CRIM. P. 41(e).

19. 18 U.S.C. § 3501 (b) (1969) (emphasis added):

> The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense

constitutionality would reach the Supreme Court, the probability . . . is that this legislation would be upheld."[20]

Chief Justice Warren Burger, who wrote the majority opinion in *Harris*, later voiced strong objections to the exclusionary rule in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[21] His objections are based on traditional criticisms: (1) perfectly reliable and probative evidence establishing guilt cannot be used because someone else broke the law; (2) the officer who violates the law is not punished; (3) the innocent person whose constitutional rights have been violated has no remedy; and (4) there is no empirical evidence to show that the rule in fact deters proscribed conduct.[22] Chief Justice Burger

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with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge *need not be conclusive* on the issue of voluntariness of the confession.

20. 2 U.S. CODE CONG. AND ADM. NEWS, S. REP. NO. 1097, at 2112, 2138, 90th Cong., 2d Sess. (1970). 18 U.S.C. § 3501 was adopted to abrogate the effect of *Mallory* and *Miranda*. The committee report said: "These decisions have resulted in the release of criminals whose guilt is virtually beyond question. This has had a demoralizing effect on law-enforcement officials whose efforts to investigate crimes and interrogate suspects have been stymied by the technical roadblocks thrown up by the Court. The general public is becoming frightened and angered by the many reports of depraved criminals being released to roam the streets in search of other victims." *Id.* at 2127. The report discussed the constitutional issues and concluded:

> The committee feels that it is obvious from the opinion of Justice Harlan and other dissenting Justices . . . that the overwhelming weight of judicial opinion in this country is that the voluntariness test does not offend the Constitution or deprive a defendant of any constitutional right. No one can predict with any assurance what the Supreme Court might at some future day decide if these provisions are enacted. The committee has concluded that this approach to the balancing of the rights of society and the rights of the individual served us well over the years, that it is constitutional and that Congress should adopt it. After all, the *Miranda* decision itself was by a bare majority of one, and with increasing frequency the Supreme Court has reversed itself. The committee feels that by the time the issue of constitutionality would reach the Supreme Court, the probability rather is that this legislation would be upheld.

Id. at 2138. Another portion of the bill overruled United States v. Wade, 388 U.S. 218 (1967). The minority report strongly attacked these provisions: "The provisions on police interrogation and eyewitness testimony are so squarely in conflict with the recent decisions of the Supreme Court in the *Miranda* and *Wade* cases that they will almost certainly be declared unconstitutional as soon as they are tested in the courts." *Id.* at 2209. To date, courts considering 18 U.S.C. § 3501 have ignored the constitutional question. *See, e.g.*, Reinke v. United States, 405 F.2d 228 (9th Cir. 1968).

21. 91 S. Ct. 1999, 2012 (1971) (dissenting opinion).

22. *Id.* at 2013-15.

adds: "The doctrine deprives the police in no real sense . . ."; it is the prosecutor, who has no direct control over the police, who is penalized by losing the conviction.[23] The Chief Justice expressed a reluctance to overrule *Weeks* and *Mapp* without first providing a substitute remedy, and he made specific recommendations to the Congress on that subject.[24] His proposals require greater analysis than can be given here, but his attitude may reflect the retreat from *Miranda* anticipated by the drafters of 18 U.S.C. § 3501.

b. "Voluntariness"

The common law development of the voluntariness standard for confessions may explain why *Weeks* and *Miranda* were separated by fifty-one years. The traditional basis for the exclusion of confessions was that "under certain conditions, [they were] testimonially untrustworthy."[25] The test to determine trustworthiness developed into the "voluntariness" test. As it evolved, the emphasis was placed more on the "conditions" under which the statements were obtained and less on their reliability.[26] The objective of the trustworthiness doctrine was to protect the fact-finder from hearing unreliable evidence, but as the emphasis shifted, so did the objective, and the protection of the accused became a viable objective behind the voluntariness test.[27] The

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23. *Id.* at 2015.

24. A simple structure would suffice. For example, Congress could enact a statute along the following lines:

> (a) a waiver of sovereign immunity as to the illegal acts of law enforcement officials committed in the performance of assigned duties;
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> (b) the creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct;
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> (c) the creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under the statute;
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> (d) a provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment; and
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> (e) a provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment.

Id. at 2018 (footnote omitted).

25. 3 J. WIGMORE, EVIDENCE § 822 (Chadbourn rev. 1970) (emphasis in original) [hereinafter cited as 3 WIGMORE].

26. J. MAGUIRE, EVIDENCE OF GUILT (1959); 3 WIGMORE §§ 822, 826; McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447 (1938); McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239 (1946).

27. *See, e.g.*, Lisenba v. California, 314 U.S. 219, 238 (1941):

> Our duty then is to determine whether the . . . admission of the confessions [was] so fundamentally unfair, so contrary to the common concept of ordered liberty as to amount to a taking of life without due process of law.

voluntariness of a confession was determined solely by common law rules which could be established by each state until the Supreme Court found minimum due process requirements applicable in *Brown v. Mississippi*.[28] The cases following *Brown* further refined the rule and stated the objective of voluntariness was to secure due process of law.[29]

It is arguable that *Miranda v. Arizona* was intended to redefine the constitutional standard for voluntariness and fuse the rules applicable to confessions with the privilege against self-incrimination. Some courts have attempted to apply *Miranda* in this manner,[30] but that application is tenuous because of former Chief Justice Warren's treatment of *Miranda* in *Johnson v. New Jersey*[31] and *Davis v. North Carolina*.[32] In *Johnson*, the Court held that *Miranda* was not to be applied retroactively because the constitutional impact was not as compelling as it was in other instances,[33] and because the burden placed upon the administration of criminal justice would be overwhelming.[34] In *Davis*, a confession was excluded on the basis of the pre-*Miranda* voluntariness test; the *Miranda* requirements, however, were expressly included in that test.[35] Thus *Miranda* has been interpreted to provide a separate test, leaving unaltered the common law view that "[t]he basic standard governing the admissibility of an extrajudicial confession is whether, considering the totality of the circumstances, the statement was voluntary."[36]

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28. 297 U.S. 278 (1936). *See also* Ashcraft v. Tennessee, 327 U.S. 274 (1946).

29. *See, e.g.*, Rogers v. Richmond, 365 U.S. 534 (1961); Brown v. Allen, 344 U.S. 443 (1953); Ashcraft v. Tennessee, 327 U.S. 274 (1946); Lyons v. Oklahoma, 322 U.S. 596 (1944); Ward v. Texas, 316 U.S. 547 (1942); Lisenba v. California, 314 U.S. 219 (1941); Chambers v. Florida, 309 U.S. 227 (1940).

30. *See, e.g.*, United States v. Fox, 403 F.2d 97, 101 (2d Cir. 1968) ("Voluntariness is scarcely a limiting term of art which excludes self-incrimination or violation of the *Miranda* rules."); State v. Brewton, 247 Ore. 241, 243, 422 P.2d 581, 582 (1967). A similar conclusion was drawn in *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 969-84 (1966), which was written immediately prior to the *Miranda* decision. An analysis of the circumstances in which the *Miranda* requirements are met, but the statements are nevertheless deemed involuntary under the pre-*Miranda* test, makes this deduction more apparent. *Cf.* Kamisar, *A Dissent From the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966).

31. 384 U.S. 719 (1966).

32. 384 U.S. 737 (1966).

33. *See, e.g.*, Linkletter v. Walker, 381 U.S. 618 (1965); Jackson v. Denno, 378 U.S. 368 (1964). *See also* Haddad, *"Retroactivity Should Be Rethought": A Call for the End of the Linkletter Doctrine*, 60 J. CRIM. L.C. & P.S. 417 (1969).

