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Truth, Deterrence, and the Impeachment Exception

In *James v. Illinois*, the Supreme Court attempted to draw a bright-line rule halting the impeachment exception's steady erosion of the exclusionary rule's prohibition against using illegally obtained evidence against criminal defendants at trial.[1] A sharply divided Court held that the prosecution may use such evidence to impeach a defendant, but not a defense witness.[2] According to the Court, prohibiting impeachment of defense witnesses with illegally obtained evidence, while allowing impeachment of defendants, was necessary to sustain an appropriate balance between truth seeking at trial and deterrence of prosecutorial illegality.[3] Also to maintain the balance, the Court reaffirmed two previously established limits that applied to impeachment of defendants: first, the prosecution may use illegally obtained evidence only to impeach the defendant's credibility and not as substantive evidence of guilt.[4] Second, illegally obtained evidence must impeach testimony volunteered on direct examination or elicited on

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1 James v. Illinois, 493 U.S. 307, 309 (1990).

2 *Id.* at 320.

3 *See id.*

4 *See id.* at 313 n.3 (citing cases requiring that the trial judge instruct the jury to use illegally obtained evidence only to assess defendant's credibility and not as evidence of guilt); *id.* at 313 ("This Court insisted throughout this line of cases that 'evidence that has been illegally obtained . . . is inadmissible on the government's direct case, *or otherwise*, as substantive evidence of guilt.'" (quoting United States v. Havens, 446 U.S. 620, 628 (1980) (omission in original)) (emphasis added)).

cross-examination in response to questions "'plainly within the scope of the defendant's direct examination.'"[5] For this purpose, any questions "suggested to a reasonably competent cross-examiner"[6] by direct testimony are permissible, subjecting to impeachment statements made in response to cross-examination "reasonably suggested"[7] by the direct.

Since *James*, the lower courts have struggled to apply the distinction between impeachment of defendants and defense witnesses when confronted with prosecutors' recurrent attempts to impeach with evidence of nontestifying defendants' hearsay declarations. For evidentiary purposes, introduction of a hearsay declaration automatically makes the declarant a functional witness subject to impeachment.[8] The *James* Court did not address that possibility, however, when it found that deterrence policy required distinguishing impeachment of defendants from defense witnesses to prohibit impeachment of the latter with illegally obtained evidence. The holding of the opinion, therefore, did not decide whether (or when) the exclusionary rule allows the impeachment of defendants' hearsay declarations. Since extending the exception to defendants' hearsay declarations shifts, and possibly obliterates, the line between permitted and prohibited impeachment, resolution of this issue is critical to *James*'s quest for additional deterrence.

This Article argues that the results in the lower courts, despite Herculean efforts to police the boundary of the exception consistently with *James*, are inconsistent, unpredictable, and undetermined. Unpredictability prevents the exclusionary rule from having any meaningful deterrent effect besides that which already flows from preventing use of illegally obtained evidence in the prosecution's case-in-chief. The probability that a nontestifying defendant will suffer impeachment if he offers *any* evidence of his exculpatory words or conduct typically discourages him from introducing the evidence or allows its rebuttal. Either result effectively allows the prosecution to benefit from its illegally obtained evidence. Meanwhile, defense

5 *Id.* (quoting *Havens*, 446 U.S. at 627).

6 *Havens*, 446 U.S. at 626.

7 *Id.* at 627.

8 *See* FED. R. EVID. 806.

counsel has sometimes offered exculpatory evidence despite the risk of rebuttal or without being cognizant of its potential consequence. Since *James*'s unpredictable application sometimes prevents using illegally obtained evidence to rebut evidence of defendants' exculpatory behavior, courts sporadically prohibit the impeachment.[9] That result inhibits fact-finding accuracy but does not establish any pattern that will deter future illegal conduct. Ironically, the net result of uncertainty surrounding *James*'s application to defendants' hearsay declarations is the opposite of what *James* intended. The doctrine impedes truth seeking while having no compensating deterrent effect to further encourage compliance with constitutional requirements.

In this Article, Part I analyzes the irresolute debate over extending the impeachment exception to nontestifying defendants as a consequence of the Court's misguided conception of an ideal balance between truth seeking and deterrence. It shows that the Court has failed to conceive this balance coherently as a trade-off involving exclusion's inevitable compromise of truth seeking. Instead, it has embarked on a misconceived quest for an exception that purports to promote the truth without undermining deterrence. Consequently, it has justified the scope of the impeachment exception with an ambiguous analysis of truth seeking rather than a coherent conception of deterrence. This ambiguous analysis, which vacillates between witnesses telling and juries finding the truth, generates the uncertainty that undermines both goals. Indeed, compared to the situation engendered by current doctrine, flipping a coin to determine admissibility of illegal impeachment proof would substantially improve truth seeking *and* deterrence.

Part II shows how the Court has exploited the ambiguous conception of truth seeking to develop an idea of impeachment for purposes of constitutional exclusionary rule policy that is narrower than evidentiary impeachment. It inconsistently justifies the narrowed conception by its truth seeking rather than deterrent effects. Consequently, courts are required to distort evidence law to limit the impeachment of criminal defendants with illegally obtained evidence.

[9] *See infra* note 29.

Part III shows how courts looking to realize *James*'s promised deterrence by restricting or prohibiting impeachment of nontestifying defendants under FRE 806 are caught in the same trap. The Court's analysis requires them to portray exclusion of the evidence as consistent with evidentiary principles, although they would not require exclusion if the evidence were lawfully obtained. The effect of the approach is to render the scope of the exception dependent upon manipulable distortions of evidence law without any assurance that doing so serves constitutional deterrence policy.

Part IV demonstrates how courts allowing more generous impeachment ironically suffer a similar fate. They begin by allowing prosecutors to impeach nontestifying defendants when defense evidence of their conduct qualifies as hearsay. But the hearsay requirement in this context does not establish a meaningful limit on impeachment. Therefore, those courts must also distort evidence law to avoid allowing full evidentiary impeachment or simply acknowledge that they are eviscerating *James*. Whether the defendant is a hearsay declarant whom one may impeach because his credibility is relevant is a test designed to decide admission of impeachment evidence that is *not otherwise substantively permissible rebuttal*. It cannot bear the weight of excluding proof that rebuts exculpatory inferences from the defendant's words or conduct supposedly because the rebuttal implicates no aspect of his credibility. Applying the hearsay/credibility test therefore becomes another occasion for courts to make a choice between truth telling and truth finding that is ungoverned by evidence law and unrelated to deterrence.

Part V argues that the unpredictable application of *James*'s ambiguous truth-seeking rationale to nontestifying defendants' impeachment robs the exclusionary rule of any deterrent effect beyond that which flows from its application during the prosecution's case-in-chief. Disallowance of illegal impeachment may occasionally occur, but its unpredictability prevents that cost to the truth from generating additional incentive to forego illegality. Besides uncertainty, the impeachment exception's link to truth seeking at trial, rather than to investigatory choices, prevents accrual of net benefits in

the truth-seeking/deterrence balance.[10] Instead of allowing particularly probative impeachment, Part V urges flipping a coin which, even if not likely to be adopted, vividly illustrates the need to abandon relative truth-seeking benefits at trial as the determinant of the impeachment exception's coverage.

I
HOW TRUTH SEEKING USURPS DETERRENCE IN THE BALANCE PURPORTING TO JUSTIFY THE IMPEACHMENT EXCEPTION

The debate over applying the impeachment exception to nontestifying defendants illustrates a flaw in what now amounts to over a half-century's worth of the Court attempting to establish an optimal level of deterrence by weighing it against the truth-seeking costs of allowing illegally obtained evidence for impeachment purposes. Rather than help establish optimal deterrence, efforts to "fine-tune" the balance between deterrence and fact-finding accuracy demonstrate that there is no correspondence between criminal investigation and the potential uses of illegally obtained evidence that justifies tying optimal deterrence to evidentiary notions of impeachment. One can begin by assuming that the Court accurately conceives that a complete ban on illegally obtained evidence at trial imposes a fact-finding cost that deterrence does not justify. Yet the way to avoid it is not by allowing the evidence where the Court imagines the impeachment is particularly probative. Earmarking a class of illegally obtained evidence as admissible because it is particularly probative inevitably creates additional incentives for obtaining it. If the prosecution can use illegally obtained

[10] For example, suppose there were an easily applied, certain boundary to the exception (say, no illegally obtained evidence unless the defendant testifies at trial, in which case it all comes in) justified by the special truth-seeking benefits of the evidence in the circumstance where it is allowed. For the exception to generate net benefits, the prosecution would have to ignore the prospect of making especially probative use of illegally obtained evidence. It is simply implausible to imagine this scenario and with it the likelihood that any exception to the exclusionary rule justified by the truth-seeking benefits of a category of evidence allowed at trial will ever fail to generate equivalent deterrence disadvantages. There is always the possibility that, after making use of particularly probative evidence at trial, all who know of that use will drink the Lethean draft and forget the benefit realized. But if that possibility were true, we would not need the exclusionary rule at all. As long as we *believe* that exclusion is the consequence, we are deterred, and if, after imbibing of the Lethean draft we forget that the evidence is admitted, we can always have maximum truth seeking and deterrence.

impeachment evidence when it really makes a difference, even its selective admission may effectively remove any deterrence beyond that which already flows from preventing the prosecution from using it in its case-in-chief.

The consequence for the scope of the exclusionary rule at trial is ironic. Achieving additional truth seeking that is not excessive in its deterrence cost is the goal. However, its accomplishment requires counterintuitive means. It requires selective allowance of illegally obtained impeachment evidence according to a pattern that does *not* mirror the evidence's contribution to truth seeking, or else any truth-seeking benefits induce offsetting deterrence costs. Ideally, the pattern would allow the evidence only when the prospect of its use beyond the prosecution's case-in-chief would not affect criminal investigators' decisions to obtain it illegally.[11] Allowing the proof only when the profit to the prosecution would not encourage subsequent illegal behavior would obviously yield net benefits. Those benefits, however, would accrue because the prospect of attaining them would create no additional incentive to obtain evidence illegally, not because the evidence was particularly probative. More accurate fact finding would merely be a beneficial consequence of not excluding evidence when unnecessary to deter, a dependent variable with no independent influence upon the scope of the exception. In contrast, allowing truth-seeking influence by admitting some illegally obtained impeachment *only because it is particularly probative* assures that the benefits of obtaining it illegally cannot help but to increase the incentive to obtain it.

[11] Identifying occasions when suppressing evidence has no effect on investigators' behavior appears to be the goal of lower courts requiring a "cognitive nexus" between the misconduct and the crime for which the defendant is tried before suppressing evidence, even in the prosecution's case-in-chief. *See, e.g.*, State v. Booker, 135 P.3d 57, 59 (Ariz. Ct. App. 2006) (holding that deterrence of police misconduct does not require suppression of defendant's drug paraphernalia obtained during an unsuccessful search for a kidnapping victim when offered during defendant's trial for a subsequent assault upon the person who summoned police to his apartment). Nonetheless, the Court has yet to accept the proposition that one can safely identify circumstances under which admission of illegally obtained evidence will have such a benign consequence, and whether it might do so is beyond the scope of this Article. Currently, the Court holds that because additional deterrence from prohibiting the use of illegally obtained evidence beyond the prosecution's case-in-chief is necessary, though speculative, the benefits of deterrence must be weighed against their truth-seeking costs. *See* Oregon v. Hass, 420 U.S. 714, 722–23 (1975).

Undoubtedly because of the inability to identify circumstances where impeachment use has *no* effect on investigators' behavior, the Court has not allowed deterrence alone to drive the scope of the exception. Instead, it has treated truth seeking as an independent variable, useful in helping to determine the exception's boundaries as the product of a "balance" on a scale comparing the marginal benefits of exclusion (fewer constitutional violations) to its marginal costs (fewer accurate verdicts). Yet balance, at least in the sense of symmetry as in a balance sheet, is too apt a metaphor. Absent identification of occasions when admissibility beyond the case-in-chief will not affect investigative choices at all, any truth-seeking benefit presumptively exacts a commensurate deterrence cost as the prosecution realizes the benefit of the evidence it obtained. Nothing about impeachment distinguishes it from other evidence in this regard; the evidence's probity determines its contribution to establishing the truth *and* the incentive to obtain it.

To avoid the offsetting loss of deterrence and enjoy net gains from reducing what the Court posits are gratuitous truth-seeking costs, uncoupling the evidence's admissibility beyond the case-in-chief from its truth-seeking benefits (and so the incentive to obtain it) is necessary. The inability to identify particular investigative choices that are insensitive to the potential impeachment use of illegally obtained evidence is not necessarily a bar. All that is necessary is eliminating truth seeking as an independent variable. One can do that by making the ability to use illegally obtained evidence as impeachment depend upon the flip of a coin. Compared to unfettered impeachment use or complete exclusion, truth seeking *and* deterrence will be improved.[12] What the coin flip does *not* do is induce offsetting costs to one value by benefiting the other. The prosecution's prospective payoff remains constant at only fifty percent, whatever the proof's truth-seeking benefits. So there will always be some incentive, beyond preventing use on the case-in-chief, marginally deterring a decision to obtain the proof, while some illegally obtained evidence will always qualify for admission, enhancing truth seeking.

[12] Insofar as there is truth-seeking cost unnecessary to give the prosecution sufficient incentive to comply with constitutional requirements, we will reduce it by up to half. Insofar as there is insufficient deterrence from suppression only in the case-in-chief, we will increase it by up to half.

In contrast to the coin flip, the status quo employs a decision rule that *always* allows the prosecution to benefit from illegally obtained evidence. In all cases, it is potentially admissible impeachment, and will therefore benefit the prosecution one hundred percent of the time. Even if not admitted to impeach exculpatory testimony, the evidence still benefits the prosecution by discouraging such testimony. So additional deterrence depends entirely on the prospect that the inability to use it to impeach *or* discourage defense witnesses' testimony will marginally deter the prosecution from obtaining evidence nonetheless useful to impeach/discourage the defendant's testimony. For any deterrence at all to flow from such an already slim circumstance, two things are critical. First, the distinction between impeaching the defendant and other defense witnesses must be clear enough to enable prudent defense counsel to call such witnesses without fear of paving the way for admission of illegally obtained evidence. Second, the category of excluded defense witness impeachment must be wide enough to render the possibility of marginal deterrence plausible. However, the Court undermines those principles by linking the distinction between impeaching defendants and defense witnesses, like the other boundaries of the exception, to truth-seeking goals. Although required to effectuate the deterrence held necessary by *James*, the lower courts are equipped with doctrine requiring them to run a fool's errand to find a truth-seeking rationale for preventing impeachment of defendants' hearsay declarations.

That truth seeking preempts deterrence in the lower courts analyses of nontestifying defendants' impeachment is an unsurprising consequence of the Supreme Court's approach. Deterrence considerations alone hardly suffice to explain, much less justify, the doctrines (1) allowing impeachment only of testimony elicited on direct examination or on cross examination "reasonably suggested by the . . . direct,"[13] (2) requiring use of impeachment evidence "only to impeach,"[14] and (3) limiting impeachment to defendants but not defense witnesses.[15] Indeed, the Court has barely tried to explain or justify its approach. It

13 United States v. Havens, 446 U.S. 620, 627 (1980).

14 *Id.* at 628.

15 James v. Illinois, 493 U.S. 307, 313 (1990).

has said nothing about circumstances under which police are likely to be dissuaded from obtaining evidence illegally because it will fail the "reasonably suggested by the direct test," be admitted to impeach the defendant but not his witness, or, once admitted, be subject to limiting instruction restricting its use to impeachment. Instead, the Court has simply noted that without these limitations, the occasions upon which courts will admit illegally obtained evidence would be more frequent—a veritable tautology that ignores how illegally obtained evidence is equally useful when, although not admitted, it discourages the exculpatory testimony that it would otherwise impeach.[16]

In place of reasons rooted in criminal investigation, the Court has explained the exception's evidentiary limits as a product of truth-seeking considerations.[17] These purport to show that the impeachment exception applies only when the truth-seeking costs of applying the exclusionary rule beyond the case-in-chief are high enough to justify lost deterrence. In *James*, for example, the Court reasoned that defense witnesses have a lesser motive to testify falsely than defendants do, and so the prospect of impeachment with illegally obtained evidence is not as

[16] The best the Court could do was to assert that "inadmissibility of illegally obtained evidence must remain the rule, not the exception." *Id.* at 319. Courts allow truth seeking to usurp even this modest goal by allowing impeachment of nontestifying defendants whenever defense evidence implicates their credibility.

Comparing the Court's treatment of the incentive to obtain impeachment evidence illegally when lawful means have failed with the incentive when lawful means may still bear fruit also illustrates how truth-seeking concerns preempt deterrence considerations. The police have substantial incentive to give *Miranda* warnings despite being allowed to use unwarned statements to impeach because, if warned, the statements may also be used on the prosecution's case-in-chief. The police do not have a similar incentive to cease questioning when a suspect invokes his right to silence because there is no likelihood of using statements subsequently acquired except to impeach. The police have everything to gain and nothing to lose by acting illegally in the latter, but not the former, situation. *See* Steven D. Clymer, *Are Police Free to Disregard* Miranda*?*, 112 YALE L.J. 447, 506–07 (2002). Although the deterrent effects of allowing impeachment use of statements obtained under each circumstance may differ dramatically, the Court has elected to consider them the same. It sees the incentive to obtain unwarned and postinvocation statements for impeachment as equally "speculative," effectively rendering their admission dependent upon their contribution to truth seeking. *Compare* Harris v. New York, 401 U.S. 222 (1971) (allowing impeachment with unwarned statements), *with Hass*, 420 U.S. 714 (allowing impeachment with statements obtained after the defendant requested a lawyer, when police had nothing to lose by unlawfully continuing the interrogation).

[17] *See James*, 493 U.S. at 314.

important to encourage them to speak truthfully.[18] Similarly, the Court reasoned that defendants, having less control over their witnesses' testimony than their own, would be dissuaded from calling witnesses who, although possessed of probative evidence, might open the door to illegally obtained evidence in unanticipated direct testimony or cross-examination reasonably related to the direct.[19]

The suggestion that fact-finding accuracy justifies the limited scope of the exception, however, is the cause of the unpredictability of the exception's application generally and of *James*'s application to nontestifying defendants' hearsay declarations in particular. The only way that the Court sustains the illogical argument that some restrictions on admission of otherwise admissible probative evidence exact a lesser truth-seeking cost is by employing an ambiguous explanation of how evidence contributes to accurate fact finding at trial. On one hand, the Court regards this contribution in terms of *finding* the truth, helping the fact finder reach the presumptively accurate conclusion that conforms to all the evidence admissible under usual evidentiary processes. On the other, the Court perceives the contribution in terms of *speaking* the truth, preventing defendants from relying on testimony that, considering the illegally obtained evidence, appears false. In the latter sense, the impeachment exception is less concerned with the accuracy of the fact finder's verdict than with assuring that specific falsehoods do not inform its conclusion. Often, the Court presents this view as specifically concerned with preventing "perjury" from going unexposed. It therefore further narrows the exception's purpose to preventing defendants from offering *intentionally* false testimony, not that which is merely mistaken. But since honestly mistaken testimony also detracts from fact-finding accuracy, perhaps even more significantly than intentional lies, and the Court ultimately justifies preventing perjury as a means to assure fact-finding accuracy, its position on whether it cares only about deliberate lies is no more settled than its straddle of the prior choice between juries finding and witnesses speaking the truth.

