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Barbara Mello
University of Baltimore School of Law

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NOTES AND COMMENTS

EXCLUSIONARY RULE UNDER ATTACK

Analysis of three cases—Harris v. New York, United States v. Calandra and Michigan v. Tucker—reveals a systematic attack by the current Supreme Court on the exclusionary concept in search and seizure and self-incrimination cases. The author examines the Court's treatment of precedent cases and explores the logical framework of the erosion of the exclusionary rule's protections accorded persons accused of crime.

Those assessing the Nixon Presidency may conclude that one of its most significant legacies is the effect of his realignment of the Supreme Court on the criminal justice system. Four vacancies occurring in his first administration gave Mr. Nixon an opportunity to mold the Court in his own image.[1] The new majority created by his appointments has, in only three years, made substantial inroads into major criminal decisions of the Warren Court. Further limitations on the protections accorded those accused or suspected of crime could lead to the undoing of the Warren "revolution."

The immediate target of the present Court seems to be the abolition of the exclusionary rule[2] and its corollary doctrine, "the fruit of the poisonous tree."[3] A series of cases decided since 1971 has undermined the force of the rule.[4] Two decisions announced in the first half of

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1. Four months after taking office (May 21, 1969) Richard Nixon nominated Warren E. Burger to replace retiring Chief Justice Earl Warren. On May 15, 1969, Justice Abe Fortas resigned. A year later (May 12, 1970), after Senate rejection of successive nominations of Clement Haynsworth and G. Harold Carswell, the appointment of Justice Harry A. Blackmun was approved. In September 1971, Justices Hugo L. Black and John Marshall Harlan both retired. The following month Mr. Nixon nominated Lewis F. Powell, Jr., and William H. Rehnquist to the Court. The Senate approved Justice Powell's appointment on December 6, 1971, and Justice Rehnquist's four days later. The Court was then, Nixon told a press conference, "as balanced as I can make it." The Washington Post, Jan. 20, 1973, at C-8.
2. The principle, sometimes called the "suppression doctrine," is that evidence obtained by means of illegal government activity is not admissible against one whose constitutional rights have been violated by that activity. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).
3. The prohibition is of the use of evidence derived from evidence which has been illegally seized. The phrase originated with Justice Frankfurter, Nardone v. United States, 308 U.S. 338, 341 (1939), but the principle dates from Justice Holmes' statement in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920): "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.* at 392.
4. Scheneckloth v. Bustamonte, 412 U.S. 218 (1973); Kirby v. Illinois, 406 U.S. 682 (1972); Kastigar v. United States, 406 U.S. 441 (1972); Harris v. New York, 401 U.S. 222 (1971); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (dissenting opinion); Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (dissenting opinion).

1974, *United States v. Calandra*[5] and *Michigan v. Tucker*,[6] weaken still further both the rule and the corollary.

Chief Justice Burger came to the Court with a record of opposition to the exclusionary rule and support of the common law principle that so long as evidence is competent, the courts will not inquire into the means by which it was obtained.[7] At his earliest opportunity he made known the course he hoped the Supreme Court, under his leadership, would adopt with regard to suppression of illegally obtained evidence. In a lengthy and detailed dissent in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[8] Chief Justice Burger wrote:

> For more than 55 years this Court has enforced a rule under which evidence of undoubted reliability and probative value has been suppressed and excluded from criminal cases whenever it was obtained in violation of the Fourth Amendment. . . . The rule has rested on a theory that suppression of evidence in these circumstances was imperative to deter law enforcement authorities from using improper methods to obtain evidence. . . . If an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule. . . .
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> Although I would hesitate to abandon it until some meaningful substitute is developed, the history of the Suppression Doctrine demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective.[9]

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5. 414 U.S. 338 (1974).
6. __U.S.__, 94 S. Ct. 2357 (1974).
7. *See, e.g.*, Burger, *Who Will Watch the Watchman?* 14 AM. U. L. REV. 1 (1964). The common-law rule, defined in 8 J. WIGMORE, EVIDENCE § 2183 (McNaughton rev. 1961) was approved by the Supreme Court in Adams v. New York, 192 U.S. 585 (1904). *Adams* quoting from 1 S. GREENLEAF, EVIDENCE § 245a noted: "It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The Court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question." 192 U.S. at 595.
8. 403 U.S. 388 (1971). *Bivens* held that a Fourth Amendment violation by federal agents gives rise to a federal cause of action for damages, although there is no express statutory authorization for such a remedy.
9. *Id.* at 413-15. In the remainder of the *Bivens* dissent the Chief Justice outlined a legislative proposal for a "meaningful substitute" for exclusion. It included: (a) waiver of sovereign immunity; (b) 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; (c) creation of a special tribunal to adjudicate all claims under the statute; (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 (e) a provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment. S. 881, 93d Cong., 1st Sess. (1973), introduced by Senator Lloyd Bensten (D. Tex.) in February 1973, follows the Burger guidelines. Damages would not be assessed against the offending agent, but directly against the United States, on the theory of respondeat superior. The measure provides no remedy for violations by *state* officers, a problem the

In the same dissent the Chief Justice also suggested the strategy he felt the Court should follow in attacking the exclusionary rule, at least in search and seizure cases:

> I do not propose, however, that we abandon the suppression doctrine until some meaningful alternative can be developed. In a sense our legal system has become the captive of its own creation. To overrule *Weeks* and *Mapp*, even assuming the Court was now prepared to take that step, could raise yet new problems. Obviously the public interest would be poorly served if law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on "criminals" had been declared. I am concerned lest some such mistaken impression might be fostered by a flat overruling of the suppression doctrine cases. For years we have relied upon it as the exclusive remedy for unlawful official conduct; in a sense we are in a situation akin to the narcotics addict whose dependence on drugs precludes any drastic or immediate withdrawal of the supposed prop, regardless of how futile its continued use may be.[10]

The present Court's decisions dealing with the exclusionary rule have followed this policy of gradual withdrawal. They have limited, eroded and contradicted earlier suppression cases, especially *Mapp v. Ohio*[11] and *Miranda v. Arizona*.[12] They have nullified important aspects of these and other decisions protective of the rights of the accused.[13] But

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Chief Justice dismisses by saying, "Once the constitutional validity of such a statute is established, it can reasonably be assumed that the States would develop their own remedial systems on the federal model." 403 U.S. at 423-24. This, of course, also assumes—not so reasonably—that the states would waive sovereign immunity to suit in such cases. Any action under such a measure would naturally be subject to all tort defenses, including good faith.

10. *Id.* at 420-21. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), announced the same day as *Bivens*, the Chief Justice continued the theme: "This case illustrates graphically the monstrous price we pay for the exclusionary rule in which we seem to have imprisoned ourselves." 403 U.S. at 493. *Coolidge*, holding inadmissible evidence seized under a warrant authorized by a prosecuting attorney rather than by a neutral magistrate, and rejecting the same evidence under the "plain view" doctrine because its discovery was not inadvertent, found three Justices, Burger, Blackmun and Black, in agreement that the Fourth Amendment, standing alone, would not support an exclusionary rule. Justice White also dissented from the *Coolidge* holding, but on the ground that the Fourth Amendment was satisfied. Chief Justice Burger declined to accept the proposition, advanced by Justice Black in both *Coolidge* and *Mapp*, that the Fifth Amendment requires exclusion of evidence seized in violation of the Fourth Amendment.
11. 367 U.S. 643 (1961).
12. 384 U.S. 436 (1966).
13. The present Court's treatment of the Warren Court decisions of Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); and Walder v. United States, 347 U.S. 62 (1954), as well as the earlier cases of Agnello v. United States, 269 U.S. 20 (1925); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Weeks v. United States, 232 U.S. 383 (1914); and Counselman v.

they have not openly and candidly overruled them, announcing new law to take their place. This comment will assess the current status of the exclusionary principle, and examine critically the methods the present Court has employed to attack it.

THE GROWTH AND DECLINE OF THE EXCLUSIONARY RULE

Most of the twentieth century courts have excluded evidence resulting from illegal searches and seizures,[14] coerced confessions,[15] and compulsory self-incrimination.[16] The Warren Court made the exclusionary rule binding on the states,[17] clarified the bases for its application, and increased the number of contexts in which illegally obtained evidence would be suppressed. Having held the privilege against self-incrimination applicable to the states,[18] it applied that privilege to the admissibility of confessions.[19] It then extended the

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Hitchcock, 142 U.S. 547 (1892) will be developed more fully in the text and subsequent notes.

14. Weeks v. United States, 232 U.S. 383 (1914), enunciated the rule for search and seizure cases. Mapp v. Ohio, 367 U.S. 643 (1961), applied it to the states, after Wolf v. Colorado, 338 U.S. 25 (1949), had held that freedom from unreasonable searches and seizures was a right protected against invasion by the states through the Fourteenth Amendment. In search and seizure cases exclusion is grounded on the Fourth Amendment. Justice Black consistently maintained that the Fourth Amendment, standing alone, would not support the principle, but that the Fourth and Fifth Amendments, taken together, as in Agnello v. United States, 269 U.S. 20 (1925), and Boyd v. United States, 116 U.S. 616 (1886), compelled exclusion. Thus when he found no Fifth Amendment violation Justice Black refused to apply the exclusionary rule. Coolidge v. New Hampshire, 403 U.S. 443 (1971) (Black, J., dissenting); Mapp v. Ohio, 367 U.S. 643 (1961) (Black, J., concurring).
15. Rochin v. California, 342 U.S. 165 (1952); Brown v. Mississippi, 297 U.S. 278 (1936). Early cases found authority for the exclusion of evidence, either physical or testimonial, extracted from a defendant by brutal or shocking methods in the concept of due process. Hence the rule in this context was applied to the states as early as 1936. *See, e.g.*, Culombe v. Connecticut, 367 U.S. 568, 602 (1961); Chambers v. Florida, 309 U.S. 227 (1940).
16. Counselman v. Hitchcock, 142 U.S. 547 (1892), held that a defendant could not be compelled to give self-incriminating testimony unless he was granted immunity from prosecution co-extensive with the Fifth Amendment privilege, and that the government was barred from both direct and derivative use of such testimony. *See also* Ullman v. United States, 350 U.S. 422 (1956); Shapiro v. United States, 355 U.S. 1 (1948); Brown v. Walker, 161 U.S. 591 (1896).
17. Mapp v. Ohio, 367 U.S. 643 (1961).
18. Malloy v. Hogan, 378 U.S. 1 (1964).
19. Writing for the majority in Malloy v. Hogan, 378 U.S. 1 (1964), Justice Brennan re-examined the history of suppression of coerced confessions. Twining v. New Jersey, 211 U.S. 78 (1908), had held that the Fifth Amendment privilege was not a "fundamental right" and hence was not applicable to the states through the Fourteenth Amendment. The Court in Brown v. Mississippi, 297 U.S. 278 (1936), Justice Brennan conceded, had felt impelled in light of the *Twining* decision, to base exclusion on the common-law confession rationale and to say that its holding did not involve self-incrimination. He concluded: "But this distinction was soon abandoned, and today the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897, when, in Bram v. United States, 168 U.S. 532, the Court held that '[i]n 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

