

Comment

Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority

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Today more and more new and vexing problems reach the courts and they call for the highest order of thoughtful exploration and careful study.

Chief Justice Warren E. Burger
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When Chief Justice Burger announced the decision in *Harris v. New York*²—holding that statements elicited in violation of *Miranda v. Arizona*³ may be used to impeach—he reportedly characterized it as a matter “of interest mostly to members of the bar” and not worth describing from the bench.⁴ On the surface, his opinion for the Court—joined by Justices Blackmun, Harlan, Stewart and White⁵—does indeed give an impression of little general interest or importance. It is very short—just eleven paragraphs—and is written in the flat, descriptive style typical of simple and uncontroversial cases. The initial six paragraphs set out the facts; the seventh argues that *Miranda* cannot be regarded as controlling; and the remainder of the opinion consists of four arguments—really assertions—in support of the Court’s result. There is no indication that important considerations of policy have been weighed or that significant practical results may flow from the decision. Rarely, however, has so short an opinion concealed so much.

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1. N.Y. Times, May 19, 1971, at 28, col. 1 (Remarks entitled “The Necessity for Civility,” delivered before the American Law Institute).

2. 401 U.S. 222 (1971).

3. 384 U.S. 436 (1966).

4. Washington Post, Feb. 25, 1971, at A-1, col. 7.

5. Mr. Justice Brennan wrote a dissenting opinion for himself and Justices Douglas and Marshall. Mr. Justice Black dissented without opinion.

The result reached in *Harris* was, we think, wrong. But that is not the reason why, or the perspective from which, we have chosen to focus on the case.⁶ Nor do we wish to use *Harris* as a vehicle for entering the ongoing debate about the proper role of the Supreme Court in the American system of government.⁷ In the course of our discussion, we will suggest that the opinion, in its haste to decide a broad and controversial question of constitutional law, ignores a narrower ground of decision which would have compelled a contrary result; and that its brevity and unclarity leave the lower courts without guidance concerning recurrent and related issues. But in the main, our criticisms are not of that order. They are, first, that the majority, in crucial respects, flatly misstates both the record in the case before it and the state of the law at the time the decision was rendered; and second, that each of the arguments set forth by the Court masks a total absence of analysis and provides no support for its result.

If *Harris* were but an isolated instance of these faults, it would still be a source of concern. But, unfortunately, it is not alone. To illustrate this, we have, in the footnotes, made a number of cross-references to Mr. Justice Blackmun's opinion for the Court in *Wyman v. James*,⁸ which upheld warrantless "visits" to the homes of nonconsenting welfare recipients. Since the deficiencies of the *James* opinion are apparent on its face and are ably highlighted by Mr. Justice Marshall's dissent, there would be little point in our addressing that case on its merits. But we have found some disturbing similarities of argumentation and some striking parallels in the manner in which the Court on the two occasions treated the record and the relevant sources—parallels which suggest that *Harris* may not be an aberration.

Reasonable men can and do differ about the proper role of the Supreme Court,⁹ as they can and do about the balance to be struck between "liberty" and "order." But there is little room for disagreement about the desirability in Supreme Court adjudication of reasoned argument as opposed to arrogant *pronunciamento* or about the undesirability, indeed the intolerability, of what is, at best, gross negligence concerning the state of the record and the controlling precedents.¹⁰

6. Compare p. 1226.

7. See Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 770 (1971), and sources cited *id.* at 770 nn.4 & 5.

8. 400 U.S. 309 (1971); see notes 39, 40, 64, 100 and 101 *infra*.

9. See Wright, *supra* note 7.

10. Speaking at the annual dinner of the Minnesota Law Review on May 7, 1971, Professor Kurland repeated his charge that the late Warren Court reached its results "disingenuously" and "fraudulently." Compare Kurland, *The Supreme Court, 1963 Term*,

Because we have chosen to focus on unarguable vices, this Comment does not aspire to the sweep and scope of much academic criticism of the Court. Our task, though narrow, is important nonetheless. Put simply, it is to help keep the Court to traditional standards of candor and logic.

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The relevant facts in *Harris* can be briefly stated. Petitioner was arrested on January 7, 1966, and taken to police headquarters, where he was questioned about drug transactions which allegedly took place on January 4 and 6. He was given "no warning of a right to appointed counsel"¹¹ and during the questioning indicated that he would "rather see a lawyer before I keep on."¹² Nevertheless, the questioning continued, and petitioner made certain incriminating statements.

At his trial for two counts of drug sale, petitioner testified in his own behalf and denied committing the alleged crimes. On cross-examination, and over petitioner's objection, some incriminating statements from his pre-trial interrogation were read and he was asked whether he remembered them. Petitioner said that he remembered some but not others.¹³ The jury was instructed that it could consider the contents of the pre-trial statement solely for purposes of evaluating petitioner's "believability."¹⁴ It convicted him on the second count but

Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government," 78 HARV. L. REV. 143, 145 (1964). At the same dinner he went on to assert:

The Burger Court has effected one other change of some importance. It has already changed the Court's aficionados into the Court's critics. [Anthony Lewis is the only alleged changeling unmasked by name.] Suddenly an institutional value has loomed on the horizons of those who carefully avoided seeing that value when the Warren Court was in its ascendancy.

In light of this attempted gun-spiking, it may not be amiss explicitly to record that although we certainly fall generally in the camp of the late Court's admirers, it would be difficult to charge us with an uncritical tolerance of that Court's failures of consistency and logic. See, e.g., Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1208-12 (1970).

11. 401 U.S. at 224. The questioning took place before the Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), but the trial was held after it. Thus under *Johnson v. New Jersey*, 384 U.S. 719 (1966), the *Miranda* rules were applicable.

12. Appendix in the Supreme Court at 74 [hereinafter Appendix], *Harris v. New York*, 401 U.S. 222 (1971). He subsequently indicated he would be satisfied to see a lawyer "tomorrow." *Id.*

13. *Id.* at 58-63. Concerning the transaction for which he was convicted, petitioner testified at trial that the bags that had been sold contained baking powder rather than heroin. *Id.* at 30-31. He was then asked on cross-examination whether he recalled having admitted to the police that he had bought "two five-dollar bags of heroin for Bermudez," and that he had "handed the narcotics to Bermudez who had given him twelve dollars and half of the heroin in one of the envelopes." See Brief of District Attorney of New York County at 12, *Harris v. New York*, 401 U.S. 222 (1971). There can be no doubt, therefore—as indeed the Chief Justice acknowledged—that the impeachment was direct rather than collateral.

14. Appendix, *supra* note 12, at 95.

was unable to agree on the first. The New York appellate courts affirmed the conviction,¹⁵ and the United States Supreme Court granted certiorari.¹⁶

I. The Majority's Representation of the Record

Crucial to the Court's conclusion is its assertion that "Petitioner makes no claim that the statements made to the police were coerced or involuntary."¹⁷ The record is clear, however, that petitioner made precisely that claim in the courts below,¹⁸ and reiterated it before the Supreme Court in his briefs and oral argument.¹⁹

The issue arose at the trial in the following way: at the prosecutor's first reference to the pre-trial statements, petitioner's counsel objected on the grounds that the state had failed to "lay a foundation and show that it was *voluntarily* made, under the law, *and* in conformity with the requirements as set up in the case of *Miranda v. Arizona*."²⁰ The trial judge overruled the objection, citing *People v. Kulis*, a New York case holding an illegally obtained statement to be "admissible on the question of defendant's credibility as a witness."²¹ At the close of cross-examination, the objection was renewed. Petitioner's counsel argued that the interrogation had occurred "prior to any mention of an attorney," and that "[i]n addition" the statement had been "presented to the jury before any examination was had, so that legal voluntariness of this statement" could not be established.²² The trial judge responded as follows:

Let the record reflect, Mr. Projansky, for you, that you are taking an exception to the fact that under the Huntley case, it was not offered on a basis of notice required under 831 of the Code of Criminal Procedure, that you *also* have an exception under the fact that it violates the Miranda against Arizona decision in the United States Supreme Court.²³

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

16. 398 U.S. 937 (1970).

17. 401 U.S. at 224. The Court's assertion is crucial because it later states that an inadmissible statement can be used to impeach "provided of course that the trustworthiness of the evidence satisfies legal standards." *Id.* The reference to "legal standards" apparently relates to the "voluntariness of the confession." *Id.* at 229 n.2.

18. Appendix, *supra* note 12, at 57, 69.

19. Petition for Certiorari at 10, Brief for Petitioner at 11, 19, 24, Transcript of Oral Argument at 12, 18, *Harris v. New York*, 401 U.S. 222 (1971).

20. Appendix, *supra* note 12, at 57 (emphasis added).

21. *People v. Kulis*, 18 N.Y.2d 318, 322-23, 221 N.E.2d 541-42, 274 N.Y.S. 873, 875 (1965).

22. Appendix, *supra* note 12, at 69. Counsel was cut off by the trial judge before he could complete the sentence, but the meaning is clear.

23. *Id.* at 70 (emphasis added).