34. Johnson v. New Jersey, 384 U.S. 719, 731 (1966).

35. Davis v. North Carolina, 384 U.S. 737, 740 (1966).

36. Murphy v. State, 8 Md. App. 430, 435, 260 A.2d 357, 359 (1970). *See also* State v. Butler, 19 Ohio St. 2d 55, 61, 249 N.E.2d 818, 822 (1969) ("The decision in *Miranda* did not discard the

c. Impeachment

When compared to those of the exclusionary rule and the voluntariness test, the objectives of testimonial impeachment are relatively simple. As with most rules of evidence, the objective of the impeachment process is to facilitate the search for truth.[37] The objective of impeachment is clearly distinguishable from the *Weeks* exclusionary rule, which serves to exclude unquestionably trustworthy evidence. The voluntariness test, both pre- and post-*Miranda*, falls somewhere between these two extremes because the untrustworthiness of a confession *can* stand alone as a reason for exclusion.[38] The predominant reasons for exclusion under *Miranda* are very similar to those of *Weeks*; nevertheless, the *Miranda* Court stated that adhering to its requirements "can mitigate the dangers of untrustworthiness".[39]

The exclusionary rules of *Weeks* and *Miranda*, as well as the result imposed when the voluntariness test is not met, raise pre-trial questions of admissibility, while evidence admitted to impeach goes to the weight of the testimony. Evidence suppressed because its procurement was accomplished through constitutionally proscribed means either speaks directly to the guilt of the accused or is irrelevant. It can be assumed that evidence subject to suppression would not generally be beneficial to the defendant if admitted.[40] Impeaching evidence, on the other hand, is usually related to veracity, character or other factors which have no direct bearing on the guilt of the accused. In *Harris v. New York*, unconstitutionally obtained evidence, which was directly related to guilt but inadmissible in the prosecution's case in chief, was admitted to impeach the accused as a witness. The conflict thus created, between the impeachment process and the constitutional mandate to protect the accused, is the focus of this note.

III. THE DEVELOPMENT OF THE LAW

a. From Agnello *to* Walder

Agnello v. United States[41] was the first Supreme Court case to

distinction between voluntary and involuntary statements made by an accused and used by the prosecution."). For an example of another situation in which the distinction between the *Miranda* test and the traditional voluntariness test has been applied, *see In re* Martinez, 83 Cal. Rptr. 382, 463 P.2d 734 (Sup. Ct. Cal.), *cert. denied*, 400 U.S. 851 (1970).

37. 1 J. WIGMORE, EVIDENCE § 1 (3rd ed. 1940).

38. *See* Miranda v. Arizona, 384 U.S. 436, 455-56 n. 24 (1966); 3 WIGMORE § 822.

39. 384 U.S. at 470.

40. "If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution." Miranda v. Arizona, 384 U.S. 436, 477 (1966).

41. 269 U.S. 20 (1925).

consider the impeachment issue under the *Weeks* doctrine. In *Agnello*, police seized a can of cocaine in the defendant's home during an unlawful search made subsequent to the defendant's arrest at another place on a charge of illegal possession and sale of cocaine. No effort was made to introduce this evidence in the case in chief, but on cross-examination the defendant was asked if he had ever seen or had possession of the can of cocaine. When he responded in the negative, the can of cocaine was introduced to impeach the defendant. The Supreme Court held that the illegally obtained evidence could not be admitted and stated: "the contention that the evidence of the search and seizure was admissible in rebuttal is without merit."[42] Once the determination was made that the search and seizure was unlawful, the evidence thus seized would not be admitted for any purpose.[43] This conclusion was in effect an application of the fundamental rule set forth by Mr. Justice Holmes in *Silverthorne Lumber Co. v. United States*:

> 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.[44]

The impeachment problem was apparently settled by *Agnello* and did not appear again until 1954 in *Walder v. United States*.[45] Walder had been arrested in 1950 for illegal possession of narcotics. Police had illegally seized heroin in Walder's possession and, when the evidence was suppressed, the charge was dropped. Two years later, Walder was arrested on a similar charge and the two year old evidence was admitted at trial to impeach the defendant's direct testimony that he had never possessed narcotics. The Supreme Court held that the unlawfully obtained evidence was admissible to impeach the defendant's credibility. Ruling that a contrary result would provide the defendant "with a shield against contradiction of his untruths" and thereby create "a perversion of the Fourth Amendment",[46] the Court specifically distinguished

42. *Id.* at 35.

43. This was the primary consideration before the Court because the appellate court had determined the search to be lawful and never discussed the impeachment question. Agnello v. United States, 290 Fed. 671 (2d Cir. 1923). The decision was a significant refinement of the *Weeks* doctrine in two other respects: (1) the defendant could move to suppress illegally obtained evidence during the trial if he was not aware that the evidence had been seized; and (2) the subject matter of suppression was contraband, in which no property right existed. *See* FED. R. CRIM. P. 41(e), Advisory Committee Notes.

44. 251 U.S. 385, 392 (1920).

45. 347 U.S. 62 (1954).

46. *Id.* at 65.

Agnello on two important points. The primary emphasis was on the distinction between direct and cross-examination testimony as the basis for impeachment. The Court read *Agnello* as having underscored the fact that the prosecutor elicited the statements on rebuttal so that he might "smuggle" the prohibited evidence in,[47] while in *Walder* the "sweeping claims" were made in response to direct questioning by defendant's counsel.[48] The second distinction was the collateral nature of the *Walder* evidence in contrast to the *Agnello* evidence which was directly related to defendant's guilt.

The Court said that the 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, and therefore not available for its case in chief."[49] One difficulty with *Walder* was the Court's failure to point out that the evidence would have been inadmissible in the prosecution's case in chief even if legally obtained because it was not probative or relevant. Nor could it be used as direct evidence of guilt, as it would have been in *Agnello*. The Court's failure in *Walder* to draw this distinction clearly left a significant question unanswered: how "collateral" does the unlawfully obtained evidence have to be? The answer to this question was developed under the law of confessions, not the law of search and seizure.

b. From Walder *to* Miranda

The confessions doctrine, even with the expansion of the voluntariness standard, always required the exclusion of confessions if they were untrustworthy.[50] While courts continued to redefine "voluntariness" after 1936,[51] the general rule regarding the admissibility of involuntary confessions to impeach the defendant was:

> Involuntary confessions of accused persons are inadmissible to impeach them as witnesses on the same ground that hearsay and all other incompetent evidence is inadmissible to impeach other witnesses, because they are unworthy of belief.[52]

Because of the continued influence of the common law rule that

47. *Id.* at 66.
48. *Id.* at 65.
49. *Id.*
50. *See* notes 25-36 *supra* and accompanying text.
51. Brown v. Mississippi, 297 U.S. 278 (1936). *See* text accompanying notes 26-29 *supra.*
52. State v. Turnbow, 67 N.M. 241, 249, 354 P.2d 533, 540 (1960). The federal rule was established in Harrold v. Territory, 169 Fed. 47 (8th Cir. 1909). *See also* People v. Underwood, 61

confessions were not admissible because they were unreliable, an involuntary confession was deemed untrustworthy for impeachment purposes even though its trustworthiness was not the reason it was judged involuntary.[53] Therefore, *Weeks, Agnello* and *Walder* had no relationship to the confession doctrine. No question concerning the trustworthiness of evidence suppressed under the auspices of the fourth amendment was ever raised and no means has been devised to establish the absolute truth of a confession. However, the exclusionary rule announced in *Mallory v. United States*[54] applied the deterrence rationale of *Weeks* to statements obtained while suspects were in custody in violation of rule 5(a) of the Federal Rules of Criminal Procedure.[55]

The *Mallory* rule, based on a federal rule and not the Constitution, was applicable only in the federal courts. The first case to extend *Walder* to *Mallory* confessions was *Tate v. United States*.[56] The sole issue in *Tate* was whether the trial court erred in admitting, for impeachment purposes, the statements by the defendant obtained in violation of *Mallory*. Judge Burger,[57] speaking for the court, characterized the problem as follows:

> [We are faced here] with the problem of reconciling two competing policies of the law: (1) the policy that proscribes, as a prophylactic measure, the use of evidence obtained in violation of a rule of law, and (2) the policy which demands truth from witnesses in the judicial process and which regards an adversary judicial proceeding as a search for truth. The rationalization of these competing principles into a consistent pattern is by no means free from difficulty. . . . The answer lies not in any rigid formula but rather in a cautious balancing of the important

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Cal. 2d 113, 389 P.2d 937, 37 Cal. Rptr. 313 (1964); Ladner v. State, 231 Miss. 445, 95 So. 2d 468 (1957); Killough v. State, 94 Okla. Crim. 131, 231 P.2d 381 (1951); *contra, e.g.*, State v. McClung, 66 Wash. 2d 654, 404 P.2d 460 (1965), *cert. denied*, 384 U.S. 1013 (1966). *See generally* 3 WIGMORE § 821 at 314-318 n. 9; Annot. 89 A.L.R.2d 478 (1963).