Fifth Amendment's exclusionary rule to police interrogation of a suspect in custody[20] and to identification testimony derived from improperly conducted lineups.[21] It also defined important limitations to the rule,[22] chief among which was the requirement that standing to invoke it is predicated on an invasion of one's own constitutional rights—that one may not vicariously assert the rights of another.[23]

Growing out of the concept of exclusion was the doctrine of the "fruit of the poisonous tree," which bars secondary exploitation of the primary illegality.[24] Not only is illegally obtained evidence subject to exclusion, but other evidence derived from it is suppressed as well. The Warren Court, although it narrowed the doctrine somewhat,[25] extended its application to verbal as well as tangible material.[26]

As the law stood when the present Court was assembled, one who was personally aggrieved was entitled, in a federal or a state court, to suppression of physical evidence, a statement or confession, or identification testimony unlawfully obtained by state agents. The government was not permitted to profit from its illegal activity. Unless the

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by that portion of the Fifth 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." ' " 378 U.S. at 6–7. For discussion of confessions and self-incrimination, see L. LEVY, ORIGINS OF THE FIFTH AMENDMENT—THE RIGHT AGAINST SELF-INCRIMINATION (1968); *Developments in the Law—Confessions*, 79 HARV. L. REV. 935 (1966).

20. Miranda v. Arizona, 384 U.S. 436 (1966). *Miranda* based exclusion on both the Fifth Amendment self-incrimination clause and the Sixth Amendment right to assistance of counsel, which the Court said was essential to make the Fifth Amendment guarantee meaningful in the interrogation setting.

    In Mallory v. United States, 354 U.S. 449 (1957) and McNabb v. United States, 318 U.S. 332 (1943), which held inadmissible confessions obtained from a suspect held an unduly long time without being arraigned before a magistrate, the exclusionary rule was applied as a rule of evidence only, based on the supervisory power of the Supreme Court over the lower federal courts. Since this power derived directly from FED. R. CRIM. P. 5(a), the *McNabb-Mallory* rule does not apply to the states. *See* Culombe v. Connecticut, 367 U.S. 568, 598–602 (1961).

21. The companion decisions, United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967), grounded the exclusion of a witness' identification of a suspect based on a lineup at which the accused was denied the assistance of counsel on the Fifth and Sixth Amendments, as well as due process.

22. These are in addition to the constitutional limitation that illegally obtained evidence will be excluded only when significant state action was involved in its production.

23. The leading standing cases have concerned illegal searches and seizures. Jones v. United States, 362 U.S. 257 (1960), rejected the "subtle distinctions" of common-law property concepts which courts had employed for many years to deny standing to those who had no possessory interest in the premises invaded, holding that "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." *Id.* at 267. Alderman v. United States, 394 U.S. 165 (1969), held, however, that Fourth Amendment rights are personal and may not be vicariously asserted. *Alderman* decided that one has no standing to suppress evidence unlawfully seized from another, but must establish that the illegal search aggrieved him personally.

24. Note 3 *supra*.

25. Walder v. United States, 347 U.S. 62 (1954), granted the prosecution a limited right to use otherwise inadmissible evidence to impeach a defendant's trial testimony on matters collateral to his guilt or innocence.

26. Wong Sun v. United States, 371 U.S. 471 (1963).

prosecution could show that the evidence in question derived from an independent, legal source,[27] the courts were required to prohibit its indirect use.[28] The rule applied to anything of evidentiary value, no matter how trustworthy it might be.[29]

From the time of the exclusionary rule's announcement in *Weeks v. United States*[30] until the start of the present decade, the unmistakable trend was toward its expansion and extension into new areas. The present Court has begun a process of contraction and limitation. Four important decisions before 1974 signaled a course toward more tolerant standards of admissibility. *Harris v. New York*,[31] which will be examined in detail, held that a defendant's statements made to police in the absence of adequate *Miranda* warnings are admissible to impeach his testimony at trial.

Kastigar v. United States,[32] which upheld a "use immunity" statute,[33] reduced the scope of immunity required to be granted one compelled to give self-incriminating testimony.[34] *Kastigar* held that, since the Fifth Amendment privilege does not apply unless the witness is exposed to possible criminal penalties,[35] only the compelled testimony itself, or any evidence derived from it, will be excluded in a subsequent criminal prosecution of the witness. The government is not foreclosed, as courts for eighty years had held it was,[36] from future prosecution for the offense or "transaction" to which the testimony relates.

In 1972, in *Kirby v. Illinois*,[37] the Court limited the number of situations in which identification testimony would be suppressed. *United States v. Wade*[38] and *Gilbert v. California*[39] had announced a

27. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).
28. Nardone v. United States, 308 U.S. 338 (1939). The ban on indirect use is not, however, absolute. As the connection between the illegal activity and the evidence sought to be introduced grows more tenuous, the taint becomes "dissipated," and the evidence may be admitted. Wong Sun v. United States, 371 U.S. 471 (1963).
29. Davis v. Mississippi, 394 U.S. 721 (1969).
30. 232 U.S. 383 (1914).
31. 404 U.S. 222 (1971).
32. 406 U.S. 441 (1972).
33. Organized Crime Control Act of 1970, 18 U.S.C. §§ 6002-03 (1970).
34. *See also* Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S 472 (1972); Piccirillo v. New York, 400 U.S. 548 (1971).
35. Ullman v. United States, 350 U.S. 422. "[The] sole concern [of the privilege] is ... with the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to the criminal acts....' Immunity displaces the danger. Once the reason for the privilege ceases, the privilege ceases." *Id.* at 438-39, quoting Boyd v. United States, 116 U.S. 616, 634 (1886).
36. Counselman v. Hitchcock, 142 U.S. 547, 585-86 (1892). "We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States.... In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates." *See also* Ullman v. United States, 350 U.S. 422 (1956); Brown v. Walker, 161 U.S. 591 (1896).
37. 406 U.S. 682 (1972).
38. 388 U.S. 218 (1967).
39. 388 U.S. 263 (1967).

rule of per se exclusion of identifications based on lineups at which the suspect was denied the assistance of counsel. *Kirby* held that the *Wade-Gilbert* rule does not apply to lineups held before the accused was under indictment. This was an apparent, though tacit, reversal, since cases denying retroactivity to the rule, as well as subsequent applications of it, had dealt with pre-indictment lineups.[40] Although the *Kirby* Court distinguished the underlying basis of *Miranda*,[41] its reasoning that the right to counsel does not attach before "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information or arraignment"[42] appears to mark a turning away from that decision.[43]

In 1973, in *Schneckloth v. Bustamonte*,[44] the Court refused to extend the requirement of *Miranda*-type warnings to the search and seizure context. Evidence will not be excluded because of the state's failure to prove that one who consented to a search knew, or was notified, that he had the right to withhold his consent.[45]

With these decisions the Court arrested the expansion of the exclusionary rule. Within a six-month period, it dealt the doctrine two further blows. *United States v. Calandra*,[46] decided in January 1974, held that a grand jury witness who has been granted immunity from prosecution has no standing to invoke the exclusionary rule to bar questions based on evidence illegally seized from him. *Michigan v. Tucker*,[47] announced in June, decided that when a suspect is interrogated without being given full *Miranda* warnings, the testimony of a witness whose identity was learned through that interrogation is admissible at trial, when the witness himself is available for cross-examination.[48]

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40. Foster v. California, 394 U.S. 440 (1969); Stovall v. Denno, 388 U.S. 293 (1967). *See also* Coleman v. Alabama, 399 U.S. 1 (1970).
41. "[T]he *Miranda* decision was based exclusively upon the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination, upon the theory that custodial *interrogation* is inherently coercive." 406 U.S. at 688. *Kirby*, said the Court, concerned only the right to counsel; the privilege against self-incrimination was "in no way implicated." *Id.* at 687.
42. *Id.* at 689.
43. Writing for the majority in *Kirby*, Stewart, J., said: "The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the Government has committed itself to prosecute, and only then that the adverse positions of Government and defendant have solidified." 406 U.S. at 689. This is a decided departure from *Miranda*'s statement that "our adversary system of criminal proceedings commences" when "the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 477. The "starting point" language of *Kirby* also appears to restrict the principle of Escobedo v. Illinois, 378 U.S. 478 (1964), which held that pre-indictment interrogation is a "critical stage" of criminal proceedings, during which the Sixth Amendment right to counsel attaches.
44. 412 U.S. 218 (1973).
45. This also appears to repudiate the philosophical basis of *Miranda*, that one cannot make an intelligent waiver of a right unless he knows that the right exists, and that the only way to be sure he knows is not to rely on presumption, but to tell him.
46. 414 U.S. 338 (1974).
47. __U.S.__, 94 S. Ct. 2357 (1974).
48. This is the question expressly left open in Harrison v. United States, 392 U.S. 219 (1968),

In both of these cases the Court went beyond its narrow holdings to issue broad pronouncements redefining the limitations and purposes of the exclusionary rule. So inimical are these declarations to the doctrine as twentieth-century courts have developed it that Justice Brennan, in dissent from the opinion in *Calandra*, was moved to sound a note of alarm:

> In *Mapp*, the Court thought it had "close[d] the only courtroom door remaining open to evidence secured by official lawlessness" in violation of Fourth Amendment rights. The door is again ajar. As a consequence, I am left with the uneasy feeling that today's decision may signal that a majority of my colleagues have positioned themselves to reopen the door still further and abandon the exclusionary rule in search and seizure cases.[49]

An examination of the methods that this Court has employed to diminish the exclusionary rule without the necessity of "any drastic or immediate withdrawal of the supposed prop"[50]—*i.e.*, without overruling *Weeks*, *Mapp* and *Miranda* and the cases that rely on them—is illuminating. Careful study of three cases, *Calandra*, *Tucker* and the 1971 decision *Harris v. New York*[51] discloses a disconcerting reliance on selective reasoning, manipulation and sometimes outright misstatement of controlling precedent.[52]

HARRIS V. NEW YORK

The *Harris* opinion gave the new Chief Justice an opportunity to try the strategy he would later urge in *Bivens*.[53] He seriously weakened *Miranda*, but did not withdraw its support altogether. *Harris* has been thoroughly analyzed.[54] It merits attention here, however, because it provided a foundation for the decision in *Tucker*.