The trial judge thus ruled, in effect, that no hearing was required to establish admissibility under either *Miranda* or the pre-*Miranda* voluntariness tests, since even if the statement were found inadmissible under both tests, it could still be used to impeach under the holding of the *Kulis* case.²⁴

In the state appellate proceedings, neither the petitioner nor the state drew any distinction between statements obtained in violation of *Miranda* and those which are involuntary in the pre-*Miranda* sense.²⁵ The assumption of both parties throughout these proceedings was the same as that of the trial court: that an illegally obtained statement can be used to impeach regardless of whether the illegality was based on a violation of *Miranda* or of pre-*Miranda* standards of voluntariness. As the state's brief in the Appellate Division put it:

It really makes no difference why the *Kulis* statement was illegal, and it makes no difference why this appellant's statement was illegal. Once it is acknowledged that they are in fact illegal, they have been as tarred as black as they can get.²⁶

24. *Kulis* involved a statement whose admissibility was not governed by *Miranda*. The court found it inadmissible under *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963). No distinction was drawn in *Kulis* between statements secured in violation of *Escobedo* and those which would be deemed involuntary in the more traditional sense of that term.

25. See, e.g., Appellee's Brief at 4, *Harris v. People*, 31 App. Div. 2d 828, 298 N.Y.S.2d 245 (1969). In referring to those statements which are involuntary in the pre-*Miranda* sense, we mean to include those statements which would be deemed involuntary or coerced under *Johnson v. New Jersey*, 384 U.S. 719 (1966).

26. Appellee's Brief, *supra* note 25, at 4. In its brief in opposition to certiorari, the state took the position that there was no need for a hearing on the issue of voluntariness, since

without doubt, the statement would have been ruled involuntary and hence inadmissible at the trial, because, as we have already pointed out, it was deficient in terms of *Miranda*. . . . [T]he District Attorney's Office, because the defect is a glaring one, came to precisely the same conclusion, that it was involuntary and inadmissible Respondent's Brief in Opposition to Certiorari at 9-10, *Harris v. New York*, 401 U.S. 222 (1971). The state did not, in its brief in opposition, distinguish between a statement taken in violation of *Miranda* and a statement which would have been deemed involuntary in the pre-*Miranda* sense. "It is our submission to the Court that *Miranda* represents simply a new and heightened gauge of voluntariness." *Id.* at 4. In refusing to draw such a distinction, the state was following the New York law which, likewise, drew no such distinction for impeachment purposes. See *People v. Kulis*, 18 N.Y.2d 318, 221 N.E.2d 541, 274 N.Y.S.2d 873 (1966).

In its brief on the merits, the state shifted its position, arguing that "on its face there is surely no flaw in the voluntariness of this statement." Brief for Respondent at 35, *Harris v. New York*, 401 U.S. 222 (1971). The state also said that "the question of voluntariness was never raised at the trial . . ." *Id.* (The record, however, clearly establishes that it was. See p. 1201 *supra*.) Indeed, the state conceded that "[i]f the question of voluntariness is decided adversely to the prosecutor, he may not use the statement to impeach . . ." (It is not clear whether this purported to be a statement of New York law or federal constitutional law.)

Thus, in its first brief before the Court, the state apparently conceded that the statement was involuntary, but argued that even involuntary statements may be used to impeach; whereas in its second brief, it apparently conceded that if the statement was involuntary it could not be used to impeach, but argued that the statement was volun-

Nor did petitioner's briefs or oral argument before the Supreme Court in any way abandon or concede his involuntariness claim. In his petition for certiorari, petitioner explicitly argued that *Jackson v. Denno*²⁷ required a pre-trial determination of voluntariness before a statement could be used for any purpose. "Fundamental fairness," he argued, "requires a pre-trial hearing on the question of voluntariness."²⁸

During oral argument counsel for petitioner was asked whether there was any "claim here that the statement was coerced. . . ."²⁹ His answer was as follows:

[T]he young man who tried this case for legal aid, made such an objection, and he made it by referring to Jackson vs. Denno and to section 813(f) of the Code of Criminal Procedure in New York, which is the statute dealing with a hearing on the question of voluntariness. . . . [W]hen we asked for a hearing on that issue, we were foreclosed by the prosecution's objection that the result of such a voluntariness hearing wouldn't prevent him from using it, and the trial judge . . . agreed with that on the authority of Kulis³⁰

One of the Justices then summed up petitioner's position in the following exchange:

Q. Well, then, as to coercion, the involuntariness of this statement, do I understand it to be your submission that because of the attitude the prosecutor took, the ruling of the court was that even assuming it was coerced it could still be used?

A. Exactly, but I also say—

Q. We should decide this case therefore on the hypothesis, whatever the facts may be, that this was coerced?

A. Exactly. . . .³¹

tary. This confusion was somewhat cleared up during the oral argument, where the latter position was taken.

27. 378 U.S. 368 (1964). *Jackson* involved a claim of involuntariness in the pre-*Miranda* sense.

28. Petition for Certiorari, *supra* note 19, at 10.

It is respectfully submitted that such an illegally obtained statement cannot be used unless and until the requirements of a pre-trial determination of *voluntariness* have been fulfilled in accordance with *Jackson*.

Id. (Emphasis added.)

29. Transcript of Oral Argument, *supra* note 19, at 10.

30. *Id.* at 10-11.

31. *Id.* at 12. Petitioner's counsel then went on to restate his position in the following terms:

I think it was clearly illegally obtained and I point out respectfully that that was conceded all the way through the New York courts. It was treated as such. It was not conceded to be involuntary in the classic sense, but by our foreclosure from it, by the trial judge's reading of Kulis as allowing this in an involuntary case, I think this is the posture in which this case comes before this Court.

Petitioner's counsel then went on to catalogue the facts pointing toward involuntariness. He described the off-the-record preliminary questioning as "a secret inquisition, something in the nature of a subtle star chamber proceeding . . ."³² He told the Court that petitioner was a twenty-three year old addict with a tenth grade education who, at the time he made the statement, "was suffering from withdrawal symptoms."³³ Petitioner also had testified that he could not remember the interrogation because it had occurred at a time when "my joints was down and I needed drugs."³⁴ He had alleged as well that he may have been suffering from the after effects of an automobile accident which put him in a hospital for a month, gave him a concussion and affected his memory;³⁵ and that he was interrogated off the record prior to the taking of his formal statement in the presence of three assistant district attorneys and two detectives.³⁶ Finally, petitioner's counsel was asked whether there was a claim that "the contents of the statements are untrue." His answer was, "Yes, Judge."³⁷

It is possible, of course, that an evidentiary hearing would not have led to a conclusion that the statement was involuntary in the pre-*Miranda* sense, but that was not the issue before the Court.³⁸ Nor was that what the Chief Justice said. Joined by four other Justices, he asserted that "Petitioner makes no claim that the statements made to the police were coerced or involuntary." This statement is simply incorrect. In light of the papers and oral argument presented to the Court, it is difficult to understand how it could have been made.³⁹

Id. at 13-14. Petitioner's claim that the statement was involuntary in the pre-*Miranda* sense was asserted in another relevant context. Mr. Justice Blackman asked whether petitioner would "be here today" if *Johnson v. New Jersey*, 384 U.S. 719 (1966), had held "that retroactivity was directed to the time of the taking of the statement rather than to the time of the beginning of the trial." Transcript of Oral Argument, *supra* note 19, at 19. (The trial in this case postdated *Miranda*, but the statement was taken before that decision. See note 11 *supra*.) Petitioner's counsel answered: "Yes, because in that posture could they possibly have denied us a hearing on voluntariness?" Transcript of Oral Argument, *supra* note 19, at 20. In other words, petitioner asserted that even if *Miranda* had not been applicable, he would have "been here" on the voluntariness claim.

32. *Id.* at 12.

33. *Id.* at 4.

34. Appendix, *supra* note 12, at 59.

35. *Id.* at 64; Brief for Petitioner, *supra* note 19, at 5.

36. *Id.*; Appendix, *supra* note 12, at 72, 74.

37. Transcript of Oral Argument, *supra* note 19, at 7. Indeed, the New York County District Attorney's brief acknowledged that the relevant portion of the pre-trial statement was a "false account." See note 96 *infra*.

38. Nor did the Court purport to be determining for itself—as it could not properly do on this record—that the statement was voluntary in the pre-*Miranda* sense. See, e.g., *Machibroda v. United States*, 368 U.S. 487 (1962).

39. Mr. Justice Blackmun's opinion for the Court in *Wyman v. James*, 400 U.S. 809 (1971), at one point uses a somewhat similar approach, albeit with respect to a much less crucial point. In arguing that most welfare home "visits" are reasonable (an irrelevant

It is also surprising, in light of this record, that the Court reached out to decide the broad constitutional issue of whether a statement obtained in violation of *Miranda* may be used to impeach.⁴⁰ During

argument, since the claim of respondent accepted by the court below was that a warrant should have been obtained), the Court notes that Mrs. James received advance written notice of the visit she refused (with the consequence that her assistance was terminated). 400 U.S. at 320. And so she did. But *James* was a class action, and *all twelve* of the affidavits other than Mrs. James's filed by the plaintiffs recited that the case worker "most often" comes without warning! The Court simply notes this troublesome fact in a footnote and makes no comment whatsoever in response. 400 U.S. at 320 n.8. This is, we suppose, preferable to not mentioning it at all but still seems less than adequate.