18 *See id.* at 314–15.

19 *Id.* at 315–16.

What should be an argument about how to achieve the additional deterrence *James* promised, therefore, has become a study in how the doctrine leads the lower courts to manipulate the concept of truth seeking to justify broader or narrower applications of the exception. The broader exception allows rebutting any defense evidence that, without the prosecution's illegally obtained evidence, potentially points the fact finder toward a false verdict. The narrower exception aims to allow rebutting only specific falsehoods. Both find support.

The contours of the exception—confining use of illegally obtained evidence to credibility and limiting impeachment to testimony on direct examination or on cross-examination plainly within the scope of the direct—appear as narrow attempts to assure only that witnesses speak the truth, not to prevent the exclusionary rule from interfering with the accuracy of the fact finder's conclusion once the defendant has elicited evidence. Emphasis on the latter would not justify excluding illegally obtained evidence that, although not exactly contradicting specific testimony about matters the defendant chose to raise, nonetheless rebutted the potentially false inferences that defendant sought to establish with the evidence. Similarly, the *James* Court argued that fact-finding accuracy would suffer more from preventing impeachment of defendants than defense witnesses because the former, having an interest in the outcome, would be more likely to give false testimony.[20] But it did not consider how defendants' interest in the outcome would discredit their testimony without further impeachment, or how defense witnesses' putative disinterest would make their testimony credible without any impeachment.[21] Consequently, while giving lip service to the idea that the purpose of allowing impeachment was to prevent inaccurate fact finding, one aspect of the doctrine focused narrowly on inaccuracies flowing from the likelihood of false testimony.

Another aspect of the Court's analysis, however, focuses specifically on fact-finding accuracy. First, the Court justified the prevention of false testimony by explaining the negative impact that falsehoods have on the accuracy of the trier of fact's

[20] *See id.* at 313–17.

[21] *See id.*

ultimate determination.[22] Then, the Court withdrew false inferences' immunity from contradiction conferred by the "plainly within the scope of . . . direct" limitation by defining it to allow any questions "suggested to a reasonably competent cross-examiner."[23] That standard allows counsel to explore *all* exculpatory inferences suggested by the direct testimony, effectively empowering the prosecution to rebut any inferences from the proof that impede fact-finding accuracy. Finally, the *James* Court argued that the prohibition on impeachment of defense witnesses is consistent with fact-finding accuracy.[24] It reasoned that, uncertain of whether defense witnesses will confine their testimony to avoid opening the door to admission of illegally obtained proof, defendants would forego calling them although the witnesses could offer probative exculpatory evidence.[25]

The contrast between speaking and finding the truth informs the current conflict over applying the impeachment exception to the exculpatory words and conduct of a nontestifying defendant. Some courts have prevented extending the exception to nontestifying defendants by giving renewed life to the idea that the exception aims to impeach only specific false testimony.[26] That requirement did less to prevent using illegally obtained evidence to impeach testifying defendants after the Court allowed impeachment of testimony elicited on cross-examination about matters "reasonably suggested" by the direct testimony.[27]

22 *See id.* at 311 (stating that the impeachment exception is concerned with helping fact finders "'arriv[e] at the truth'" (quoting United States v. Havens, 446 U.S. 620, 626 (1980))).

23 *Havens*, 446 U.S. at 626–27.

24 *See James*, 493 U.S. at 315 (expanding impeachment exception may deter defendants from introducing reliable evidence).

25 *See id.* at 316 n.6 (noting that impeaching a defense witness or taking impeachment of a defendant too far prevents the defense from providing probative exculpatory evidence).

26 *See, e.g.*, United States v. Trzaska (*Trzaska II*), 111 F.3d 1019, 1024–25 (2d Cir. 1997) (holding illegally obtained statements inadmissible because they were insufficiently inconsistent with defendant's hearsay declarations); People v. Trujillo, 49 P.3d 316, 322–25 (Colo. 2002) (holding that impeachment by illegally obtained evidence is permissible only if it presents a direct contradiction with the witness's trial testimony).

27 *See, e.g.*, United States v. Morla-Trinidad, 100 F.3d 1, 6–7 (1st Cir. 1996) (finding use of illegally obtained evidence of participation in the crime permissible after defendant's direct testimony that impliedly denied involvement in events constituting the charged crime was "reasonably construed" to contradict

The rule suppressed the conflict between using illegally obtained evidence only to show that the defendant's specific testimony was false and to rebut any potentially false inferences the jury may draw from it. Simply by cross-examining the defendant about the inferential facts he would have the jury draw from his direct testimony, the prosecutor elicits responses that allow her to contradict as false testimony inferences that might otherwise be immune from contradiction.

In contrast, when a nontestifying defendant's hearsay declaration is impeached, he is not available for cross-examination about inferential facts that may be drawn from it.[28] There is no cross-examination "reasonably suggested by the direct" in which the prosecutor can make the defendant incorporate inferences from his hearsay declaration into his testimony as a prelude to contradicting them. Questions about the hearsay declaration's literal truthfulness rarely address all of the exculpatory inferences it supports. Consequently, courts considering impeachment of a nontestifying defendant's hearsay declaration cannot avoid deciding between pursuing truth *telling* and truth *finding*, and some have used the opportunity to exclude evidence that, although admissible under FRE 806, they find insufficiently related to the former.[29]

government witnesses' testimony on noncollateral matters); U.S. *ex rel.* Russell v. Haws, No. 99 C 4223, 2002 WL 31056724, at *12–14 (N.D. Ill. Sept. 13, 2002) (holding that where defendant testifies on direct examination to calling X from home during approximate time of the crime, prosecution can introduce and then contradict defendant's illegally obtained statement that he called Y during that same period); Manns v. State, 122 S.W.3d 171, 192–93 (Tex. Crim. App. 2003) (concluding that evidence of defendant's conduct during illegal interrogation is admissible to rebut testimony designed to convey "impression of forthrightness" during interview and trial testimony). *But see* People v. Lawson, 762 N.E.2d 633, 640–41 (Ill. App. Ct. 2001) (holding that it is improper to admit illegally obtained statements that the prosecution concedes did not relate to any specific statements made by the defendant on direct examination because purpose of impeachment exception is to prevent perjurious testimony).

[28] Courts have yet to allow prosecutors to call defendants to cross-examine them about their hearsay statements despite the argument that, by offering those statements, defendants waive their privilege against self-incrimination as if they had testified to those same matters on direct examination.

[29] *See, e.g.*, *Trzaska II*, 111 F.3d at 1024–25. Other cases have prohibited use of illegally obtained evidence when the defendant did not testify without considering whether other defense evidence established the defendant as a hearsay declarant. *See, e.g.*, State v. Brockman, 725 N.W.2d 653, 655–56 (Iowa Ct. App. 2006); State v. Green, 500 S.E.2d 452, 466 (N.C. Ct. App. 1998) (Horton, J., dissenting); State v. Brooks, No. 92-1982-CR-FT, 1992 WL 380886, at *2 (Wis. Ct. App. Dec. 23, 1992)

More courts have allowed FRE 806[30] its full scope, emphasizing that truth *finding* requires no less.[31] Still others have gone further to allow impeachment of defendants' statements to experts who base opinions on them, even if those statements were not admitted as hearsay.[32] For these courts, the challenge is hardly to find an evidentiary rationale for admission of evidence that enhances fact-finding accuracy; that much is a forgone conclusion. Instead, it is to show how promoting truth seeking by extending the exception to admit illegally obtained evidence whenever it impeaches the credibility of nontestifying defendants' exculpatory conduct leaves *anything* for *James* to

(unpublished disposition). These cases show that prosecutors have been slow to make the argument. Nonetheless, its near universal success when made, *see* cases cited *infra* note 31, suggests that they will press the claim with increasing frequency.

30 FED. R. EVID. 806 (allowing a party to attack the credibility of a hearsay declarant).

31 *See, e.g.*, Appling v. State, 904 S.W.2d 912, 916–17 (Tex. App. 1995) (allowing impeachment of nontestifying defendant's hearsay statements if illegally obtained evidence has some bearing on their credibility); Hendrickson v. Norris, 224 F.3d 748, 751 (8th Cir. 2000); United States v. Trzaska (*Trzaska I*), 885 F. Supp. 46, 48–50 (E.D.N.Y. 1995), *rev'd*, 111 F.3d 1019 (2d Cir. 1997); Wilkes v. United States, 631 A.2d 880, 887–88 (D.C. 1993); People v. Barcheers, No. D036109, 2001 Cal. App. Unpub. LEXIS 279, at *32–35 (Cal. Ct. App. Jan. 3, 2001); People v. Johnson, 50 Cal. Rptr. 2d 17, 18–19 (Ct. App. 1996); People v. Williams, 692 N.E.2d 1109, 1125–26 (Ill. 1998); People v. McCartney, 563 N.E.2d 1061, 1066–67 (Ill. App. Ct. 1990); State v. Weeks, No. W1998-00022-CCA-R3-CD, 2000 Tenn. Crim App. LEXIS 775, at *56–57 (Oct. 2, 2000) (Ogle, J., dissenting) (holding that defendant's illegally obtained statements can be used to impeach contradictory statements made to his psychiatrist, but not as "substantive evidence" to rebut the defendant's insanity defense); State v. DeGraw, 470 S.E.2d 215, 221–24 (W. Va. 1996).

32 *See, e.g.*, *Barcheers*, 2001 Cal. App. Unpub. LEXIS 279, at *32–35 (holding that defendant's illegally obtained statements are admissible to cross-examine a defense psychiatrist, where they contradict statements that the defendant made to the psychiatrist and upon which he relied in forming his expert opinion, because admitting the statements serves the same truth-seeking function as impeaching the defendant); *Wilkes*, 631 A.2d at 887–91 (stating that *James* allows impeachment of a defense psychiatrist whose opinion relies on defendant's statements because the rule prohibiting impeachment of defense witnesses does not apply to experts who are allowed to base their testimony on knowledge imparted by others; impeachment of the defense psychiatrist properly includes eliciting contrary opinions from prosecution psychiatrists relying on the illegally obtained statements); *Williams*, 692 N.E.2d at 1128 (holding that prosecution can use illegally obtained statements on cross-examination of expert because such statements are not admitted to "impeach the expert, but rather to test the soundness and fairness of the expert's opinion"); *DeGraw*, 470 S.E.2d at 221–24 (finding no error admitting a defendant's illegally obtained statements inconsistent with statements on which his expert relied because the real witness impeached by the illegal statement, since it was not admitted for its truth, was the defendant).

exclude. In this, only one thing is certain: using the evidentiary concept of impeachment as a limiting principle to prevent *or* to justify extending the exception to nontestifying defendants requires distorting evidence law and therefore fails to decide a question that only deterrence policy can answer coherently.

II
DISTORTING EVIDENCE LAW TO LIMIT THE IMPEACHMENT OF CRIMINAL DEFENDANTS

In its most coherent incarnation, the impeachment exception prohibits the prosecution from using illegally obtained evidence as part of its affirmative case for a defendant's guilt while allowing it to use illegally obtained evidence to rebut defense evidence.[33] Under the exception, a fact finder would use illegally obtained evidence only when evaluating defense evidence, but not as affirmative evidence of guilt. To abide by that requirement, a fact finder ideally would have to employ a two-stage fact-finding process. First, it would decide whether the prosecution's legally obtained evidence alone proves beyond a reasonable doubt that the defendant committed the crime. If not, it should return a verdict of not guilty, and there is no need to proceed. If, however, the fact finder concludes that the prosecution's lawful proof establishes guilt beyond a reasonable doubt, it should proceed to the second stage. At the second stage, the fact finder decides whether *all* the evidence, including the defense evidence and the prosecution's illegally obtained rebuttal, still supports a guilty verdict.

Neither the Court, nor any lower court, has ever considered translating into an actual two-stage determination this ideal way of distinguishing between using illegally obtained evidence affirmatively to prove guilt and only to attack the credibility of defense evidence. This failure should not be surprising since it would be unprecedented to ask a fact finder essentially to render consecutive verdicts on the same elements of the same charges in

[33] *See* James L. Kainen, *The Impeachment Exception to the Exclusionary Rules: Policies, Principles, and Politics*, 44 STAN. L. REV. 1301, 1352–53 (1992); *see also Wilkes*, 631 A.2d at 884 (affirming jury instruction to consider illegally obtained evidence rebutting defendant's affirmative defense only after first finding, without reference to the illegally obtained evidence, "that the Government has proven every element of the offenses charged beyond a reasonable doubt").

the same case.[34] Nor is it apparent that courts should invent such a procedure. The impact that a two-verdict system would have on juries and the expectations they bring to the fact-finding process in criminal cases is highly uncertain, however ideal the procedure may be in theory.[35]

Moreover, it is hardly clear that even an actual two-stage jury verdict would solve all the impeachment exception's problems. The defense may, as it virtually always does, elicit evidence on cross-examination of the prosecution's witnesses.[36] Considering the extent to which evidence elicited by the defendant from prosecution witnesses invites admission of illegally obtained evidence would remain a central problem.[37] Indeed, that problem is particularly salient when one includes the possibility of impeaching a defendant's hearsay declaration, as likely to be elicited on cross-examination of a prosecution witness as on the

34 Courts have used the "two-step" instruction only in the unusual circumstance where one can separately apply the evidence to an affirmative defense whose elements do not overlap those of the crime. *See Wilkes*, 631 A.2d at 884. Nor has anyone suggested actually using separate juries, one to render a verdict on the prosecution's direct case, made exclusively with lawfully obtained proof, and the other to render a verdict on the entirety of the proof, including the defense case and the prosecution's unlawfully obtained evidence. To do so would exact an enormous efficiency cost and pose the same difficulties of deciding whether the defense has crossed the line into presenting a case through examination of witnesses called by the government.

35 For example, juries may feel manipulated by a system that first prevents them, and then allows them, to consider illegally obtained evidence. This could induce them to assume that there is always more than what we allow them to hear, making them more inclined to convict to avoid being "fooled."

36 In such a case, the trial does not neatly divide, by formal announcement that the prosecution has rested, into the prosecution's lawful affirmative case considered alone (without reference to defense evidence), and the prosecution's entire case (including illegally obtained impeachment proof) considered in conjunction with the defense evidence.

37 Potential solutions range from the extremes of not holding the defendant responsible for any evidence elicited from a witness that the prosecution calls, to holding him responsible for anything the witness says on cross-examination. An intermediate solution might hold that the defendant is responsible only for evidence outside the scope of direct examination. But the solution would then implicate the myriad, and notoriously difficult to apply, definitions of the scope of direct. *See, e.g.*, 1 MCCORMICK ON EVIDENCE § 21, at 83–84 (John William Strong ed., 4th ed. 1992) (noting that the "subject matter" of direct may be read narrowly to mean the points or facts testified to, more broadly to mean the transactions described in the testimony, or most broadly to mean the issues affected by the testimony). In the end, there is no reason to think that any of these evidentiary concepts would necessarily solve a question that has to do with deterrence, not the purposes of the scope-of-direct rule.

defense case. Although ideal in theory, a two-stage process would fail because it provides no way to define the evidence available at each stage. The idea of the prosecution's affirmative case does not necessarily include only evidence elicited by the prosecution during its case-in-chief or also include defense evidence adduced before the prosecution rests.

Since there is no institutional way to ensure that a jury will decide whether the prosecution's lawful proof alone establishes guilt beyond a reasonable doubt before proceeding to consider illegally obtained evidence, courts have employed available evidentiary mechanisms to confine the use of illegally obtained proof to its discrediting effect upon defense evidence. They have done so in several ways. Often, courts simply rely on a limiting instruction telling the jury to consider the evidence only to impeach the credibility of defense evidence and not as affirmative proof of guilt. Without further explication of what it might mean to use the evidence only in that fashion, the instruction may be intended to get the jury to mimic the ideal two-step deliberation. In effect, this burden-of-proof-styled instruction asks the jury temporarily to forget that it is considering whether to find an historical fact from all the evidence. Instead, it should ignore defense evidence and the prosecution's (unlawfully obtained) rebuttal first to make a judgment about whether the prosecution's case-in-chief alone satisfies its burden. However, since the factual inferences from the evidence are the same irrespective of whether it is used to discredit defense evidence or as affirmative proof of guilt, the likelihood that the jury will accomplish this feat before resuming its usual role of historical fact finder is exceedingly slim.[38]

[38] Consider, for example, the following report of a trial court's effort to confine the use of illegally obtained evidence to contradicting the defendant's proof even though the contradicting fact also established guilt. The prosecution was for DWI:

> At the close of evidence, the court instructed the jury, "The alcohol concentration established by the analysis of the sample of the defendant's blood can only be used to impeach evidence presented by the defendant that he was not under the influence of alcohol." When asked for clarification from the jury during its deliberations, the trial court provided the following written response: "The results of the test of defendant's blood may be used as evidence. However, it may only be used to directly contradict evidence introduced by the defendant that he was not under the influence of alcohol. It may not be used for any other purpose."

State v. Brockman, 725 N.W.2d 653, 655 (Iowa Ct. App. 2006). One can sympathize with the jurors who were wrong to conclude that they could use the blood test as

Consequently, many courts employ evidentiary concepts to attempt to distinguish between factual inferences supported by the evidence constituting "affirmative proof of guilt" and "impeachment" as a prelude to formulating a more typical limiting instruction allowing the jury to consider only the latter. Elsewhere in evidence law, instructions distinguishing between permissible and impermissible factual inferences from proof are familiar and often presumed effective. Then, considering the weight of the evidence for the respective inferences and the likelihood that the jury will ignore those forbidden, the court may admit the evidence pursuant to the factual-inference-styled instruction or, if the evidence's impeachment value standing alone is relatively small, exclude it entirely. Skeptical that juries will temporally structure deliberations to differentiate using illegally obtained evidence as affirmative proof of guilt or rebuttal, those courts employ evidentiary concepts that distinguish between factual inferences constituting proof of guilt and credibility evidence.

However laudable this attempt to effectuate the Court's limited-use mandate may be, the fact remains that, routinely, the same factual inferences that discredit the defense case simultaneously advance the prosecution's affirmative case for guilt. Limiting factual inferences therefore inevitably forbids fact finders from fully using the illegally obtained evidence even as it bears on the credibility of defense evidence. This may have relatively little impact compared to the alternative where courts simply admit the proof and trust juries to distinguish "affirmative" from "credibility" use of illegally obtained evidence without telling them anything more. In both cases, the jury has heard the proof, and we cannot be certain how either styled limiting instruction will influence deliberations, if at all.[39] Nonetheless, the approach taken makes *all* the difference when a

affirmative proof of the defendant's drunkenness just because the court allowed them to use it to contradict his evidence of sobriety. Moreover, it is not even apparent that courts are absolutely clear that this result is the goal of distinguishing affirmative proof of guilt from impeachment or that we would want juries to become accustomed to making decisions that ignore permissible inferences from proof made known to them.

[39] In one case, we cannot be sure that the jury will understand or follow the admonition not to consider a factual inference that the illegally obtained evidence supports. In the other, we cannot know how or whether the jury will distinguish evidence of guilt from credibility, much less expect an ideal two-step deliberation.

court *excludes* illegally obtained evidence because its probative value as "credibility" evidence does not justify the risk that the jury uses it as "proof of guilt." In that situation, deciding which factual inferences are permissible, because they implicate credibility, and which are impermissible, because they implicate the affirmative case for guilt, is critical.