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which held that since the defendant's testimony at his first trial was the fruit of an illegally obtained confession, it could not be introduced at his retrial. The Court said: "We have no occasion in this case to canvass the complex and varied problems that arise when the trial testimony of a witness other than the accused is challenged as 'the eventiary product of the poisoned tree.'" 329 U.S. at 223 n.9.

49. 414 U.S. at 365 (citation omitted).
50. Note 10 *supra*.
51. 401 U.S. 222 (1971).
52. Dershowitz and Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1201–08 (1971), present a convincing argument that the *Harris* opinion also involved misrepresentation of the record.
53. *Harris* was decided some four months before *Bivens* and *Coolidge*.
54. Excellent examinations of its reasoning and implications are Dershowitz and Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971); Kent, *Harris v. New York: The Death Knell of Miranda and Walder?*, 38 BROOKLYN L. REV. 357 (1971); *Admitting the Inadmissible: The Wounding of Miranda*, 23 BAYLOR L. REV. 639 (1971); and Note, *Harris v. New York —A Retreat from Miranda*, 45 TEMPLE L.Q. 118 (1971).

Harris was arrested for selling heroin to an undercover police officer. Before questioning him, the police told him of his right to be silent, of possible evidentiary use of any statement he might make, and of his right to consult an attorney. They did not tell him of his right to court-appointed council.[55] He eventually gave the police an incriminating statement, which the prosecution did not introduce in its case in chief. Taking the stand at trial, Harris claimed that he had actually sold baking powder, intending to defraud the purchaser.

On cross-examination Harris was confronted with the transcript of his interrogation. Although the transcript was not shown to the jury, the prosecutor read the questions and answers from it. Harris' answers on cross-examination were wholly inconsistent with parts of his prior statement. The trial court instructed the jury that it should consider the statement only in relation to the defendant's credibility, and not as evidence of his guilt. The jury convicted on one count of the two-count indictment.

Harris testified on cross-examination that he did remember making a statement, but he was vague in recalling what he had said. Queried on his poor memory, he replied, "My joints was down and I needed drugs."[56] He admitted that he was a heroin addict.

The Court, in an eleven-paragraph opinion, ruled that the uncounseled statement was admissible to impeach the defendant's trial testimony, "provided of course that the trustworthiness of the evidence satisfies legal standards."[57]

Leaving aside the question of the legal trustworthiness of the statement, made while under arrest, of an addict experiencing withdrawal, the majority's treatment of the two cases on which it purports to rely prompts some concern.

To deal with the self-incrimination question, the Court first had to come to terms with *Miranda*. Six federal courts of appeal and appellate courts of fourteen states had interpreted that decision as making no

55. The interrogation took place before *Miranda* was decided, but since the trial was after *Miranda*, under the rule of Johnson v. New Jersey, 384 U.S. 719 (1966), *Miranda* applied.

56. 401 U.S. at 227 (Brennan, J., dissenting).

57. *Id.* at 224. Chief Justice Burger by implication resurrects the trustworthiness rationale of the coerced confession rule, *see* Lisenba v. California, 314 U.S. 219, 236 (1941), which had been on the decline for years before being laid to rest in Rogers v. Richmond, 365 U.S. 534, 540–41 (1961): "Our decisions under [the Fourteenth] Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is not so because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our law: that ours is an accusatorial and not inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth."

The Chief Justice has long supported the trustworthiness premise. Writing in dissent in Lockley v. United States, 270 F.2d 915 (D.C. Cir. 1959), which concerned a statement obtained in violation of the *Mallory* rule, then Judge Burger wrote: "A coerced confession is rejected because it is not a *true* statement but one exacted by duress or force and thus inherently unreliable. A confession rejected under Rule 5(a) for 'unnecessary delay' is not discredited as inherently untrustworthy; it is rejected as a means of enforcing Rule 5(a)—a prophylactic suppression." *Id.* at 921, n.1.

"distinction between statements used on direct as opposed to cross-examination."[58] *Harris*, however, evaded the *Miranda* barrier by branding as dictum, and therefore "not controlling," one of *Miranda's* important explicative passages. The Chief Justice wrote:

> Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an 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. *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes. . . .[59]

One passage in *Miranda* that "can indeed be read" to bar use for any purpose of a statement obtained without giving all four of the required warnings is the following:

> 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 intented to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication.* These statements are incriminating in any meaningful sense of the word and may not be used without full warnings and effective waiver required for any other statement.[60]

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58. 401 U.S. 222, 231 (dissenting opinion), and cases cited note 4 *supra*, including Franklin v. State, 6 Md. App. 572, 252 A.2d 487 (1969).
59. 401 U.S. at 224.
60. 384 U.S. 436, 476-77 (1966) (emphasis added). This is not the first time this Court has branded an important passage in an earlier case as dictum and therefore "not controlling." Counselman v. Hitchcock, 142 U.S. 547 (1892), stated that only absolute immunity could supplant the Fifth Amendment privilege. Two later cases, Adams v. Maryland, 347 U.S. 179, 182 (1954) and United States v. Murdock, 284 U.S. 141 (1931), had called this the principle of *Counselman*. Nevertheless, the present Court, in Kastigar v. United States, 406 U.S. 411, 455 (1972), said that this statement was in the context of ancillary points, not necessary to the holding.

This language, though not essential for reversal of the four convictions under review in *Miranda*, unmistakably conveys the Court's thinking concerning the exact situation found in *Harris* and the precise use to which the defendant's statement was put.[61]

If the Fifth Amendment's self-incrimination clause has been violated, it is not the Court but the Constitution that demands exclusion. Yet in discussing *Miranda's* requirement of suppression of testimony obtained from a defendant without a knowing, intelligent waiver of the Fifth Amendment privilege, Chief Justice Burger makes no mention of the exclusionary rule contained in the Amendment itself.[62] Instead, he predicates suppression on deterrence of police misconduct[63]—a rationale that, when acknowledged, has largely been confined to search and seizure cases,[64] and has no place in a self-incrimination setting. The following language in *Harris*, then, seems incongruous in its Fifth Amendment context: "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."[65]

Even if this assertion were constitutionally sound, its reasoning avoids reality. In practical application *Harris* holds out a strong inducement to police to violate *Miranda's* command if they cannot get a statement by complying with it. Suppose, for example, that a suspect is given the *Miranda* warnings and starts to answer questions, then changes his mind and asks that the interrogation be stopped. The officer will be greatly tempted to continue, knowing that if he does compel a confession, it can be used to impeach any testimony the defendant offers—if the mere fact of the prosecution's having it does not keep the defendant off the stand in the first place. Since the state's case seldom depends entirely on the defendant's statement, without corroborating testimony (as it may on illegally seized physical evidence), losing the use of such a statement in the case in chief may be a small price to pay for the

61. That this was the result intended by the *Miranda* Court is indicated by the fact that the equation of admissions and "exculpatory" statements to confessions drew specific criticism in each of the three dissenting opinions filed in *Miranda*. 384 U.S. 436, 502 (Clark, J., dissenting and concurring); *Id.* at 505 (Harlan, J., dissenting); *Id.* at 535 (White, J., dissenting).

62. "No person shall . . . be compelled in any criminal case to be a witness against himself."

63. This is an old theme for the Chief Justice. Two years before *Miranda* was decided he wrote: "We see thus that the Supreme Court has steered a waivering course—Justice Jackson called it 'inconstant and inconsistent'—in explaining the suppression of evidence obtained by official illegality. At times, confusing and even contradictory rationales have been put forward. But despite this groping, the Court now appears to have settled upon the need for deterrence of police violations as the principal reason for suppression." Burger, *Who Will Watch the Watchman?*. 14 AM. U. L. REV. 1 (1964).

64. *See, e.g.*, Wolf v. Colorado, 338 U.S. 25 (1949), *overruled in part*, Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 365 U.S. 206 (1960); Irvine v. California, 347 U.S. 128 (1954).

65. 401 U.S. 222, 225 (1971).

prosecutorial advantage to be gained by (1) possibly preventing the defendant from testifying, and (2) acquiring a statement that may provide further investigatory leads, including the identities of witnesses whose testimony now, under *Tucker*, will be admissible.

An additional passage in *Harris* indicates a lack of sympathy with the central themė of *Miranda:*

> 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. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment.[66]

The apparent error is that Harris did *not* make his statement to "some third person," but to the *police*, in custodial interrogation—the very situation that Miranda went to exhaustive lengths to demonstrate as coercive.[67] To fail to see a distinction between a casual remark to an acquaintance and a statement given to interrogating officers in a police station is to ignore *Miranda's* reasoning in extending the privilege against self-incrimination to the interrogation setting.

Another case vitiated by the *Harris* Court was *Walder v. United States.*[68] It was on this case that *Harris* relied as direct precedent for permitting illegally produced evidence to be used for impeachment.[69]

Walder had once been indicted for purchasing and possessing heroin. The prosecution was dropped, following his successful motion to suppress the evidence. Two years later he was again indicted, on other narcotics charges. At trial he denied ever having bought, sold, possessed or given away any narcotics in his entire life. On cross-examination he reiterated these statements. The government then, over his objection, questioned him about the heroin capsule unlawfully siezed from him two years before. Denying that any narcotics had been taken from him, Walder flatly contradicted the affidavit he had filed in connection with his motion to suppress the evidence in the earlier proceeding. The government then called one of the officers who had taken part in the unlawful search and seizure and the chemist who had analyzed the capsule it produced. The trial judge admitted this evidence, charging the jury that it was not to be used to determine guilt or innocence, but solely to test the defendant's credibility. The conviction was affirmed.

The difference between Walder's position and Harris' is apparent. If

66. *Id.* at 325–26.
67. *Miranda* dwells on the unique conditions existing in the police station, describing in detail the psychological techniques used by police to extract confessions. 384 U.S. 436, 448–55 (1966).
68. 347 U.S. 62 (1954).
69. 401 U.S. 222, 224–25 (1971).

the *Walder* jury chose to believe the government's rebutting evidence, it was led inevitably only to conclude that the defendant was not truthful. It was not bound to convict him. The *Harris* jury could hardly do otherwise, if it believed the impeaching testimony.

The *Walder* holding was expressly limited to rebuttal of collateral issues raised by the defense:

> Of course the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all 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.[70]

This language, like that cited earlier from *Miranda*, seems clearly to deal with the precise situation found in *Harris*.[71] Certainly the defendant was not "free to deny all elements of the case against him" when the government could impeach his denial by means of his own illegally obtained statement, directly incriminating him. *Harris* renders the limiting language of *Walder* inoperative:

> 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 on 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*. . . . The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby.[72]

Surely the impeachment process was helpful to the jury, but the cost to the defendant was scarcely a "speculative possibility", since our Constitution recognizes a "difference in principle" between refusing to allow one defendant to perjure himself on a collateral matter[73] and permitting the government to prove its case against another by flouting his Fifth Amendment privilege. The *Harris* Court advanced a policy justification for its holding: "The shield provided by *Miranda*

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70. 347 U.S. 62, 65 (1954).