40. *Wyman v. James*, 400 U.S. 309 (1971), in several ways provides another textbook example of reaching out prematurely to decide a broad and novel issue of constitutional law. (And, like *Harris*, it disregards at least one narrow ground which would have compelled the *contrary* decision.) The record was so inadequate with respect to some details of home visits—for example, whether advance notice is typically given, *see note 39 supra*—that even counsel for the state conceded in oral argument that a hearing might be appropriate to clarify the situation. Transcript of Oral Argument at 3, *Wyman v. James*, 400 U.S. 309 (1971). The state further argued that Mrs. James had failed to exhaust her state remedies, that the Court should withhold decision for the moment to let the state system grapple with the issue and perhaps build in safeguards which would blunt Mrs. James's claim of unreasonableness. It is quite clearly settled that the exhaustion requirement as such does not apply in Section 1983 actions, which *James* was. *See Damico v. California*, 389 U.S. 416 (1967). But the Court of late has shown a renewed enthusiasm for having district courts, in 1983 actions as well as others, "abstain" while the state system clarifies and has the first constitutional crack at the practice under attack. *See, e.g., Dyson v. Stein*, 401 U.S. 200 (1971). (On the admittedly fine distinction between the exhaustion and abstention doctrines in 1983 actions, *see, e.g., C. WRIGHT, LAW OF FEDERAL COURTS* 197 (2d ed. 1970):

[T]he Court held [referring to *McNeese v. Board of Education*, 373 U.S. 663 (1963), the precedent upon which *Damico* placed primary reliance] that in a civil rights case exhaustion of state administrative remedies is not needed, but in doing so it specifically cited the abstention cases and distinguished them on the ground that in the case before it there was no issue of state law that might be dispositive.)

If such abstention is proper in First Amendment areas, where the very rights in issue will be "chilled" while the state system operates, it would surely seem proper in the *James* context as well, particularly in light of representations made in the state's brief concerning the sort of safeguards which might be built in by the state authorities.

[T]he appellee here began but did not complete the administrative hearing process. She had a prior termination hearing but did not proceed to a state fair hearing. . . . Complete exhaustion of administrative remedies was particularly important here because of the vague nature of the complaint and the essentially administrative nature of the relief sought. Appellee was complaining about being asked unspecified questions. The twelve recipients supporting her position complained of the timing of the visits and the circumstances under which interviews are conducted. . . .

[A] state forum, judicial or administrative, might have been able to alter substantially the nature of the questions involved . . . by its interpretation of Section 134-a of the New York Social Services Law which requires investigation of an application and personal contacts but does not mandate a home visit. This would apparently be a case of first impression for the State agency which could promulgate a flexible rule or adhere to a strict one. . . . At the least, they might require a showing of individual necessity for a home as opposed to an office visit before termination of aid if such a course were deemed wise.

Brief for Appellant at 43-44, *Wyman v. James*, 400 U.S. 309 (1971). Of course the optimism expressed in the quoted passage is somewhat self-serving, but one thing is clear: a court genuinely committed to avoiding the decision of issues whose contours cannot clearly be discerned could have somehow—by remand or a sort of abstention—found a way to educate itself concerning the precise nature of the visits under attack before permanently placing on them the imprimatur of constitutional legitimacy.

Additionally, the Court in *James* made no attempt whatever to counter Mr. Justice Marshall's argument that unconsented-to visits (as Mrs. James's certainly were) have been

oral argument, counsel for the state was asked the following question by Mr. Justice Stewart: "What if this had been a coerced confession, could you impeach him with that?"⁴¹ The answer was as follows:

If this had been a coerced confession, it is the people's view and the respondent's view that it couldn't have been used for any purpose⁴²

Counsel for the state was then asked what his position would be in a case where petitioner had claimed, at the trial, that the statement was involuntary: "Wouldn't you agree that then you have a hearing outside of the jury?" The state's reply was unequivocal:

Oh, by all means, Mr. Justice, . . . there has to be some judicial

forbidden by the supervising federal authorities. Mr. Justice Marshall's suggested non-constitutional disposition not only would have had the effect of "remanding" the question to the political processes, but also seems soundly grounded in the language of the federal *Handbook of Public Assistance Administration*:

The [state welfare] agency especially guards against violation of legal rights and common decencies in such areas as entering a home by force, or without permission, or under false pretenses; making home visits outside of working hours, and particularly making such visits during sleeping hours;***

DEPT OF HEW, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Pt. IV, § 2200(a) (emphasis supplied). A federal regulation, so long as it is within the authority delegated by a valid federal statute, generally takes precedence over state law. Whether the handbook should count as such a regulation seems to us somewhat unclear. The Court did not address that issue, however, and indeed used the word "forbidden" in relying on other phrases of the very same regulation to buttress its claim that home visits generally are reasonable. 401 U.S. at 321. Compare note 64 *infra*.

Even granting the Court's desire to break with the tradition that only an emergency can justify invading a citizen's privacy without a warrant, it did so precipitously, without really knowing what the searches in issue looked like, without letting the state system operate so as to inform it and perhaps to deal with the searches' more objectionable features, and without acceding to the apparent federal command that such searches take place only with the consent of the searched. But just as questionable practices should not be invalidated in ignorance, they should not be legitimated in ignorance.

41. Transcript of Oral Argument, *supra* note 19, at 25.

42. *Id.* This issue was pressed further in the following exchange between Mr. Justice Stewart and counsel for the state:

Q. I didn't mean an untrue confession, I meant simply an involuntary confession, could you use that to impeach him?

A. No. Mr. Justice Stewart, I don't think we could, for this reason: The point I am trying to make is a voluntary confession, if it is voluntary in the traditional sense, can be relied upon to express the truth, whereas an involuntary confession is subject, to take the obvious example, a man will say anything to keep from being beaten and all we have to do is go to some of the countries beyond the Iron Curtain to demonstrate that. There is a point beyond which human endurance can't continue. . . .

Q. . . . And let's assume further that it is wholly true. Could you have used that to impeach him?

A. I don't think so, Mr. Justice Stewart, because the thought is that we must define a class of confessions which may be used for these purposes, and I think once you define the class as being a true confession rather than a voluntary confession, then you're getting into extraneous matters that perhaps aren't properly explored in the context of this.

Q. What you are saying then is that it can't be given any use because it is inherently unreliable as being involuntary?

A. As being involuntary, yes, Mr. Chief Justice (sic).

Id. at 26-27.

determination of that prior to any concept of throwing this in the man's face. Just simple justice would compel that.⁴³

Thus the state explicitly conceded that a hearing would have to be held before a statement alleged to be "coerced or involuntary" could be used for impeachment. Moreover, as previously demonstrated, the record plainly established that petitioner had explicitly requested a hearing to determine whether the statement was involuntary. Accordingly, canons of judicial restraint (to say nothing of "simple justice" to Mr. Harris, who never *did* get his voluntariness hearing) should have led the Court to remand the case to the state courts for a hearing to determine whether the statement was involuntary in the pre-*Miranda* sense. It could have done this in a short per curiam opinion such as the following:

The state concedes that a statement which is involuntary or coerced in the pre-*Miranda* sense may not be used for impeachment purposes. It also acknowledges that if a hearing is requested to determine whether a statement was involuntary or coerced, the statement may not be used to impeach unless there has been a judicial determination that it was not involuntary or coerced. At the trial, petitioner requested a hearing to determine whether his statement was involuntary. That request was denied, on the ground that it made no difference—for purposes of impeachment—whether the statement was involuntary in the pre-*Miranda* sense.

Accordingly, we remand the case for a hearing. If it is determined that the statement was involuntary in the pre-*Miranda* sense, then the conviction must be reversed. If it is determined that it was voluntary in the pre-*Miranda* sense, there will then be

43. *Id.* at 27-28. The oral argument then proceeded in the following way:

Q. Now your brother on the other side has told us that because of the posture in which this question arose in the trial court, we must proceed upon the hypothesis that this was an involuntary confession.

A. Mr. Justice Stewart, I think perhaps Mr. Aurnou may have expressed himself somewhat more enthusiastically than was his intention. I don't think you have to make such a presumption because when you read the record and when you see what it was that was sought to be brought into context here, it was not the voluntariness of the confession as to voluntariness alone. The only point that was brought into context was whether it was admissible in terms of *Miranda*, a question on which all of us agree, there was never any doubt about that. We had come to that conclusion months and months and months before this trial.

Q. When the prosecution sought to use it for impeachment purposes, was there any request for hearing on the involuntariness of the confession?

A. I would have to get these minutes to refresh my recollection before I could give you an absolutely definitive answer, Mr. Chief Justice. My recollection is that there was a hearing for the purpose of discovering whether—there was a hearing requested for the purpose of discovering whether or not this was admissible, and we all know it wasn't.

Id. at 28. As demonstrated above, however, a check of the "minutes" would have plainly established that a hearing to determine the voluntariness of the statement—in addition to its admissibility under *Miranda*—had been requested.

occasion for us to decide the issue whether a statement voluntary in the pre-*Miranda* sense but obtained in violation of *Miranda* may be used for impeachment purposes.

The Court did not, however, elect to follow this course of judicial restraint. Instead it reached out to consider an issue about which there was unanimity among the circuits and little conflict among the states, and indeed it decided it *contrary* to the weight of all this authority.⁴⁴ It should therefore be instructive to examine the arguments offered by the Court in support of its conclusion.