Moreover, in the post-*James* cases, it is not enough to distinguish using illegally obtained evidence as affirmative proof of guilt from attacking the credibility of the opposing party's evidence. It is also necessary to isolate the value of illegally obtained evidence for impeaching the defendant from its value for impeaching other defense witnesses. Central to this task is determining whether and how a *defendant*'s credibility may be an issue, especially if the defendant elicits evidence of his exculpatory words or conduct but does not testify. A ready evidentiary analogy is offered by FRE 806, which allows impeachment of nontestifying hearsay declarants as if they had testified.[40]

That rule, however, does not respect the limits that the Court has placed on defendants' impeachment, even if they did take the stand. While FRE 806 permits impeachment of a hearsay declarant, it decidedly does not attempt to limit the use of allowable impeachment to credibility inferences only. Nor does it consider overlapping "credibility" and "proof of guilt" inferences as cause for a limiting instruction or possible exclusion. Therefore, the alternative responses to proposed impeachment of defendants' hearsay declarations are the same. A court can simply give jurors a "defendant's-credibility-only" instruction on the burden of proof model, accepting that it likely does not prevent them from using the evidence as proof of guilt. Or the court can impose limits on using factual inferences that the impeaching proof supports, either to create a more effective limiting instruction or, ultimately, to exclude evidence which, although satisfying FRE 806, similarly presents undue risk of "improper" use as affirmative evidence of guilt.

Nothing in evidence law prevents dual use of evidence that bears permissible inferences as impeachment and affirmative

[40] FED. R. EVID. 806 ("When a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be attacked . . . by any evidence which would be admissible . . . if declarant had testified as a witness.").

proof of guilt. Indeed, the category of impeachment-by-contradiction proof acknowledges the especially probative force of proof whose factual inferences impeach the opposing party's evidence while also advancing the party's affirmative case, and virtually all evidence admitted under the impeachment exception fits the "impeachment-by-contradiction" description. Consequently, courts using established evidentiary concepts cannot coherently distinguish between credibility and proof of guilt inferences to decide whether and how to allow impeachment of defense evidence. Truth seeking as understood by evidence law demands admitting impeachment-by-contradiction proof precisely because its overlapping uses make it especially probative.

The observation would hardly merit mention if the Court acknowledged that deterrence provides the only possible justification for suppressing evidence typically allowed by evidentiary rules. But the Court has not offered a deterrence rationale for requiring credibility-only use of illegally obtained evidence. It has not shown, for example, how credibility-only use will deter police misconduct, even marginally, compared to affirmative use. Instead, it suggests that, holding deterrent effects constant, truth seeking justifies only credibility use because the probative value of illegally obtained evidence is highest when used to impeach specific defense testimony. This requires the lower courts to distort the concept of evidentiary impeachment to make it appear that truth seeking excludes or disfavors contradicting substantive evidence amenable to affirmative use, which it decidedly does not. Unfortunately, such distortion lies at the root of courts' arguing that truth seeking justifies confining the use of illegally obtained evidence when they attempt, in the service of constitutional deterrence policy, to avoid applying FRE 806 to permit impeachment of a nontestifying defendant.

III
PREVENTING IMPEACHMENT OF DEFENDANTS' HEARSAY DECLARATIONS

The leading case refusing to apply FRE 806 to permit impeachment of a nontestifying defendant's words or conduct is

the Second Circuit's opinion in *United States v. Trzaska*.[41] In *Trzaska*, the defendant, a previously convicted felon, was charged with illegal possession of firearms and ammunition.[42] The police lawfully discovered the contraband with which the indictment charged Trzaska in a garage he rented.[43] Trzaska's defense was that his son Kevin was in exclusive possession of the guns and ammunition, even though they were stored in Trzaska's garage.[44] His proof consisted of the testimony of his son, Kevin.[45] Kevin described how Trzaska told him to pick up the guns from a friend, who was holding them for Trzaska, but who had repeatedly asked Trzaska to take them back.[46] Kevin further testified as follows:

> Q. Do you know why your father asked you to pick them up?
> A. He didn't want nothing to do with them anymore.
> Q. Did he tell you why [he] didn't want to have anything to do with them?
> A. Because he had too many problems in his past, and he—he wanted to put it down.[47]

On summation, defense counsel used this testimony to establish that Trzaska was no longer in possession of the guns because he had surrendered them to his son:

> "He (Kevin) told you his father did not want to have anything to do with them (the guns). He knew it was trouble. He knew that he was a convicted felon, and therefore was in a different category than his son. He knew that if he took those guns into his possession and kept them, that not only was he risking the violation of parole, but he was also risking sitting right where he's sitting right now. So he tells his son, 'they're yours.'"[48]

To rebut the claim that Trzaska surrendered the guns to Kevin, the government offered a rifle and ammunition that Trzaska's parole officer illegally seized from Trzaska's apartment several

41 United States v. Trzaska (*Trzaska II*), 111 F.3d 1019 (2d Cir. 1997).

42 United States v. Trzaska (*Trzaska I*), 885 F. Supp. 46, 47 (E.D.N.Y. 1995), *rev'd*, 111 F.3d 1019 (2d Cir. 1997).

43 *See id.*

44 *See id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

days before the lawful search of the garage.[49] The government also offered Trzaska's statement, suppressed as the fruit of the illegal apartment search: "I'm a drug addict with this; it's a sickness."[50]

Applying *James* to allow Trzaska's impeachment (not that of his son), the trial judge admitted the proffered evidence.[51] He reasoned that when a criminal defendant introduces his own exculpatory hearsay statement, its probative value depends upon the defendant's credibility no less than if the defendant had actually testified.[52] Thus, the contraband and the statement satisfied both FRE 806 and *James* by impeaching Trzaska's hearsay declaration.[53]

What of *James*'s requirement that the evidence be used *only* to impeach the defendant and *not* to impeach the defense witness? After all, the government's rebuttal proof might be used to impeach the in-court witness, Kevin, by suggesting that Trzaska had never made the statement Kevin attributed to him or that Kevin had not assumed exclusive control over the guns. Also, the jury might use the proof as affirmative evidence of Trzaska's guilt rather than merely to neutralize his evidence. It might not simply discount the defendant's evidence of nonpossession of the garage guns, and instead consider Trzaska's admitted simultaneous possession of the apartment guns as affirmative proof that he possessed the garage guns rather than, or together with, anyone else having access to the garage, such as Kevin. Following the Court's mandate that the prosecution use illegally obtained evidence *only* to impeach the defendant, the trial judge gave a limiting instruction telling the jury "to use Trzaska's [suppressed] statement . . . only to impeach Trzaska's statement to his son."[54] Here the instruction potentially did double duty, conveying to the jury that the proof should be used only to evaluate the credibility of Trzaska (not his son), and then only to assess Trzaska's evidence, and not as affirmative proof of his guilt.

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49 *Id.*

50 *Id.*

51 *Id.*

52 *See id.* at 49.

53 *See id.* at 50.

54 United States v. Trzaska (*Trzaska II*), 111 F.3d 1019, 1023 (2d Cir. 1997).

What may have seemed to the trial judge a straightforward application of *James* to the unanticipated situation of the defendant as hearsay declarant became far more complicated, or, at least, confused, when the Second Circuit reversed the trial court's decision to admit the illegally obtained evidence in *Trzaska II*.[55] While reversing, the Second Circuit attempted to avoid two difficult issues presented by the proof: the constitutional question of whether the prosecution may impeach a defendant who offers his hearsay declarations rather than his in-court testimony, and the evidentiary question of whether the court properly classified Trzaska's statement as hearsay.[56]

First, since relevant testimony of a defense witness will almost always include facts about the defendant's words or conduct, allowing impeachment of defendants' hearsay declarations is not a simple step; it potentially eviscerates *James*'s purported limitation on the exception.[57] Second, the court thought that deciding whether Trzaska's statement qualified as hearsay and thus subjected him to impeachment was particularly troublesome. It noted that the statement potentially bore hearsay and nonhearsay inferences, and Trzaska, although possibly intending to use it only for its nonhearsay inference, offered it without qualification. Since the prosecution did not object, the court received the statement without qualification, leaving its status undetermined until such time as the government, arguing that the statement was hearsay, attempted to impeach Trzaska. Under those circumstances, the court wondered whether it had been proper for the trial court, which considered the statement hearsay, to treat the statement as received "for all purposes to which it was relevant" or "only for the purpose which the proponent intended."[58]

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[55] *Id.* at 1025.

[56] *See id.* at 1025–26.

[57] *See infra* Part IV.

[58] *Id.* at 1026. The court observed:

> The rule could be that the statement was offered for all purposes to which it was relevant—if this were the rule, Trzaska could be impeached . . . . On the other hand, the rule could be that the statement was offered only for the purpose which the proponent intended it at the time was offered—if this were the rule, Trzaska could not be impeached . . . .

Id.

To avoid deciding whether a defendant's hearsay declaration invites impeachment with illegally obtained evidence or whether Trzaska's statement should be considered hearsay, the court held that, even assuming affirmative answers to both questions, Trzaska's impeachment was improper as a matter of ordinary evidence law.[59] Seizing on Trzaska's suppressed statement that he was like "a drug addict"[60] when it came to firearms and comparing it with his statement to his son that he "'didn't want nothing to do with [the guns] anymore,'"[61] the appellate court reasoned that the two statements were insufficiently inconsistent to merit the former's admission.[62] It then reversed the conviction, finding that admission of the suppressed statement was not harmless error since the jury learned not only that Trzaska admitted to being addicted to guns, but also that he did so while commenting on the rifle and ammunition that the police had seized illegally from his apartment.[63]

The court based its claim that the statements were insufficiently inconsistent to merit admission on its interpretation of Trzaska's statement to his son as establishing "'intent to relinquish ownership'"[64] or a "desire to give . . . to his son" the guns found in his garage and charged in the indictment.[65] It then reasoned that one might interpret his subsequent, suppressed statement that he was addicted to guns in two possible ways.[66] First, the statement might have admitted a "general" obsession with guns.[67] Acknowledging that "for two statements to be inconsistent, they need not be 'diametrically opposed,'"[68] the court nonetheless concluded that whatever inconsistency there was between the statements was attenuated

59 *Id.* at 1024–25.

60 *Id.* at 1025.

61 *Id.* at 1023 (alteration in original).

62 *Id.* at 1025.

63 *Id.*

64 *Id.* (quoting United States v. Trzaska (*Trzaska I*), 885 F. Supp. 46, 47 (E.D.N.Y. 1995), *rev'd*, 111 F.3d 1019 (2d Cir. 1997)).

65 *Id.*

66 *See id.*

67 *Id.* This general obsession was not necessarily inconsistent with the earlier desire to give up the guns in the garage because "[a]lcoholics may give away alcohol and cigarette smokers may give away cigarettes." *Id.*

68 *Id.* at 1024 (quoting United States v. Agajanian, 852 F.2d 56, 58 (2d Cir. 1988)).

because they were uttered approximately a year apart.[69] Although it did not discuss why this fact was important, the court seemed to think that the time elapsed between the stated desire to give up the guns and the admission of an obsession with guns increased the likelihood that Trzaska's attitude toward guns had simply changed.[70] Therefore, the obsession with guns one year later did not sufficiently contradict the perhaps sincerely held desire to be rid of them.[71] Second, the Court noted that Trzaska's "addicted" statement might be interpreted as an admission that he possessed only the specific guns in the apartment, which were found right before he spoke, not the garage guns with whose possession he was charged.[72] Viewed this way, the statement was insufficiently inconsistent with the earlier expressed desire to be rid of *different* guns, those in the garage and not the apartment.[73]

Whatever merit there may have been in prohibiting Trzaska's impeachment as a matter of deterrence, the court's attempt to attribute the result to ordinary evidence law failed miserably. In concluding that Trzaska's statements were insufficiently inconsistent to merit his impeachment, the court took three steps that are unjustified if applied to lawful evidence. First, it ignored the impeaching effect on Trzaska's statement of his possession of the apartment guns, quite apart from whether he had said anything about them at all to his probation officer. Second, focusing exclusively on Trzaska's statement to his probation officer, the court treated the statement as if it were merely an inconsistent statement admissible only for the inconsistency's bearing on Trzaska's credibility, and not as evidence of any facts asserted in the statement. Finally, treating Trzaska's confessed addiction and possession of the apartment guns merely as an inconsistent statement, the court required a degree of inconsistency between the statements that would eliminate any likely explanation except that Trzaska had lied to his son. While all these moves were explicable as means of shoring up deterrence by manipulating the *constitutional* requirement that

69 *Id.* at 1025.

70 The court noted that the time lapse "clouds" the inconsistency, "[c]onsidering the changing nature of a person's subjective intent." *Id.*

71 *See id.*

72 *Id.*

73 *Id.*

the suppressed evidence be used only to impeach Trzaska's statement, none were a consequence of the evidentiary concept of impeachment. Indeed, if one assumes that the *Trzaska II* court applied constitutionally permissible impeachment correctly, analysis of the divergence between it and permissible evidentiary impeachment in this context illustrates how far the former's focus on deterrence can, indeed must, deviate from the latter's focus upon accurate fact finding.

To begin with, there was simply no reason to ignore the evidence of Trzaska's possession of the suppressed guns and focus exclusively on his statement. Proof of an inconsistent statement is surely not the only mode of impeachment; a well-established form of impeachment is impeachment by contradiction.[74] Impeachment-by-contradiction evidence includes any proof that, by contradicting a fact asserted by a witness, suggests that the witness's testimony is not credible.[75] The contradiction may show an honest mistake or a deliberate lie; in either event, impeachment-by-contradiction evidence, by virtue of proving a contradicting fact, shows the witness to be an unreliable reporter of the contradicted fact.

Since impeachment-by-contradiction evidence undermines a witness's credibility by virtue of proving a contradictory fact, there is no way to conceive that the evidence (unlike inconsistent statement evidence) can attack credibility without also establishing substantive evidence. Moreover, the rules of evidence themselves typically require that the impeachment-by-contradiction evidence be relevant to the issue of guilt at trial in order not to be excluded as contradictory proof of a "collateral" matter.[76] Consequently, absent unusual circumstances, whenever impeachment-by-contradiction proof is admitted under the impeachment exception, there will be an overlap between inferences from the evidence that impeach the

74 *See, e.g.*, 1 MCCORMICK ON EVIDENCE, *supra* note 37, § 49.

75 *See* MICHAEL H. GRAHAM, EVIDENCE: AN INTRODUCTORY PROBLEM APPROACH 466–68 (2d ed. 2007).

76 The collateral evidence rule generally prohibits proof that contradicts a witness on an unimportant matter. A matter substantively relevant to commission of the crime will never be collateral. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 6.47 (3d ed. 2003). Evidence that is not substantively relevant will also escape the collateral evidence bar if it establishes more than that the witness may have been innocently mistaken about the contradicted fact. *Id.*

defendant's credibility and those that, by proving a substantively relevant fact, may also serve as affirmative proof of guilt.

Nonetheless, the mere fact of an overlap did not render the suppressed apartment gun inadmissible to impeach Trzaska. The Court allows admission of suppressed physical evidence to impeach defendants' trial testimony by contradiction where the illegally obtained evidence also provides powerful proof of guilt.[77] Indeed, it long ago rejected the opportunity to say that admission of illegally obtained evidence depends upon its bearing no permissible evidentiary inference on the issue of defendant's guilt. In *Walder v. United States*, the case that established the impeachment exception, evidentiary principles themselves happened to limit the use of suppressed physical evidence to the credibility of the defendant's testimony, and not allow its use as affirmative proof of guilt.[78] After *Walder* presented those unusual circumstances, some suggested that the exception applied only if ordinary evidence principles do not allow the prosecution to use the proof as affirmative evidence of guilt. But the Court quickly rejected that suggestion in *United States v. Havens*, holding that evidence contradicting defendant's testimony while bearing permissible inferences as affirmative proof of guilt is admissible, although subject to a "credibility only" limiting instruction.[79]

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[77] *See, e.g.*, United States v. Havens, 446 U.S. 620, 628–29 (1980) (upholding admission of proof showing possession of the instrumentalities of the crime to impeach defendant's denial of participation).

[78] Walder v. United States, 347 U.S. 62, 63–65 (1954). There, the Court admitted illegally obtained evidence of Walder's previous drug possession to impeach his direct testimony that he had never used drugs. *Id.* at 64–65. The Court limited its use to the credibility of Walder's testimony that he had never possessed drugs. *Id.* Even if not obtained illegally, courts would so restrict the evidence since it had no permissible use as affirmative proof of guilt. Its admission was justified only as a means of fighting fire with fire: Walder had wrongfully introduced evidence of specific instances of conduct to prove his character, in violation of FRE 405(a), entitling the prosecution to rebut it by similar, ordinarily impermissible means. But all that was necessary to counteract Walder's rule violation and return to the *status quo ante* was to neutralize his testimony establishing his good character. Discounting his testimony that he never possessed drugs was sufficient to undo the damage; there was no justification for allowing the jury to use the proof of Walder's prior possession affirmatively to infer subsequent possession of the heroin with whose possession he was charged.

[79] *See Havens*, 446 U.S. at 624–25 (holding that illegally obtained evidence can be used to impeach noncollateral as well as collateral matters).

At the same time, the *Havens* Court described its constitutional holding as applying to illegally obtained evidence whose admission was "otherwise proper."[80] Consequently, where the "collateral evidence rule" applies to prevent admission of impeachment proof that contradicts only a collateral point—i.e., a point that is not relevant to the substantive issues—it was possible to advance the following argument: because the impeachment exception requires illegally obtained evidence to be used only on the issue of witness credibility and not as affirmative proof of guilt, such evidence cannot be substantively relevant. As merely contradicting, and not substantively relevant proof, illegally obtained contradicting evidence is collateral.[81] Since the constitutional bar prevents using illegally obtained evidence as affirmative evidence of guilt, the evidentiary ban against impeachment of a witness on a collateral matter prevents admission of the illegally obtained evidence at all. Illegal impeachment-by-contradiction evidence, permissible to show a witness's contradiction, but not to establish affirmative evidence of guilt, is stripped of evidentiary justification. Subject to constitutionally required limited use as mere credibility evidence, illegal contradicting evidence is no longer "otherwise admissible" under the rules and therefore must be excluded.[82]

Recognizing that rejection of this argument was already implicit in *Havens*'s admission of impeachment by contradiction proof (and in many cases decided in its wake), the court in *Tennessee v. Electroplating Inc.* explicitly rejected this clever attempt to use evidentiary principles effectively to prevent admission of any impeachment by contradiction evidence.[83] First, it noted that the impeachment exception "is not limited to evidence that merely attacks the quality of a defendant's testimony."[84] Instead, the cases "clearly authorize the use of 'impeachment' evidence which is relevant to substantive issues

[80] *Id.* at 626.

[81] See, for example, *State v. Electroplating Inc.*, 990 S.W.2d 211, 225–26 (Tenn. Crim. App. 1998), where the court considered but rejected the argument in the text.

[82] *See id.* The court recognized that the defendant's attempt to use evidentiary principles to exclude what *Havens* allowed was a clever, though futile, attempt to refight a battle already lost. *See id.* at 226 & n.17.

[83] *See id.* at 226.