53. *See, e.g.*, Jackson v. Denno, 378 U.S. 368, 383-84 (1964); Rogers v. Richmond, 365 U.S. 534, 545 (1961); *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 961-968 (1966).

54. 354 U.S. 449 (1957); *see also* McNabb v. United States, 318 U.S. 332 (1943).

55. FED. R. CRIM. P. 5(a):

> (a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

See also LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 WASH. U.L.Q. 331; *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 984-96 (1966).

56. 283 F.2d 377 (D.C. Cir. 1960).

57. Now Chief Justice of the United States.

> considerations involved in keeping the trial process as an efficient means of determining the truth along with the need for keeping law enforcement practices on a level consistent with the standards of our society.[58]

The court concluded that the balancing of these considerations favored admissibility in this case—but not without conditions. Neither statement was *per se* inculpatory; no act described in the statements constituted "elements of the case against him"; none of those acts were unlawful; the testimony was given on direct examination; and the impeaching statements were significant only on the issue of defendant's credibility.[59]

The court held that *Walder* was controlling and declared that the distinctions between *Tate* and *Walder* clearly supported its decision. The evidence in *Walder* "was vastly more damaging than the impeachment evidence here" and was obtained in violation of a constitutional right, whereas rule 5(a) "confers no 'rights' in the constitutional sense."[60] The court further suggested that the deterrence theory behind the *Mallory* suppression rule makes the accused "an incidental and always undeserving beneficiary" of the rule.[61] By admitting exculpatory statements made during a period of "unnecessary delay" under 5(a) to impeach credibility, the court can do its best "to make certain [the defendant] tells the truth and, as most oaths command, 'the whole truth'" without sapping the vitality of the deterrence objective of *Mallory*.[62] Analyzing the argument that the admission of these statements would undesirably influence the defendant's decision whether to testify, Judge Burger concluded:

> What is proscribed by Walder is the freedom to "resort to perjurious testimony" on the assumption that prior inconsistent statements would be kept from the jury. Neither sound public policy nor the ends of justice in the particular case would be served by a different rule. Whatever inhibition arises out of our view of the law it is not against testifying, but against testifying falsely.[63]

The rule admitting exculpatory statements on collateral matters under the *Walder* doctrine was thus established.

The *Walder-Tate* rule was applied in *Bailey v. United States*,[64]

58. 283 F.2d at 379.
59. *Id.* at 380.
60. *Id.*
61. *Id.* at 381.
62. *Id.*
63. *Id.* at 382.
64. 328 F.2d 542 (D.C. Cir.), *cert. denied*, 377 U.S. 972 (1964).

affirming a manslaughter conviction. Judge Wright dissented, pointing out that the statements "bore on the central issue" of the case and did not satisfy the "collateral" requirement of *Tate*.[65] Other cases on this issue had distinguished *Tate* on the collateral point.[66] Then, in *United States v. Curry*,[67] statements were admitted to impeach the defendant although they were obtained in violation of the sixth amendment's right to counsel and rule 5(a) of the federal rules. The court followed the *Walder* doctrine and found the policies supporting exclusion of illegally obtained evidence not distinguishable on the grounds that one rule was based on the Constitution and the other on a statute: "Neither Walder nor any of the cases directly interpreting it indicates that the principle of limited admissibility for collateral impeachment purposes is inapplicable when evidence is excluded because unconstitutionally obtained."[68]

Shortly after the *Curry* decision, the Supreme Court in *Miranda v. Arizona* established rigid standards for the admissibility of statements obtained from the defendant during custodial interrogation. One element of that decision sought to eliminate the common law distinctions between confessions and admissions and between inculpatory and exculpatory statements. The language of this paragraph had a significant impact on the subsequent application of the *Walder-Tate-Curry* doctrine:

> The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of *any* statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to *impeach* his testimony at a trial or to

65. *Id.* at 546 n. 3 (Wright, J., dissenting).

66. *See* Inge v. United States, 356 F.2d 345 (D.C. Cir. 1966); White v. United States, 349 F.2d 965 (D.C. Cir. 1965); Johnson v. United States, 344 F.2d 163 (D.C. Cir. 1964).

67. 358 F.2d 904 (2d Cir.), *cert. denied*, 385 U.S. 873 (1966). *See also* Comment, *Excluded Statements Collateral to Issue of Guilt May be Used to Impeach Credibility of Defendant When They Vary From His Testimony on Direct*, 4 HOUS. L. REV. 144 (1966).

68. 358 F.2d at 911.

> demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. *These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement . . . .*[69]

c. *From* Miranda *to* Harris

The first court to decide the impeachment issue after *Miranda* was the Supreme Court of Oregon in *State v. Brewton.*[70] Otherwise voluntary statements were excluded because the *Miranda* warnings had not been properly given. The trial court, however, ruled these statements admissible to impeach the testimony of the accused. The Supreme Court reversed and found that "any attempt in the future to restrict the exclusionary rule to the state's case in chief would be inconsistent with the constitutional principles which are inherent in the *Miranda* case . . . ."[71] The court rejected the *Tate* rule as "virtually unworkable" and suggested that any alternative finding "could be a major step backward."[72] The court considered the need to prevent perjury but found "the price of such prevention could be to keep defendants off the stand entirely"; a price too great to pay.[73]

The majority of states which have decided the issue follow the lead of *Brewton.*[74] One of the exceptions[75] is *State v. Butler,*[76] in which the court

69. Miranda v. Arizona, 384 U.S. 436, 476-77 (1966) (emphasis added). All or part of this paragraph has been quoted by courts deciding the impeachment question as support for their decision to exclude the statements. *See, e.g.*, Blair v. United States, 401 F.2d 387, 392 (D.C. Cir. 1968); Proctor v. United States, 404 F.2d 819, 821 (D.C. Cir. 1968); United States v. Fox, 403 F.2d 97, 102 (2d Cir. 1968); United States v. Pinto, 394 F.2d 470, 476 (3rd Cir. 1968); Groshart v. United States, 392 F.2d 172, 177 (9th Cir. 1968); Velarde v. People, 466 P.2d 919, 923 (Sup. Ct. Colo. 1970); State v. Galasso, 217 So. 2d 326, 329 (Sup. Ct. Fla. 1968); Franklin v. State, 6 Md. App. 572, 578, 252 A.2d 487, 491 (1969); People v. Kulis, 18 N.Y.2d 318, 323-24, 221 N.E.2d 541, 542, 274 N.Y.S.2d 873, 876 (1966) (dissenting opinion); State v. Catrett, 276 N.C. 86, 91, 171 S.E.2d 398, 404 (1970); State v. Butler, 19 Ohio St. 2d 55, 60, 248 N.E.2d 818, 823 (1969) (dissenting opinion). Mr. Justice Brennan reproduced a portion of the paragraph in his dissenting opinion in Harris v. New York, 401 U.S. 226, 230 (1971).