71. *Walder* stated a very narrow exception to an important principle of Agnello v. United States, 269 U.S. 20 (1925), that evidence produced by means of an illegal search and seizure is not admissible in rebuttal when the defendant has not testified concerning it in his direct examination. 269 U.S. at 35. By ignoring *Walder*'s express limitation of the application of its holding, the *Harris* Court appears to have overruled, without citing, this aspect of *Agnello*.

72. 401 U.S. 222, 225 (1971).

73. It was clear that Walder *had*, in fact, committed perjury, since both his earlier affidavit and his contradictory testimony were made under oath. Such was not the case with Harris.

cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."[74]

This pronouncement necessarily assumes that the defendant's unsworn statement, made in the "inherently coercive"[75] atmosphere of station-house interrogation, when he had not seen an attorney, and was badly in need of drugs, is true, whereas the testimony given in court, under oath, and with the assistance of counsel who himself had an interest in preventing perjury in his client, is false. The basis for such an assumption would seem to be that the defendant who says "I did it" is always telling the truth, and the one who says "I didn't" is always lying—which hardly comports with the presumption of innocence.

The Court's justification further assumes that, on balance, the government's interest in preventing perjury outweighs the individual's right not to be compelled to be a witness against himself. To strike such a balance gives little weight to a constitutional guarantee that has been called the "essential mainstay" of the adversary system.[76] The government has a ready remedy for perjury, in prosecution *for that offense* and imposition, following conviction, of the penalty affixed by law. It is both unnecessary and constitutionally impermissible for a court to assume perjury where none is proven and to punish it, without trial, by compelling a defendant to incriminate himself on another, unrelated charge. Harris was not asserting a right to perjure himself,[77] any more than he was asserting a right to deal in narcotics. His claim was no more than the Constitution guarantee of the right to a trial free of the taint of self-incrimination.

UNITED STATES V. CALANDRA

In January, 1974, the Court carved another deep inroad into the exclusionary rule, and appeared to repudiate its constitutional bases as enunciated over the past sixty years since *Weeks v. United States.*[78] *United States v. Calandra,*[79] in a 6-3 decision written by Justice Powell, held that a witness granted immunity from prosecution must answer a grand jury's questions based on evidence obtained in violation of the witness' own Fourth Amendment rights.

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74 401 U.S. 222, 226 (1971). The terminology is borrowed from *Walder*: "[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." 347 U.S. 62, 65 (1954).

75. This epithet, first used in Ashcraft v. Tennessee, 322 U.S. 143 (1944) (dissenting opinion), was accepted by the present Court in Kirby v. Illinois. 406 U.S. 682, 688 (1972).

76. Malloy v. Hogan, 378 U.S. 1. 7 (1964).

77. The Court spoke of "right" as well as license: "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." 401 U.S. 222. 225.

78. 232 U.S. 383 (1914).

79. 414 U.S 338 (1974).

In connection with an investigation of suspected illegal gambling, federal agents secured a warrant authorizing a search of John Calandra's place of business. The warrant specified that the object of the search was bookmaking records and wagering paraphernalia. Executing it, the agents conducted a thorough four-hour search of the two-story Royal Machine and Tool Company, spending more than three hours going through Calandra's office and files.

Although the agents found no gambling equipment, one discovered a card indicating that a certain doctor had been making periodic payments to Calandra. Aware that the U.S. Attorney's office had been investigating extortionate credit transactions, and that the doctor had been a victim of loan sharks, the agent seized the card.

Three months later a special federal grand jury was convened to investigate possible loan-sharking activities. It subpoenaed Calandra to question him about the evidence seized during the earlier search. Calandra appeared, but refused to testify, invoking the Fifth Amendment. The government then requested the district court to grant him transactional immunity, pursuant to the statute then in effect.[80] Calandra moved[81] for suppression and return of the evidence on the grounds that the affidavit supporting the warrant was insufficient and that the search exceeded its scope. At a hearing on the motion, he stipulated that he would refuse to answer questions based on the seized materials. The district court granted the motion and ordered that Calandra need not answer any of the grand jury's questions based on the evidence, holding that:

> ... there is a requirement of due process which allows a witness to litigate the question of whether the evidence which constitutes the basis for the questions asked of him before the grand jury has been obtained in a way which violates the constitutional protection against unlawful search and seizure.[82]

The Court of Appeals for the Sixth Circuit affirmed that the district court had properly entertained the suppression motion and that a grand jury witness may invoke the exclusionary rule to bar questioning based on evidence obtained in an unlawful search and seizure, regardless of any grant of immunity.[83]

Justice Powell reviewed at some length the history and purpose of the grand jury, paying particular attention to its inquisitorial function. The decision in this case, he said, would balance the historical importance of that function against the *deterrence value* of the exclusionary rule if the petitioner were permitted to invoke it in this context.[84] The Court of Appeals had said: "Against the interest of unencumbered

80. 18 U.S.C. § 2514 (1968).
81 Fed. R. Crim. P. 41(e).
82. *In re* Calandra, 332 F. Supp. 737, 742 (N. D. Ohio 1971).
83. United States v. Calandra, 465 F 2d 1218 (6th Cir. 1972).
84. 414 U.S. 338, 347 (1974).

inquiry and the efficient administration of justice must be weighed *the importance which society attaches to the protection of the Fourth Amendment guarantee of privacy* which is afforded by access to the exclusionary rule and Rule 41(e)."[85]

The Court refused to impede the grand jury's functioning by making what it called an "unprecedented extension"[86] of the exclusionary rule to its proceedings. Such an extension, however, is not without precedent. Both the district court and the Court of Appeals concluded that, although the law on the precise question was unsettled,[87] the better authority favored the extension of the rule.[88]

Calandra, of course, was not interested in deterring future police misconduct. He sought to mitigate the immediate effect on him of a past invasion of his rights. Justice Powell could offer him no comfort:

> The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim: "[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." Linkletter v. Walker, 381 U.S. 618, 637 (1965). Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizures: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960). *Accord*, Mapp v. Ohio, 367 U.S. 643, 656 (1961); Tehan v. United States, *ex rel.* Shott, 382 U.S. 406, 416 (1966); Terry v. Ohio, 392 U.S. 1 (1968). In sum, *the rule is a judicially created remedy* designed to safeguard Fourth Amendment rights generally through its deterrent effect, *rather than a personal constitutional right of the party aggrieved.*[89]

The cases cited in that passage do not support the conclusion that the rule is no more than a judicially created remedy designed to deter police misconduct, and not a personal constitutional right. In fact, the very precedents the Court relies appear to compel the opposite conclusion.

True, *Elkins v. United States*[90] does contain the language quoted.

85. 465 F.2d 1218, 1225–26 (6th Cir. 1972) (emphasis added).
86. 414 U.S. 338, 354 (1974).
87. 332 F. Supp. 737, 738 (N. D. Ohio 1971).
88. Cited in support of this position were *In re* Egan, 450 F.2d 199 (3d Cir. 1971), *aff'd*, 408 U.S. 41 (1972); *In re* Evans, 452 F.2d 1239 (D.C. Cir. 1971), *cert. denied*, 408 U.S. 930 (1972); United States v. Gelbard, 443 F.2d 837 (9th Cir. 1971) *rev'd*, 408 U.S. 41 (1972); Centracchio v. Garrity, 198 F.2d 382 (1st Cir. 1952); *In re* Fried, 161 F.2d 453 (2d Cir. 1947).
89. 414 U.S. at 347–48 (emphasis added).
90. 364 U.S. 206 (1960).

But *Elkins* was decided a year before *Mapp* had overruled the portion of *Wolf v. Colorado*[91] that declared that the exclusionary rule was not an "essential ingredient" of the Fourth Amendment right.[92] The *Wolf* Court defined the rule as a deterrent remedy in order to justify its refusal to make it binding on the states. When *Elkins* was decided, *Wolf* was still good law. It no longer is today. The *Elkins* Court in 1960 quite properly relied on it; for the *Calandra* Court in 1974 to do the same, even indirectly, is to reflect inaccurately the present state of the law. Furthermore, even though it followed the pre-*Mapp* law, *Elkins*, which abrogated the "silver platter" doctrine,[93] did not define deterrence as the sole basis for exclusion. The fundamental justification for the rule, it said, was "the imperative of judicial integrity."[94]

Mapp, on the page cited by Justice Powell, did acknowledge *Elkins*' recognition of a deterrent purpose for the rule. The theme of the paragraph containing that acknowledgement, however, was reaffirmation of the moral imperative stated in the earlier case: "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[95]

Justice Powell cited *Terry v. Ohio*[96] as being in accord with the proposition that deterrence is the "prime purpose" of the exclusionary rule.[97] The only statement to which he could have referred, on the page cited, is this: "The entire deterrent purpose of the rule excluding evidence seized in violation of the Fourth Amendment rests on the assumption that 'limitations upon the fruit to be gathered tend to limit the quest itself.' "[98]

But "the entire deterrent purpose" is not at all the same as "deterrence, the entire purpose." *Terry* does, of course, like *Elkins* and *Mapp*, recognize *a* deterrent purpose incident to the exclusionary rule, but the conclusion that deterrence is the prime purpose of the rule cannot stand against even a cursory reading. While imposing limits on the application of the rule, *Terry* reiterated the need to keep the judicial system free from apparent partnership in illegal activity by law-enforcement officers: "Courts which sit under our Constitution cannot and

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91. 338 U.S. 25 (1949).
92. *Id.* at 29.
93. This was a policy under which the Court permitted in federal courts evidence seized by state officers (who were not then under any constitutional restrictions on searches and seizures), which would have been inadmissible under *Weeks* if seized by federal officers. *Elkins* decided that since Wolf v. Colorado, 338 U.S. 25 (1949), had held that the Fourth Amendment prohibition applied to the states, the "silver platter doctrine" was no longer constitutionally viable.
94. 364 U.S. 206, 222 (1960).
95. 367 U.S. 643, 659 (1961).
96. 392 U.S. 1, 29 (1968).
97. Note 89 *supra*.
98. 392 U.S. 1, 29 (1968).

will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."[99]

The two other cases Justice Powell cited in support of his assertion that the "prime purpose" of the exclusionary rule is deterrence, *Linkletter v. Walker*[100] and *Tehan v. United States*, ex rel. *Shott*,[101] are both cases in which the issue was *retroactive application* of a newly announced constitutional standard.

Linkletter laid out three criteria for determining when newly decided constitutional rules of criminal procedure will be applied in review of cases tried before the rules were formulated: (1) the purpose served by the new rules; (2) the extent of law enforcement officials' justifiable reliance on prior standards; and (3) the effect on the administration of justice of retroactive enforcement.