[84] *Id.*

and which usually implicates the defendant on the ultimate issue of guilt."[85] Only the constitutional rule limits the use of evidence otherwise admissible on the issue of guilt to the issue of defendants' credibility.[86] Consequently, the court noted, there was no reason to impose on such evidence the requirement that the evidentiary rules formulated to apply to "credibility-only" evidence.[87] Moreover, if it were necessary to find the evidence not collateral, "such evidence can be said to be non-collateral for impeachment purposes."[88] The prohibition against using the evidence as *affirmative* proof of guilt did not prohibit its *substantive* use to "'disprove a material proposition'" by contradicting the defendant's testimony about a fact relevant to guilt.[89] By allowing proof of a fact contradicting the exculpatory fact introduced by defendant's testimony, the impeachment exception surely allowed the jury to use illegally obtained evidence as *substantive* evidence of guilt, even though it was admonished not to make use of the evidence beyond disproving the defendant's evidence. The admonition was against using the proof to advance the case for guilt *beyond counteracting defendant's evidence*, not prohibiting reliance on inferences the evidence may bear on factual propositions relevant to defendant's guilt. Therefore, there was nothing in the evidentiary concept of impeachment to prevent proof of Trzaska's possession of the apartment guns to contradict his statement to his son claiming intent to part with, and disinterest in, the guns found in his garage and guns in general.

Just as there was no evidentiary bar on using Trzaska's possession of the apartment guns to contradict his claimed disinterest in the garage guns, there was no evidentiary bar against using the suppressed statements to prove their contents. The entire discussion of the degree of inconsistency between the statements and Trzaska's hearsay declaration was premised upon the assumption that their only impeaching effect lay in their showing an inconsistency "'that has a *reasonable bearing on*

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85 *Id.*

86 *See id.*

87 *Id.* at 226 n.17.

88 *Id.*

89 *Id.* (quoting COHEN, PAINE, & SHEPPERD, TENNESSEE LAW OF EVIDENCE § 613.5 (1995)).

credibility.'"[90] But that simply was not so. First, Trzaska's statements were admissions of a party opponent and admissible to prove any facts asserted therein.[91] Second, Trzaska's admissions to being addicted to guns and to possessing (at least) the apartment guns impeached his hearsay declaration of disinterest in guns by contradiction in a manner identical to the physical proof of his possession of the apartment guns.

Limiting the impeaching effect of his statements to their value as inconsistent statements, as if they were inadmissible to prove what they asserted, again confused making "substantive" and "affirmative" use of the illegally obtained statements. Just as there was no bar to making substantive use of the illegally seized apartment guns to show possession of the garage guns, there was no such limitation on the substantive use of the statements to show the possession of apartment guns directly or indirectly through Trzaska's continuing obsession with guns. As with the nonstatement proof of Trzaska's possession of the apartment guns, the cases only prevented the jury from relying upon the statements when deciding whether the prosecution, in the absence of Trzaska's hearsay declaration, had carried its burden. The jury was free to decide that the statements, by showing his continuing obsession with and possession of guns, contradicted Trzaska's claimed disinterest in guns generally and intent to part with the guns with whose possession he was charged.

After Trzaska offered his statement to his son to show his intent to part with and disinterest in the garage guns, any evidence suggesting that he possessed them, including that he admitted to being an addict obsessed with guns and was in simultaneous possession of other guns, was admissible impeachment-by-contradiction proof. As an addict obsessed with guns, Trzaska may have been a notoriously unreliable reporter of his intent not to exercise control over objects of his obsession within his reach.[92] Moreover, continued possession of

[90] United States v. Trzaska (*Trzaska II*), 111 F.3d 1019, 1025 (2d Cir. 1997) (quoting 28 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6203, at 514 (1993)).

[91] *See* FED. R. EVID. 801(d)(2)(A).

[92] *Cf.* Halvorsen v. Baird, 146 F.3d 680, 686 (9th Cir. 1998) (holding plaintiff's alcoholism admissible to impeach his denial that he had been drinking, as denial is a characteristic of alcoholism so that an alcoholic's "testimony that he was not drunk could be subjectively truthful, yet false").

and obsession with guns may have shown that Trzaska's professed intent to surrender the guns was nothing more than a way to placate his son or a ploy to get him to retrieve them for him from Trzaska's friend. By tending to prove the subsequent possession of garage guns, the illegally obtained evidence also tended to show that Trzaska simply did not have the attitude toward the guns that he reported when he spoke to his son. This is so whether the evidence consisted of his simultaneous possession of the illegally seized apartment guns or the suppressed admission that he possessed those guns and/or was addicted to guns.

Nonetheless, the likelihood that the jury would use the illegally obtained evidence affirmatively despite the courts' limiting its use to Trzaska's credibility led them to find a way to restrict the substantive inferences for which it could be used. While admitting the evidence, the district court instructed the jury to consider the seized apartment guns only insofar as they provided a "context" for Trzaska's suppressed statement and further instructed them to consider the statement only for its bearing on whether Trzaska spoke truthfully to his son.[93] The instruction was designed to allow the jury to use the illegally obtained evidence only to discount Trzaska's hearsay declaration; in other words, to "neutralize" the evidence of Trzaska's hearsay declaration and so decide the case as if they heard neither it *nor* the illegally obtained proof.

Still, the relevance of the evidence as impeachment-by-contradiction proof, even if used only to neutralize Trzaska's evidence, depended on its value as substantive proof that Trzaska had possessed the garage guns. Possession requires "the power and intention to exercise control over the firearm."[94] The guns' location in Trzaska's garage clearly established his power to control them, and the crucial issue was thus whether he intended to control them. Evidence that Trzaska continued to possess and to be obsessed with guns after speaking to his son cast doubt on the credibility of his claimed disinterest in, and intent to dissociate himself from, the guns whose retrieval he asked his son to accomplish.

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[93] United States v. Trzaska (*Trzaska I*), 885 F. Supp. 46, 47–48 (E.D.N.Y. 1995), *rev'd*, 111 F.3d 1019 (2d Cir. 1997).

[94] *See* 2 LEONARD SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL § 35.07 (2007) (Instructions 35–49).

There was ample precedent simply to pretend that a limiting instruction would prevent affirmative use of the illegally obtained evidence that, while impeaching the defendant's testimony, was also highly probative on the issue of guilt. Nonetheless, the circuit court was apparently unwilling to simply follow that precedent in a setting that extended the impeachment exception to nontestifying defendants' hearsay declarations.

James had drawn a line between impeachment of defendants and defense witnesses to limit the occasions upon which the prosecution might use illegally obtained evidence.[95] That restraint might easily be obliterated if a defense witness's testimony about a defendant's words or conduct invited impeachment whenever they bore an exculpatory hearsay inference, *and* one could not rely upon the jury to avoid making affirmative use of the impeachment proof. The likelihood that the jury would remember what the illegally obtained evidence showed of Trzaska's possession when assessing the credibility of his stated intent not to do so anymore, and yet forget what it showed of Trzaska's possession when deciding whether the government carried its burden on that issue is remote. One might imagine that the issue would come down to a single decision about what the evidence showed of Trzaska's intent at the relevant time without necessarily considering whether the illegally obtained evidence showed it directly or through a judgment about the credibility of Trzaska's statement made a year earlier.

Consequently, the Second Circuit, skeptical about whether any substantive evidence of Trzaska's gun possession would not be used as affirmative proof of guilt, sought a way to separate using the illegally obtained evidence to assess the credibility of Trzaska's hearsay statement from using it as proof of possession at all.[96] To do so, the appellate court took the trial court's focus on the statement, rather than the seized guns, one step further. Where the trial court had been willing to allow Trzaska's "admission that he suffered from a narcotic-like addiction to guns"[97] to be used to cast doubt on whether Trzaska reliably

95 *See* James v. Illinois, 493 U.S. 307, 313 (1990).

96 *See* United States v. Trzaska (*Trzaska II*), 111 F.3d 1019, 1025 (2d Cir. 1997).

97 *Trzaska I*, 885 F. Supp. at 47.

reported to his son that he "didn't want nothing [*sic*] to do with [guns] anymore,"[98] the Second Circuit treated Trzaska's "addiction" statement as if its *only* impeachment value were as an inconsistent statement.[99] Treating the statement as if it were not admissible for the truth of the matter asserted, the court focused exclusively on the inconsistency between Trzaska's admitted addiction while possessing the apartment guns on the one hand, and his intention to abandon the garage guns to his son on the other.[100] Thus recast, the illegally obtained evidence was *not substantive proof* of a desire for guns admissible to cast doubt on his claimed disinterest in the garage guns. Instead, it was merely a statement about possessing the apartment guns and being addicted to guns whose probative value depended entirely upon there being sufficient inconsistency with his claimed disinterest in the garage guns to show that he had "blown hot and cold" on the specific subject of his interest in *them*.[101]

Eliminating factual inferences that followed from Trzaska's addiction to guns and simultaneous possession of the apartment guns, the court then inquired about what the inconsistency with the suppressed statement showed regarding whether Trzaska had spoken falsely to his son.[102] Although Trzaska's hearsay declaration asserted he was abandoning the garage guns because he no longer wanted to be involved with any guns, the court read it narrowly as a disavowal of interest only in the garage guns.[103] Thus, a subsequent statement about possession of different guns or an admitted addiction to guns was not "necessar[ily] inconsistent" with abandonment of the specific guns with whose possession he was charged.[104] Even then, however, the court acknowledged that inconsistent statements need not be "'diametrically opposed.'"[105] That the statements were not

98 *Id.*

99 *See Trzaska II*, 111 F.3d at 1025.

100 *Id.*

101 *See id.*. The court noted that its admission depended upon a "'variance between the statement and the testimony that has a *reasonable bearing on credibility*.'" *Id.* (quoting 28 WRIGHT & GOLD, *supra* note 90, § 6203, at 514).

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.* at 1024 (quoting United States v. Agajanian, 852 F.2d 56, 58 (2d Cir. 1988)).

necessarily inconsistent with an earlier intent to abandon the garage guns did not mean that they failed to establish an inconsistency sufficient to establish Trzaska an unreliable reporter of that intent. Nonetheless, the court found it significant that the statements were made a year apart, as "[c]onsidering the changing nature of a person's subjective intent, this time lapse clouds [the] inconsistency."[106] The court concluded that the statements were "insufficiently inconsistent to allow Trzaska to be impeached."[107]

To reach that conclusion, the court applied a narrower conception of how an inconsistent statement affects credibility than evidence rules require. Inconsistent statement impeachment is a form of "specific impeachment." Specific impeachment communicates to the fact finder what testimony to doubt but not necessarily why to doubt it. In the case of inconsistent statement impeachment, the fact that a witness has spoken inconsistently on a subject suggests that the witness is an unreliable reporter on that subject, but does not necessarily show *why* the witness is unreliable. Unreliability, as shown by the inconsistent statement, is perfectly consistent with a defect in any of the witness's testimonial capacities of perception, memory, narration, or sincerity. Even viewing Trzaska's suppressed statement exclusively as an inconsistent statement questioning his testimonial capacities, the changed attitude toward the guns he expressed was surely sufficient to raise a question about whether he spoke reliably about his desire not to control the guns.

Nonetheless, the court ignored what the inconsistency showed about Trzaska's reliability on that subject *generally* and focused exclusively on what it showed about whether he *intentionally* misrepresented his intent to his son.[108] Noting that Trzaska may simply have changed his mind about the guns while truthfully reporting his attitude at the times he spoke, the court found his suppressed statement "insufficiently inconsistent" because it may have truthfully reported the "changing nature of [Trzaska's] subjective intent."[109] Citing a test for inconsistency that focused

106 *Id.* at 1025.

107 *Id.*

108 *See id.*

109 *Id.*

exclusively on whether an inconsistent statement showed that a witness did not "'*believe*[] *the truth* of the facts testified to'"[110]—that is, intentionally misrepresented—the court found that the subsequent statement did not merit admission because it was insufficiently probative that he had lied when he reported his intention to dissociate himself from the guns.[111]

The court's focus on Trzaska's sincerity to the exclusion of the other testimonial capacities ignored the possible ways that his shifting description of his attitude toward the guns undermined his credibility as a reporter of his intentions about them, even if he had sincerely reported his feeling at the moment he spoke. That Trzaska had expressed contradictory attitudes toward the guns, from a desire to be rid of them to an uncontrollable desire for them, suggested that he could not reliably distinguish a firm intention from a fleeting feeling regarding their possession and, perhaps having distinguished those mental states, accurately communicate them. The inconsistent statement thus impeached Trzaska's capacities for perception and narration on this topic as well as his insincerity. There was nothing in evidence law to prevent its use for this purpose, even assuming that the statement could be admitted only as an inconsistent statement and not used substantively to establish the desire for guns that it confessed. In the end, the appellate court excluded the proof because its probative value on the issue of whether Trzaska's hearsay declaration was a deliberate lie was insufficient, even though it surely provided some support for that inference.[112]

The court balked at simply admitting the evidence for this as well as the substantive impeachment purposes because the proof also proved Trzaska's guilt by affirmatively establishing his intent to control the guns at the relevant time rather than by neutralizing evidence of his earlier intent to relinquish them.[113] Exclusion was undoubtedly a plausible product of the court's conscientious attempt to assure that some deterrence flowed from compliance with the constitutional mandate that illegally obtained evidence be used only to impeach Trzaska, and not as

110 *Id.* (quoting 1 MCCORMICK ON EVIDENCE, *supra* note 37, § 34, at 115) (emphasis added).

111 *See id.*

112 *See id.*

113 *See id.*

affirmative evidence of guilt, considering that the jury would most naturally use the evidence as proof of possession. Therefore, unlike the trial court, which was willing to rely on a limiting instruction, however ineffective, to satisfy the constitutional mandate, the appellate court opted for exclusion where it felt that the risk of affirmative use—direct proof of possession irrespective of Trzaska's exculpatory statement—was too great. This was hardly an implausible result as a matter of salvaging constitutional deterrence policy.

Excluding the illegally obtained evidence, however, did not follow from evidentiary rules. Once he had offered his hearsay declaration of disinterest in the garage guns, there was nothing in those rules suggesting that the physical evidence and Trzaska's statements were not admissible impeachment to cast doubt on that disinterest, however they may do so. Nor was there anything to suggest that Trzaska's statements, if examined only for their inconsistency, were inadmissible to show his unreliability as a reporter of his desire to exercise control over the guns in ways besides showing that he lied. Finally, even if it were necessary for the inconsistency to show that Trzaska's hearsay declaration was an intentional lie, there was nothing in the surrounding circumstances that eliminated that possibility, and, indeed, much that supported it.

Despite all this, one could hardly fault the court for offering evidentiary reasons to exclude the proof. Rather than explain particular limits on impeachment by deterrence analysis, the Supreme Court has said that whether a witness is *speaking* untruthfully is an especially important component of assuring fact-finding accuracy when justifying limits on the use of illegally obtained impeachment.[114] According to the court's reasoning, the fact that the illegally obtained evidence allowed a substantial possibility that Trzaska spoke truthfully showed that his impeachment was unwarranted. Nevertheless, by focusing only on whether Trzaska lied, the court unwittingly demonstrated how far the Supreme Court's focus on whether a witness has

[114] For example, the *James* Court considered the lesser possibility that defense witnesses would lie, James v. Illinois, 493 U.S. 307, 314 (1990), but did not consider how their honestly mistaken testimony (immune from rebuttal with illegally obtained evidence) might impede accurate fact finding far more significantly than defendants' obviously self-serving lies.

spoken the truth deviates from normal evidentiary impeachment processes concerned with enabling juries to find the truth.

The *Trzaska II* court excluded the evidence because it did not sufficiently contradict Trzaska's stated attitude toward the garage guns *at the moment he expressed it to his son*.[115] It thought that, even considering the illegally obtained evidence, there was a substantial possibility that he had reported a sincerely felt intention to abandon the garage guns and be done with all guns.[116] That Trzaska may have subsequently *changed* his attitude toward the guns between the time he spoke and the time he was found with them in his garage undermined the court's confidence that he spoke insincerely and therefore justified prohibiting his impeachment.

From the perspective of fact-finding accuracy, however, the singular focus on whether Trzaska expressed a sincerely felt (but perhaps fleeting) desire to abandon the guns when he spoke to his son reflects a stunning reversal of priorities. The analysis has it exactly backwards; what matters in the case is Trzaska's intent *at the time the guns were found in the garage*. Indeed, by preventing the prosecution from using the illegally seized evidence to show that Trzaska *had* changed his mind, as well as to cast doubt on his previously claimed intent, the court refused to allow the prosecution to use the evidence to contradict *the very inferences upon whose relevance Trzaska's hearsay declaration depended*.

Trzaska's intent toward the guns when he spoke to his son was relevant only if one inferred from it subsequent action bearing on his intent to control the guns when they were found in the garage, such as surrendering them to his son, or continuity in his attitude toward the guns between the time when he spoke to his son and when the guns were found. Any evidence that contradicted the inference that Trzaska had acted on his intent to be through with guns by relinquishing them to his son, or that he still felt as he said he did about them, contradicted the inferences required to make his hearsay declaration relevant to his possession of the guns when they were found in the garage. Therefore, from the perspective of *finding* the truth, what mattered was not just the possibility that Trzaska had truthfully

115 *See Trzaska II*, 111 F.3d at 1025.

116 *See id.*

described a momentary attitude toward the guns a year before they were found in his garage, but whether Trzaska's hearsay declaration accurately described an attitude that he *still* held at the time when he was charged with their possession.

From a truth-*finding* perspective, the lapse of time between Trzaska's statements had the exact opposite effect than that suggested by the court. If anything, the passage of time increased the likelihood that Trzaska's earlier-described intent was not an accurate depiction of his attitude when he was charged. What mattered was the proximity in time of physical control over the guns whose possession Trzaska denied, the admitted addiction to guns, and the possession of other guns, not the length of time between those events and his statement to his son. That those events were simultaneous and current, while the statement to his son was a year old, made the inference from the fresh evidence that much more probative for rebuttal. It disproved the continuity in Trzaska's attitude by showing his intent to control the guns *at the relevant time*—when charged with their possession—rather than his attitude at a remote time whose relevance depended upon its continuance.

The exclusive focus on whether Trzaska spoke truthfully discounted the impeachment value of the evidence showing that he had been unable to act upon his expressed intent to part with the guns or to maintain his resolve to avoid them. It led the court to consider Trzaska's statement *only* as an assertion about his state of mind at the time he spoke, rather than for its relevant inference as evidence about his state of mind when the guns were discovered. The trial court, recognizing that Trzaska's statement obviously was offered to show that "he was *no longer* involved with guns" and so "not illegally in possession of the firearms as charged," allowed the prosecution to use the illegally obtained evidence to challenge the credibility of the statement as proof of Trzaska's state of mind at the relevant time.[117]

In contrast, the appellate court focused on the credibility of Trzaska's statement as proof of what it literally described, not its credibility as proof of the inferences that made it relevant.[118] The court immunized Trzaska's hearsay declaration from

[117] United States v. Trzaska (*Trzaska I*), 885 F. Supp. 46, 47 (E.D.N.Y. 1995), *rev'd*, 111 F.3d 1019 (2d Cir. 1997).

[118] *See Trzaska II*, 111 F.3d at 1025.

contradiction because the illegally obtained evidence, although rebutting the declaration's only probative value in the case, potentially did so without necessarily showing the declaration to be false. Arguably, this narrow reading was required to salvage deterrence by assuring that the prosecution did not use the evidence to establish guilt beyond "neutralizing" Trzaska's statement or attacking his (as opposed to his evidence's or another witness's) credibility. But whatever reason there might be for allowing false inferences from Trzaska's (possibly) true words to pass without rebuttal could have nothing to do with accurate fact finding.