70. 247 Ore. 241, 422 P.2d 581, *cert. denied*, 387 U.S. 943 (1967). *See also* Comment, *Confession Taken in Violation of Miranda Rule Held Inadmissible for Impeachment Purposes*, 42 N.Y.U. L. REV. 772 (1967); Comment, *Voluntary Confession Elicited Unlawfully Cannot be Used to Impeach Defendant*, 36 U. CIN. L. REV. 738 (1967).

71. 247 Ore. at 243, 422 P.2d at 582.

72. *Id.* at 244, 422 P.2d at 583.

73. *Id.*

74. *See* People v. Gardner, 266 Cal. App. 2d 19, 71 Cal. Rptr. 568 (1968); Velarde v. People, 466 P.2d 919 (Sup. Ct. Colo. 1970); State v. Galasso, 217 So. 2d 326 (Sup. Ct. Fla. 1968); People v. Leflar, 38 Ill. 2d 216, 230 N.E.2d 827 (1967); Franklin v. State, 6 Md. App. 572, 252 A.2d 487 (1969), *cert. denied*, 399 U.S. 912 (1970); People v. Marsh, 14 Mich. App. 518, 165 N.W.2d 853 (1968); People v. Wilson, 20 Mich. App. 410, 174 N.W.2d 79 (1969); People v. Schwartz, 30 App.

held that "voluntary statements of an accused made to police without cautionary warnings are admissible on the issue of credibility after defendant had been sworn and testifies in his own defense."[77] Although the language of *Miranda* indicated a contrary finding, it did not decide that issue.[78] The *Butler* court suggested that the dictum in *Miranda* should not be read to undermine the status of *Walder*.[79]

The federal courts unanimously followed the *Brewton* reasoning.[80] In

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Div. 2d 385, 292 N.Y.S.2d 518 (1968); State v. Catrett, 276 N.C. 86, 171 S.E.2d 398 (1970); State v. Swanson, 9 Ohio App. 2d 60, 222 N.E.2d 844 (1967); Commonwealth v. Padgett, 428 Pa. 229, 237 A.2d 209 (1968); Commonwealth v. Robinson, 428 Pa. 458, 239 A.2d 308 (1968); Cardwell v. Commonwealth, 209 Va. 412, 164 S.E.2d 699 (1968); Gaertner v. State, 35 Wis. 2d 159, 150 N.W.2d 370 (1967). *Cf.* People v. Canard, 257 Cal. App. 2d 444, 65 Cal. Rptr. 15 (1967), *cert. denied*, 393 U.S. 912 (1968); People v. Luna, 37 Ill. 2d 299, 226 N.E.2d 586 (1967); State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968); State v. Gresham, 10 Ohio App. 2d 199, 227 N.E.2d 248 (1967); Spann v. State, 448 S.W.2d 128 (Ct. Crim. App. Tex. 1969); Carter v. State, 414 S.W. 2d 663 (Ct. Crim. App. Tex. 1967). *See also* Kent, *Miranda v. Arizona—The Use of Inadmissible Evidence for Impeachment Purposes*, 18 W. RES. L. REV. 1177 (1967); Pye, *Miranda*, 35 FORDHAM L. REV. 199, 218-219 (1966); Note, *The Collateral Use Doctrine: From Walder to Miranda*, 62 NW. U. L. REV. 912 (1968); Note, *The Impeachment Exception to the Exclusionary Rules*, 34 U. CHI. L. REV. 939 (1967). *But see* Cole, *Impeaching with Unconstitutionally Obtained Evidence: Some Reflections on the Palatable Fruit of the Poisonous Tree*, 18 DEPAUL L. REV. 25 (1968).

75. *See also* Serrano v. State, 84 Nev. 676, 447 P.2d 497 (1968); State v. Kimbrough, 109 N.J. Super. 57, 262 A.2d 232 (1970); People v. Quick, 30 App. Div. 2d 561, 291 N.Y.S.2d 132 (1968); State v. Butler, 19 Ohio St. 2d 55, 249 N.E.2d 818 (1969); State v. Grant, 459 P.2d 639 (Sup. Ct. Wash. 1969). *Cf.* Kiraly v. State, 212 So. 2d 311 (Ct. App. Fla. 1968); State v. Jackson, 201 Kan. 795, 443 P.2d 279 (1968), *cert. denied*, 394 U.S. 908 (1969); May v. State, 211 So. 2d 845 (Sup. Ct. Miss. 1968); Kelly v. King, 196 So. 2d 525 (Sup. Ct. Miss. 1967); State v. Howard, 182 Neb. 411, 155 N.W.2d 339 (1967).

People v. Harris, 31 App. Div. 2d 828, 298 N.Y.S.2d 245, *aff'd*, 25 N.Y. 2d 175, 250 N.E. 2d 349, 303 N.Y.S.2d 71 (1969) relied heavily on People v. Kulis, ___ App. Div. 2d ___, 264 N.Y.S.2d 506 (1965), *aff'd*, 18 N.Y.2d 318, 221 N.E.2d 541, 274 N.Y.S.2d 873 (1966). *Kulis* was a pre-*Miranda* case involving statements inadmissible because they were obtained in violation of Escobedo v. Illinois, 378 U.S. 478 (1964). The court held that *Escobedo* did not affect the *Walder* exception. Judge Keating, in his dissenting opinion, argued that *Miranda* (even though not applicable to the *Kulis* case) clearly eliminated the application of the *Walder* doctrine to *Escobedo* violations as well as subsequent *Miranda* violations. 18 N.Y.S.2d at 323-24, 221 N.E.2d at 542, 274 N.Y.S.2d at 875-76. *People v. Harris* was a post-*Miranda* case, but the New York Court of Appeals concluded, contrary to the rule adopted in the majority of jurisdictions, that *Miranda* had not affected the *Walder-Kulis* rule. *See* Note, *Limited Use of Unlawfully Obtained Statements to Impeach Defendant's Credibility: The New York Rule in Light of Escobedo and Miranda*, 13 N.Y.L. FORUM 146 (1967); Comment, *Statements Elicited After Denial of Request for Counsel—Admissible to Impeach Credibility of Defendant*, 33 BROOKLYN L. REV. 363 (1967).

76. 19 Ohio St. 2d 55, 249 N.E.2d 818 (1969).

77. *Id.* at 59, 249 N.E.2d at 822.

78. *Id.* at 58, 249 N.E.2d at 821-22.

79. *Id.*

80. Blair v. United States, 401 F.2d 387 (D.C. Cir. 1968); Proctor v. United States, 404 F.2d 819 (D.C. Cir. 1968); United States v. Fox, 403 F.2d 97 (2d Cir. 1968); United States v. Pinto, 394 F.2d

Groshart v. United States,[81] the court analyzed the entire history of the "admissible to impeach" doctrine and found the cases establishing the doctrine "undermined by the Supreme Court's *Miranda* decision."[82] The holding in *Groshart* was clear: unless the *Miranda* requirements were fully satisfied, statements obtained "may not be used against the defendant at the trial for any purpose whatsoever."[83] This was the rule in the federal courts until *Harris v. New York*.