II. The Majority's Representation of the Precedents

A. *Miranda v. Arizona*

The most obvious precedential hurdle for the Court in *Harris* was of course, *Miranda* itself, which had held that "the prosecution may not use statements, whether exculpatory or inculpatory . . . unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."⁴⁵ Prior to *Harris*, that decision had been widely—indeed, almost unanimously—interpreted to preclude the impeachment use of statements obtained in violation of its rules.⁴⁶ The opinion in *Harris*, however, disposes of *Miranda* in its first paragraph of argument:

Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose,

44. The dissenting opinion summarized the case law as follows:

Six federal Courts of Appeals and appellate courts of 14 States have reached [a result contrary to that reached by the majority]. *United States v. Fox*, 403 F.2d 97 (CA 2 1968); *United States ex rel. Hill v. Pinto*, 394 F.2d 470 (CA 3 1968); *Breedlove v. Beto*, 404 F.2d 1019 (CA 5 1969); *Groshart v. United States* 392 F.2d 172 (CA 9 1968); *Blair v. United States*, 130 U.S. App. D.C. 322, 401 F.2d 387 (1968); *Wheeler v. United States*, 382 F.2d 998 (CA 10 1968); *People v. Barry*, 237 Cal. App. 2d 154, 46 Cal. Rptr. 727 (1965), *cert. denied*, 386 U.S. 1024, 87 S. Ct. 1382, 18 L. Ed. 2d 464 (1967); *Velarde v. People*, 466 P.2d 919 (Colo. 1970); *State v. Galasso*, 217 So.2d 326 (Fla. 1968); *People v. Luna*, 37 Ill. 2d 299, 226 N.E.2d 586 (1967); *Franklin v. State*, 6 Md. App. 572, 252 A.2d 487 (1969); *People v. Wilson*, 20 Mich. App. 410, 174 N.W.2d 79 (1969); *State v. Turnbow*, 67 N.M. 241, 354 P.2d 533 (1960); *State v. Catrett*, 276 N.C. 86, 171 S.E.2d 398 (1970); *State v. Brewton*, 247 Ore. 241, 422 P.2d 581, *cert. denied*, 387 U.S. 943, 87 S. Ct. 2074, 18 L. Ed. 2d 1328 (1967); *Commonwealth v. Padgett*, 423 Pa. 229, 237 A.2d 209 (1968); *Spann v. State*, 448 S.W.2d 128 (Tex. Ct. App. 1969); *Cardwell v. Commonwealth*, 209 Va. 412, 164 S.E.2d 699 (1968); *Gaertner v. State*, 35 Wis. 2d 159, 150 N.W.2d 370 (1967); *see also Kelly v. King*, 196 So. 2d 525 (Miss. 1967). Only three state appellate courts have agreed with New York *State v. Kimbrough*, 109 N.J. Super. 57, 262 A.2d 232 (1970); *State v. Butler*, 19 Ohio St. 2d 55, 249 N.E.2d 818 (1969); *State v. Grant*, 459 P.2d 639 (Wash. 1969).

401 U.S. at 231 n.4. (Brennan, J., dissenting).

45. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

46. *See cases cited note 44 supra.*

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, provided of course that the trustworthiness of the evidence satisfies legal standards.⁴⁷

This summary of *Miranda* is misleading in two respects. First, by stating that "some" comments "can . . . be read" to preclude the *Harris* result, the Chief Justice suggests that that is but one of several possible readings. However, a pervasive and unambiguous aspect of *Miranda* was its explicit rejection of distinctions based on the manner in which a statement is used by the Government or the degree to which it is helpful to it:

The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of *any statement* made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself *in any manner*; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, *statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at 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 the full warnings and effective waiver required for any other statement.*⁴⁸

Miranda's repeated references to "exculpatory" statements⁴⁹ were thus intended to cover precisely the kind of statement at issue in *Harris* and the specific use to which it was there put. Nor did these references pass unnoticed. They were the object of explicit and uncomplimentary reference in each of the three dissents filed in *Miranda*.⁵⁰ Accordingly,

47. 401 U.S. at 224.

48. 384 U.S. at 476-77 (emphasis added).

49. See also *id.* at 444.

50. *Id.* at 502 (Clark, J., dissenting and concurring); *id.* at 505 (Harlan, J., dissenting); *id.* at 535 (White, J., dissenting).

Miranda not only "can" be read to require reversal of Harris's conviction, it can be read no other way!

Second, it is of course technically accurate to say that *Miranda's* discussion of impeachment was not necessary to the Court's holding, since the statements in *Miranda* had been used as part of the prosecution's case in chief. But *Miranda* did not purport to be an opinion limited to its precise facts. Indeed, the stated reason for granting certiorari in that case was because *Escobedo v. Illinois*⁵¹—which was limited to its facts—had been "the subject of judicial interpretation" under which "state and federal courts, in assessing its implications, [had] arrived at varying conclusions." *Miranda* purported to "give concrete constitutional guidelines for law enforcement agencies and courts to follow."⁵² Thus, the opinion was deliberately structured so that the constitutional principles—which grew out of the experience of many cases—were set out before the Court set forth the specific facts of the cases before it.⁵³ Moreover, the opinion said that it was part of its "holding" that an uncounseled "exculpatory" statement could not be used by the prosecution. The Court summarized its sixty-three page opinion as follows:

Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.⁵⁴

One might wish to criticize the *Miranda* opinion for its far-ranging, "guidebook" format. But, rightly or wrongly, that opinion is what it is, and it *does* "follow" from it that evidence inadmissible because of a *Miranda* violation "is barred for all purposes." An important part of *Miranda* was squarely overruled in *Harris*; the Court does no service by pretending that it wasn't.

This kind of treatment of a troublesome precedent may not be that unusual. Though more candor was, we think, in order, the Court's be-

51. 378 U.S. 478 (1964).

52. *Miranda v. Arizona*, 384 U.S. 436, 440-42 (1966).

53. Because of the nature of the problem and because of its recurrent significance in numerous cases, we have to this point discussed the relationship of the Fifth Amendment privilege to police interrogation without specific concentration on the facts of the cases before us. We turn now to these facts to consider the application to these cases of the constitutional principles discussed above.

Id. at 491. The only previous allusion to the facts in the cases at bar had, significantly, not specified whether the statements at issue were used as part of the prosecution's case in chief or by way of impeachment. *Id.* at 445.

54. *Id.* at 444.

havior with respect to *Miranda* pales beside what it did with *Walder v. United States*.⁵⁵ That case, like *Miranda*, squarely faced the *Harris* issue and resolved it in favor of the defendant. But the *Harris* opinion is not content flimsily to “distinguish” *Walder*—instead, by dint of some skillful editing, it represents it as a supporting and controlling precedent!

B. *Walder v. United States*

The Court places its principal reliance on *Walder*, suggesting that it is following a general rule laid down in that case and merely extending it slightly to apply to the facts of *Harris*, since there is no “difference in principle” between the two. The Court’s entire discussion of *Walder* is as follows:

In *Walder v. United States*, 374 U.S. 62 (1954), the Court permitted physical evidence, inadmissible in the case in chief, to be used for impeachment purposes.

“It is one thing to say the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government’s possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.

“[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government’s disability to challenge his credibility.” 347 U.S., at 65.

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*.⁵⁶

The actual situation was, however, considerably different from that suggested by the Court. *Walder* did not state the general rule: instead, it stated a rather special exception to the general rule laid down in 1925 by a unanimous Supreme Court in the case of *Agnello v. United States*.⁵⁷ In *Agnello*, the Supreme Court had held that a defendant who

55. 347 U.S. 62 (1954).

56. 401 U.S. at 224-25.

57. 269 U.S. 20 (1925). *Agnello*, in turn, relied on Justice Holmes’s opinion for the Court in *Silverthorne v. United States*, 251 U.S. 385 (1920).

did not, in his direct examination, testify about an illegally seized item, could not be cross-examined about that item. The *Agnello* Court's analysis was as follows:

And the contention that the evidence of the search and seizure was admissible in rebuttal is without merit. In his direct examination, Agnello was not asked and did not testify concerning the can of cocaine. In cross-examination, in answer to a question permitted over his objection, he said he had never seen it. He did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search.⁵⁸

The *Walder* case carved out of that general rule a limited exception responsive to the particular—and unfair—trial tactic of the defendant in that case. The Government had unlawfully seized heroin from Walder in 1950 and had indicted him for the possession of it. The evidence had been suppressed and the indictment dismissed. Two years later, the Government indicted him for an entirely different drug offense. At his trial for this latter crime, Walder took the witness stand and denied the specific acts with which he stood charged. Then—of his own accord—he went beyond denying these acts and volunteered testimony that he had never had any narcotics in his possession in his entire life. At that point, the trial court permitted the Government to question him about the heroin unlawfully seized from him two years earlier and to introduce the testimony of the officer who had made the seizure. It was in this context that the *Walder* Court held that where the defendant “[o]f his own accord,” goes “beyond a mere denial of complicity in the crimes of which he was charged,” and makes a “sweeping claim,” then the government may “introduce by ways of rebuttal evidence illegally secured by it”⁵⁹ The Court in *Walder* explicitly reaffirmed the general rule laid down in *Agnello*:

Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief.⁶⁰

Indeed, the *Walder* Court went out of its way to reconcile its limited

58. *Agnello v. United States*, 269 U.S. 20, 35 (1925).