The analysis shows how the extent of constitutional deterrence beyond exclusion in the prosecution's case-in-chief has become dependent upon manipulation of the ambiguous concept of truth seeking endorsed by the Court. Exclusion of the illegally obtained evidence to impeach Trzaska's hearsay declaration required progressive narrowing of the impeachment purposes for which it could be used that had no basis in evidentiary law. It also required the court to parse the statement closely to distinguish between using the illegally obtained evidence to show Trzaska's statement false (allowed) or unreliable evidence of the point for which it was offered (not allowed). Even then, the substantial overlap between the remaining permissible and impermissible impeachment uses potentially allowed admission of the evidence pursuant to ineffective, if not incoherent, limiting instructions or exclusion of what, despite all the limitations imposed, was still highly probative impeachment.

Nor was *Trzaska* at all unique in this regard. Virtually all post-*James* cases supporting exclusion rely, to some extent, on similar evidentiary distortions to limit factual inferences from illegally obtained impeachment and manipulate the result to appear consistent with truth seeking. After all, the lower courts are required to play with the cards that the Supreme Court dealt.

For example, in *People v. Trujillo*, a prosecution for failing to appear, the court disallowed impeachment use of a defendant's suppressed admission that he was fleeing police because he understood that there was a warrant out for his arrest.[119] The prosecution offered his statement after his wife testified that

[119] People v. Trujillo, 49 P.3d 316, 318 (Colo. 2002).

Trujillo, although accustomed to telling her of his next court date for entry onto a calendar she kept for him, either did not tell her anything about the date he subsequently missed or told her the date that she recorded incorrectly.[120] In addition, Trujillo's wife and mother testified about his poor memory and learning disorder making it difficult for him to keep track of appointments himself.[121] The court disallowed the impeachment, relying on *James*'s holding that extending the exception to witnesses other than the defendant would "undermine the deterrent effect" of the exclusionary rule and not "promote the truth-seeking function of the court."[122] Nevertheless, as in *Trzaska*, the former rationale was completely lost in the attempt to rationalize the latter.

The *Trujillo* court spent most of the opinion arguing that the impeachment exception forbade using Trujillo's statements to impeach his wife and mother because it does not allow using a defendant's statements as substantive evidence.[123] If not used for their truth, it argued, a defendant's prior statements are relevant only to impeach by inconsistent statement; they show, at most, that he has contradicted himself, not that the facts asserted in his statements are true. Consequently, they are admissible only if the defendant testifies. Meanwhile, unless used as proof of facts they assert, a defendant's statements have no impeaching effect at all on the testimony of other defense witnesses. Denied substantive use, the defendant's statements are not admissible to impeach those witnesses by contradiction.[124] According to the court, the Supreme Court prohibits all substantive use of defendant's suppressed statements, not just their use as affirmative evidence of guilt.[125] Consequently, "impeachment" has a special meaning for purposes of the exception that, while allowing the prosecutor to use a defendant's statements to show inconsistency with his testimony, does not allow him to use the

120 *Id.*

121 *Id.*

122 *Id.* at 324 (citing James v. Illinois, 493 U.S. 307, 313–14 (1990)).

123 *See id.* at 319–26.

124 *Id.* at 325. ("Logic tells us that only the speaker of the statement may be impeached in this way, that is, by her own prior inconsistent statements. Hence, if the defendant does not testify, then she cannot be impeached by her own earlier inconsistent statement.").

125 *See id.* at 320 n.3 (citing Harris v. New York, 401 U.S. 222 (1971)).

statements as impeachment-by-contradiction evidence of facts contradicting the testimony of other witnesses.[126] This erroneous reading of the Court's impeachment exception jurisprudence seems even to have been enshrined in Colorado law where unlawfully obtained statements are used as examples of statements limited to nonhearsay use.[127] However, it is without support in the Supreme Court's cases that, while enjoining courts to limit illegally obtained evidence to impeachment uses, routinely allow contradicting evidence and therefore support no arbitrary limitation on statement evidence in this regard.

More critically, the court rested exclusion of Trujillo's statements on this flimsiest of evidentiary premises to combat what amounted to a major assault on *James*. The prosecution in *Trujillo* advanced the novel claim that the prohibition of defense witness impeachment applied only to evidence that was the product of Fourth Amendment violations (as in *James*), not Fifth Amendment violations (as in *Trujillo*).[128] But rather than respond that there was no precedent at all distinguishing the two, much less allowing impeachment of defense witnesses with *Miranda*-violative statements, or that the suggested result would undercut the deterrence *James* promised, the court spoke mostly about how substantive use to rebut the defense witnesses would fail to provide adequate truth-seeking benefits.[129]

Saddled with *James*'s reasoning, perhaps the court did its best. It suggested that admitting Trujillo's statement might prevent him from presenting his "best defense" and do "little to limit

126 *See id.* at 320.

127 *See id.*. Colorado does not seem alone in this regard. *See, e.g.*, McCracken v. State, 820 A.2d 593, 601–02 (Md. Ct. Spec. App. 2003). Maryland law, for example, prohibits the jury from using a defendant's suppressed statements elicited during cross-examination or rebuttal as substantive evidence. *See id.* Consequently, it is error to admit those statements without so instructing the jury or to allow their proof with extrinsic evidence unless the defendant is first given an opportunity to explain or deny them. *See id.*

128 For ease of reference, this Article refers only to statements taken in violation of *Miranda* and not statements obtained involuntarily when mentioning Fifth Amendment violations. The impeachment exception does not apply to the latter. The use of involuntary statements against the maker amounts to compelled self-incrimination, not just a violation of Miranda's prophylactic rule. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 397–98 (1978) (prohibiting use of involuntary statements to impeach defendant).

129 *See Trujillo*, 49 P.3d at 322–26.

perjury at trial."[130] But it was no better than the *Trzaska* court at deploying the Court's flawed reasoning that only perjured testimony (to which only defendants are likely to resort) will interfere with fact finding. Thus the *Trujillo* court could not explain why its reasons were sufficient to exclude, in the name of accurate fact finding, evidence that clearly would be admissible if obtained lawfully. For that, the court could only fall back onto the erroneous claim that using Trujillo's statements to impeach his wife "does not meet the definition of impeachment."[131]

The three concurring justices' response to the *Trujillo* majority further demonstrated the adverse consequences of truth seeking's usurpation of deterrence in analysis of the exclusionary rule's scope at trial. First, the concurring opinion correctly recognized that the impeachment exception did not separately define "impeachment" to exclude contradiction, thereby requiring the defendant's statements to be used only to show self-contradiction.[132] Absent deterrence considerations, the exception allowed their use to contradict defense witnesses.[133] Next, however, the concurrence acceded to the prosecution's request to allow impeachment of defense witnesses with the defendant's suppressed statements without referring to *James*'s discussion of deterrence at all![134] In its place, the opinion offered more evidentiary sleight of hand.

According to the concurrence, despite *James*, one could blithely allow contradiction of defense witnesses with a defendant's statements because illegally obtained evidence can be used to contradict "only if it presents a *direct* conflict or contradiction with the witness's trial testimony."[135] So, the opinion concluded, "the defendant's statement that he actually knew he was to appear in court on the day in question,"[136]

130 *Id.* at 324.

131 *Id.* at 325.

132 *Id.* at 327 (Coats, J., concurring).

133 *See id.* at 328.

134 *See id.* at 326–29.

135 *Id.* at 329 (emphasis added). The court cited no federal case for this proposition nor did it attempt to square the result with the Court's allowance of impeachment of testimony elicited on cross-examination that was reasonably suggested by the direct, a rule which puts the directness of the contradiction into the prosecutor's hands.

136 *Id.*

although otherwise admissible to impeach his wife and mother, failed the *direct* contradiction test because it "in no way conflicted with or made any less true or accurate his mother's testimony concerning his history of poor memory or his wife's testimony about her usual practice of recording his court dates, which was not done in this case."[137] Exclusion of the evidence to impeach defense witnesses was therefore entirely dependent upon a decision about how directly the suppressed proof contradicted those witnesses.

The opinion then asserted, without explanation, that the requirement of a direct contradiction would mean "impeachment of another witness with the defendant's excluded custodial statements should rarely become an issue unless the testimony involves contradictory representations of the defendant himself."[138] As in *Trzaska*, however, the "directness" of the contradiction reflected nothing more than a hunch about the suppressed proof's ability to show that the witnesses spoke falsely (perhaps intentionally so) rather than provided testimony that, in the absence of the suppressed proof, supported a false conclusion. By attempting to focus exclusively on the former, the opinion similarly insulated the very inference that made the testimony of Trujillo's witnesses relevant—he was unaware of the specific court date for which he failed to appear—from suppressed evidence that directly contradicted the inference, if not the testimony itself.

The opinion also showed that "directness," as in *Trzaska I* and *II*, was a matter of degree in the eye of the beholder. Surely Trujillo's admittedly accurate memory of his scheduled hearing date cast doubt upon whether he had failed to follow his practice of informing his wife of the date or whether she had not recorded it correctly; it even cast doubt on his mother's testimony that he had a poor memory and was unable to keep track of his appointments.[139] In fact, it was entirely plausible that the indirectness of the contradiction was a consequence of the witnesses' (or counsel's) understanding about what they could

137 *Id.*

138 *Id.*

139 Moreover, if impeachment of defense witnesses were allowed to promote truth *finding*, it obviously should not matter whether they spoke falsely or whether the defendant used their evidence to support a false inference.

testify to without opening the door to the suppressed evidence rather than an indicium of the testimony's veracity.

Attaching the fate of exclusion to truth seeking could be expected to create no more effective a limit for impeachment of defense witnesses than it had for defendants. There was no reason to think that a direct contradiction requirement would effectively eliminate impeachment of defense witnesses, but not defendants. Truth seeking would demand admission of the suppressed evidence subject to instruction that it be used only to impeach the credibility of the defense witnesses and not as affirmative evidence of guilt, just as it did when defendants were impeached.

In all the *sturm und drang* about how inapt evidentiary notions of impeachment and truth seeking might determine allowable impeachment of other defense witnesses, the *Trujillo* court lost sight of the basic deterrence rationale for *James*. Consequently, it missed the central point that whatever effect *James* might have on prosecutorial behavior would dissipate if the court extended the exception to impeachment of nontestifying defendants' exculpatory words or conduct. It recognized that most courts have extended the exception to allow impeachment of defendants' hearsay declarations and statements made to experts who rely upon them in forming their opinions.[140] Moreover, like many such courts, the *Trujillo* majority characterized these extensions as "narrow" exceptions to the "rule" preventing use of illegally obtained evidence if the defendant does not testify.[141] But the narrowness of these exceptions to the rule of exclusion is as problematic as the chimerical view that invocation of evidentiary concepts rooted in fact-finding accuracy will costlessly create the required deterrence of constitutional violations.

Although the *Trujillo* court was "not called upon to address either of these circumstances here,"[142] it was not at all clear why that was so. Perhaps the prosecutor had not urged the point, but if Trujillo's failure to report his scheduled court date came in the context of an agreement with his wife that he report all such appointments, it was hardly evident that it was *not* hearsay

140 *See Trujillo*, 49 P.3d at 325.

141 *See id.*

142 *Id.*

inviting *his* impeachment. As this Part shows, once the credibility of a nontestifying defendant's statement is implicated, all that prevents its contradiction with illegally obtained evidence is the patently false, and thus completely manipulable, equation between the statement's potential impact on fact-finding accuracy and the sincerity with which it was possibly made. That makes *James*'s quest for additional deterrence depend entirely upon whether a meaningful limit on the use of excluded evidence subsists in the idea that prosecutors can impeach nontestifying defendants' exculpatory words and conduct only when they implicate their "credibility." It is to that question that the Article now turns.

IV
DISTORTING EVIDENCE LAW TO JUSTIFY THE IMPEACHMENT OF NONTESTIFYING CRIMINAL DEFENDANTS

The case for extending the impeachment exception to nontestifying defendants' words and conduct follows logically from the doctrine making defendants' "credibility" the gravaman of the exception in the service of truth seeking. First, a defendant's credibility is no less relevant when he offers his hearsay declaration than when he testifies.[143] Similarly, a defendant's credibility is no less relevant when the probative value of exculpatory testimony offered by a defense witness depends upon the truthfulness of a defendant's statement, even if that statement is not used in a fashion that qualifies as a hearsay use.[144] Second, as far as truth seeking justifies the impeachment exception, the doctrine should allow impeachment of a nontestifying defendant's statements whenever his credibility may affect their probative value.

In that respect, the defendant's out-of-court statement is indistinguishable from testimony.[145] So far, no court has rejected

143 *See* cases cited *supra* note 31.

144 *See* cases cited *supra* note 32.

145 One might construe the "credibility" requirement for impeachment with illegally obtained evidence as concerned with whether verdicts are informed by perjury in its technical sense of lying under oath and therefore find that out of court statements not made under oath are immune from impeachment. That there is no indication in the cases that this argument has ever been made, much less accepted, is further evidence that the exception is understood to pursue truth telling as a means to truth finding, rather than for its own sake.

the truth-seeking argument for allowing impeachment of defendant's hearsay statements pursuant to FRE 806 (and also impeachment of statements made to experts upon whose truth the experts relied in forming a conclusion about the defendant's culpability), as long as the statements are admitted subject to a "defendant's credibility" limiting instruction of some kind.[146] The only case to reject the prosecution's attempt to impeach a defendant's hearsay declaration remains *Trzaska II*, which disallowed the impeachment after assuming no per se bar against impeachment of defendants' hearsay declarations, thus disallowing it for reasons apart from whether the defendant's statement was offered as hearsay or as live testimony.[147]

From a deterrence perspective, the move from impeaching defendants' testimony to impeaching nontestifying defendants' out-of-court statements appears quite different. Any evidentiary categorization used to define how or when illegally obtained evidence can be used at trial will create a boundary between exclusion and admission that is arbitrary, at least at the edges, from the perspective of deterrence. Only an extraordinary fortuity would cause the boundary between permitted and prohibited evidentiary uses of illegally obtained proof to map exactly onto the exigencies and incentives of criminal investigation. So as a means of assuring that, as *James* requires, there be *some* truth seeking and *some* deterrence beyond that engendered by the case-in-chief prohibition, an easily administered rule allowing illegally obtained evidence to impeach only a testifying defendant is perfectly plausible. Moreover, if the exception is truly intended to prevent a defendant from taking advantage of the exclusionary rule to offer "*perjurious testimony* in reliance on the Government's disability to challenge his credibility,"[148] the objection does not extend to false out-of-court statements that are neither testimony (because not made in court) nor perjurious (because not made under oath).

Nonetheless, the lure of truth seeking is strong, considering that the doctrine encourages the lower courts to seek an optimal

146 *See* cases cited *supra* notes 31–32.

147 *See* United States v. Trzaska (*Trzaska II*), 111 F.3d 1019, 1024–25 (2d Cir. 1997).

148 Walder v. United States, 347 U.S. 62, 65 (1954) (emphasis added).

point at which they can promote both fact-finding accuracy and deterrence without expense to the other. Consider, for example, the fate of the dissent in *Wilkes v. United States*, in which Judge Farrell disagreed with the court's allowing impeachment of a defense psychiatrist with a defendant's suppressed statements.[149] Of all the opinions on the subject, Judge Farrell's came closest to arguing that, simply for deterrence reasons, *James* should be read categorically to prohibit using illegally obtained evidence if the defendant does not testify.[150] He reasoned that the truth-seeking benefit of allowing the impeachment in *Wilkes* would be no greater than that declined by the *James* majority and therefore could not be distinguished on that basis.[151]

In response, the *Wilkes* majority labeled such an approach "wooden," saying that reading *James* to place the categorical prohibition of defense witness impeachment ahead of its balancing approach was to elevate form over substance and thereby forego the further truth-seeking benefits that accrue when courts do not treat defense witnesses "as a homogenous group."[152] Properly viewed, *James* allows impeaching the defense psychiatrist with illegally obtained evidence contradicting what the defendant told him because truth seeking and deterrence may be simultaneously achieved. As the *Wilkes* majority put it:

> The exception enables defendants to testify truthfully and avoid admission of the suppressed evidence, provided they do not open the door by contradicting the suppressed evidence. Hence the impeachment exception, properly applied, accommodates competing societal and individual interests.[153]

According to the court's reasoning, the impeachment exception applies to defendant's statements because it does not compromise deterrence. The threat of impeachment deters only untruthful testimony, and therefore any diminished deterrence is justified by truth-seeking benefits. Since no required deterrence of unlawful conduct is diminished, the exception "accommodates" both goals. Meanwhile, although *James*

149 Wilkes v. United States, 631 A.2d 880, 891 (D.C. 1993) (Farrell, J., dissenting).

150 *See id.* at 891–92.

151 *Id.* at 893 n.2.

152 *Id.* at 887 (majority opinion).

153 *Id.* at 888.

seemingly foreclosed extending that argument to defense witnesses because untrammeled impeachment *would* unacceptably reduce deterrence, it nonetheless minimized, if not denied, the truth-seeking cost of prohibiting their impeachment.[154] Unsurprisingly, therefore, courts applying *James* seized on its Panglossian claim that "rebuttal of a defense witness 'would not further . . . truth-seeking'" rather than relying on its deterrence prong to justify the inevitable compromise of truth-seeking that occurs when evidence is excluded only because it was obtained illegally.[155]

That truth seeking's support for prohibiting defense witness impeachment is more than a harmless pretense was manifest when prosecutors sought to extend the exception to allow impeachment of nontestifying defendants. Shortly after *James*, the court in *State v. Brooks* declined to allow impeachment of a nontestifying defendant's denial of ownership of a bag of cocaine with his suppressed confession of ownership.[156] It said that the exculpatory statement, like the defendant's hair color in *James*, was "a directly observed event . . . which . . . is sought to be contradicted by an illegally obtained . . . statement," and so "no principled distinction can be drawn between *James* and this case."[157]

Nonetheless, since *Brooks* relied on *James*'s truth-seeking prong, it was easy to show the opinion manifestly wrong as applied to defendants' hearsay declarations. As subsequent courts were quick to point out, the argument that truth seeking does not require extending the exception to impeach presumptively truthful defense witnesses does not apply where the probative force of the observed event depends upon the

154 The Court asserts that defense witnesses whose testimony is immune from potential impeachment will nonetheless testify truthfully because they (unlike defendants) are discouraged from testifying falsely by the prospect of perjury charges. *See* James v. Illinois, 493 U.S. 307, 314 (1990). The Court also asserts that allowing the impeachment of defense witnesses will not deter only untruthful testimony because defendants, uncertain whether defense witnesses will confine their testimony to avoid opening the door to illegally obtained proof, will forego their probative exculpatory evidence. *Id.*

155 State v. Brooks, No. 92-1982-CR-FT, 1992 WL 380886, at *2 (Wis. Ct. App. Dec. 23, 1992) (alteration in original).

156 *Id.*

157 *Id.*

veracity of the defendant.[158] Nothing prevents a defense witness who truthfully reports what a defendant says from introducing a false statement on which the jury may rely. The defense witness's susceptibility to a potential perjury charge is no protection from the defendant's mendacity. And the defendant's false statement as reported by his witness may undermine factual accuracy as significantly as the defendant's false testimony. So if a "principled distinction" failed to exist between impeaching nontestifying defendants' *statements* and events such as those in *James*, it would have to be because the need for deterrence was indistinguishable, not because there was no potential difference in their impact on truth seeking as understood by *James*.