IV. HARRIS V. NEW YORK

Viven Harris was arrested January 7, 1966 on two counts of selling heroin to police undercover agents.[84] At the time of his arrest he was interrogated without adequate warnings required by *Miranda v. Arizona*.[85] The state's case consisted of testimony by the undercover agent regarding the two alleged transactions, supplemented by the testimony of another undercover agent and the police chemist. The district attorney conceded that the defendant's statements were not admissible as evidence in chief[86] and made no effort to use them as such. Harris took the stand, and certain elements of his testimony were inconsistent with his statements made during the unlawful

470 (3rd Cir. 1968); Groshart v. United States, 392 F.2d 172 (9th Cir. 1968); Wheeler v. United States, 382 F.2d 998 (10th Cir. 1967). *Cf.* United States v. Armetta, 378 F.2d 658 (2d Cir. 1967); United States v. Prebish, 290 F. Supp. 268 (S.D. Fla. 1968); United States v. Birrell, 276 F. Supp. 798 (S.D.N.Y. 1967); *but cf.* United States v. Hart, 407 F.2d 1087 (2d Cir. 1969); Dillon v. United States, 391 F.2d 433 (10th Cir. 1968).

81. 392 F.2d 172 (9th Cir. 1968).

82. *Id.* at 178.

83. *Id.*

84. Harris v. New York, 401 U.S. 222, 223 (1971). *See also* Comment, *Criminal Law: The Retreat From Miranda*, 11 S.CL. LAW. 440 (1971).

85. 384 U.S. 436 (1966).

86. 401 U.S. at 223. The fault in the warnings given was the failure to inform the defendant of his right to appointed counsel before he was questioned:

> He was apprised of his privilege to remain silent and that anything he said might be used against him. He was then questioned, but prior to making any admissions said he would like to speak to an attorney. The assistant district attorney brought the questioning to a close, told the defendant he had a right to counsel and asked him if he desired to speak to an attorney then.

People v. Harris, 31 App. Div. 2d 828, 829, 298 N.Y.S.2d 245, 246 (1969). The defendant then voluntarily answered questions. The court accepted the district attorney's concession that the statements were obtained in violation of *Miranda*, but suggested that "under the circumstances herein, the *Miranda* warnings given herein might have been found sufficient by the Trial Judge" after a hearing on that issue. *Id.* at 829, 298 N.Y.S.2d at 248 (opinion of Brennan, J.). As a result of the district attorney's concession, adequacy of the warnings was never an issue on appeal.

interrogation.[87] On cross-examination, over objection by defense counsel, the state was permitted to introduce those portions of defendant's interrogation statements inconsistent with his direct testimony to impeach his credibility.[88] Harris was found guilty on one count[89] and sentenced to six to eight years in prison. The conviction was

87. The gist of the portions [of statements made during custodial interrogation] read in the presence of the jury is twofold: (1) on January 4, 1966 defendant acted as the undercover police officer's agent in obtaining narcotics and (2) on January 6, 1966 defendant obtained narcotics from an unknown person outside a bar and then sold the drugs to the undercover agent in a bar.

Id. When the defendant took the stand on his own behalf he testified "that he did not give the undercover agent drugs on January 4, 1966; but on January 6, 1966 he did go to a friend's home where he put baking powder in two glasine envelopes and sold the latter as heroin to the agent." *Id.*

88. 401 U.S. at 223. "The court charged the jury that this statement went to the credibility of the witness and was 'not proof of the defendant's guilt'. Defense counsel in his summation uttered a similar admonition." 31 App. Div. 2d at 829, 298 N.Y.S.2d at 247.

89. The jury failed to agree on the other count which was dropped by the state. 31 App. Div. 2d at 828, 298 N.Y.S.2d at 247. This failure to agree was an important consideration for the dissenters in the Appellate Division of the Supreme Court:

> The trial essentially involved a test of credibility between the undercover agent and defendant. The jury was unable to agree as to the alleged sale on January 4, although the undercover agent testified unequivocally that defendant sold him a bag of white powder on that date and the police chemist testified that the bag contained heroin. Defendant denied this alleged sale. It seems reasonable to infer from the jury's disagreement on the January 4 charge that they may have had some reservations about the officer's veracity.

Id. at 831, 298 N.Y.S.2d at 250 (Christ, J., dissenting). This fact was emphasized because the decision in the New York Supreme Court was not based solely on the issue which ultimately reached the United States Supreme Court, but also on the question of what constitutes "harmless-constitutional error". Two Judges, Beldock and Munder, held that the admission of the tainted statements were not error; three Judges, Brennan, Christ and Rabin, agreed that the admission constituted error of constitutional dimensions, but Judge Brennan was convinced "beyond a reasonable doubt" that the error was harmless. Thus, Judge Brennan wrote the majority opinion and enunicated the holding of the court but was the only one of the five judges to agree with it. People v. Harris, 31 App. Div.2d 828, 298 N.Y.S.2d 245 (Brennan, J.), *id.* at 83, 298 N.Y.S.2d at 249 (Beldock, P.J. and Munder, J., concurring), and *id.* (Christ, J., dissenting joined by Rabin, J.). The issue of harmless constitutional error was not discussed by the New York Court of Appeals, People v. Harris, 25 N.Y.2d 175, 250 N.E.2d 349, 303 N.Y.S.2d 71 (1969) (holding the admission of statements taken in violation of *Miranda* warnings for impeachment purposes did not constitute error); and was criticized in a footnote by Mr. Justice Brennan in Harris v. New York, 401 U.S. at 229 n.2 (1971). Other cases finding this error to be harmless are: People v. Barry, 237 Cal. App. 2d 154, 46 Cal. Rptr. 727 (1965), *cert. denied*, 386 U.S. 1024 (1967); State v. Galasso, 217 So. 2d 326 (Sup. Ct. Fla. 1968); Commonwealth v. Padgett, 428 Pa. 229, 237 A.2d 209 (1968); Gaertner v. State, 35 Wis. 2d 159, 150 N.W.2d 380 (1967); *but see* Cardwell v. Commonwealth, 209 Va. 412, 164 S.E.2d 699 (1968). These cases interpret Chapman v. California, 386 U.S. 18 (1967). *See also* Note, *A Multi-rule Approach to Harmless Constitutional Error*, 18 U.C.L.A. L. REV. 202 (1970).

An additional issue before the New York courts in the *Harris* case concerned the failure of the prosecution to give notice of intention to "offer a confession or admission in evidence." N.Y. CODE CRIM. PROC. § 813-f (Supp. 1970). *See* notes 126-133 *infra* and accompanying text.

upheld by the New York courts,[90] and affirmed on appeal to the United States Supreme Court. The Court held that statements by an accused, inadmissible in the prosecution's case in chief, may be admitted to impeach the defendant's testimony if the statements satisfy the legal standards of trustworthiness.[91]

The Court reasoned that though *Miranda* gave some indications to the contrary, the protection which *Miranda* affords "cannot be perverted into a license to use perjury by way of a defense . . . ."[92] *Miranda* only barred the prosecution from *making its case* with in-custody statements of an accused prior to his waiver of counsel. Although Harris was impeached by testimony bearing directly on the crimes charged, the Court found no "difference in principle" that required a result contrary to *Walder v. United States*.[93]

Mr. Justice Brennan, in his dissenting opinion,[94] disagreed with the majority's use of *Walder* and its narrow interpretation of the principles espoused by *Miranda*. A belief that the use of unconstitutionally obtained evidence directly relating to the question of guilt was an infringement on the defendant's right to choose with an "unfettered will" whether to take the stand, led Brennan to conclude that the decision "will seriously undermine" and go "far toward undoing much of the progress made in conforming police methods to the Constitution."[95]

Chief Justice Burger placed great emphasis on the quest for "truth". While he points out that the defendant made no claim that the statements were "involuntary",[96] his holding calls for legal standards of "trustworthiness".[97] He also stated:

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90. People v. Harris, 31 App. Div. 2d 828, 298 N.Y.S.2d 245, *aff'd*, 25 N.Y.2d 175, 250 N.E.2d 349, 303 N.Y.S. 2d (1969) (*per curiam*).

91. 401 U.S. 222, 224 (1971); Chief Justice Burger wrote the majority opinion with Justices Harlan, Blackmun, Stewart, and White concurring without separate opinions; Mr. Justice Brennan wrote a dissenting opinion concurred in by Justices Douglas and Marshall; Mr. Justice Black dissented without opinion.