In applying these criteria the Court stressed the deterrent function of the rule, not as a rationale for its imposition, but in a context of determining what benefits and burdens might accrue from back-dating its application.[102] *Linkletter* and *Tehan* were not saying, "What is the reason for the rule?" but, "What is the purpose to be served by applying it after the fact?" In this context deterrence and reparation are the important factors to consider, since protection of the Fourth Amendment guarantee cannot be instituted retroactively.

Within this framework, both *Linkletter* and *Tehan* decided that the harm that had been done by constitutional violations antedating the case at hand could not be undone; that the violations in question had not been such as tended to contaminate the truth-finding function of the defendants' trials; and that the benefit the injured individuals might derive from retrospective purification of police procedures would be outweighed by the detrimental effect on society of, for example, releasing numerous defendants, properly adjudged guilty and under long sentence, for whom retrial would be difficult.

To say that the rule's deterrent purpose would not be served by retroactive application, after the wrong was long since complete and trial had been had under rules that were valid at the time, is a very much different thing from saying that deterrence was the primary rationale for its formulation.

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99. *Id.* at 12.

100. 381 U.S. 618 (1965), holding that Mapp v. Ohio, 367 U.S. 643 (1961), would not be applied retroactively. *Linkletter* states: "*Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights." 381 U.S. at 636.

101. 382 U.S. 406 (1966), denying retrospective application to Griffin v. California, 380 U.S. 609 (1965).

102. "Once the premise is accepted that we are neither required to apply, not prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Linkletter v. Walker, 381 U.S. 618, 629 (1965).

The cases cited by Justice Powell, considered in their proper contexts, do not lead to the conclusion that "in sum the rule is a judicially created remedy . . . rather than a personal constitutional right of the party aggrieved."[103] The "sum" comprises Justice Powell's own extrapolations; it does not represent the total weight of the precedents he cites.

Mapp, building on *Weeks* and *Silverthorne*, goes to painstaking lengths[104] to make clear that a "personal constitutional right" is exactly what the Court, in extending it to the states, found the rule to be. If it had not so considered it, there would have been no basis for the *Mapp* decision. The Supreme Court of the United States has no authority to make a mere "judicially created remedy" binding on the state courts. The language of *Mapp* makes its position clear:

> Finally, the Court in [Weeks] clearly stated that *use of the seized evidence involved a "denial of the constitutional rights of the accused.*" Thus, in the year 1914, in the Weeks case, this Court "for the first time" held that "in a federal prosecution *the Fourth Amendment barred the use* of evidence secured through an illegal search and seizure." This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a *clear, specific, and constitutionally required*—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to "a form of words." It meant, quite simply, that "conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . ." and that such evidence "shall not be used at all."
>
> There are in the cases of this court some passing references to the Weeks rule as being one of evidence. But the plain and unequivocal language of Weeks—and its later paraphrase in Wolf—to the effect that *the Weeks rule is of constitutional origin*, remains entirely undisturbed.[105]

Finally, after detailed examination of the history of the exclusionary rule from *Weeks* through *Elkins*, the *Mapp* Court announced its holding:

> Today we once again examine Wolf's constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that

103. 414 U.S. 338, 348 (1974).
104. 367 U.S. 644, 646-55 (1961).
105. *Id.* at 648-49 (1961) (emphasis added; citations omitted).

> very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of *the Constitution* is, *by that same authority*, inadmissible in a state court.[106]

Exclusion, then, as announced in *Weeks* and reiterated in *Mapp*, exists to protect the right guaranteed by the Fourth Amendment—the right of the people to be secure against unreasonable searches and seizures. It is "part and parcel" of the Fourth Amendment.[107]

As Justice Brennan pointed out in dissent in *Calandra*, deterrence is, at best, only a desirable by-product of the exclusionary rule.[108] The aim of the Court in formulating the rule was to seek out a meaningful sanction for invasions of Fourth Amendment guarantees.[109] The tool, however, had to be one capable of judicial, as distinguished from administrative, enforcement.

Bound by this limitation, the Court looked to the logic of the Fourth Amendment itself. The mandate dictated its own sanction. The First Amendment's command, "Congress shall make no law . . ." implies, "but if it does, the courts will strike it down." The Sixth Amendment's, "[i]n all criminal prosecutions the accused shall enjoy the right . . ." implies, "but if he doesn't, the courts will not permit his conviction to stand." The Fifth Amendment's "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . ." says clearly, "but if he is, the courts will not hear his testimony." The Fourth Amendment treats the right of security against unreasonable search and seizure of "persons, houses, papers and effects"—in other words, unlawful capture of evidence. The Amendment says this right "shall not be violated." The implication appears to be, "[b]ut if it is, the courts will not receive the evidence."

This is what the Court in *Mapp* implied when it spoke of the command of exclusion as being a "clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard."[110] "Judicially implied" does not mean "judicially contrived" or "judicially manufactured." It means derived by judges construing the language of the Amendment itself, the normal judicial function. And in the phrase "deterrent safeguard," the operative word is *safeguard*. The exclusionary rule is a sanction, a means of preserving a precious right, which, because of its nature and the people on whom it operates in its punitive aspects—prosecuting attorneys and police—has an incidental deterrent effect.

If Congress were to pass a law establishing a state religion, no one would ask how frequently this kind of thing happened. No court would

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106. *Id.* at 654-55 (emphasis added).
107. *Id.* at 651.
108. 414 U.S. at 356.
109. *Id.*
110. Note 105 *supra*.

debate whether the imposition of sanction would deter future Congresses from passing illegal legislation. The statute would fall, because the Constitution decrees it. If a defendant were convicted after being denied the right to call his witnesses, the question whether reversal would deter future courts from lawlessness would not arise. The same reasoning makes debate about the incidence of particular kinds of police misconduct, and discussion of the deterrent value of imposing the exclusionary rule in a given case, non sequitur.

The present Court, however, does not see the exclusionary rule as necessary to the logic of the Bill of Rights. Having set up deterrence as the rule's prime justification, Justice Powell then posited effective deterrence as the sole criterion for determining whether it should be applied in a given case: "As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."[111]

In Calandra's case Justice Powell concluded that the goal of deterrence would not be served, on the theory that the police would not be prompted to conduct illegal searches and seizures to gather evidence for presentation to a grand jury, if that evidence would not be admissible at a later criminal trial of the one from whom it has been seized.[112] This conclusion does not reflect the reality of investigative strategy.

The effect is to leave one in Calandra's position without remedy for a real violation of his rights, unless he can prove damages.[113] Since he has been granted immunity, his claim cannot be vindicated in the criminal process.[114] The decision in effect says, "Your Fourth Amendment rights are worth nothing unless the government chooses to indict you, because in the absence of provable damages, you have no forum in which to assert them."

What this means is that now the government has license, in investigating organized crime, as here, or the activities of political dissidents, or "enemies," to violate with impunity the Fourth Amendment rights of those whom it does not seek to prosecute. The incentive, in terms of information for "background files" or investigative leads to higher organization figures, would be, to some, irresistible.

In determining that Calandra had standing to claim suppression, the Court of Appeals relied on Rule 41(e), Federal Rules of Criminal Procedure.[115] Both *Jones v. United States*[116] and *Alderman v. United*

111. 414 U.S. at 348.

112. *Id.* at 348–49.

113. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), allows recovery of damages from federal agents conducting an illegal search and seizure. If the illegal conduct is by state officers, acting under color of state law, an action lies under 42 U.S.C. § 1983 (1871).

114. The immunity granted Calandra was transactional. Under the "use immunity" statute, 18 U.S.C. § § 6002–03 (1970), upheld in Kastigar v. United States, 406 U.S. 441 (1972), he would be in a worse predicament, because he could still be prosecuted on the basis of evidence arrived at independently of his testimony.

States[117] had made plain that the requirement of standing to assert the exclusionary rule is given expression in the "person aggrieved" language of Rule 41(e). The Court of Appeals decided that Calandra was indeed a person aggrieved, and that the rule was broad enough to permit him to file a motion under it prior to indictment.[118]

Reversing, Justice Powell stated that Rule 41(e) "does not constitute a statutory expansion of the exclusionary rule,"[119] and asserted that permitting a suppression motion to be made before indictment would constitute such an expansion. Justice Powell cites *Brown v. United States*,[120] *Alderman*,[121] *Wong Sun v. United States*[122] and *Jones*[123] for the proposition that:

> [S]tanding to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search. . . . This standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search.[124]

What this assertion seemingly overlooks is that in each of the cases cited to support it, the motion to suppress came after indictment. The holdings were confined to those in the position of criminal defendant because the question of standing was *raised* by criminal defendants. None of the cases cited presented the question found in *Calandra*—that of a person actually aggrieved, in the *Jones* and *Alderman* sense,[125]

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115. "A person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. . . . The motion shall be made before trial or hearing unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."
116. 362 U.S. 257 (1960).
117. 394 U.S. 165 (1969).
118. United States v. Calandra, 465 F.2d 1218, 1223, (6th Cir. 1972).
119. 414 U.S. at 337-38 n.6.
120. 411 U.S. 223 (1973).
121. 394 U.S. 165 (1969).
122. 371 U.S. 471 (1963).
123. 362 U.S. 257 (1960).
124. 414 U.S. 338, 348 (1974) (citations omitted).
125. "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as

who knows in advance of indictment that a grand jury is basing a part of its investigation on evidence illegally seized from him, and who moves at that stage for suppression of both the evidence and its use as the basis for questioning.

No previous standing case holds that *only* a criminal defendant may invoke the exclusionary rule. Such a holding, indeed, would be contrary not only to the promise of the Fourth Amendment, that the rights it protects "*shall not be violated*," but also to the rule of *Weeks:* "[T]his remedy reaches all alike, *whether accused of crime or not*, and the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws."[126] Justice Holmes in *Silverthorne Lumber Co. v. United States*[127] took this language to mean that illegally seized evidence could not be laid before the grand jury.

A general test for determining standing was stated in *Association of Data Processing Service Organizations, Inc. v. Camp:*[128]

> [I]t concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.[129]

If we assume that the "zone of interests" to be protected here is the Fourth Amendment guarantee, then, since Calandra's rights were violated by the search itself, clearly Calandra had standing. Only if we assume that the "zone of interest" is nothing more than the deterrence of future unlawful police conduct can any question arise. Even then, the fact that he would otherwise be without a remedy would seem enough to tip the balance in his favor.

If the purpose of the exclusionary rule is, as stated in *Weeks* and *Mapp*, to preserve Fourth Amendment rights, then in deciding whether to apply the rule in a particular case, logic would dictate that we look to the purpose of the Amendment—which is not to protect the right of the criminal *defendant*, as Justice Powell's position assumes, but to protect the right of the *people*. "[I]t is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself. . . ."[130] Therefore, anyone whose rights are violated by an unreasonable search or seizure should have standing to invoke the exclusionary rule, whenever he becomes aware of the violation.