The possibility that deterrence might justify similar treatment of these "observed events" received short shrift. Instead, courts assumed that if impeachment of defendants' *testimony* generates truth-seeking benefits without exacting unacceptable deterrence costs, the impeachment of defendants' *hearsay statements* should not be any different.[159] Similarly, courts reasoned that impeachment of defense experts' opinions about defendants' culpability based on the credibility of defendants' statements, would also exact no additional deterrence cost while preventing the defendant from speaking falsely to the experts.[160] One court put it in three rather simple propositions: truth-seeking is advanced,[161] by preventing the defendant from lying,[162] while deterrence does not suffer, because the defendant can always avoid the illegally obtained evidence by speaking truthfully.[163]

158 The prosecution in *Brooks* did not argue that the defendant was a hearsay declarant, although he clearly was. *See id.* Instead, it sought to distinguish *James* because the defense testimony it sought to impeach "deal[t] with 'the very statement of the defendant which had been suppressed.'" *Id.* at *1.

159 *See* cases cited *supra* note 31.

160 *See* cases cited *supra* note 32.

161 Wilkes v. United States, 631 A.2d 880, 889 (D.C. 1993) ("We do not think the truth-seeking function of a trial would be served, even marginally, if the medical experts on either side of the case were required to render opinions on complicated issues of mental disability while ignorant of facts essential to a valid diagnosis.").

162 *Id.* at 890 ("We do not think that such a defendant should be allowed to lie to the psychiatrist and get away with it when there is evidence tending to show that he lied and that the psychiatrist's diagnosis was based on that lie.").

163 *Id.* ("A defendant may still avoid admission of the suppressed evidence if he or she does not open the door by telling something to a psychiatrist that is contradicted by that evidence.").

But *no* court stopped to consider what interpreting *James* to allow all this evidence would mean for its attempt to preserve some exclusion beyond the prosecution's case-in-chief. Lost in the discussion was what *James* would exclude if it permitted impeachment of all of the defendant's out of court statements implicating his credibility. Rather than analysis, courts offered only blithe assertions that impeachment of nontestifying defendants would amount to an unusual circumstance and narrow exception to *James*'s prohibition.[164] Analysis and subsequent experience, however, show otherwise.

As a rule, defense witnesses' exculpatory testimony will incorporate defendant hearsay or otherwise implicate defendants' veracity. Cases where defense witnesses' testimony will not implicate defendants' credibility will constitute the exceptions. Consequently, admissibility of illegally obtained evidence to impeach nontestifying defendants will routinely depend only upon the same manipulation of truth seeking as governs when courts concede that a defendant's credibility is implicated, as discussed in the previous part. But for narrowly focusing on truth *speaking*, in ways not required by the Court's ambiguous conception of truth seeking and foreign to evidence law, instances of exclusion will be rare and unpredictable exceptions rather than the rule. The effect of extending the exception to nontestifying defendants is effectively to use *James*'s truth-seeking rationale to vitiate its deterrence component.

The "hearsay" test for impeachment of defendants actually eliminates very little exculpatory evidence. Virtually any exculpatory evidence will involve proof of a defendant's words and conduct since his behavior is the subject of the trial. Under the FRE's definition of hearsay, the defendant's conduct, *whether verbal or not*, is potentially hearsay if it is intended as an assertion.[165] If verbal or nonverbal conduct is intended to communicate a fact whose existence the proponent wants the

164 *See* cases cited *supra* notes 31–32.

165 *See* FED. R. EVID. 801(a) ("A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."); FED. R. EVID. 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.").

jury to infer from the conduct, it is hearsay and therefore subject to impeachment.

Consider the facts in *Trujillo*. Any conduct exhibited by the defendant asserting his belief that he was not due in the relevant court on the relevant day would be as much hearsay as his saying that he was unaware of the appointment. To show his belief that there was no such appointment, the defendant relied on his wife's testimony that he had not reported that appointment to her.[166] A court would thus have to decide whether, in the circumstances, his nonreport was intended to communicate that he had no appointment. Although courts would typically presume a nonreport alone to be nonassertive, they would also clearly find failure to make a report *in response to an inquiry* to be assertive and hence hearsay.[167] Trujillo's wife did not testify that his nonreport came in response to a specific request that she made to Trujillo to report any scheduled appearances, but she did testify to an established practice that required Trujillo to report and she to record his court dates.[168] The practice amounted to a standing instruction to report all court dates without which the nonreport was simply not probative of Trujillo's belief that he had no appointment, making a strong case for Trujillo's understanding his nonreport to communicate that belief to his wife. Coupled with the suppressed evidence that he *was* aware of the appointment he failed to report to his wife, circumstances easily qualify Trujillo's silence as an intended assertion of his belief that he had no subsequent court date, justifying introduction of his illegally obtained admission.[169]

In addition, further analysis of the facts shows that the evidence suggesting that Trujillo was unaware of the appointment consisted of more than his mere nonreport. Trujillo's wife not only testified that he had not told her of the relevant date; she also stated that he told her of an appointment in a different court on the same day.[170] In a context in which he

166 People v. Trujillo, 49 P.3d 316, 318 (Colo. 2002).

167 *See* MUELLER & KIRKPATRICK, *supra* note 76, § 8.10.

168 *Trujillo*, 49 P.3d at 318.

169 A host of additional factors such as the regularity and importance of the practice and whether there had been recent reminders or discussion of it could affect the court's decision about whether his failing to tell her about the appointment was intended to assert its nonexistence.

170 *Trujillo*, 49 P.3d at 318.

reported another court date, his failure to report the omitted date was that much more likely intended to assert its nonexistence. But it was hardly necessary to focus on the nonreport. Trujillo's report of the *other* appointment was clearly hearsay to show that he believed that he had a *different* appointment that he mistakenly confused with the relevant one, inviting impeachment with his statement showing knowledge of the latter engagement.

Moreover, even if Trujillo had merely said nothing and one was uncertain whether his nonreport was intended as an assertion, it can still qualify as hearsay subjecting him to impeachment. The assertion-based definition of hearsay adopted by FRE 801(a) is not adopted everywhere. Some jurisdictions continue to use the common law's "declarant-centered" definition of hearsay which does not require that the declarant's conduct be intended to assert the fact it is offered to prove.[171] It is enough if the conduct's relevance depends upon the declarant's belief in the matter it is being offered to prove.[172] The idea is very simple.

The "assertion-based" definition of hearsay excludes from its ambit nonassertive conduct and assertive conduct offered for reasons other than its asserted inference on the theory that, if offered to prove a fact that the declarant was not intending to assert, the risk of insincerity is substantially reduced.[173] But, as proponents of the "declarant-centered" definition are quick to point out, the risk of insincerity, even if reduced for conduct that *appears* nonassertive, is hardly eliminated.[174] Conduct that appears nonassertive on its face may nonetheless have been intended as an assertion by the declarant. Consequently, the inexact application of the "intent to assert" test will undoubtedly allow some intended assertions with a high risk of insincerity.[175]

171 *See* RONALD J. ALLEN ET AL., EVIDENCE: TEXT, PROBLEMS, AND CASES 451 (4th ed. 2006).

172 *See id.*; *see, e.g.*, TEX. R. EVID. 801(c).

173 *See* FED. R. EVID. 801(a) Advisory Committee's Note.

174 *See, e.g.*, ALLEN ET AL., *supra* note 171, at 445–47 (noting the impossibility of eliminating the sincerity risk because intent to assert test must include the declarant's unstated beliefs).

175 *Id.* at 436 (describing that the intent to assert test "inevitably entails the risk that the wrong decision will be made . . . because the actor has cleverly disguised an assertion").

Furthermore, as proponents of the common law test are also quick to point out, the assertion-based definition of hearsay concentrates only on the reduced sincerity risk, ignoring the narration, memory, and perception risks affecting nonassertive conduct as well as intended assertions.[176] Under the declarant-centered definition of hearsay, Trujillo's nonreport of his appointment is hearsay regardless of whether he intended to communicate anything to his wife by not reporting it. It is enough that the relevance of the nonreport to prove that he did not know of the court date clearly depends upon his belief that he had no such appointment.

For whatever reason, the prosecution in *Trujillo* did not argue that the illegally obtained evidence was admissible to impeach Trujillo because he was a hearsay declarant. Instead, they made another argument that the court rejected because it conceded that Trujillo's wife was the sole object of the State's impeachment efforts.[177] But that concession was surely unnecessary. Had the court focused on Trujillo's impeachment as a hearsay declarant, perhaps it would have realized how far allowing impeachment of defendants' hearsay declarations would go toward undermining *James*. Even Trujillo's mere silence would surely be hearsay under a declarant-centered definition and possibly be hearsay under an assertion-centered definition.

Meanwhile, although the hearsay characterization of Trujillo's silence under the assertion-centered view might be problematic, it still presented no obstacle to his impeachment. First, the broader, declarant-centered definition would encompass occasions on which nontestifying defendants' conduct implicated their credibility. The assertion-based definition cannot capture all instances in which a defendant engages in conduct with intent to mislead and overlooks the other hearsay risks besides

[176] *Id.* at 435 (observing that the advisory committee inexplicably and without support asserts that the hearsay dangers associated with the testimonial capacities of perception, memory, and narration are "'minimal in the absence of an intent to assert'" (quoting FED. R. EVID. 801(a) Advisory Committee's Note)); *see* Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 972–73 (1974). Tribe argues that the hearsay dangers associated with nonassertive conduct counsel, at most, creating a hearsay exception admitting it. *See id.* If such conduct were admitted pursuant to a hearsay exception, it could be impeached pursuant to FRE 806.

[177] *See* People v. Trujillo, 49 P.3d 316, 318 (Colo. 2002).

sincerity. Therefore, *neither* truth speaking *nor* truth finding supports applying the narrower hearsay definition, even if adopted by local hearsay law.[178]

Second, admissibility of illegal contradicting proof as a matter of local evidence law does *not* depend upon designation of the defendant's out-of-court statement as hearsay under those rules. Illegal contradicting proof is admissible rebuttal evidence regardless of whether it impeaches the defendant's credibility. The admissibility of Trujillo's confession to contradict evidence of his conduct showing him unaware of the court date, for example, did not depend upon that conduct's classification as hearsay. The statement rebutted the inference of Trujillo's ignorance, whether or not local hearsay law conceived his conduct showing that ignorance as hearsay. Since it was admissible under local evidence law *regardless of whether the jurisdiction used an assertion-based definition*, there was nothing to stop its admission subject to the usual instruction that it be used only to impeach Trujillo and not as affirmative proof of guilt.

Indeed, only admission would insure that suppression had not enabled the defendant to "lie and get away with it,"[179] as repeatedly evidenced by cases allowing evidence contradicting defendants' statements to experts. In these cases, courts allow prosecutors to use illegally obtained evidence to contradict defendants' out of court statements irrespective of whether they are admitted as hearsay at all and regardless of the hearsay

178 Reasons besides reliability may support the narrower definition. *See* ALLEN ET AL., *supra* note 171, at 435–36 (explaining that a variety of necessity arguments may support the narrower view). But even if adopting the narrower definition illustrates a jurisdiction's belief that the evidence it exempts from hearsay characterization is reliable enough to be admitted, that belief cannot support imposing the narrower definition under the impeachment exception. The jurisdiction premises the belief that admitting such evidence promotes truth seeking on the assumption that, where it does not, contradictory evidence will rebut it. Truth seeking cannot support adopting the narrower definition where the consequence is to disable the prosecution from rebutting false evidence whose admission the definition allows.

179 *See* Wilkes v. United States, 631 A.2d 880, 890 (D.C. 1993) ("We do not think that such a defendant should be allowed to lie to the psychiatrist and get away with it when there is evidence tending to show that he lied *and that the psychiatrist's diagnosis was based on that lie*.").

definition employed.[180] Courts deciding those cases agree that the hearsay classification is not determinative of nontestifying defendants' impeachment.[181] Instead, that the probity of the defense witness's testimony is dependent upon the credibility of

[180] *See* cases cited *supra* note 32. In those cases, the statements may have been admitted under FRE 803(4) (the hearsay exception for statements made for purposes of medical diagnosis), entitling the jury to consider them for their truth. *See* FED. R. EVID. 803(4). They also may have been admitted under FRE 703 (allowing experts to base inferences and opinions on inadmissible evidence) subject to a limiting instruction requiring the jury to use them only to assess the basis of the expert's opinion. *See* FED. R. EVID. 703. In the latter case, the defendant is not a hearsay declarant. But the courts did not rely on that distinction to determine admissibly, properly recognizing that the circumstances making the defendant a hearsay declarant do not exhaust the situations in which his credibility is an issue justifying impeachment. The defendant's credibility is equally important whether the jury relies upon his statement for its truth or credits an expert's conclusion because it is informed by the defendant's statement. To do the latter requires the jury to find that the expert is not just informed, but informed *accurately* by the defendant's statement. Effectively, then, the jury need not directly rely on the truth of the defendant's statement to make his credibility an issue; it relies indirectly on his credibility when the expert offers an opinion presupposing the truth of the defendant's statement.

The illegally obtained evidence contradicting the defendant's statement undermines reliance on its truth whether the jury's reliance is direct (e.g., he committed the crime during a blackout because he said he did) or indirect (e.g., he committed the crime during a blackout because the expert said he did, a conclusion he partially supported by crediting the defendant's statement that he committed the crime during a blackout). Courts have disagreed about whether contradicting the defendant's statement to his psychiatrist impeaches the defense expert as well as the defendant. Nonetheless, only the appropriate limiting instruction is at stake; courts have unanimously agreed that the evidence is admissible to impeach nontestifying defendants' statements to their experts regardless of whether they are admitted as hearsay. *Compare Wilkes*, 631 A.2d at 884, 890–91 (defendant's illegal statements showing memory of crime admissible to impeach defense psychiatrist's testimony that defendant suffered a blackout; statements subject to limiting instruction telling jury to use the proof only when considering defendant's insanity defense and not when deciding whether the government proved the elements of the crime), *with* State v. DeGraw, 470 S.E.2d 215, 222 (W. Va. 1996) (defendant's illegally obtained statements showing memory of crime admissible to impeach defendant's claim to have suffered a blackout; statements subject to limiting instruction preventing the jury from considering them to establish the truth of statements so as not "to impeach a defense witness's testimony, but to impeach the contradictory statements the defendant made to that witness"). The *DeGraw* court's attempt to confine the effect of the proof to the defendant's impeachment fails for two reasons. First, it treats the defendant's illegal statements as if they were only inconsistent statements inadmissible for their truth, thereby confusing their (prohibited) affirmative and (permissible) substantive uses. Second, jurors can hardly be expected to follow a limiting instruction telling them to use the statements (considered as substantive evidence) to rebut the testimony of the defendant but not other witnesses when, as is frequently the case, their testimony is offered to establish the same point.

[181] *See* cases cited *supra* note 32.

a defendant's (possibly fabricated or otherwise false) statements determines admission. The circumstances under which this is true are simply not limited to occasions in which the defendant's statements are admitted as hearsay, much less whether they are admitted as hearsay under any particular definition.

Even if courts were to use only the "hearsay-declarant" test to limit impeachment of nontestifying defendants, the test immediately stumbles upon the distinction between defendants' "statements" implicating their credibility, and conduct, which does not. Both hearsay definitions encompass as "statements" any conduct, including nonverbal conduct, which a defendant may have engaged in with an eye toward misleading observers about his responsibility for the criminal conduct. In the present context, when a court decides whether the defendant's conduct was so intended, it does so *with the benefit of illegally obtained evidence contradicting the exculpatory inference the defendant is drawing from his conduct*. Under that circumstance, it is a foregone conclusion that the defendant may have engaged in the conduct to disguise his involvement in the crime. The consequences are manifest. All that can potentially prevent admission of the illegally obtained evidence is an ad hoc judgment about whether, *despite questioning the defendant's credibility*, the contradicting proof mostly shows him to be insincere or the innocent bearer of false or misleading evidence. This is a judgment whose relation to truth telling, much less truth finding, is tenuous at best.

The problem is endemic because little or no exculpatory conduct of defendants will be immune from impeachment because it is free from the possibility that the defendant engaged in that conduct to cover up his crime. One might think such a circumstance exists when a defense witness offers the defendant an alibi contradicted by illegally obtained evidence.[182] But even then, one would have to examine the circumstances of the alibi testimony carefully to see whether it did not encompass exculpatory evidence manufactured by the defendant.

[182] *See, e.g.*, State v. Green, 500 S.E.2d 452, 464 (N.C. Ct. App. 1998) (Horton, J., dissenting) (asserting that illegally obtained statements were improperly used to impeach alibi witnesses, but not considering whether nature of the reported alibi rendered defendant a hearsay declarant); *see also* Jackson v. United States, 589 A.2d 1270, 1271 (D.C. 1991); *cf.* People v. Hernandez, No. B170634, 2004 WL 2428700, at *12–13 (Cal. Ct. App. Nov. 1, 2004).

The facts of *James* are particularly telling. In *James*, the defendant offered the testimony of a witness describing James's appearance at the time of the crime as different from that of the shooter described by seven eyewitnesses to the murder.[183] Illegally obtained evidence showed that James had dramatically changed his hairstyle the morning after the shooting from that matching the eyewitnesses' description.[184] Under the circumstances, it was silly to imagine that James had suddenly been seized with the need to make a fashion statement and his makeover was unrelated to a desire to disguise the possibility that he was the gunman. If so motivated, changing his appearance implicated his credibility no less than an equally exculpatory description of his appearance at the time of the crime. Once allowing impeachment of nontestifying defendants' hearsay declarations, disallowing James's impeachment made as much sense as impeaching defendants' exculpatory claims made to their psychiatrists, but forbidding impeachment of their malingering conduct in the psychiatrists' presence designed to support those claims.

Even testimony about defendants' mere physical presence at a certain location can trigger hearsay categorization and clearly implicate defendants' credibility. Consider *Appling v. State*, in which the defendant was charged with possession of stolen property.[185] The defendant offered his girlfriend's testimony that a friend, Haas, had borrowed defendant's truck and returned "with the bed of the truck full of liquor cases."[186] When he saw the liquor, defendant asked Haas, "'What is this?' Haas replied that his girlfriend, whose parents owned several liquor stores, gave it to him."[187] The defendant argued that Haas's statement was nonhearsay proof admissible for its effect on him to show

183 James v. Illinois, 493 U.S. 307, 310 (1990).

184 *See id.* at 309. James was arrested after the crime at his mother's hair salon, where he appeared with short, black hair. *Id.* Witnesses to the crime testified that he wore long reddish-hair while committing the crime. *Id.* at 310. Although James's witness testified that James wore short, black hair on the night of the crime, James admitted, in his illegally obtained postarrest statement, to having worn long, reddish hair on the night of the crime and to having gone to his mother's beauty shop afterwards to change his appearance. *See id.* at 309–10.

185 Appling v. State, 904 S.W.2d 912, 914–15 (Tex. App. 1995).

186 *Id.* at 916.