59. *Walder v. United States*, 347 U.S. 62, 65 (1954).

60. *Id.*

holding with the general rule of *Agnello*, asserting that *Agnello* had “foreshadowed” the *Walder* result.⁶¹

Harris, of course, is like *Agnello* rather than *Walder*, and *Harris*’s conviction would clearly have been reversed had the earlier decision been followed. Accordingly, the *Harris* Court did not extend a general rule laid down in *Walder* to the facts in the case before it, as it suggested it was doing; instead, it squarely overruled the unanimous decision in *Agnello* without even citing it.

Nor was the *Harris* Court unaware of the *Agnello* rule it was overturning. For it appears to have gone to some pains to excise from its rendition of *Walder* all reference to *Agnello*. *Harris*’s quotation from *Walder* (reproduced above)⁶² begins its second paragraph with a bracketed capital letter, indicating that something has been omitted. That something, it transpires, is *Walder*’s reiteration of the *Agnello* principle. What follows is the original passage from *Walder*. The non-italicized material is what *Harris* quoted; the italicized material, what it omitted.

*Take the present situation. Of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics. Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government’s disability to challenge his credibility.*⁶³

It is clear—especially from the (excised) phrase “Beyond that, however”—that the excised material is the general rule, and the (quoted) material “beyond that” the *Walder* exception. The precision of the *Harris* Court’s editing of the quotation from *Walder* also suggests that the omission was not inadvertant.⁶⁴

61. *Id.* at 66.

62. See text at note 56 *supra*.

63. *Walder v. United States*, 347 U.S. 62, 65 (1954) (emphasis supplied).

64. Again, *Wyman v. James*, 400 U.S. 309 (1971), is disturbingly similar. In support of its irrelevant claim, see note 39 *supra*, that most home visits are reasonable, the Court observes:

Forcible entry or entry under false pretenses or visitation outside working hours or snooping in the home are forbidden.

400 U.S. at 321. What the Court omits to mention is that the provision in question, Part IV, § 2300(a) of the HEW *Handbook of Public Assistance Administration*, refers to

It is important to understand the criticism we are here making. There may be legitimate arguments in favor of overruling the general rule laid down in *Agnello* and reiterated in *Walder*. We do not—at this point—dispute the *conclusion* reached by the Court. But it was misleading for the Court not to acknowledge that there was a general rule precluding the use of illegally seized evidence for impeaching a defendant's testimony denying the crime and that it was squarely overruling a unanimous decision of a prior Supreme Court.

The Court does acknowledge that there is a distinction between *Walder* and the case at bar: "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."⁶⁵ But it immediately proceeds to argue—more precisely, assert—that this is a distinction without a difference: "We are not persuaded that there is a difference in principle that warrants a result different from that reached by the Court in *Walder*."⁶⁶ That is all the Court says about the difference between the two cases, leaving unstated the reasons why it was "not persuaded" that a distinction which had been deemed dispositive for nearly a generation was not based on "principle."

There are, in fact, important differences between *Walder* and *Harris*—differences which at the very least should have been faced. *Walder* involved impeachment by means of evidence obtained in violation of the Fourth Amendment—an Amendment that does not, in terms, provide for the exclusion of evidence secured in violation of it. Indeed, the Fourth Amendment "exclusionary rule" is a court-created device—of relatively recent vintage—designed to discourage primary violations of the prohibition against "unreasonable searches and seizures."⁶⁷ The Fifth Amendment, on the other hand, seems on its face to prohibit the Government from using compelled statements "against" the defendant.⁶⁸ It is an exclusionary rule—and a constitutionally created one.⁶⁹

entering a home by force, or without permission, or under false pretenses; making visits outside of working hours. . . .

DEPT OF HEW, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Pt. IV, § 2300(a) quoted, 400 U.S. at 346 (Marshall, J., dissenting) (emphasis supplied). Nowhere does the Court mention the reference to entry without permission, though it draws support from the phrases on either side of it. As in *Harris*, the device of convenient omission (by paraphrase rather than ellipsis this time) has saved the Court the bother of facing a passage which, if taken seriously, might have defeated the government's claim. See note 40 *supra*.

65. 401 U.S. at 225.

66. *Id.*

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

68. The relevant portion of the Fifth Amendment reads as follows: "nor shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

69. See, e.g., *Brown v. Walker*, 161 U.S. 591 (1896).

Accordingly, courts would seem less justified in carving exceptions out of the Fifth Amendment's exclusionary rule than out of the Fourth's.

Moreover, the fact that evidence was secured in violation of the Fourth Amendment casts no doubt on its reliability, whereas one of the underlying reasons for excluding evidence obtained in violation of the Fifth Amendment is precisely the possibility that it may be untrustworthy. Although this is somewhat less true of statements obtained in violation of the prophylactic rules of *Miranda*, an important purpose of the *Miranda* rules was "to guarantee that the accused gives a fully accurate statement to the police"⁷⁰

It was for these reasons, among others,⁷¹ that both before and after *Walder*, the weight of federal and state authority was to the effect that evidence taken in violation of the Fifth—as contrasted with the Fourth—Amendment, could never be used to impeach.⁷² The Court in *Harris* fails to acknowledge these distinctions between the Fourth and Fifth Amendments. It simply assumes that in the context of impeachment they are not differences "in principle" deserving even the briefest discussion.

The distinction the Court does allude to—only to dismiss in a conclusory sentence—is also a critical one, in both practical and constitutional terms. There is an important difference between impeaching a defendant's testimony as to collateral matters and impeaching him as to testimony bearing directly on the crime charged. The difference—simply stated—is this: there is a considerable risk that illegally obtained evidence *which bears directly on the crime charged* will be con-

70. *Miranda v. Arizona*, 384 U.S. 436, 470 (1966); cf. *Johnson v. New Jersey*, 384 U.S. 719 (1966).

71. Permitting impeachment by means of illegally seized evidence is more likely to induce violations of the Fifth than the Fourth Amendment. For physical evidence is often, perhaps most often, contraband, and if it is suppressed as to the government's case in chief, the case will frequently have to be dropped. Confessions and statements, however, are practically always nothing more than buttressing evidence: suppression of a confession or other statement will seldom cause the prosecution to drop its case. With respect to a statement, therefore, it would be worthwhile (in a way it would not be with respect to contraband) for the police to press on and get it illegally when it has become clear it cannot be obtained legally. For despite the illegality the case will likely go forward, and if the statement can be used for impeachment, it will likely keep the defendant off the stand or at any rate discredit his testimony. With respect to contraband, however, no such incentive will exist. For once the search is declared illegal, the case will likely be dropped. And *Walder* situations—where the defendant is later indicted for a similar crime and on the stand denies ever having transgressed—are obviously rare, surely not so common as to figure into a policeman's calculus.

72. See generally Annot., 89 A.L.R.2d 478 (1963), and cases cited. Several cases involving the *Mallory* rule (*Mallory v. United States*, 354 U.S. 449 (1957)) have gone the other way. See, e.g., *Bailey v. United States*, 328 F.2d 542 (D.C. Cir. 1964), cert. denied, 377 U.S. 972.

sidered by the jury as *direct evidence of the defendant's guilt*. This risk is significantly reduced when the illegally obtained evidence does not directly relate to the elements of crime charged. This important difference may be illustrated by contrasting the facts of *Walder* with those of *Harris*. In *Walder*, the illegally obtained evidence related to an event which had occurred two years prior to the alleged crime. In *Harris*, on the other hand, the illegally obtained statements contained admissions of elements of the crime with which the defendant then stood charged. To be sure, the jury—as in *Walder*—was instructed not to consider that evidence as bearing on the elements of the offense, but rather only as bearing on the defendant's credibility. It is possible that the jurors diligently followed this limiting instruction and cleansed their minds of the contents of the statements when they were deliberating about the elements of the crime. But surely the risk of infection is significantly greater in the *Harris*-type case than in the *Walder*-type case.⁷³

Indeed, it was this very difference that was explicitly and successfully argued by the Government in its brief in *Walder*. The Government pointed out that in *Agnello*

the suppressed evidence was so closely related in point of time to the offense charged that there was a real danger that the suppressed evidence would be considered by the jury as proof of guilt, as of affirmative benefit to the Government. No such danger existed here, since the suppressed evidence related to a point in time remote from the offenses charged.⁷⁴

The Government then concluded that

there was in this case no danger that the supposed evidence would be used as affirmative evidence in behalf of the Government beyond the limited scope for which we contend it was admissible, i.e., merely to neutralize the effect of petitioner's perjury.⁷⁵

A number of recent decisions of the Supreme Court have relied on the principle that the Court in *Harris* found unpersuasive. For example, *Jackson v. Denno*⁷⁶ and *Bruton v. United States*⁷⁷ both rest on the

73. To be sure, there is always a risk of the jury's inferring that liars are more likely to be criminals than truth-tellers, and—where the impeachment evidence relates to a prior similar crime—of the jury's inferring from that that the defendant is guilty of the crime charged. These risks, which are fairly common to impeachment evidence, are, however, considerably easier to guard against than an improper, "truth of the matter asserted," inference from a statement admitting guilt of the crime charged.

74. Brief for the United States at 32-33, *Walder v. United States*, 347 U.S. 62 (1954).

75. *Id.* at 33.