The *Calandra* decision does not directly impair the earlier standing

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a consequence of a search or seizure directed at someone else." Jones v. United States, 362 U.S. 257, 261 (1960).

126. 232 U.S. 383, 391-92 (1914) (emphasis added).
127. 251 U.S. 385, 391 (1920).
128. 397 U.S. 150 (1970).
129. *Id.* at 153.
130. U.S. v. Poller, 43 F.2d 911, 914 (2d Cir. 1930).

cases. They are inapposite to the situation presented here, and the holdings still stand when applied to the facts that they cover. The same is not true of Justice Powell's treatment of *Silverthorne*,[131] the progenitor of the "fruit of the poisonous tree" doctrine. There is reason to agree with Justice Brennan: "Only if Silverthorne is overruled can its precedent force to compel affirmance here be denied."[132]

Silverthorne held that a grand jury must be denied access to illegally seized records, books and papers.[133] Pursuant to the Silverthornes' motion to suppress these materials, the district court ordered return of the originals, impounding photographs and copies of them. After returning the originals, the grand jury tried to recover them by issuing a subpoena duces tecum. When the Silverthornes refused to comply, the corporation was adjudged in contempt.[134] In reversing the conviction, the Court, through Justice Holmes, said:

> The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. . . . . In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. . . . 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.[135]

Calandra, like the Silverthornes, sought to avoid furnishing the grand jury with evidence that he would not have been called on to supply had it not been for the illegal search and seizure. Justice Powell distinguished *Silverthorne* first on the ground that the plaintiffs-in-error had been indicted and could therefore invoke the exclusionary rule by virtue of their being criminal defendants.[136] Moreover, he continued, the government's interest in *Silverthorne* in recapturing the original documents was:

> . . . founded on a belief that they might be useful in the criminal prosecution already authorized by the grand jury. It

131. 251 U.S. 385 (1920).
132. 414 U.S. 338, 362–63 (1974) (dissenting opinion).
133. The Silverthornes, father and son, indicted on a single, specific charge, were arrested and detained for several hours. During that time federal agents, without a warrant, went to their office and "made a clean sweep of all the books, papers and documents found there." 251 U.S. at 390. After making photographs and copies of the material, the district attorney then presented it to the grand jury that had returned the original indictment, and a new indictment was framed.
134. Although the lumber company was a corporation, it was, under the rule of Hale v. Henkel, 201 U.S. 43 (1906), in the same position as Calandra with respect to self-incrimination.
135. 251 U.S. 385, 391–92 (1920) (citations omitted).
136. 414 U.S. 338, 352 n.8 (1974).

did not appear that the grand jury needed the documents to perform its investigative or accusatorial functions. Thus, the primary consequence of the Court's decision was to exclude the evidence from the subsequent criminal trial.[137]

But if the grand jury did not need the documents to perform its investigative or accusatorial functions, why did it need them? What other need would a grand jury have for evidence that "might be useful" in a criminal prosecution it had already authorized? The only logical reason for the grand jury's wanting the material was to gain information for further criminal charges.

The final ground cited by Justice Powell for distinguishing the two cases is that in *Silverthorne* there had been a judicial determination before the issuance of the subpoena that the search and seizure was illegal, so it was not necessary to interrupt the grand jury proceedings pending decision of a pre-indictment motion to suppress.[138] That judicial determination, however, came on a motion filed during earlier grand jury proceedings, in the course of which the documents were ordered returned. Justice Powell raises no question about the interruption of that proceeding, which seems to weaken somewhat his basis for distinction.

Silverthorne's pronouncement that illegally seized evidence "shall not be used at all," Justice Powell dismissed as "broad dictum."[139] It has, he said, been substantially undermined by later decisions, chiefly the standing cases cited earlier,[140] among which *Calandra* will now be numbered.

MICHIGAN V. TUCKER

In *Michigan v. Tucker*[141] the Court, speaking this time through Justice Rehnquist, built on *Harris* and *Calandra* to further restrict

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137. *Id.*

138. Justice Powell put great stress on the fact that interruption for adjudication of suppression motions in advance of indictment would result in a series of "mini-trials," which would unduly delay the grand jury proceedings, possibly frustrating important investigations. The district court had considered this argument too, and Judge Battisti "respectfully rejected" it in eloquent terms:

> The term delay means that time during which a case is allowed to lie unresolved when there is no justifiable reason not to dispose of the lawsuit. Delay means unavoidable delay. . . . Time properly consumed in the trial of a complex case, or analyses of complex or difficult issues, or in holding a hearing to examine whether one's constitutionally protected rights have been violated is not delay, as that term is used in the context of the courts. . . . The judicial system is designed to protect the Bill of Rights, not to cast it aside in a mad rush toward the goal of judicial efficiency. Any examination of a potential infringement of those rights can, under no circumstances, be considered avoidable delay. *In re* Calandra, 332 F. Supp. 737, 741 (N.D. Ohio 1971).

139. 414 U.S. 338, 352 n.8 (1974).

140. *Id.* at 348.

141. __U.S.__, 94 S. Ct. 2357 (1974).

Miranda's exclusionary rule and to seriously erode "the fruit of the poisonous tree" as courts since *Wong Sun* and *Miranda* have understood the doctrine.

One morning in April 1966 a woman in Pontiac, Michigan, failed to report to her job. A friend and co-worker, alarmed when she did not answer her telephone, went to her house and found her, bound and gagged and partly undressed. She had been raped and severely beaten. Throughout the course of the trial and the appeals she was unable to recall what had happened to her.

When her friend arrived, he found a dog inside the victim's house, although she did not own one. Later, while talking to police, he saw what he thought was the same dog. Police followed it to Tucker's house, where it sat down in the front yard; neighbors reported that the dog was Tucker's. Tucker was arrested and taken to the sheriff's office, where officers noticed scratches on his face and blood on his underwear. Tucker explained that the scratches had been caused by the flailing of a goose he and his friend Henderson had shot,[142] but the blood on his underwear proved to be human.

Before interrogation began, Tucker, like Harris, was given warnings that were sufficient under *Escobedo v. Illinois*,[143] but was not, however, told that an attorney would be appointed if he could not afford to hire one.[144]

In the course of questioning, Tucker said that he had been with Henderson during the general time when the crime occurred. Interviewed by the police, Henderson gave information incriminating Tucker.[145] Tucker's appointed attorney moved in advance of trial for suppression of Henderson's expected testimony on the ground that it was the fruit of the illegal interrogation. The prosecution stipulated that the witness' identity had been learned only through the police questioning. Although the trial court excluded Tucker's own statement, it allowed the prosecution to introduce Henderson's testimony. Tucker was convicted and sentenced to twenty to forty years' imprisonment. Following affirmation by the Court of Appeals[146] and the Supreme Court of Michigan,[147] he petitioned for habeas corpus in the federal

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142. Tucker v. Johnson, 352 F. Supp. 267 (E.D. Mich. 1972).
143. 378 U.S. 478 (1963).
144. Tucker did not ask for a lawyer, and did not assert denial of the right to counsel, thus *Escobedo* did not govern here. The *Miranda* decision was not announced for another two months, but since trial was held after that time, as in *Harris*, *Miranda* applied under the rule of Johnson v. New Jersey, 384 U.S. 719 (1966).
145. Henderson said that although he had seen Tucker on the date in question, Tucker had left him rather early in the evening. The scratches on Tucker's face had been there when Tucker arrived at Henderson's house on the following day. Henderson had asked Tucker "if he got hold of a wild one or something." Tucker replied, "Something like that," and when asked who she was, answered, "Some woman lived the next block over—a widow woman." __U.S.__, 94 S. Ct. at 2360.
146. People v. Tucker, 19 Mich.App. 320, 172 N.W.2d 712 (1969).
147. 385 Mich. 594, 189 N.W.2d 290 (1971).

district court. "Reluctantly," the district court granted the writ.[148] Relying on *Silverthorne*, *Wong Sun* and *Gilbert*, the court said: "[I]t is clear that testimony of third parties which is obtained as the result of a violation of Sixth Amendment rights of the accused cannot be introduced against the accused at trial."[149] The Court of Appeals approved without opinion.[150]

Narrow grounds for reversal were argued by the State of Michigan[151] and accepted by two concurring Justices, Brennan and Marshall. They urged that *Johnson v. New Jersey*[152] be modified by adoption of an "activity date," as opposed to Johnson's "trial date," rule concerning the retroactive effect of *Miranda*. That is, the date of interrogation, rather than the date of the trial, should be the one used to determine whether *Miranda* applied in a given case.[153] Justice Brennan reasoned that the adoption of such a policy was particularly appropriate when admissibility of fruits of interrogation was at issue, as opposed to admissibility of a direct statement, because the element of unreliability is less important in such a case.[154]

The case could also have been decided on the narrow basis that the "poisonous tree" doctrine should not apply to the testimony of a live witness, provided the witness himself is available for cross-examination. This ground, also urged by the state,[155] would have been consistent with two cases decided by Chief Justice Burger when he was a Court of Appeals judge.[156] Such a result could have been justified in a case like

148. Tucker v. Johnson, 352 F. Supp. 266 (E.D. Mich. 1972).

149. *Id.* at 269. In Gilbert v. California, 388 U.S. 263 (1967), the Court said that the trial testimony that the witnesses had identified the defendant at the pre-trial lineup had to be excluded since the lineup itself was illegal: "That testimony was the direct result of the illegal line-up, 'come at by exploitation of [the primary] illegality.' [Wong Sun v. United States, 371 U.S. 471 (1963)]."

150. 480 F.2d 927 (6th Cir. 1973).

151. Brief for Petitioner at 8-10, Michigan v. Tucker, ___ U.S. ___, 94 S. Ct. 2357 (1974). The State also argued that *Miranda* should be overruled and the "all attendant circumstances" test of voluntariness reinstated.

152. 384 U.S. 719 (1966).

153. Such an approach would be consistent with Stovall v. Denno, 388 U.S. 293 (1967), which held that the rule of *Wade* and *Gilbert* would apply only to confrontations that took place after the date of decision; with Desist v. United States, 394 U.S. 244 (1969), which held that the standards set forth in Katz v. United States, 389 U.S. 347 (1967), would apply only to wiretaps made after the decision date; and with Williams v. United States, 401 U.S. 646 (1971), which held that the Chimel v. California, 395 U.S. 752 (1969), standards would apply only to searches conducted after the decision date. In addition, Jenkins v. Delaware, 395 U.S. 213 (1969), had held that the *Miranda* rules would not apply to retrials of persons whose original trial had begun prior to *Miranda*, which is not inconsistent with an "activity" rationale.