187 *Id.*

that he was unaware that the liquor was stolen property.[188] But the court allowed Appling's impeachment, finding that his question, "What is this?" was a hearsay statement effectively denying knowledge of the liquor's origins.[189] To impeach his denial, it admitted suppressed statements in which Appling had variously claimed (1) that the liquor was his, obtained for a party he was giving, although he had no receipt for it, and (2) that although the liquor did not belong to him, he took it when he found it abandoned in the grass on the side of the road while stopping to urinate.[190]

Although the court relied on Appling's question to trigger his impeachment, Haas's answer, admitted as nonhearsay proof for its effect on Appling, was equally deserving of hearsay classification, implicating Appling's credibility. A doctrine that allowed Appling's impeachment only because he inquired, "What is this?" but otherwise ignored his role in eliciting and adopting Haas' false exculpatory statement would be absurd.[191] Appling's witness need not have volunteered that Appling inquired about the liquor; it was enough for her to testify that Haas, in Appling's presence, explained how he obtained it. Denying Appling's impeachment because Haas's statement was offered only for its effect on Appling, however, would overlook that Haas was an accomplice who, with Appling's cooperation, likely staged the exculpatory statement in the presence of Appling's girlfriend so she would not object to their having the liquor at her house. Even if he were not part of the charade from the beginning, and only played along with Haas by failing to dispute Haas's account of the liquor's origins, Appling's credibility was no less implicated when he cooperated in the deception by adopting Haas's explanation than it was by his seemingly innocent question.

The hearsay-declarant test for impeaching nontestifying defendants fared no better at establishing a categorical boundary when defendants' assertive verbal statements were purportedly

188 *See id.*

189 *See id.* at 916–17.

190 *Id.* at 915–16.

191 Moreover, some courts might not find that question hearsay at all. *See* MUELLER & KIRKPATRICK, *supra* note 76, § 8.4, at 702 & n.5 (noting cases holding that questions are nonassertive and arguing that questions should be interpreted as hearsay).

admitted as legally operative "verbal acts" rather than for their truth. Admission of defendants' statements in those circumstances would not trigger impeachment under FRE 806 because their relevance does not depend upon the truth of any matter being asserted by the defendant. Since the relevance of "verbal acts" depends solely on whether they are uttered, they implicate only the reporting witness's, and not the defendant's, credibility. *Trzaska*, however, illustrates well how the line between verbal act and hearsay declaration is easily obliterated when the issue concerns the relevance of a nontestifying defendant's statement to his culpability.

Recall that the *Trzaska II* court assumed that Trzaska was a hearsay declarant who could possibly be impeached with illegally obtained evidence because, inter alia, it sought to avoid deciding whether his statement, offered without qualification and admitted without objection, should be considered for all (including hearsay) purposes for which it was relevant or only for the (nonhearsay) purpose for which the proponent intended.[192] Avoiding that question presupposed that if Trzaska's statement *had* been offered only as a verbal act, he could not be impeached. Hoping to avoid admission of the illegally obtained evidence, defense counsel argued that he intended the statement only as a verbal act by which Trzaska transferred title of the guns to his son and that he used the statement consistently with its admission only as a verbal act.[193] In summation, defense counsel noted that Trzaska's instructions to his son to pick up the guns from Trzaska's friend were given while Trzaska said that he was through with guns and did not want them anymore.[194] Uttering the instructions coupled with the disclaimer of interest, he contended, sufficed to transfer title to the guns to Trzaska's son irrespective of the truth of Trzaska's asserted disinterest in them.[195] But analysis of the statement's bearing on Trzaska's culpability shows the futility of attempting to separate hearsay from nonhearsay inferences to allow impeachment only if the statement's relevance implicates his credibility.

192 *See* United States v. Trzaska (*Trzaska II*), 111 F.3d 1019, 1026 (2d Cir. 1997).

193 *See id.*

194 United States v. Trzaska (*Trzaska I*), 885 F. Supp. 46, 47 (E.D.N.Y. 1995), *rev'd*, 111 F.3d 1019 (2d Cir. 1997).

195 *Trzaska II*, 111 F.3d at 1026.

To begin with, the proposition that Trzaska's words constituted only a verbal act transferring title to the guns was problematic at best. For that to be true, Trzaska's mere uttering of the words would have to establish the donative intent and delivery required to make a completed gift.[196] The statement, "they're yours" (to which defense counsel argued Trzaska's words amounted), while pointing to an object not easily capable of manual transfer, has been held a nonhearsay verbal act that transfers title.[197] Here, since the guns were in another's custody, courts may not require Trzaska physically to hand them over to make a completed gift, and might hold instead that the instructions to pick them up would satisfy the delivery requirement.[198] Alternatively, one commentator has termed the delivery requirement "a fiction that is roughly equivalent to intent and may be viewed as one way of proving that the donor wanted to transfer ownership of his property."[199] In effect, "courts will sustain a gift of chattels on some theory, so long as they are convinced that the parties intended that result and gave some objective manifestation of that intent."[200] The instruction to retrieve the guns in which Trzaska disclaimed an interest may satisfy this relaxed view of the delivery requirement by "objectively manifesting" Trzaska's intent to part with the guns.

Viewing Trzaska's statement as satisfying the delivery requirement, however, does not mean that it functions *only* as a verbal act. However one conceives the delivery requirement,

196 The gift of a chattel requires donative intent, delivery, and acceptance. WALTER B. RAUSHENBUSH, THE LAW OF PERSONAL PROPERTY § 7.1, at 77–78 (3d ed. 1975). Acceptance is presumed where the gift is beneficial to the donee. *Id.* § 7.14, at 127–28. Here, the guns benefited Kevin financially and by potentially eliminating his father's liability for their possession, and there was no suggestion that Kevin expressly refused them. Therefore, whether there was a completed gift would depend upon satisfying the intent and delivery requirements.

197 *See, e.g.*, Hanson v. Johnson, 201 N.W. 322, 322–23 (Minn. 1924) (holding that tenant's pointing to a double crib of corn while saying to his landlord "this belongs to you" was a verbal act transferring title to the corn from the tenant to the landlord).

198 RAUSHENBUSH, *supra* note 196, § 7.4, at 87 (noting that physical delivery is not required where goods are in the custody of a third person); *id.* § 7.5, at 92–93 (stating that constructive delivery, the surrendering of power and control to a donee by means other than physical delivery, satisfies the delivery requirement where actual delivery is inconvenient).

199 JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 153 (3d ed. 1989).

200 *Id.* at 154–55 (footnote omitted).

whether Trzaska actually had the requisite donative intent is still relevant to the transfer of title. Even if conceived as an objective manifestation of his intent, his spoken words are also evidence of his subjective state of mind, which helps determine whether a gift has been made.[201] Indeed, since the words were necessary to show his subjective intent to part with the guns, evidence tending to show that Trzaska did not actually intend to transfer them should be admissible. As evidence of his subjective intent to part with title, the claimed desire to be through with the guns is hearsay impeachable by any evidence showing that he actually harbored a contrary intent, such as his

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[201] To this extent, the law of gifts differs from the law of contracts where the objective manifestation of intent often controls over the subjective intent of the parties. In contract:

> Intent to contract is determined objectively; the manifestation of a party's intention rather than his actual, real or secret intent is controlling. . . . In many cases . . . it will be sufficient to charge that if a party said specified words or did a particular act he is bound, without discussion of intent. When that is not possible, the jury should be instructed that . . . [a] person's secret intent has no bearing; only the intent indicated by his words and acts may be considered.

2 COMM. ON PATTERN JURY INSTRUCTIONS, ASS'N OF SUPREME COURT JUSTICES, NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL § 4:1, at 870 (1968) (internal citations omitted). In the law of gifts: "A valid gift requires a showing of intent by the gift-giver to make a gift . . . . Intent to make a gift means a *present desire* on the part of the owner of property to transfer ownership to another." 2 COMM. ON PATTERN JURY INSTRUCTIONS, ASS'N OF SUPREME COURT JUSTICES, NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL § 7:65, at 1356 (2d ed. 2008) (emphasis added). An earlier version of this instruction required a putative donor to "manifest" an intention to make a gift, but nonetheless also described the requisite intention as a matter of the donor's "present desire." 2 COMM. ON PATTERN JURY INSTRUCTIONS, ASS'N OF SUPREME COURT JUSTICES, NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL § 7:65, at 1225 (1968). The current instruction, which substitutes a "showing" for a "manifestation" of the putative donor's donative intent, makes clear that the earlier requirement was intended to be an evidentiary, not a substantive, requirement for a gift since "the law does not assume that a gift was made or intended." 2 COMM. ON PATTERN JURY INSTRUCTIONS, ASS'N OF SUPREME COURT JUSTICES, NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL § 7:65, at 1356 (2d ed. 2008). Thus, the person claiming to be the object of a gift must prove that the putative donor subjectively intended to make a gift, usually, but not necessarily, by evidence that objectively manifested donative intent.

The objectivist view of contract law protects the reasonable expectations of a contractual partner over the unknown idiosyncrasies of the other contracting partner. *See, e.g.*, *id.* § 4:1, at 651–52 (noting that objectivist interpretation of business contracts protects "the reasonable expectation and purpose of the ordinary business person"). Donees, however, are the objects of gratuitous transfers, and thus do not receive equivalent protection from the idiosyncrasies of donors.

continuing possession of and obsession with guns. Furthermore, given the obvious overlap between viewing the words as an objective manifestation of intent and as evidence of actual intent, it is impossible to imagine the fact finder considering only whether he said them to satisfy the delivery requirement, and not whether he meant them to satisfy the donative intent requirement.

More critically, treating the statement as a verbal act would be wrong even if other proof of Trzaska's subjective attitude rendered the statement unnecessary for that purpose. Prohibiting the prosecution's evidence because a limiting instruction would prevent the jury from considering the statement's hearsay aspect (bearing on intent) while relying on its nonhearsay aspect (bearing on delivery) would be disingenuous because *possession*, not ownership, was its critical concern. The issue for the jury was not whether Trzaska made an enforceable gift of the guns, but rather whether he possessed them when found in his garage. Whether Trzaska had legal title to the guns, although "relevant to prove possession," was only a subsidiary question while possession was the ultimate issue.[202]

Possession requires "the power and intention to exercise control over the firearm."[203] Despite whether Trzaska transferred title to his son by virtue of his earlier statement, he was guilty of the crime if he intended to exercise control over the guns when police found them in his garage. Indeed, transfer of ownership one year before the charged crime was relevant if, and only if, one inferred Trzaska's intention regarding the guns at the time of the crime from the fact that he had previously given them away. Even assuming that he had conveyed title, the jury, to evaluate that inference, would have to ask about the depth of his desire and commitment to be through with the guns, and whether he changed his mind about them. After all, the very point of Trzaska's transferring ownership may have been to facilitate their continued possession by inducing his son to retrieve and store them, allowing Trzaska easier access and providing him with a cover story.

Additionally, a shallow, momentary desire to surrender title to the guns, however effective for that purpose, hardly bespoke

202 *See* 2 SAND ET AL., *supra* note 94, § 35.07 (Instructions 35–49).

203 *Id.*

continuing disinterest once they were again within his reach. So it was not possible to imagine that the jury could evaluate the significance of Trzaska's statements on the issue of possession without considering them as evidence of how he really thought about them—his subjective desire to be done with them—regardless of whatever legal effect merely uttering the words may have had. Treating Trzaska as a hearsay declarant, despite counsel's self-imposed limits on use of his proof, was entirely appropriate, since what his words asserted about his state of mind regarding the guns was far more important than the legal effect they had on passage of title. Trzaska could have been in possession of the guns even if title had passed to his son, and not in possession even if title remained in him. So it made no sense to think that the words could be used only as a verbal act and treated merely as proof of what Trzaska did with the guns, but not what he really thought about them.

The inability of the hearsay-declarant test to provide a meaningful boundary to the impeachment of nontestifying defendants with illegally obtained evidence is a consequence of applying it in a context for which it is neither designed nor suited. Evidence suppressed by the exclusionary rule on the prosecution's case-in-chief consists of proof that is substantive rebuttal, routinely admissible regardless of whether it also impeaches a witness's credibility. The illegally obtained evidence in *Trzaska*, for example, was admissible to rebut any inferences of nonpossession from Trzaska's proof regardless of whether he was a hearsay declarant. In contrast, evidence for which admission depends upon FRE 806's permission to impeach hearsay declarants bears no inference on a substantively relevant matter; if it did bear a substantively relevant inference, it would be admissible for that reason without reference to whether it impeached anyone, much less whether that person was a hearsay declarant or a testifying witness.

With credibility-only evidence, however, the impeachment exception is rarely, if ever concerned.[204] Indeed, in the rare instance where it was, the Court held that illegally obtained

[204] Such evidence includes general credibility evidence such as proof of bias, incapacity, criminal conviction, or act of truthfulness. General credibility evidence suggests why the witness should be doubted, but proves no fact showing the unreliability of any specific portion of the witness's statement.

general credibility proof was not probative enough to justify admission under the exception.[205] But even without that decision, it is apparent that virtually all suppressed evidence potentially admissible under the impeachment exception is the product of an unlawful search or interrogation and, but for being illegally obtained, is admissible substantive evidence of guilt.

Consequently, applying the hearsay-declarant test to defense evidence entails excluding suppressed proof that rebuts exculpatory evidence of defendants' behavior. To do so, courts must draw a distinction for which there is no occasion in evidence law between contradicting the *evidence* and impeaching the *person* whose words or conduct constitutes the evidence. When FRE 806 asks whether a person is a hearsay declarant for purposes of impeachment, the inquiry asks whether evidence bearing *only* on that person's credibility and *not* on substantive issues—i.e., general credibility proof—merits admission.

Meanwhile, any substantive evidence rebutting inferences from defense proof is admissible without regard to whether it also potentially shows statements by a witness or hearsay declarant to be false. There is simply no occasion for asking how the evidence may show the statement false as opposed to otherwise rebutting the very inferences making it relevant. There is no precedent in evidence law for deciding whether a person is a hearsay declarant when admission of substantively relevant evidence contradicting inferences from that person's conduct hangs in the balance. The hearsay-declarant test for credibility-only proof is hardly designed or suited for this context, much less when the person is a criminal defendant asking the fact finder to draw exculpatory inferences from his own conduct. Courts must assess the defendant's intention to assert the exculpatory inferences shown false by the suppressed proof against the backdrop of his being the beneficiary of the inferences. As analysis of the cases suggests, the combination of proof contradicting the evidence and the defendant's obvious

[205] *See, e.g.*, Loper v. Beto, 405 U.S. 473, 482 n.11 (1972) (distinguishing illegally obtained evidence "rebutting a specific false statement" from evidence "blackening [the witness's] character and thus damaging his general credibility in the eyes of the jury" and holding that only the former should be permitted under the impeachment exception); *see also* Mary Jo White, Comment, *The Impeachment Exception to the Constitutional Exclusionary Rules*, 73 COLUM. L. REV. 1476, 1479–80, 1496 (1973) ("[T]he Supreme Court [has] made it quite clear that specific credibility decisions such as *Walder* and *Harris* are irrelevant to general credibility problems.").

interest assures that circumstances sufficient to demonstrate that he is a hearsay declarant are routinely present.

Rather than provide a categorical boundary to the use of illegally obtained evidence, the hearsay-declarant test in this context replicates the uncertainty engendered by the ambiguity between truth telling and truth finding. It entails similar ad hoc judgments about the *extent* to which the defendant's credibility is implicated by contradicted, exculpatory proof of his conduct. The test also rests on the same distinction between the veracity of the evidence and the inferences that it supports, which is unknown to evidence law and unable to segregate credibility inferences from substantive rebuttal. Trying to parse these overlapping inferences is no more tenable a means of isolating hearsay statements than it is a way of assuring truth seeking.

When the court in *Havens* allowed impeachment of testimony elicited in cross-examination reasonably suggested by the direct, it acknowledged that even the narrower goal of truth telling could not be squared with restricting impeachment to matters literally asserted on direct examination without considering how they were intended to be understood, and would be understood, by a reasonable fact finder. As the analysis has shown, the exculpatory conduct of a criminal defendant will always have a potential hearsay aspect, and to ignore that aspect by immunizing the conduct from contradicting evidence similarly fails to promote truth *telling* as much as it fails to promote truth *finding*. Indeed, to ignore it is simply to put a premium on the skill of the defendant, his counsel, or his witness in disguising the hearsay aspects of the defendant's conduct.

For example, Appling's counsel may disguise Appling's involvement in his accomplice's exculpatory statement by not eliciting Appling's words, "What's this?," that the court found justified admission of the illegally obtained evidence.[206] By the same token, Trzaska's counsel may disguise Trzaska's involvement in distancing himself from the guns by eliciting from Trzaska's son that the guns were his, not Trzaska's, also without reporting any of Trzaska's words. Impeachment under the hearsay-declarant test would then depend simply upon the

[206] Alternatively, Appling himself may have staged his accomplice's statement in his girlfriend's presence without uttering the fateful words, or Trzaska may have waited until retrieving the guns and just handed them to his son.

extent to which the court allowed the prosecution to probe on cross-examination for the defendant's underlying words or conduct that the illegally obtained evidence undoubtedly impeaches. Nothing from an evidentiary perspective limits this inquiry; there is no truth-seeking reason to prevent the jury from learning of Appling's involvement in his own exculpation. Nor is there any truth-seeking reason preventing the jury from learning that the son based his claim of exclusive possession on Trzaska's assertion a year earlier.

Under the impeachment exception, the only possible limitation on the scope of the witness's cross-examination would be the "reasonably suggested by the direct rule," applied now to questions about the defendant's conduct reported by the witness. But there is surely no limitation emerging from that rule either; exploration of *any* exculpatory inference from the defendant's conduct is fair game, including whether its probative force depends upon defendant's credibility. Once the prosecution elicits the details surrounding the defendant's conduct, the propriety of his impeachment as a hearsay declarant is clear.

Undoubtedly, some courts will restrict efforts to elicit the details of defendant's conduct implicated by the witness's testimony, perhaps conceiving that they are preventing the prosecution from "opening its own door" to admission of the illegally obtained evidence. But doing so would interject exclusionary-rule policy in a fashion that, while laudable, is in no way required by any evidentiary test incorporated by the impeachment exception, much less one related to truth seeking. Assuming defendants' words or conduct that appear at first blush not to be hearsay are, in fact, not hearsay, then preventing further inquiry that will belie the assumption is justified, if at all, by deterrence considerations, not accurate application of the hearsay-declarant test.

Accurate application of the hearsay-declarant test inevitably eviscerates *James* by routinely allowing illegally obtained evidence. At best, therefore, the claim that the test limits, and hence justifies, impeachment of nontestifying defendants with illegally obtained evidence is based on a highly truncated, distorted evidentiary inquiry into whether the defendant is a hearsay declarant. Such an inquiry can be no more reliable a means of predicting the admission of illegally obtained evidence than trying to decide upon the extent to which illegally obtained

evidence shows defense evidence, inferences from that evidence, or the source of that evidence to be false. The answer is undoubtedly that the evidence potentially shows them all false, and the court's ultimate choice depends only on its willingness selectively to ignore the various possibilities.

V

SIMULTANEOUSLY PURSUING TRUTH SEEKING AND DETERRENCE DESTROYS BOTH

Whether courts distort evidentiary principles to restrict or expand impeachment of nontestifying defendants, disguising deterrence needs with ill-fitting evidentiary cloaks is more than a harmless pretense. Its immediate consequence has been to facilitate impeachment of nontestifying defendants and thereby use what *James said* effectively to overrule what *James did*. The truth-seeking argument for extending the exception is impeccable, while the truth-seeking argument for restricting it is demonstrably wrong, surviving only because of the confusion engendered by the ambiguous truth-seeking notion that the Court employs. The latter argument, of course, is equally wrong when courts use it to deny that allowing impeachment of nontestifying defendants effectively overrules *James*. Nonetheless, courts *restricting* the exception's reach are required *to make* erroneous truth-seeking claims while applying them to the concrete facts of those cases. In contrast, courts *extending* the exception's reach are required merely *to refer* to those arguments as not permitting illegally obtained evidence in imagined future scenarios devoid of concrete facts. Meanwhile, the courts decide the cases before them by making unassailable arguments about how impeachment serves truth seeking on the actual facts of the case.