92. 401 U.S. at 225. The Court distinguished *Miranda* with the following statement:

> Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling.

Id. at 224. *See* note 69 *supra* and accompanying text.

93. 347 U.S. 62 (1954).

94. 401 U.S. at 226.

95. *Id.* at 232. *See* Griffin v. California, 380 U.S. 609 (1965).

96. 401 U.S. at 224.

97. *Id.*

> 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* . . . . Having voluntarily taken the stand, 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 . . . .[98]

The Chief Justice makes it clear that compliance with *Miranda* and "voluntariness" are two distinct things, but no distinction is drawn between "voluntariness" and "trustworthiness". Because such a distinction exists,[99] one conclusion is that the *Harris* Court used the terms interchangeably. This conclusion must be suspect because of its implications. The due process requirement of "voluntariness" demands more than that the statements be trustworthy.[100] The question posed is whether "involuntary" statements which meet the legal standards of "trustworthiness" may be admitted to impeach under the *Harris* rule. Considering the implications of an affirmative answer to this question, it would seem unlikely, without additional explanation, that the court intended to alter the meaning or application of these technical terms. One reasonable interpretation is that the Court meant the "legal standards of trustworthiness" are manifested in the "voluntariness" test; however, the case provides no indication that this reading is proper or improper.

An alternative means of reaching the *Harris* result would be to reason that the admission of involuntary statements for any purpose is itself a direct violation of an accused's right to due process of law while exclusion under *Miranda* is merely a remedy for a person whose rights have already been breached. If the accused testified inconsistently with his voluntarily given but unconstitutionally obtained statements, that act would serve as a waiver of the protection *Miranda* provides. This reasoning process requires that the *Miranda* exclusionary rule be premised on an objective other than deterrence. Deterrence is a pre-breach remedy rather than a post-breach remedy. There is evidence that the Chief Justice used this latter approach in reaching the decision:

> The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process

98. *Id.* at 225. The emphasis here on reliability would appear to be quite different than its treatment in Simmons v. United States, 390 U.S. 377 (1968) and Harrison v. United States, 392 U.S. 219 (1968); *see* note 111 *infra*.

99. *See* notes 25-36 *supra* and accompanying text.

100. Jackson v. Denno, 378 U.S. 368 (1964); Rogers v. Richmond, 365 U.S. 534 (1961).

> should not be lost, in our view, because of the *speculative possibility* that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.[101]

It is indeed difficult to argue that this approach is consistent with the precise holding in *Miranda*.[102] The Court in *Harris* has, in effect, distinguished "'voluntary' unconstitutional confessions . . . from 'involuntary' unconstitutional confessions, solely for the purposes of impeachment . . . ."[103]—a distinction which the lower courts consistently rejected.[104]

Harris does not appear to place any limitations on the use of tainted evidence to impeach, as did its predecessors, *Walder, Tate* and *Curry*. Chief Justice Burger does not acknowledge his own prior opinions on the issue, and fails to spell out any of the limitations or potential ramifications he so carefully delineated in *Tate* and *Lockley v. United States*.[105] *Agnello* appears to be in direct conflict with the *Harris* result, but *Agnello* was not mentioned in either the majority or the dissenting opinions, although both quoted extensively from *Walder*.[106] The dissent

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101. 401 U.S. at 225 (emphasis added).

102. "[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." 384 U.S. at 444.

103. State v. Brewton, 247 Ore. 241, 242, 422 P.2d 581, 582 (1957).

104. *See* note 74 *supra*.

105. 270 F.2d 915, 918 (D.C. Cir. 1959). The court admitted a full confession on cross-examination to impeach the defendant's direct testimony. The defendant contended that the confession was obtained in violation of Rule 5(a), FED. R. CRIM. P., and should be inadmissible for all purposes. On appeal, the court found no 5(a) violation and affirmed the conviction without discussion of the *Walder* rule. *Id.* at 917-918. Judge Burger disagreed with the majority's decision and went on to consider the *Walder* problem. "A confession inadmissible under Rule 5(a) should be received for impeachment only under the *most guarded conditions*." *Id.* at 919 (emphasis added). He suggested an extension of the *Walder* doctrine in the following manner:

> From the Walder case I would conclude that before inadmissible evidence can be used for impeachment, three factors must be present: (1) the defendant must elect to take the stand, (2) his testimony which conflicts with the inadmissible statements must do more than merely deny the elements of the crime for which he is being tried, and (3) the inadmissible statements should be received only to the extent that they do not admit the very acts which are essential elements of the crime charged.

Id. at 919. These standards, plus the requirement that the inadmissible statements not be *per se* inculpatory, became the law in Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960). *See* notes 56-63 *supra* and accompanying text.

106. *Walder* considered both sides of the issue and the Court's language, taken out of context, could be used to support either side of the issue. *Compare* that portion of *Walder* quoted by the *Harris* majority:

> It is one thing to say that the Government cannot make an affirmative use of evidence

argues that *Walder* was inapposite to the *Harris* result because of the "collateral" requirement and placed great emphasis on the policies espoused by the Court's decisions of the prior decade.[107] An accused must be free to choose with an "unfettered" will whether to exercise his constitutional privilege to either testify or not testify and the majority, says the dissent, denies him that freedom of choice.[108] The only objective of exclusion discussed by the majority is "deterrence", although other objectives have played a significant role in the development of the doctrine. The Court's failure to discuss these interrelated issues in *Harris* makes any evaluation of its impact speculative.

V. The Unresolved Problems

a. The Forced Choice Between Two Valuable Rights

The privilege against self-incrimination gives a defendant the right to choose whether or not to testify. That choice must result from the "unfettered exercise of his own will."[109] The same privilege also prohibits the use of evidence obtained in violation of that right as a means of convicting an accused. As a result of *Harris*, a confession which does not meet this constitutional standard may be used against him if he takes the stand. The defendant who takes the stand has an obligation to tell the truth, but he also has the *right* "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, and therefore not available for its case in chief."[110] *Harris* places a

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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 the Fourth Amendment.

. . .

[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.

401 U.S. 224, *quoting* Walder v. United States, 347 U.S. at 62, 65; *with* the paragraph quoted by Mr. Justice Brennan:

Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He 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, and therefore not available for its case in chief.

401 U.S. at 228, *quoting* 347 U.S. at 65.

107. Miranda v. Arizona, 384 U.S. 436 (1966); Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964); Mapp v. Ohio, 367 U.S. 643 (1961).

108. 401 U.S. at 230.

109. Malloy v. Hogan, 378 U.S. 1, 8 (1964).

110. Walder v. United States, 347 U.S. 62, 65 (1954). *See also* note 106 *supra*.

burden on the defendant's ability to freely exercise his fifth amendment rights. Such a burden, which "chills" the unfettered exercise of constitutional rights, has not been tolerated by the Court in other contexts.[111]

Faced with the identical problem, the Oregon Supreme Court measured the value of defendant's testimony to the adversary process against the danger of losing that testimony because of the fear that illegally obtained statements would be used to impeach him: "If the choice is to exclude all illegally obtained evidence or to silence the defendant as a witness, it is better to exclude the illegal evidence."[112] The problem created by the forced choice between valuable constitutional rights was not discussed or evaluated in *Harris*.

b. Prejudice

Confessions have been assailed as the "weakest and most suspicious of all evidence" and great caution has been urged in considering their use.[113] Confessions secured in a manner assuring their trustworthiness have also been acclaimed as "the highest kind of evidence."[114] A confession which meets the standards of voluntariness but fails to satisfy

111. In Simmons v. United States, 390 U.S. 377 (1968), defendant's testimony at an unsuccessful pre-trial hearing to suppress certain evidence was used against him at the trial. In order to establish standing to suppress, defendant had to claim ownership of the object sought to be suppressed and was therefore confronted with a dilemma: "[A] defendant who wishes to establish standing must do so at the risk that the words which he utters may later be used to incriminate him." *Id.* at 393. The Court said: "In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." *Id.* at 394.