76. 378 U.S. 368 (1964).

77. 391 U.S. 123 (1968).

conclusion that a limiting instruction cannot be relied upon when a confession or admission of the crime at issue is involved. “[T]he risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.”⁷⁸ *Harris*, unfortunately, demonstrates that *Bruton* was wrong in at least one respect: these limitations can, in fact, “be ignored.”

Finally, there is another—almost self-evident—distinction between *Walder* and *Harris*. It is the distinction that Justice Frankfurter explicitly relied upon in carving the *Walder* exception out of the general rule of *Agnello*. It was this very distinction—as we have previously noted—that the Chief Justice excised from his quotation of *Walder*:

Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief.⁷⁹

There is surely an important difference between using illegally obtained evidence to impeach a defendant who takes the stand only to deny elements of the offense and using it to impeach the defendant who goes beyond that. According to Justice Frankfurter and the Court for which he was writing, it is a difference of constitutional magnitude.⁸⁰ And it is a difference that was not unfamiliar to the author of the *Harris* opinion. While a circuit judge he wrote at least one opinion which rested entirely on the very difference that he dismissed as not persuasive in *Harris*. In *Lockley v. United States*⁸¹—a case which is essentially a carbon copy of *Harris*—Judge Burger, dissenting from the affirmance of a conviction, argued that the defendant “must be permitted to deny the criminal act charged without thereby giving leave to the government to introduce by way of rebuttal evidence

78. *Bruton v. United States*, 391 U.S. 123, 135 (1968). *But cf.* *Dutton v. Evans*, 400 U.S. 74 (1970).

79. *Walder v. United States*, 347 U.S. 62, 65 (1954).

80. *Id.*

81. 270 F.2d 915 (D.C. Cir. 1959). In *Lockley*, the statement at issue was not—in Judge Burger’s view—coerced. It was alleged to have been obtained in violation of the *Mallory* rule. Judge Burger explained the difference as follows:

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.
270 F.2d at 921 n.1 (Burger, J., dissenting).

otherwise inadmissible."⁸² He also recognized "the hazards inherent in letting the full untested written confession in evidence, and then trying to limit the scope and weight which a jury should give to it."⁸³ Accordingly, he argued that the "proper procedure" was to admit "only that part of the written statement which does not go to the admission of acts which constitute necessary elements of the crime itself, but which at the same time constitute true impeachment . . ."⁸⁴ This distinction was necessary because the "prejudicial impact of the full confession on the jury cannot be eliminated by instruction from the bench, no matter how carefully, pointedly, or precisely phrased."⁸⁵

Judge Burger obviously regarded these distinctions—between impeaching as to the elements of the crime and impeaching as to collateral matters—as distinctions of principle when he wrote his opinion in *Lockley*. He apparently changed his mind when he decided *Harris*. Judges often do that, as they are surely entitled to (especially when they have been promoted to a higher court in the interim). But even a recently elevated judge is obligated to give his readers some clue as to why distinctions once thought to be constitutionally mandated are no longer differences "in principle."

III. The Majority's Presentation of the Policy Considerations

A. *The benefits of impeachment outweigh the "speculative possibility" that impermissible police conduct will be encouraged.*

Having distorted the two most important contrary precedents, the Court briefly suggests three policy arguments. The first is that

the benefits of [the impeachment] process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.⁸⁶

82. 270 F.2d at 921.

83. *Id.*

84. 270 F.2d at 920.

85. *Id.* Judge Burger went on to make another argument that he implicitly (*see pp.* 1201-07 *supra*) rejected in *Harris*:

Any other course, it seems to me, would permit the use of proscribed confessions in rebuttal even in the case where the trial court had taken testimony and held it inadmissible by virtue of physical or mental coercion, actual or inherent. Can it be possible to say that a court could on Monday, hold a confession obtained by force and duress inadmissible, and on Wednesday allow it to impeach the defendant's veracity?

270 F.2d at 921 n.2.

86. 401 U.S. at 225.

This unsupported assurance of "sufficient deterrence" masks a failure to consider the mechanism by which exclusionary rules are supposed to deter deliberate police misconduct. The assumption underlying such rules is that if illegally obtained evidence can be used in aid of securing convictions, then the police will have an incentive to violate the law in instances where they could not secure the evidence by lawful means.⁸⁷ Moreover, it is widely acknowledged that absent an exclusionary rule there would be nothing to overcome this incentive, since other remedies—directed punitively against individual policemen—appear to be unrealistic.⁸⁸ Accordingly, there is no reason to expect an exclusionary rule to deter deliberate violations unless it has eliminated all significant incentives toward that conduct. If an exclusionary rule were to eliminate only part of the incentive—say if it were to require the exclusion of illegally obtained evidence in 50% of the cases randomly selected—it could not be expected to deter anywhere near that percentage of violations. For in those instances where the police could not secure the evidence by lawful means, they would still have everything to gain and nothing to lose by obtaining the evidence illegally: they would have helped secure convictions in half the cases without endangering the convictions—or anything else of value to them—in the other cases. Accordingly, they would probably still engage in the prohibited conduct most of the time even though its fruits could only be used in some of the cases. This would be especially so in those instances—like the random percentage exclusion hypothesized above—where the police would not know at the time they contemplated the unlawful conduct whether its fruits would or would not be usable at the trial.⁸⁹

87. See generally *Mapp v. Ohio*, 367 U.S. 643 (1961). See also *Kaufman v. United States*, 394 U.S. 217 (1969), where the Court—holding search claims to be cognizable in § 2255 proceedings—rejected the following argument:

This deterrent function, the Government argues, is adequately served by the opportunities afforded a federal defendant to enforce the exclusionary rule before or at trial, so that the relatively minimal additional deterrence afforded by a post-conviction remedy would not seem to justify, except in special circumstances, the collateral release of guilty persons who did not raise the search and seizure issue at trial or on direct appeal.

Id. at 224-25. *Kaufman* thus implicitly accepts the theory advanced by this comment, that deterrence will be ineffective so long as any significant incentive for disobedience remains. See *id.* at 225.

88. See *Mapp v. Ohio*, 367 U.S. 643, 651-52 (1961).

89. The elimination of all significant incentives is necessary in cases of deliberate misconduct, where the police know that the only way of securing the evidence at issue is to violate the rules. It may well be that in the case of the "blundering constable" (see *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926))—where the police could have obtained the evidence lawfully, but simply "blundered" or took the "easy" way—sufficient deterrence would be provided by exclusion of some, but not all, of the unlawfully obtained

That this is precisely the situation with regard to the impeachment use of statements secured in violation of *Miranda* is easily demonstrated. Consider a situation where the police have lawfully arrested a defendant and have obtained enough admissible evidence to make a *prima facie* case. But their case is not strong, and so an effort is made to elicit a statement by the defendant that would bolster it. The defendant evidences some willingness to talk but when he is asked whether he would like to speak to a lawyer first, he shrugs his shoulders and says, "Why not?" The police know that under *Miranda* he must be given a lawyer before any further questioning; they also realize that as soon as a lawyer arrives there is little chance that any further questioning will be permitted. Under the *Harris* rule, what possible incentive would the police have to comply with *Miranda* by either terminating the interrogation or securing a lawyer? Is it not clear that any reasonable policeman, calculating the advantages and disadvantages of securing a lawyer for the defendant before any further questioning, would always conclude that he should proceed with the questioning in violation of *Miranda*?⁹⁰ If the defendant then makes a statement, the net effect of the violation will be that the police will have in their possession an item of evidence they would not have been able to secure had they complied with *Miranda*. And this evidence might very well make the difference between winning and losing the ultimate case. It might well persuade a defendant who would otherwise take the witness stand to "waive" his right to do so. (And it is widely acknowledged that a defendant—at least one without a criminal record—who takes the witness stand and tells his story has a considerably better chance of acquittal than one who stands mute.)⁹¹ Or if the defendant does take the stand,

evidence. Professor Amsterdam, in concluding that a random percentage exclusion in search and seizure cases would provide sufficient deterrence, neglects to distinguish these different categories of violation. Amsterdam, *Search, Seizure and Section 2255*, 112 U. PA. L. REV. 378, 388-91 (1964). Moreover, Amsterdam was concerning himself exclusively with violations of the Fourth Amendment, which will probably involve calculated violations less frequently than *Miranda*. See note 90 *infra*.

90. The *Miranda* situation is unlike the typical search situation in that it is tailor-made for a sequential "try it legally—if you fail, try it illegally" approach. That is, the police can attempt to obtain a statement admissible in the case in chief by giving the required warnings. If, however, the suspect requests a lawyer, they can then (instead of honoring the request and thereby losing the statement) go on—given *Harris*—to try for an uncounselled statement to use for impeachment. There is thus no moment at which the police must irrevocably decide whether to follow the Constitution or not; given *Harris*, a legal-illegal sequence is the most rational course.