Wilkes illustrates how these contrasting uses of the Court's infirm truth-seeking arguments inevitably tip the scale in favor of extending the exception. The court decided that *James* admits a defendant's illegal statements contradicting those made to his psychiatrist.[207] It began with an obviously correct truth-seeking argument requiring mention only because of the way that the impeachment exception cases have mangled the concept:

[207] Wilkes v. United States, 631 A.2d 880, 881 (D.C. 1993).

> We do not think the truth-seeking function of a trial would be served, even marginally, if the medical experts on either side of the case were required to render opinions on complicated issues of mental disability while ignorant of facts essential to a valid diagnosis.[208]

Then, to square the result with *James*, the court blithely asserted how *Wilkes* presented a unique situation because the threat of a perjury prosecution (which *James* says assures truthful testimony from defense witnesses but not defendants) would not prevent a psychiatrist from innocently relating to the fact finder "untruths told to him by his patient."[209] Required to address no concrete scenario where the exception would not apply, the *Wilkes* court failed to appreciate that the "perjury-no-deterrent" argument hardly distinguished a psychiatrist from any other witness reporting a defendant's hearsay statement. Moreover, if the court imagined the psychiatrist unique because not deterred from offering his own false opinion when relying on statements *not* received as hearsay, the claim is equally, though perhaps less obviously, false.

Wilkes held that truth seeking allowed the psychiatrist's impeachment to expose his testimony's vulnerability to the defendant's mendacity and, therefore, equally justified impeachment of other defense witnesses whose testimony was similarly vulnerable.[210] Perhaps Wilkes had fooled his psychiatrist into offering a false evaluation, but the same was perhaps true of James fooling his alibi witness into offering a false description of his appearance on the date of the crime, Trzaska fooling his son into claiming exclusive possession of the guns in his garage, Trujillo fooling his wife into testifying that he demonstrated ignorance of an appointment which he conveniently sought to avoid, and Appling fooling his girlfriend into testifying that he was legitimately notified that the liquor had been innocently obtained. From a truth-seeking perspective, there is nothing different about the vulnerability of the testimony of the expert and lay witnesses to the defendants' mendacity.

The only evidentiary difference is the *explicitness* with which an expert can base her testimony on information provided by

208 *Id.* at 889.

209 *Id.* at 889–90.

210 *See id.*

others,[211] thereby implicating defendants' credibility without necessarily triggering characterization of their statements as hearsay. However, that difference does not support ignoring the relationship between the veracity of the lay witnesses' testimony and the defendant's credibility. Instead, it supports giving the prosecution the latitude necessary to reveal the basis of the witnesses' testimony in the defendant's credibility-implicating behavior and thereby justifies the defendant's impeachment as a hearsay declarant. That process is no different from allowing the prosecution to show on cross-examination that a psychiatrist's opinion depends on defendant's statements as prelude to contradicting them although defense counsel strategically omitted mentioning the statements on direct.[212] Truth seeking does not tolerate defendants' obtaining the benefits of potential deception whether it underlies the testimony of lay or expert witnesses, a fact that would have been apparent had the *Wilkes* court actually had to decide any of the other cases.

Besides permitting impeachment of nontestifying defendants, following *James*'s lead by misrepresenting deterrence claims as promoting truth seeking renders application of that permission entirely unpredictable. Comparing Judge Farrell's dissent in *Wilkes* and the court's *Trzaska II* opinion illustrates the reason why. Judge Farrell's dissent established him as the only judge who would jettison *James*'s manipulation of contradictory truth-seeking arguments in favor of using deterrence categorically to prohibit impeachment of nontestifying defendants.[213] The approach has the virtue of establishing a per se rule excluding illegally obtained evidence in a nontrivial number of easily identifiable cases, but the putative vice of neglecting the Court's truth-seeking rationale. The majority responded by disparaging

211 Experts, unlike lay witnesses, are exempt from the requirement that their testimony be based on personal knowledge. *See* FED. R. EVID. 602.

212 *See* FED. R. EVID. 705 (stating that an expert is not required to reveal the "underlying facts or data" upon which his opinion is based to offer that opinion).

213 *Wilkes*, 631 A.2d at 891 (Farrell, J., dissenting). This description merits possible qualification because the majority allowed the evidence to impeach the defense witness along with the defendant. *See id.* at 890–91 (majority opinion). Consequently, it is theoretically possible that Judge Farrell objected only to the former when he said that the permitted evidence was "classic impeachment of a witness other than the defendant." *Id. at* 893 (Farrell, J., dissenting). But the substance of his arguments supports excluding illegally obtained evidence if the defendant does not testify regardless of whether it is used to impeach the defendant or the defendant and his witness.

a requirement that illegally obtained evidence impeach *testifying* defendants as the product of a "wooden" interpretation of *James*.[214] In contrast, a purposive reading allows courts further to "fine-tune" the scope of the exception by selectively allowing impeachment of nontestifying defendants in pursuit of the optimal mix between truth seeking and deterrence.

Accepting the challenge, the *Trzaska II* court tried to show how *James*'s truth-seeking reasoning could prohibit impeachment of a defendant's hearsay declaration.[215] Nevertheless, it succeeded only in showing how shifting focus from deterrence to truth-seeking dissolved all predictability by yielding the disparate and irreproducible results one would expect from a fatally flawed and ambiguous analysis.[216] *Trzaska II* establishes no proposition broader than its facts, while the same is true of *Wilkes* if one takes seriously its claim nonetheless to prevent impeachment of most nontestifying defendants.

The only certainties to emerge from the morass are that, although the defendant merits evidentiary impeachment in all cases, the outcome will depend upon some combination of the prosecution's sensitivity to the possibility of impeaching a nontestifying defendant, its skill in showing how the defendant's exculpatory words or conduct implicate his credibility, the court's willingness to allow the prosecution to develop any additional facts necessary to support that argument, and, ultimately, the court's manipulation of the ambiguous conception of truth-seeking enshrined in the doctrine.

The unpredictability of the outcomes undercuts *both* truth-seeking and deterrence benefits that the Court used to justify *James*. First, the evidentiary distortions that this Article shows are necessary putatively to render exclusion an ally of the truth cannot overcome the simple fact that, even if confined to truth *telling*, the truth will always support impeaching nontestifying defendants' exculpatory conduct. Second, since *James* teaches

214 *See id.* at 887 (majority opinion).

215 *See* United States v. Trzaska (*Trzaska II*), 111 F.3d 1019, 1024–25 (2d Cir. 1997).

216 For example, all in the name of truth seeking, Trzaska cannot be impeached despite fitting within FRE 806, Wilkes can be impeached despite *not* fitting within FRE 806, Appling can be impeached for the words he put in his witness's mouth, but potentially not for using his co-defendant to put equivalent words in the mouth of his witness.

that deterrence can be costless to the truth, courts are far more likely to respond to evident truth-seeking costs by admitting illegally obtained evidence than by making the hard choice that *James* portrayed as unnecessary to preserve deterrence.[217] Third, however nobly conceived in a *sub rosa* attempt to salvage *James*, occasional cases such as *Trzaska II*, which attempt to shore up deterrence by manipulating truth seeking, establish no principle. One can hardly expect competent defense counsel to rely on its holding and ignore its vivid illustration of the unpredictability of exclusion when she decides whether to offer defense evidence that may invite outcome determinative rebuttal.[218]

Absent the likelihood that defendants will risk admission of illegally obtained evidence by offering exculpatory proof, and without a discernible principle identifying occasions for

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[217] It can hardly be an accident that seventeen years after *James*, *Trzaska II* stands alone in prohibiting impeachment of a nontestifying defendant despite an express claim that his evidence implicated his credibility.

[218] Commentators cannot agree on an explanation for *Trzaska II*'s result, much less suggest circumstances under which a court would replicate it. For example, David Farnham, after observing that even a direct contradiction requirement cannot explain *Trzaska II*, writes:

> It seems that the court was looking for a way to remedy the severe prejudice to Trzaska . . . from . . . the other rifle and large quantities of ammunition—without having to establish an exception under Rule 806 to the principle established by the Supreme Court that a defendant's testimony may be impeached with illegal evidence.

David Farnham, *Impeaching the Hearsay Declarant: Rule 806 Can Be a Trap for the Unwary Lawyer*, CRIM. JUST., Winter 1998, at 4, 9. Where Farnham saw the court motivated to preserve prosecutors' ability to impeach defendants' hearsay declarations, Professor Michael Martin saw it motivated to restrict prosecutors' power in cases with "constitutional overtones." Michael Martin, *Impeachment of Hearsay Evidence*, N.Y. L.J., Aug. 8, 1997, at 3. Meanwhile, Professor Michael Graham observed:

> Having stated and embraced a liberal test for inconsistency, the court in *Trzaska* went on to conclude that the statement offered to impeach was not "inconsistent" and reversed on that basis alone, illustrating once again that a case crying out for reversal will sometimes be heard and that the application of accepted doctrine in such cases should be recognized for what it is—a hook upon which fairness rests.

2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 613.2, at 855 n.3 (6th ed. 2006). Professor Graham does not say why *Trzaska* cried out for reversal or why fairness would militate in favor of exclusion. *Trzaska II* offers defense lawyers needing to know whether witnesses' anticipated testimony will open the door to illegally obtained evidence scant comfort, especially when they consider that most other cases say fairness supports admitting *any* evidence that promotes truth seeking and potentially prevents perjury.

excluding evidence *despite* its probity, occasional exclusion of evidence impeaching nontestifying defendants cannot deter police from obtaining evidence illegally. Meanwhile, isolated courts may occasionally strike blows on behalf of deterrence. In addition, exclusion will continue to occur in the more frequent cases where defense counsel stumbles into taking the risk, and the prosecution either overlooks the possibility of impeaching the nontestifying defendant or advances the wrong argument for doing so.

These cases impose undeniable truth-seeking costs, but not in a fashion that one can expect to accomplish any offsetting deterrence benefits. An investigator conducting a cost/benefit analysis before taking an illegal step that may yield probative evidence is unlikely to refrain from taking that step because first, defense counsel may blunder into offering proof rebutted by illegally obtained evidence, and, second, one of two further things may occur: either a court incongruously finds that the otherwise admissible evidence obtained does not sufficiently contribute to the truth, or the prosecutor fails to use it despite having legal basis for doing so.[219] Therefore, courts turn *James* on its head when they interpret it to encompass impeachment of nontestifying defendants. It generates no additional deterrence compared to what exclusion on the prosecution's case-in-chief creates because the prosecution can anticipate illegally obtained evidence's utility to deter or rebut *any* exculpatory evidence of defendants' words or conduct. Meanwhile, it will occasionally engender exclusion of illegally obtained evidence impeding truth seeking for reasons that do not have any deterrent impact.

Ironically, abandoning the attempt further to fine-tune the truth-seeking/deterrence balance in favor of a categorical prohibition improves the status quo on both dimensions. Categorical prohibition assures that there will be certain deterrence beyond the prosecution's case-in-chief. By not calling the defendant, defense counsel will know that she can offer exculpatory evidence without fear of rebuttal. Meanwhile, it assures that the inevitable truth-seeking cost of exclusion will be justified by the additional deterrence that *James* sought. It

[219] Nor does it make sense to think that investigators will be deterred by the prospect of courts forgetting to give required limiting instructions and prosecutors forgetting to follow local impeachment requisites such as the "explain or deny" rule. *See, e.g.*, McCracken v. State, 820 A.2d 593, 601–02 (Md. Ct. Spec. App. 2003).

therefore avoids the combination of random truth-seeking costs and nonexistent deterrence that characterizes the status quo, a quest simultaneously to further incompatible goals that leads to the demise of both.

At the same time that categorical exclusion shows how abandoning the quest for the Holy Grail of deterrence at no truth-seeking cost can improve matters, it helps illustrate the futility of figuring the scope of the impeachment exception by balancing truth-seeking against deterrence without a firm conception of how the two factors vary independently of each other.[220] Absent that explanation, the more probative the illegally obtained evidence that is admitted, the more significantly the truth is advanced *and* deterrence diminished. Without meaningful isolation of factors *besides* exclusion's effect on the truth to influence the likelihood of prosecutorial illegality, the pursuit of those goals is a zero sum game because furthering one necessarily requires undermining the other to an equivalent extent. Consequently, any mix of truth seeking and deterrence can be seen as a "balance" because any gains achieved on one side of the scale are lost on the other.

The manipulation of truth seeking through evidentiary distortion is an obviously unsuccessful attempt to avoid this trap. Categorically prohibiting nontestifying defendants' impeachment can prevent balancing from allowing what *James said about truth seeking* entirely to eviscerate what *James did about deterrence* and thereby preserve any benefits expected from its choice of a trade-off point between never and always allowing use of illegally obtained evidence to impeach. This is no insignificant accomplishment. But beyond that, categorically distinguishing between impeachment of testifying defendants and other defense witnesses offers little assurance that the line it draws is superior to the alternatives.

An assessment of all alternatives is far beyond the scope of this Article. But it is possible briefly to consider the lessons of *James*'s interpretation for an alternative consistent with the Court's views (1) that a complete ban on illegally obtained impeachment evidence at trial imposes a fact-finding cost that deterrence does not justify, and (2) that influences on prosecutorial behavior besides those created by the scope of

[220] For further discussion, see Kainen, *supra* note 33, at 1326–27.

exclusion are too speculative to play a significant role in the analysis. That alternative is to abandon the distinction between impeachment of defendants and defense witnesses entirely in favor of flipping a coin to determine whether illegally obtained evidence can be used to impeach. It allows for selective use of impeachment evidence and does not require the court to find circumstances under which investigatory decisions are insensitive to the prospect of obtaining impeachment proof. Flipping a coin completes the process of separating admissibility prerequisites from the evidence's contribution to truth seeking. In contrast, continuing to distinguish impeachment of defendants and defense witnesses for truth-seeking reasons (however categorically and predictably), continues to fall into the trap of assuring the prosecution that it can use its illegally obtained evidence when it is most useful. Such assurance cannot but help to undermine the deterrence benefits that the Court hopes will continue to flow from selective exclusion.

In contrast, determining admissibility by the coin flip assures deterrence that is more effective by detaching exclusion decisions from the evidence's truth-seeking consequences. In that respect, it promises to generate some deterrence benefit from the inevitable truth-seeking costs of exclusion. Moreover, the coin flip assures that there will be occasions when the prosecution can make no use of its illegally obtained evidence. Under the approach distinguishing impeachment of defendants and defense witnesses, the prosecution always receives some trial benefit from illegally obtained evidence despite its exclusion from the case-in-chief. Even if the defendant does not testify, the evidence is useful to deter his exculpatory testimony. Under the coin flip, the prospect of any gain at all is only fifty percent, even if the potential payoff (impeaching/deterring defendants *and* their witnesses) is higher. Under the current approach distinguishing impeachment of defendants and defense witnesses, the prospect of gain is one hundred percent, even if the potential payoff (impeaching/deterring only defendants) is lower. Meanwhile, however, *James* defends the lower payoff by arguing that the return on impeaching/deterring defendants is much higher than for impeaching/deterring defense witnesses.

Assuming, as this Article has, that the Court is correct to associate a higher payoff with impeaching the defendant,[221] its argument proves too much. The fact that there is *always* a benefit to the prosecution coupled with the claim that the benefit applies when the evidence is most important to the prosecution proves the superiority of the coin flip. If the prosecution *always* benefits to a degree proportional to the importance of its illegally obtained impeachment evidence, we can expect that the prospective advantage is more likely to make the marginal difference when it considers obtaining the evidence than the coin flip, which excludes the proof in half the cases *despite* its truth-seeking consequence. The categorical exclusion of all impeachment proof unless the defendant testifies, therefore, while superior to current law allowing impeachment of nontestifying defendants, still suffers from the Court's use of truth seeking to justify results that only deterrence can defend.

Comparing the categorical rule with the coin flip shows that the contribution of *any* exclusion under *James* to the additional deterrence that the Court purportedly desires is minimal at best, considering *James*'s claim to reward the prosecution for obtaining illegally the most important impeachment evidence. Although the coin flip (unlike *James*) sometimes allows impeachment of *testifying* defendants, it uses a fair coin as opposed to one that, by allowing the most probative impeachment evidence, amounts to a two-headed variety made especially for the prosecution. It is no answer to justify that result by citing truth-seeking benefits if one understands the Court's claimed pursuit of additional deterrence as more than disingenuous apology. A necessary first step is to rescue the deterrence *James* promised from being lost in its truth-seeking rationale. Nothing of consequence can be accomplished without admitting the inevitable truth-seeking costs of exclusion. However, recognizing those costs is only a prelude to imposing them, even if selectively, in ways truly intended to induce compliance.

221 In fact, there are many reasons to think that this is not true. *See* Kainen, *supra* note 33, at 1313–15.

CONCLUSION

For over half a century, the Court has attempted to sculpt an impeachment exception to the exclusionary rule that creates an optimal mix of truth seeking and deterrence. While a metaphoric balance between these goals accurately depicts their mutual exclusivity, the Court has also used that notion to suggest that proper balancing of these factors reveals ways to enhance one goal without diminishing the other. Rather than accomplish that result, the Court's claim to advance deterrence without cost has succeeded only in distorting the notion of impeachment falsely to assert that truth-seeking considerations support evidentiary limits on impeachment with illegally obtained evidence that are inapplicable to lawful proof.

The most recent manifestation of this distortion is several courts' misuse of evidence law to deny that applying the impeachment exception to nontestifying defendants' hearsay declarations routinely allows illegally obtained evidence and thereby destroys whatever remaining deterrence otherwise flows from prohibiting impeachment of defense witnesses. Some courts avoid that conclusion by manipulating the Court's ambiguous concept of truth seeking to exclude impeachment evidence that, although important to *finding* the truth, they find insufficiently probative of a witness's not *speaking* the truth. Such manipulation has nothing to do with truth seeking as understood by evidence law and amounts, at best, to a disguised method of preserving deterrence. Meanwhile, most courts simply use the concept of truth seeking consistently to extend the exception, exploiting its ambiguity only to deny that by doing so they have removed all deterrence. They leave it to some future court under unspecified circumstances to take responsibility for actually excluding some impeachment evidence and being the bearer of the bad news that deterrence requires imposition of truth-seeking costs.

One can hardly blame lower courts for the truth-seeking discourse that amounts to little more than a charade. They merely apply the Court's analysis when they pretend that truth seeking justifies evidentiary limits on the use of illegal impeachment proof at trial. Indeed, one cannot blame lower courts for avoiding responsibility for delivering the bad news that the Court itself shirks. Nevertheless, allocating blame is less

important than recognizing how continuing the charade has rendered counterproductive the efforts of even those courts who would use it to preserve some modicum of deterrence. When years of purportedly perfecting the balance between truth seeking and deterrence manages to produce doctrine that subverts both, it is necessary for all courts to focus reform where the error in the analysis resides—in the conception underlying the justificatory framework and not just in its specific applications.