Three weeks later the Court struck down a death penalty provision in a federal statute because it imposed the same kind of impermissible choice. In United States v. Jackson, 390 U.S. 570 (1968), a statute authorizing a jury—and only a jury—to impose the death penalty created an impermissible choice between the defendant's free exercise of his sixth amendment right to a jury trial and his fifth amendment right not to plead guilty. *Id.* at 581.

These two cases established that a forced choice between the free exercise of two valuable constitutional rights would not be tolerated. *Cf.* Harrison v. United States, 392 U.S. 219 (1968). *But see* Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970), which held that a plea of guilty would not be deemed involuntary because the defendant was faced with the same kind of impermissible choice present in *Jackson*. The effect of *Brady, McMann* and *Parker* on the impermissible choice presented in *Harris* is unclear, but it would appear that *Simmons* is more directly in point. *But see* note 124 *infra*.

112. State v. Brewton, 247 Ore. 241, 244, 422 P.2d 581, 583 (1967).

113. 3 WIGMORE § 820b at 302.

114. *Id.*

the teachings of *Miranda* falls between these two extremes. Statements by an individual which implicate him with criminal acts are the most devastating evidence against him when he seeks exoneration. The only available safeguard is an instruction to the jury to limit its consideration of this evidence to the credibility of the accused and not to consider it as substantive evidence.[115] "Such an instruction, as seems to be generally agreed, is a mere verbal ritual."[116] Chief Justice Burger was among the first to make this point in connection with the impeachment issue, when, as Circuit Judge dissenting in *Lockley v. United States*, he said:

> . . . The charge given in this case was explicitly framed and, if it were possible to narrow the thrust and impact of the full confession in these circumstances, the trial judge did all in his power to accomplish that result. But once introduced for this "limited" purpose, the most skillful charge ever framed is hard put to accomplish the prophylactic properties essential to a fair result.[117]

In *Lockley* he was willing to admit specific portions of an illegally obtained confession to impeach the defendant, but only after those statements were judicially scrutinized under rigid specifications.[118] Those specifications were ignored in *Harris* and no allusion was made to the potential impact on a judge's ability "to accomplish the prophylactic properties essential to a fair result." It is the extreme concern for the rights of the individual that stands as a hallmark of our system of justice. The Constitution is not so limited as to merely prohibit compelling a man to testify against himself or face imprisonment, but "demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."[119] A trial judge, attempting to administer a fair trial, may wish to consider this before invoking the rule of *Harris*.[120]

c. Harris *and The Federal Rules*

The Court in *Harris* also omitted any discussion of its procedural

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115. McCORMICK § 39 at 77; *see also* Bruton v. United States, 391 U.S. 123 (1968).

116. *Id.*

117. 270 F.2d 915, 921 (D.C. Cir. 1959) (dissenting opinion). "The prejudicial impact of the full confession on the jury cannot be eliminated by instruction from the bench, no matter how carefully, pointedly or precisely phrased." *Id.* at 920.

118. *Id. See* note 105 *supra* and accompanying text.

119. Miranda v. Arizona, 384 U.S. 436, 460 (1966).

120. The degree of prejudice inherent in using unlawfully procured statements to impeach the accused is probably greater than admitting his prior felony convictions, but some of the

implications. The admissibility of challenged confessions is determined at a pre-trial hearing.[121] No pre-trial hearing was conducted in Harris' case because the prosecution conceded the statements to be inadmissible under *Miranda*. The Supreme Court thus approved the use of these statements to impeach the defendant without an independent hearing.[122] Harris made no claim that the statements were either coerced or involuntary, and this fact may serve to explain why the decision was limited to the *Miranda* requirements.

This precise issue was presented in *State v. Catrett*[123] and the court held that otherwise inadmissible statements must be subjected to an independent hearing before they can be admitted for any purpose. That decision, however, was premised on the pre-*Harris* rule that statements obtained unlawfully could not be admitted to impeach.[124] *Harris* does not appear to abrogate the rule that "involuntary" confessions are inadmissible to impeach, and the *Miranda* requirements are an element

considerations are analogous. *See, e.g.*, Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965); Weaver v. United States, 408 F.2d 1269 (D.C. Cir.), *cert. denied*, 395 U.S. 927 (1969). *See also* McGowan, *Impeachment of Criminal Defendants by Prior Convictions*, 1970 L. & SOC. ORDER 1; Spector, *Impeaching the Defendant by His Prior Convictions and the Proposed Federal Rules of Evidence: A Half Step Forward and Three Steps Backward*, 1 LOYOLA U.L. J. 247 (1970).

121. *See* Jackson v. Denno, 378 U.S. 368 (1964); *see also* 18 U.S.C. § 3501 (a) (1969); FED. R. CRIM. P. 12; 3 WIGMORE § 861; *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 1058-72 (1966).

122. *See* note 86 *supra*.

123. 276 N.C. 86, 171 S.E.2d 398 (1970).

124. *See* note 74 *supra*. *See also* Gladden v. Unsworth, 396 F.2d 373 (9th Cir. 1968); Breedlove v. Beto, 404 F.2d 1019 (5th Cir. 1968); Velarde v. People, 466 P.2d 919 (Sup. Ct. Colo. 1970); People v. Lefler, 38 Ill. 2d 216, 230 N.E.2d 827 (1967); *but see* People v. Quick, 30 App. Div. 2d 561, 291 N.Y.S.2d 132 (1968).

In Poe v. United States, 233 F. Supp. 173 (D.C.D.C. 1964), a new trial was granted because the judge refused to make an advisory decision about whether certain inadmissible statements obtained from the accused might be admitted to impeach the accused if he took the stand. At the end of the government's case, certain statements obtained from the defendant were ruled inadmissible by the court and the government rested. The only defense planned was the testimony of the defendant. The defendant's appointed counsel, uncertain as to whether these statements might be admissible under the *Walder-Tate* rule, sought an advisory ruling by the court. When the judge refused, counsel convinced the defendant not to take the stand and the defense rested. The defendant was found guilty. The motion to set aside the verdict was granted by Judge J. Skelly Wright because "[t]he failure to inform petitioner of the applicable law deprived him of a fair trial." *Id.* at 178. The decision was affirmed on appeal, 352 F.2d 639 (D.C. Cir. 1965), but only on the grounds that the decision of Judge Wright was reasonable and within his discretionary power.

In United States v. Hart, 407 F.2d 1087 (2d Cir. 1969), involving a *Simmons* situation prior to the *Simmons* decision, the court ruled that the refusal by the trial judge to make an anticipatory ruling on the admissibility of unlawfully obtained statements to impeach the defendant was not error and was within the judge's discretion. The case can be distinguished from *Poe* in that no indication was made in *Hart* that the defendant would have taken the stand had the anticipatory ruling been in the defendant's favor. This case indicates that before a ruling on "admissibility to

of "voluntariness";[125] therefore, it seems unlikely that the concession of "voluntariness" made by the defendant in *Harris* will be forthcoming as a tactical matter in future cases. Without such a concession, a hearing would appear to be necessary to establish the "voluntariness" or "trustworthiness" of the statements.