91. See, e.g., A. AMSTERDAM, B. SEGAL & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES 2-298 (1967); HANDBOOK ON CRIMINAL PROCEDURE IN THE UNITED STATES DISTRICT COURT (Federal Defenders Program of San Diego, Inc.) 218 (1967).

his admission could be used by the Government, ostensibly to impeach him, but realistically to shore up its otherwise weak case.⁹²

It may be argued that this reflects an overly cynical view of police decisions, that it should not be assumed that policemen will act on the basis of a calculation of advantages rather than out of desire to follow the law. But of course the exclusionary rule itself is based on precisely that assumption. If policemen could be counted on to follow the law without regard to the advantages of violation, there would be little need for an exclusionary rule.⁹³

B. *A defendant's privilege to testify in his own behalf "cannot be construed to include the right to commit perjury."*

Having announced that "sufficient deterrence" is provided by excluding illegally secured statements from the Government's case in chief, the Court goes on to respond to an argument no one made:

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.⁹⁴

92. See also *State v. Brewton*, 247 Ore. 241, 245, 422 P.2d 581, 583, cert. denied, 387 U.S. 943 (1967).

If we should today adopt a restrictive application of the exclusionary rule, the result could be a major step backward. This court would in effect be saying to the overzealous that police officers will be free in the future to interrogate suspects secretly, at arms length, without counsel, and without advice, so long as they use means consistent with the threat-or-promise voluntariness, and so long as they understand that they may file the information only for use to keep the defendant honest. Thus the police could, at their option, take a calculated risk: By giving up the possibility of using the suspect's statements in the state's case, they could obtain by unconstitutional means and store away evidence to use if the defendant should elect upon trial to take the stand.

93. Rules by their very announcement can, and probably often do, have some hortatory effect, but the Court's conclusion has been that that effect is insufficient to protect against deliberate police misconduct. Additionally it may take some time for the message of *Harris* to sink in, for the police to realize there is a substantial incentive—and no practical disincentive—to disobey the pronouncements of *Miranda*. *Miranda* to *Harris*—unlike *Wolf* to *Mapp*—is a case of advance followed by retreat, so there may be some holdover hortatory effect.

There may be an implication in the *Harris* opinion that the assumption that exclusionary rules have any deterrent effect on police behavior is open to question. Of course it is, as Professor Oaks has demonstrated in his fine article. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). But one of the reasons why the exclusionary rule may not be working effectively is precisely that it has been riddled with limitations that provide incentive toward violation, such as the "standing" requirement and now the *Harris* exception. See *id.* at 734. Moreover, Oaks points out that the exclusionary rule can be expected to work more effectively to prevent violations of *Miranda* than violations of *Mapp*. *Id.* at 666. This is probably no longer the case, given *Harris*.

94. 401 U.S. at 225. The Court at one point in the opinion varies this theme as follows: "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." 401 U.S. at 226. The reference to perjury derives from Justice Frankfurter's opinion in *Walder* where he said, *inter alia*, "[T]here is hardly justification for letting the

To the extent the "right to perjury" rhetoric is intended to conjure up the assumption that trial testimony is necessarily less credible than a statement given to the police without the safeguards of *Miranda*, it is of course subject to significant qualification.⁹⁵ (In *Harris* itself, the District Attorney acknowledged that the defendant's pre-trial, station-house rendition of the events for which he was convicted had been a "false account")⁹⁶ But more fundamentally, the entire argument is a straw man. Of course a defendant has no "right to commit perjury." But this was hardly petitioner's argument. Neither does a defendant have the right to commit murder, and yet the Government may not prove that crime by means of an illegally obtained statement. Nor, indeed, could it introduce such a statement as part of its case in chief in a perjury prosecution. Whether it should be permitted to use it to prove perjury in the context of a trial for a different crime is the question, and it is not answered by denying that there is a right that no one asserted.

defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." *Walder v. United States*, 347 U.S. 62, 65 (1954). But in *Walder*, of course, the defendant's trial testimony was contradicted by physical evidence whose trustworthiness was not disputed. In cases involving violation of the Fifth Amendment—as in this case—there is some question whether the statements elicited by the police were the accurate ones. See note 95 *infra*.

95. It may well be, of course, that the pre-trial statement will be true and the trial statement false, especially where the former is inculpatory and the latter exculpatory. The trial testimony, which is further in time from the events at issue, may well reflect a more calculated "story" than the earlier, perhaps more spontaneous, statement. There are, however, other considerations which suggest that the trial testimony will sometimes be more accurate than the statement elicited by the police. Trial testimony is taken under oath with the sanction of a perjury prosecution available, whereas the police statement is unsworn. Trial testimony is also prepared and elicited by an attorney who is bound not to countenance perjury in his witnesses (an obligation taken quite seriously by most lawyers), whereas the police statement is by hypothesis given without consultation with counsel. Most fundamentally, of course, the pre-trial statement will, by definition, have been given without the safeguards of *Miranda*, safeguards designed, at least in part, to ensure that the inherently coercive atmosphere of an in-custody police interrogation will not elicit an untrue statement. As the Court said in *Miranda*: the presence of counsel may help "to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial." 384 U.S. at 470.

96. Brief for District Attorney of New York County, *supra* note 13, at 12. The brief alleged that the account of the events of January 4 was "a truthful" one, but the jury was deadlocked over whether petitioner was guilty for these events. The brief said that the account of the events of January 6—for which the jury convicted—was "false." Petitioner's lawyer made the following relevant point in his oral argument:

Very often when a young and inexperienced person is before the police, and that is what happened here and that is the only case that makes a difference, because your professional criminal just doesn't get involved in this. He may give a false exculpatory statement whereas the truth were to acquit him, but he doesn't know that, and he is afraid to tell the police what happened. He thinks he had better talk to his lawyer first. So he makes up a false exculpatory statement. He can be torn to shreds at the trial by an experienced prosecutor. That is just what happened here. But it doesn't prove that the statements that he makes in his testimony at the trial is false, because it may well be, that the statement unconstitutionally obtained was false.

Transcript of Oral Argument, *supra* note 19, at 17.

The real issue, never addressed by the Court, is where to strike the balance between the state's interest in challenging the defendant's credibility and the defendant's interest in excluding illegally secured evidence. Of course the value of an exclusionary rule is not absolute, but neither is the value of challenging credibility. Even the Court suggests that not all pretrial statements may be used to impeach: before a statement may be so used, it says, its "trustworthiness [must satisfy] legal standards."⁹⁷ This formulation, which seems to indicate that only evidence of uncertain reliability is unavailable for impeachment use, suggests some important questions as to which the Court's opinion gives little guidance. For example, may physical evidence discovered as the result of a coerced statement—as where the defendant is tortured into telling where he hid the murder weapon—now be used to impeach? May an incriminating statement elicited as the result of a grant of "use" immunity be used to discredit a defendant's testimony?⁹⁸ (One can imagine the Court paraphrasing the *Harris* opinion as follows: "the shield provided by" the grant of immunity should not "be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent statements.")⁹⁹ Thus the absolute manner in which the Court rejects the "right to perjury" provides no limiting principle capable of reasoned application to the range of other cases likely to arise;¹⁰⁰ more importantly, it is not responsive to the real issues presented by the case.

97. 401 U.S. at 224.

98. Consider the following case: A person is called before a grand jury or congressional committee and asked a series of incriminating questions which he declines to answer on grounds of self-incrimination. He is then granted use immunity and directed to answer the questions, which he does. He is subsequently brought to trial on the basis of independent evidence. If he chooses to testify on his own behalf, can the government use his immunity-secured testimony to impeach his trial testimony? If this is so, or even if there is any significant likelihood that this is so, then a witness might be within his rights in refusing to answer incriminating questions under a grant of use—as distinguished from transactional—immunity, on the ground that the immunity would not be coterminous with the privilege. This may lead the Court to require "transactional"—rather than merely "use"—immunity before a witness may be compelled to give incriminating statements. See *Piccirillo v. New York*, 400 U.S. 548 (1971).

99. Cf. 401 U.S. at 226. One approach the Court might take is to permit impeachment in those cases where the rule violated has not been applied retroactively. Under this approach a conviction secured without counsel or as the result of a coerced confession or plea could not be used to impeach, but a conviction secured as a result of an illegal search and seizure or a violation of *Miranda* could be so used. This approach would not help resolve the use immunity question raised above. Nor would it help resolve the question whether a defendant's pre-trial statement obtained in violation of *Miranda* can be used to contradict other witnesses testifying on defendant's behalf. Assume, for example, that defendant told the police—in a *Miranda*-violative statement—that he committed the crime, and then a defense witness testifies that defendant was in a different city when the crime took place: could the defendant's statement be used to *contradict* the alibi testimony? (It could not, of course, be used to *impeach* under general principles of evidence.)

100. Another unanswered question is how *Harris* relates to *California v. Green*, 399

C. *Had petitioner's statement been elicited by "some third person," it could have been used to impeach him.*

The final argument offered by the Court in support of its conclusion can best be characterized as the first half of a non sequitur:

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.¹⁰¹

U.S. 149 (1970), holding that states may constitutionally use prior inconsistent statements against a defendant who has taken the stand not simply to impeach his testimony but also to prove the truth of the matter earlier asserted. It is true that the trial judge in *Harris* instructed the jury to consider the earlier statement only as to credibility, but the Court does not indicate that its decision is limited by that fact. If it is not, the one-two punch of *Harris* and *Green* could be potent indeed.