154. ___ U.S. ___, 94 S. Ct. 2357, 2371 (1974) (concurring opinion).

155. Brief for Petitioner at 6-7, Michigan v. Tucker, ___U.S.___, 94 S. Ct. 2357 (1974).

156. In Smith v. United States, 324 F.2d 879 (D.C. Cir. 1963), police learned the name of an eyewitness through illegal interrogation of the defendant. Then Judge Burger wrote:

> Here no confessions or utterances of the appellants were used against them; tangible evidence obtained from appellants, such as the victim's watch, was suppressed along with the confessions. But a witness is not an inanimate object which like contraband narcotics, a pistol or stolen goods, "speak for themselves." The proffer of a living witness is not to be mechanically equated with the proffer of

Tucker's, where the name of the witness was furnished as an alibi. The police were bound to interview Henderson, to learn whether he would in fact exculpate the defendant. An argument could be made that since the state had an obligation to seek his testimony, it should not be barred from using it.

The majority, however, rejected these bases for decision, which would have left *Miranda* intact. Instead, the Court reached out to work substantial changes in the *Miranda* doctrine. *Tucker* declares:

(1) Police interrogation of a suspect without giving him the full *Miranda* warnings does not deprive him of his privilege against self-incrimination as such, but only fails "to make available to him the full measure of procedural safeguards associated with that right since *Miranda*."[157]

(2) Therefore, since there has been no "actual infringement" of the defendant's constitutional rights, *Wong Sun* does not apply. This leaves the Court, in the absence of controlling precedent, free to "examine the matter as a question of principle."[158] *Miranda*, said the Court, does not reach the question of fruits.[159]

(3) As a matter of principle, since no deterrent purpose would be served by excluding the testimony of a live witness whose identity was learned through an interrogation conducted in good-faith omission of a procedural safeguard, that witness' testimony will be admitted. The opinion does not state whether its rule would apply if the defendant's statement had led them to physical evidence of equal reliability. The logic of the decision does not seem to bar such a conclusion.

Tucker explicitly extends the deterrence rationale for exclusion to a self-incrimination setting.[160] It then reiterates *Calandra*'s assumption that the rule is properly applied only when its deterrent purpose would be served:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of

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> inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. *Id.* at 881.

Similarly, concurring in Brown v. United States, 375 F.2d 310 (D.C.Cir. 1967), he wrote:

> The critical aspect of *Smith-Bowden* is that live witnesses are not "suppressed," as inanimate objects may be. When an eyewitness is willing to give testimony, under oath and subject to all the rigors of cross-examination and penalties of perjury, he must be heard. How he came to be in court is a matter which goes only to the weight, not the admissibility, of his testimony. *Id.* at 319.

157. __ U.S. __, 94 S. Ct. 2357, 2364 (1974).

158. *Id.*

159. *Id.* at __, 94 S. Ct. at 2368 n.26.

160. *Harris* extended it implicitly.

> such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.[161]

Justice Rehnquist considers it sufficient that, in accordance with *Miranda* and *Johnson*, the defendant's own statements were excluded at trial. Evidence derived from those statements is not barred, because to do so would not further the goal of deterrence.[162]

If any person is compelled in a criminal case to be a witness against himself—as *Miranda* held he is when interrogation is conducted absent the prescribed warnings and required waiver—exclusion of his testimony is not optional. The Fifth Amendment *is* an exclusionary rule.[163] Though many different reasons have been advanced to explain the historical basis of the privilege,[164] and it has been subject periodically to attack,[165] it is beyond question that unless a defendant is insulated from any criminal penalties, the government may not use his compelled testimony to prove its case against him.[166] Exclusion in a Fifth Amendment context is not to deter future misconduct, but to carry out the express terms of the Amendment.

Tucker had argued that the testimony should be excluded on the ground that the adversary system requires "the government in its contest with the individual to shoulder the entire load."[167] This

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161. __ U.S. __, 94 S. Ct. 2357, 2365 (1974). Justice Rehnquist cited *Calandra* for the proposition that the exclusionary rule's "prime purpose is to deter future unlawful police conduct," *Id.* at __, 94 S. Ct. at 2365, and stated that *Calandra* "relied upon" (in addition to *Elkins*) *Mapp*, *Tehan* and *Terry*. *Id.* at __, 94 S. Ct. at 2365, n.20. He then continued, "*In a proper case this rationale would seem applicable to the Fifth Amendment context as well.*" __ U.S. at __, 94 S. Ct. at 2365 (emphasis added).

162. "Whatever deterrent effect on future police conduct the exclusion of those statements may have had, we do not believe it would be significantly augmented by excluding the testimony of the witness Henderson as well." __ U.S. at __, 94 S. Ct. at 2366 (1974).

163. *See, e.g.*, Rochin v. California, 342 U.S. 165 (1952) (Douglas, J., concurring), "But I think that words taken from his lips ... are ... inadmissible provided they are taken from him without his consent. They are inadmissible because of the command of the Fifth Amendment.

"That is an unequivocal, definite and workable rule of evidence for state and federal courts." *Id.* at 179.

164. *E.g.*, Miranda v. Arizona, 384 U.S. 436, 460 (1966); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55-57 n.5 (1964); Rogers v. Richmond, 365 U.S. 534, 540 (1961); Boyd v. United States, 116 U.S. 616 (1886); United States v. Grunewald, 233 F.2d 566, 579, 581-82 (2d Cir. 1956) (Frank, J., dissenting), *rev'd* 353 U.S. 391 (1957).

165. Palko v. Connecticut, 302 U.S. 319 (1937); Friendly, J., *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968). *See also* Twining v. New Jersey, 211 U.S. 78 (1908).

166. *See, e.g.*, Counselman v. Hitchcock, 142 U.S. 547, 652 (1892), the privilege must be "as broad as the mischief against which it seeks to guard."
See Kastigar v. United States, 406 U.S. 441 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); Brown v. Walker, 161 U.S. 591 (1896).

167. 8 J. WIGMORE, EVIDENCE § 2251 (McNaughton rev. 1961) quoted by the court, __ U.S. at __, 94 S. Ct. at 2366.

interpretation of the basis of the privilege Justice Rehnquist defined as a "suggested basis for the *exclusionary rule* in Fifth Amendment cases.[168] He discredits Wigmore's rationale by saying that to the extent that it "may exist independently of the deterrence and trustworthiness rationales,"[169] it is of no help to Tucker, since "the government is not forbidden all resort to the defendant to make out its case."[170] To support this statement Justice Rehnquist cited *Schmerber v. California*[171] and *United States v. Dionisio.*[172] Neither of these cases has any bearing, however, on Tucker's situation, since both dealt expressly with the compelled production of *nontestimonial* evidence, which the Court held was not protected by the Fifth Amendment privilege.

The Fifth Amendment requires exclusion of evidence produced in violation of the privilege it confers. *Miranda* held that the privilege is violated by custodial interrogation that does not comply fully with its requirement of warnings and waiver. The interrogation in *Tucker* did not meet the *Miranda* requirement. Hence it would seem that under the principles of *Silverthorne* and *Wong Sun*, evidence derived from that interrogation must be excluded, unless *Miranda* does not apply,[173] or an exception is made to it,[174] or *Miranda* is overruled. Justice Rehnquist rejected all three of these options. Instead, he distorted the controlling precedent to conclude that interrogation without the full *Miranda* warnings did not violate Tucker's Fifth Amendment rights:

> The Court [in *Miranda*] recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. As the Court remarked: '[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.' The suggested safeguards were not intended to "create a constitutional straightjacket," but rather to provide practical reinforcement for the right against compulsory self-incrimination.[175]

The actual passage cited in *Miranda* does not carry the meaning Justice Rehnquist found in it. What *Miranda* said was that the warnings and waiver that it demanded to protect the Fifth Amendment privilege were not the only possible safeguards that could be devised to suit the purpose. The states were encouraged to work out alternative solutions

168. __ U.S. at __, 94 S. Ct. at 2366 (emphasis added).
169. *Id.* at __, 94 S. Ct. at 2366–67.
170. *Id.* at __, 94 S. Ct. at 2367.
171. 384 U.S. 757 (1966).
172. 410 U.S. 1 (1973).
173. For example, it would not apply under the suggested "activity date" rationale.
174. An example is, by excepting the testimony of an alibi witness.
175. __ U.S. __, 94 S. Ct. 2357, 2364 (1974) (citations omitted).

to arrive at the same result, but until they did, the procedure laid out in *Miranda* was constitutionally mandatory.[176] The State of Michigan had made no showing of any effort to develop alternative procedures to cover the full scope of the *Miranda* requirement. Its officers had simply omitted an element of the necessary warnings.

The conclusion that the omission of the required warnings was not a violation of a constitutional right, but only a deprivation of a procedural safeguard conflicts with express language in *Miranda:* "The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation[,]"[177] and: "In each instance [of the four cases decided in *Miranda*], we have concluded that statements were obtained from the defendant under circumstances that did not meet *constitutional standards* for protection of the privilege."[178] If the *Miranda* Court had not considered the warning and waiver requirement of constitutional dimension, of course, it would have been constitutionally prohibited from applying it to the states. This facet of federalism the Court ignored in *Tucker* as it did in *Calandra.*

In further support of the contention that the defendant was not deprived of any constitutional right, Justice Rehnquist asserted that since Tucker said he did not want a lawyer, his statement "could hardly be termed involuntary as that term has been defined in the decisions of this court."[179] He was "simply not exposed to 'the cruel trilemma of self-accusation, perjury, or contempt.' "[180]

One purpose of *Miranda,* however, was to end the confusion and uncertainty fostered by the long-standing policy of case-by-case ad-

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176. It is impossible for us to see the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket *which will handicap efforts at reform,* nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. *However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following procedures must be observed.* 384 U.S. 436, 467 (1966). (emphasis added).

177. *Id.* at 476.

178. *Id.* at 491 (emphasis added).

179. __ U.S. at __, 94 S. Ct. at 2364.

180. *Id.* at __, 94 S. Ct. at 2364, quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

181. For thirty years after Brown v. Mississippi, 297 U.S. 278 (1936), holding inadmissible a confession obtained by state officers who beat a suspect with ropes and studded belts, the Court attempted, by considering the "totality of the circumstances," to determine whether a particular confession was voluntary or coerced. Frankfurter, J., discusses the "ultimate test" of voluntariness in Culombe v. Connecticut, 367 U.S. 568, 570-602 (1961). *See also Developments in the Law—Confessions,* 79 HARV. L. REV. 935, 973-82 (1966).

judication of voluntariness.[181] Instead, per se exclusion was to follow omission of the necessary warnings and failure to get a knowing, intelligent waiver of the right they were instituted to protect. The "voluntariness" test was expressly rejected.[182] *Tucker* appears to reinstate it.