Another procedural problem created by *Harris* relates to the discovery provisions of the current Federal Rules of Criminal Procedure[126] and the proposed amendments.[127] The current rules permit the judge, in his discretion, to order the prosecution to disclose "written or recorded statements made by the defendant" which should be known to the government.[128] The proposed amendments make such disclosure mandatory and include the disclosure of "the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person known to the defendant to be a government agent."[129] This language is similar to the New York rule[130] which was an issue in the *Harris* case at the state appellate level.[131] The appellate court found the statute to require disclosure only when the prosecution intended to introduce the evidence in its case in chief; since the evidence was admitted to impeach, there was no breach of the disclosure requirement. Testimony inconsistent with unlawfully obtained prior statements was a contingency the state could not anticipate so as to establish "intention" within the meaning of the rule.[132] This result would be different under the proposed rules if written or recorded statements were involved. However, if "intent" is similarly defined, the result would be the same under the proposed rules regarding oral statements. The slight difference in incriminating quality between oral and written

impeach" will be made, the defendant must take the stand; wait and see if the government attempts to introduce the statements; and then suffer the consequences of an independent hearing at that point. The result of *Harris* and *Hart* may be that two separate hearings on the admissibility of the same evidence must be held employing different standards for each hearing. *See* notes 141-43 *infra* and accompanying text.

125. *See, e.g.*, Davis v. North Carolina, 384 U.S. 737 (1965); notes 30-36 *supra* and accompanying text.

126. FED. R. CRIM. P. 16.

127. *See Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts*, 48 F.R.D. 553 (1970).

128. FED. R. CRIM. P. 16(a)(1)(i)(1).

129. 48 F.R.D. at 588.

130. N.Y. CODE CRIM. PROC. § 813-f (Supp. 1970).

131. People v. Harris, 31 App. Div. 2d 828, 298 N.Y.S.2d 245, *aff'd*, 25 N.Y.2d 175, 250 N.E.2d 349, 303 N.Y.S.2d 71 (1969).

132. People v. Harris, 31 App. Div. 2d 828, 829, 298 N.Y.S.2d 245, 247 (1969).

statements would hardly seem to justify the procedural distinction. Providing an adequate defense for an accused who "can't remember" what he said to police would be less burdensome if the contents of these statements were known. This information would assist counsel in making an intelligent decision about how to plead and whether to have defendant testify on his own behalf. Disclosure of unlawfully obtained statements, not intended by the prosecution for its case in chief but now available for impeachment, would serve to further the objectives of Rule 16.[133]

V. CONCLUSION

If the Court had reached the opposite conclusion in *Harris* the result would simply have been consistent with the decisions of the last decade.[134] Some analysis of the related issues might have provided guidelines and insight into the Court's thinking on these constitutional problems.[135] However, *Harris* did neither of these and the actual result makes evaluation of its significance speculative.

133. The objective stated by the advisory committee is "that broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence." *Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts*, 48 F.R.D. 553, 597 (1970). *Cf.* Brady v. Maryland, 373 U.S. 83 (1963).

A possible means available to the defense counsel for circumventing this limitation would be to disclose to the government a present intention to have the defendant testify, the nature and substance of his anticipated testimony, and a specific request to the effect that "if, given these events, you intend to offer the oral statements for impeachment purposes, we request full disclosure of such statements in accord with Rule 16." If the government responds by producing the statements, then (1) a more intelligent decision can be made as to whether defendant should take the stand, (2) defendant's direct testimony could be tailored to avoid inconsistency with the prior oral statements, or (3) counsel could have the defendant impeach himself by disclosing the prior statements, thus eliminating the need for the prosecution to introduce them and diminish the prejudicial impact of impeachment on cross-examination. If the government responds by claiming an inability to formulate "intent" on such conditional circumstances and any decision regarding rebuttal necessarily depends on what the defense actually does on direct, then at the very least, the potential argument for waiver presents an interesting legal question for appellate review. The best result would seem to be to alter the proposed amendments to the Federal Rules to give oral statements the same status as written or recorded statements.

134. *See, e.g.*, Harrison v. United States, 392 U.S. 219 (1968); Simmons v. United States, 390 U.S. 377 (1968); Miranda v. Arizona, 384 U.S. 436 (1966); Griffin v. California, 380 U.S. 609 (1965); Escobedo v. Illinois, 378 U.S. 368 (1964); Jackson v. Denno, 378 U.S. 368 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); Mapp v. Ohio, 367 U.S. 643 (1961); Rogers v. Richmond, 365 U.S. 534 (1961).

135. The value of such comment might be questioned given *Harris'* treatment of similarly helpful comments in *Miranda*. *See* notes 92-93 *supra* and accompanying text.

Chief Justice Burger observed that *Harris* would be of little interest "except to members of the bar."[136] This comment is difficult to comprehend considering *Harris*' treatment of *Miranda v. Arizona*. The innocent as well as the guilty are exposed to the rigors of police interrogation. Statements obtained in that "inherently compelling atmosphere",[137] once thought to be completely protected, may now be admitted to impeach. The significance of this result, compounded by the inadequacy of the Court's analysis, cannot be underplayed.

Whatever *Harris*' significance, it does not overrule *Miranda*. Adequate warnings and effective waiver must be proved before statements can be admitted in the prosecutor's case in chief. Tainted statements may be used to impeach only if they are voluntary. Judges who wish to insure the constitutional rights of the accused and those who do not want to risk being overruled, may find the impeachment distinction unworkable. The Supreme Court has subjected confessions to rigid standards of appellate review when the defendant's statements are admitted into evidence.[138] Review is nonexistent when such statements are excluded.[139]

Harris did not overrule the state court decisions establishing a contrary rule insofar as those decisions were based on state constitutional provisions or case law development.[140] The states remain free to choose their own rule. The federal rule was altered by *Harris*, but an evaluation of its practical application involves a consideration of 18 U.S.C. § 3501. It provides that "the presence or absence of any of the above mentioned factors[141] to be taken into consideration by the judge *need not be conclusive* on the issue of voluntariness of the confession."[142] A judge, without examining the constitutional problems of that provision, *could* find inadequate *Miranda* warnings sufficient to support exclusion on "voluntariness" grounds.[143] Review of a trial judge's

136. Millstone, *Supreme Court Moving to the Right*, St. Louis Post-Dispatch, Feb. 28, 1971, § F, at 1, col. 2. The Chief Justice took the unusual step of not announcing the *Harris* decision from the Bench.

137. *See* Miranda v. Arizona, 384 U.S. 436, 448, 456-61, 465-68, 476-78, 496 (1966).

138. 8 WIGMORE § 862.

139. *See* Benton v. Maryland, 395 U.S. 784 (1969), *overruling* Palko v. Connecticut, 302 U.S. 319 (1937).

140. *See* notes 70-77 *supra* and accompanying text.

141. These factors are quoted in note 19 *supra*. Included are the *Miranda* warnings.

142. 18 U.S.C. § 3501 (b) (1969) (emphasis added).

143. This result would not be inconsistent with the pre-*Miranda* voluntariness test notwithstanding 18 U.S.C. § 3501. *See* Davis v. North Carolina, 384 U.S. 737 (1966) and notes 30-36 *supra* and accompanying text.

finding that a confession was involuntary would be extremely unusual in contrast to the rigid standards invoked when the finding is voluntary. Judges inclined to follow the *Miranda* policies could utilize this approach to circumvent *Harris* on the impeachment question.

The fear expressed by Mr. Justice Brennan, that *Harris* "goes far toward undoing much of the progress made in conforming police methods to the Constitution,"[144] is entitled to attention. The same fine line distinction which may be unworkable could be a means to circumvent *Miranda*. If statements inadequate only under *Miranda* are generally held to be voluntary for impeachment purposes, then it is difficult to foresee how *Miranda* would not become merely a "form of words".[145]

144. 401 U.S. at 232.

145. In Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1921), Mr. Justice Holmes stated that the exclusionary rule of *Weeks* was necessary to prevent the fourth amendment from becoming merely a "form of words". Former Chief Justice Warren, in Miranda v. Arizona, 384 U.S. 436, 444 (1966), applied these same words to the fifth amendment. Their use in this note is in reference to the language of the uncounted Supreme Court decisions interpreting the Constitution to mandate exclusion.