The bounds of the "principle" of *Wyman v. James*, permitting warrantless and unconsented-to "visits" of the homes of welfare recipients to make sure the grants are not being misused or fraudulently claimed, are similarly unclear. Can the government engage in an unconsented-to and warrantless search of a taxpayer's home to see whether the claimed dependents really exist? Can it similarly search the homes and places of business of all those who receive any sort of governmental benefit, as most of us today do in one form or another, in order to determine eligibility?

There is reason to think not. Perhaps the most regrettable feature of the Court's opinion in *James* is the double standard it apparently applies to the claims of the poor and the claims of the rest of us, a double standard disfavoring the former.

In relying on the state's interests in uncovering child abuse and welfare fraud to uphold its suspension of the warrant requirement for welfare recipients, the Court provides a textbook example of a sort of discrimination it has repeatedly told legislatures and administrators they are not to indulge in, namely assuming that poor people are morally inferior to others and consequently applying a different set of rules to them. *Anyone* may mistreat his child; yet, the Court surely would not uphold warrantless "visits" of the homes of the more affluent to check for such mistreatment. And *any of us* may misrepresent his eligibility for a particular form of governmental benefit, be it a farm subsidy or a tax deduction; but with respect to the claims of the non-poor, government officials have always had to be content with whatever sort of convincing validation the claimant is able and willing to come up with—they have never had a mandate to "visit" his home over his protests unless they get a warrant.

That the Court intends to retain this comparative immunity for the affluent is indicated by a fallacious analogy:

It seems to us that the situation is akin to that where an Internal Revenue Service agent, in making a routine civil audit of a taxpayer's income tax return, asks that the taxpayer produce for the agent's review some proof of a deduction the taxpayer has asserted to his benefit in the computation of his tax. If the taxpayer refuses, there is, absent fraud, only a disallowance of the claimed deduction and a consequent additional tax.

Wyman v. James, 401 U.S. 309, 324 (1971). Mr. Justice Marshall's answer, here as often, is decisive:

[T]he analogy is seriously flawed. The record shows that Mrs. James has offered to be interviewed anywhere other than her home, to answer any questions and to provide any documentation which the welfare agency desires. The agency curtly refused all these offers and insisted on its "right" to pry into appellee's home. Tax exemptions are also governmental "bounty." A true analogy would be an Internal Revenue Service requirement that in order to claim a dependency exemption, a taxpayer *must* allow a specially trained IRS agent to invade the home for the purpose of questioning the occupants and looking for evidence that the exemption is being properly utilized for the benefit of the dependent. If such a system were even proposed, the cries of constitutional outrage would be unanimous.

Id. at 343 (Marshall, J., dissenting).

101. 401 U.S. at 225-26. This "argument" is a popular one with the emerging majority.

It is difficult to understand what conclusion is supposed to be derived from that statement. Of course inconsistent statements made to "some third person" could be introduced for "cross-examination and impeachment." They could be introduced in the Government's case in chief as well. For the Fifth Amendment simply does not apply to statements made to private persons, and there is thus no constitutional distinction between the use of such statements in the Government's case in chief and its cross-examination for impeachment. Is the Court suggesting that all statements made to a third person that would be admissible should also be admissible when elicited by the Government? We assume not: for that would—simply put—mark an end to the privilege against self-incrimination (as well as the exclusion of evidence secured in violation of the Fourth Amendment, which also is inapplicable to third persons). Or is the Court expanding the scope of the privilege by applying the rules currently applicable to statements elicited by Gov-

Mr. Justice Blackman's opinion for the Court in *Wyman v. James* argues, *inter alia*, that: The home visit is not a criminal investigation, does not equate with a criminal investigation, and despite the announced fears of Mrs. James and those who would [sic] join her, is not in aid of a criminal proceeding.

400 U.S. at 323. The relevance of this assertion is questionable at best. The state defended its rejection of Mrs. James's offer to meet anywhere but in her home and there to provide all relevant information, on the ground that it needed to visit the home in order to ferret out possible welfare fraud and child abuse. Leaving aside for the moment the possibility of criminal sanctions, it should be noted that a finding of fraud can lead to a termination of benefits, a finding of child abuse to loss of custody. *Camara v. Municipal Court*, 387 U.S. 523 (1967), a case *Wyman* purports not to disturb, is crystal clear that the Fourth Amendment, and in particular its warrant requirement, apply to inspections which can result only in civil sanctions. See also *See v. City of Seattle*, 387 U.S. 541 (1967). See generally *Wyman v. James* 400 U.S. 309, 339 (1971) (Marshall, J., dissenting). But in any event, pursuing its (irrelevant) argument that a welfare visit is not "in aid of a criminal proceeding," the Court continues:

And if the visit should, by chance, lead to the discovery of fraud and a criminal prosecution should follow,¹² then, even assuming that the evidence discovered upon the home visitation is admissible, an issue upon which we express no opinion, that is a routine and expected fact of life and a consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct. 400 U.S. at 323. This passage is in several ways misleading. The statute whose citation appears in the Court's footnote twelve, Section 145 of the New York Social Welfare Law, defines the crime of welfare fraud and obligates welfare officials to turn over "to the appropriate district attorney or other prosecuting official" any evidence of such fraud they uncover. The Court is of course technically correct in its claim that it is not deciding that evidence uncovered during a home visit is admissible in a criminal proceeding. For that issue is not before it. But the issue has been settled for years: it has always been the law that evidence uncovered during a lawful search, no matter what the purpose of the search was, is admissible in a criminal proceeding. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 20 (1968). And evidence uncovered during home visits is of course routinely admitted in state welfare fraud prosecutions. The Court can hardly be unaware of all this, and demonstrates it is not by going on to "explain" that even if such evidence is admitted, that, after all, would be no different from admitting evidence of the observations of a layman. Thus as in *Harris* the Court attempts to legitimate the admission of evidence gathered by government officials by noting that the same evidence would be admissible if discovered by a private citizen. Since constitutional limitations do not bind private citizens, this recurrent "logic" has the potency to carry the emerging majority virtually any place it wishes to go.

ernment agents to statements elicited by private persons? We doubt this as well. But we have been unable to discern any other plausible interpretation of the Court's argument.¹⁰²

IV. Conclusion

Our disagreement with the result reached in *Harris* is not, as we previously noted, the reason we selected it for analysis and criticism. We have no doubt that a respectable opinion affirming the conviction could have been written. But such an opinion would have been obligated to acknowledge that it was working important changes in the law—that it was squarely overruling the general rule of *Agnello* and *Walder*, significantly cutting back on central aspects of *Miranda*, and virtually rejecting the very assumptions on which all exclusionary rules designed to control deliberate police misconduct are built. This is not to say that the Court's prior conclusions respecting these matters should be regarded as sacrosanct. But issues of this moment deserve more substantial treatment than they were here accorded.

A thoughtful opinion acknowledging the value choices at issue and resolving them against the defendant would at least have been candid, though not in our view convincing. This one was neither. It was little more than a vote—a reflection of numerical power. Its intention was apparently not to persuade, but merely to prevail. It has prevailed—for the moment—but, to the credit of the Supreme Court as an institution, decisions that fail to persuade often do not long outlast the men who wrote them.

102. There is one sentence in the opinion which exceeds all others in confusion: The conflict between petitioner's testimony in his own behalf concerning the events of January 7 contrasted sharply with what he told the police shortly after his arrest. 401 U.S. at 225. In the first place, it is unclear what the "events of January 7" were. The two count indictment charged sales on January 4 and January 6, not on January 7. The only relevant events of January 7 were petitioner's arrest and interrogation. And there was no conflict whatever between petitioner's trial testimony "in his own behalf" concerning his arrest and what he told the police. Indeed he barely mentioned January 7 and his arrest in his trial testimony, and he did not mention it at all in his statement to the police. Nor did he testify "in his own behalf" about the interrogation of January 7. He was of course asked about it on cross-examination, but merely replied that he remembered some of the questions but not others. How then can it be said that the "conflict between petitioner's testimony in his own behalf concerning the events of January 7, contrasted sharply with what he told the police . . ." (The syntax of the sentence confuses things even more: how can a "conflict between" one statement "contrast sharply" with another statement?)

Perhaps the Chief Justice merely got his dates confused. He may have meant to say "the events of January 4 or 6," in which case he would be speaking of the circumstances giving rise to the two count indictment. But at an earlier point in the opinion he said, more accurately, that petitioner's statement to the police "partially contradicted" his direct testimony concerning those events rather than "contrasted sharply" with it. *Id.* at 223.

The Court's philosophy obviously is changing and doubtless will continue to change as more appointments are made. Ideological ebb and flow is an inherent, though generally more gradual, part of the American judicial system. But failures of logic and candor are neither inherent nor desirable in our highest Court. In that regard, the *Harris* opinion seems to have taken an overdrawn academic caricature¹⁰³ of the Warren Court's methodology and used it as a recipe. What is vice in a liberal, however, is not necessarily virtue in a conservative. In light of President Nixon's 1968 campaign attacks on the Warren Court, it is perhaps not surprising that his appointees should seek to reverse many of the holdings of that Court with something more than deliberate speed.¹⁰⁴ The real disappointment is that men of the stuff of Justices Harlan, Stewart, and White would have joined this sort of opinion.

103. See, e.g., sources cited in Wright, *supra* note 7, at 770 nn.4 & 5.

104. But see *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), and, as to Mr. Justice Blackman, *James v. Valtierra*, 402 U.S. 137, 143 (1971).

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