Apparently, under *Tucker*, if a defendant's statement can be considered voluntary by the "cruel trilemma" test, his constitutional rights are not violated by incomplete *Miranda* warnings. Then, provided the omission was inadvertent and neither willful nor negligent, only his statements themselves are barred. Evidence derived from them is admissible. This may be true whether such evidence is physical or testimonial.

> The court said in *Miranda* that statements taken in violation of the *Miranda* principles must not be used to prove the prosecution's case at trial. That requirement was fully complied with by the state court here: respondent's statements, claiming that he was with Henderson and then asleep during the time period of the crime were not admitted against him at trial.[183]

Building on this Court's own fragile precedent, Justice Rehnquist cites *Harris* as authority that a failure to give an interrogated suspect full *Miranda* warnings does not compel exclusion of his statements in every conceivable situation.[184] *Harris*' conclusion that it does not follow from *Miranda* that all evidence inadmissible in the case in chief is barred for all purposes, provided its trustworthiness satisfies legal standards, says Justice Rehnquist, "is equally applicable here."[185]

Tucker's assertion that *Miranda* requires exclusion only of the defendant's statements, and not of their fruits, conflicts with the language of that case—language that under the *Harris* standard must be considered "controlling," since it appeared in the Court's summary of its holding:

> After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, *no evidence* obtained as a result of interrogation can be used against him.[186]

Two of the dissenters in *Miranda* took "no evidence" to apply to

182. "In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. ... To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice." 384 U.S. 436, 457 (1966).
183. __ U.S. __, 94 S. Ct. 2357, 2364 (1974).
184. *Id.* at __, 94 S. Ct. at 2367. The situation here, however, is not similar to that in *Harris*.
185. *Id.* at __, 94 S. Ct. at 2367–68.
186. 384 U.S. 436, 479 (1966) (emphasis added).

fruits as well as to direct statements.[187] Justice Brennan, also a member of the *Miranda* Court, stated that his concurrence in the result in *Tucker* (on the basis of an "activity date" modification of *Johnson*) rests on the assumption that *Miranda* requires the exclusion of fruits in order to give full effect to the "no evidence" language of the holding.[188] Justice Rehnquist disposed of this argument by flat contradiction. Modification of *Johnson*, he stated, would not solve the problems of this case. *Johnson* is not controlling on fruits, for the reason that the parent decision, *Miranda*, did not reach the question of fruits.[189]

Miranda held that police failure to comply with its requirements violated the Fifth Amendment privilege. That being so, the Court could hardly have felt it necessary to spell out that it meant the decision to apply to fruits of a coerced confession as well as to the confession itself. A long line of cases, beginning with *Counselman* in 1892, had held that a violation of the self-incrimination clause barred not only direct but derivative use of the defendant's testimony.[190]

Kastigar v. United States,[191] a decision of the present Court, recognized that derivative use is prohibited even when the fruit is the testimony of a live witness. Stating that "use-derivative use" immunity is consistent with the conceptual basis of *Counselman*, the Court cited that case's condemnation of an immunity statute without a "derivative use" provision on the ground:

> that it could not prevent the *obtaining and the use of witnesses* and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.[192]

Miranda offered strong incentive to police and prosecutors to comply with its terms. If the state could establish that the required warnings

187. Justice Clark wrote, "The court further holds that failure to follow the new procedures requires inexorably the exclusion of any statement by the accused, *as well as the fruits thereof*." 384 U.S. at 500 (emphasis added). And Justice White said: "Today's decision leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused has effectively waived his rights, and *whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation*, all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution." 384 U.S. at 545 (emphasis added). In concurring in the *Tucker* decision, however, Justice White said *Miranda* did not deal with the testimony of third persons. __ U.S. at __, 94 S. Ct. at 2372.

188. __U.S. __, 94 S. Ct. 2357, 2372 n.5. For interpretations that "evidence obtained as a result" does not include derivative evidence, *see* H. FRIENDLY, BENCHMARKS 279 (1967); 35 FORDHAM L. REV. 169, 193 (1966).

189. __ U.S. at __, 94 S. Ct. at 2364 n.26.

190. *See, e.g.*, Hoffman v. United States, 341 U.S. 479, 486 (1951). "The privilege afforded not only extends to answers that would in themselves support a conviction ... but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute...." Henderson's testimony falls clearly within this definition.

191. 406 U.S. 441 (1972).

192. *Id.* at 454, citing 142 U.S. 547, 564 (1892) (emphasis added).

had been given, and the necessary waiver obtained, it virtually assured the admissibility of any statement the defendant made, so long as the police conduct had not been so grossly coercive as to violate due process.[193] The combined holdings of *Tucker* and *Harris* seem to remove any incentive to more than ritualistic adherence to *Miranda*.

If an element of the warnings is omitted, or the warnings are given and a voluntary waiver not obtained, the defendant's statement itself, under *Harris*, may be used to impeach any testimony he offers at trial. Now, in addition, if the state can meet the elusive requirement of showing that any deficiency under *Miranda* was inadvertent and not willful,[194] evidence derived from that statement is admissible in the prosecution's case in chief. If, as Justice Rehnquist concludes, *Miranda* does not reach the question of fruits, there would seem to be no logical necessity to limit *Tucker's* holding to live testimony. If that is so—if the state may make full use of the defendent's statement to gather leads to whatever corroborative evidence it needs—then loss of the statement itself as direct evidence would, in most cases, be no loss at all. The "fruit of the poisonous tree" would seem to have lost most of its vitality in self-incrimination cases. Moreover, obedience to *Miranda* appears to be reduced almost to a discretionary matter of investigative strategy.

Justice Rehnquist justified the *Tucker* holding as a balance of interests. On the one side he placed society's interest in "making available to the trier of fact all concededly relevant and trustworthy evidence," and its interest in the "effective prosecution of criminals." On the other, he placed the "need to provide an effective sanction to a constitutional right."[195]

THE QUALITY OF JUSTICE

Abandonment of the exclusionary rule has much reasoned support.[196] The means the present Court has chosen to achieve it, however, leave much to be desired. The process of attrition of the rule, rather than overruling it, breeds uncertainty as to what the law is. In pursuing its policy of gradual withdrawal, the Court has made hairline distinctions and novel interpretations of earlier cases. It has then built

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193. Rochin v. California, 342 U.S. 165 (1952).

194. Actually, *Tucker* does not state where the burden of proof of willfulness or negligence lies.

195. __ U.S. at __, 94 S. Ct. at 2366.

196. *E.g.*, Irvine v. California, 347 U.S. 128, 135–36 (1934); People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926); 8 J. WIGMORE, EVIDENCE § 2148a (McNaughton rev. 1961); Little, *The Exclusionary Rule of Evidence as a Means of Enforcing the Fourth Amendment Morality on Police*, 3 IND. L.F. 375 (1970); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785 (1970); Burns, *Mapp v. Ohio: An All American Mistake*, 19 DEPAUL L. REV. 80 (1969); Waite, *Judges and the Crime Burden*, 54 MICH. L. REV. 679 (1944).

on its own short string of precedents to create the impression that the law has always been what the Court now says it is.

Moreover, the decisions of this Court tend to overlook or dismiss the distinct imperatives enunciated in the earlier cases.[197] This Court apparently thinks in terms of practical goals, weighing principle according to whether it furthers them. In both *Tucker* and *Calandra*, for instance, the Court makes clear that in its view the application of the exclusionary rule depends wholly on whether its invocation in a particular type of proceeding will significantly further the goal of deterrence of unlawful police conduct. It treats deterrence as the sole rationale for the rule, ignoring the other bases explicitly stated in prior cases: the constitutional mandate;[198] the imperative of judicial integrity;[199] and the facilitation of the fair administration of justice.[200] Apparently this Court does not agree that it "is a less evil that some criminals should escape than that the Government should play an ignoble part."[201]

A focus on results, particularly when they promote efficient law enforcement, finds support among some reputable scholars and practitioners, who disparage decisions dealing in philosophical abstractions.[202] But even purely pragmatic decisions should depend on careful reasoning and honest attention to precedent. They should not be based on bald pronouncements that ignore or misread the clear constitutional command of earlier cases. The practice of this Court, however, has been to distort the meaning of the principal exclusion cases, making them appear to say what they do not say—or not to say what they do say.[203]

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197. For instance, in his dissent in *Bivens*, Chief Justice Burger wrote: "From time to time members of the Court ... have articulated varying alternative justifications for the suppression of important evidence in a criminal trial. Under one of these alternative theories the rule's foundation is shifted to the 'sporting contest' thesis that the government must 'play the game fairly' and cannot be allowed to profit from its own illegal acts. But the exclusionary rule does not ineluctably flow from a desire to ensure that government plays the 'game' according to the rules." 403 U.S. 388, 414 (dissenting opinion) (citations omitted). *See also* Justice Brennan's dissent in *Calandra*: "For the first time, the Court today discounts to the point of extinction the vital function of the rule to insure that the judiciary avoids even the slightest appearance of sanctioning illegal government conduct. This rejection of 'the imperative of judicial integrity' ... openly invites '[t]he conviction that all government is staffed by ... hypocrites. [This conviction is] easy to instill and difficult to erase.' " 414 U.S. at 360.

198. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

199. Elkins v. United States, 364 U.S. 206 (1960).

200. Linkletter v. Walker, 381 U.S. 618 (1965).

201. Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

202. *See, e.g.*, Harrison v. United States, 392 U.S. 219 (1968) (White, J., dissenting); Inbau, *Playing God: 5 to 4*, 57 J. CRIM. L. 377 (1966); H. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965).

203. The practice is not without precedent:
"'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'
"'The question is,' said Alice, 'whether you *can* make words mean so many different things.'
"'The question is,' said Humpty Dumpty, 'which is to be the master—that's all.'"
L. CARROLL, THROUGH THE LOOKING GLASS 299-300 (Gosset and Dunlop ed.).

Many have felt that the Warren Court went too far in protecting the rights of criminal defendants. Re-evaluation of its decisions by a newly constituted Court, with a different philosophical bent, is expected and appropriate. The traditions of our jurisprudence, however, lead us to expect that constitutional issues will not be reached when the case can be decided on narrower grounds, and that decisions will be no broader than they need be to reach the issues of a particular case. It was on this point that the Warren Court drew some of its harshest rebukes from "strict constructionists."

"It is emphatically the province and duty of the judicial department to say what the law is."[204] This power, under our Constitution, reposes nowhere else. If our highest Court, in haste to reformulate the law, misrepresents what the law has been, then it arrogates to itself the function of law-making so that justice is no longer defined by law, but by the men of the Court.

Barbara Mello

204. Marbury v. Madison, 5 U.S. 137 (1803), cited in United States v. Nixon, ___ U.S. ___, 94 S Ct. 3090 (1974).