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COMMENTS

FRUIT OF THE POISONOUS TREE: RECENT DEVELOPMENTS AS VIEWED THROUGH ITS EXCEPTIONS

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This comment analyzes recent developments of the "fruit of the poisonous tree" doctrine in relation to the fourth amendment exclusionary rule by focusing on relevant Supreme Court and leading lower court decisions. The authors examine the "fruit" doctrine chiefly through the lens of the exceptions which have developed around it. While generally it is the fruit of fourth amendment violations that is examined, some recent Supreme Court decisions based on the fifth amendment are also discussed, paricularly in relation to the "impeachment" exception. These later cases help indicate the future course of judicial interpretation of the fourth amendment.

I. INTRODUCTION

At common law the admissibility of evidence was not affected by the illegality of the means through which it was obtained. In 1914 this rule was changed when the Supreme Court in *Weeks v. United States*[1] adopted the exclusionary rule. Pursuant to this rule, evidence procured by means of an unlawful search and seizure by federal officers is not admissible against the defendant in a federal

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1. 232 U.S. 383 (1914), *overruled on other grounds,* Elkins v. United States, 364 U.S. 206 (1960).

court if timely objection is made on the basis of the fourth amendment. It took the Supreme Court forty-seven years to make this rule applicable to state criminal prosecutions, but this was accomplished in *Mapp v. Ohio*[2] by virtue of the due process clause of the fourteenth amendment. The Court has based its use of the exclusionary rule to protect a defendant's fourth amendment rights on the assumption that it would serve to deter future police misconduct and to prevent governmental participation in illegal conduct.[3]

Upon adoption of the exclusionary rule, there remained the question of whether indirect as well as direct evidence procured by exploitation of the illegality need be suppressed. This question was answered in 1920 in *Silverthorne Lumber Co. v. United States*[4] where the "fruit of the poisonous tree" doctrine was first espoused. The *Silverthorne* Court rejected the government's contention that the United States Constitution prohibits the illegal seizure of evidence but not any advantages that the government would gain over the defendant through information received as a result of the illegal act. The Court explained that it was not merely that the "evidence so acquired shall not be used before the Court but that it shall not be used at all."[5] However, the Court also stated that the facts which had been illegally obtained could have been used if knowledge of them had been gained from an independent source.[6]

This rule existed for nineteen years without a name. Then, in *Nardone v. United States*,[7] it was appropriately called "the fruit of the poisonous tree" doctrine. The *Nardone* decision not only acknowledged the "independent source" exception to the "fruit" doctrine but also established the "attenuation" exception. By this latter exception the prosecution is free to prove that the connection between the initial illegality and the derived evidence has become "so attenuated as to dissipate the taint."[8]

In the 1963 case of *Wong Sun v. United States*,[9] the Supreme Court handed down a decision that has become the landmark of the

2. 367 U.S. 643, *rehearing denied*, 368 U.S. 871 (1961).
3. Elkins v. United States, 364 U.S. 206, 217 (1960).
4. 251 U.S. 385 (1920).
5. *Id.* at 392.
6. *Id.*; *see* section II,B *infra* for an analysis of the "independent source" exception.
7. 308 U.S. 338, 341 (1939).
8. *Id.* at 341; *see* section II,A *infra* for an analysis of the "attenuation" exception.
9. 371 U.S. 471 (1963).

"fruit of the poisonous tree" doctrine. The Court adopted a standard for determining whether the proferred evidence is "fruit"; the standard is "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"[10] This was the last major Supreme Court case in this area until the 1970's.

II. EXCEPTIONS TO THE FRUIT OF THE POISONOUS TREE DOCTRINE

A. *Attenuation*

The "fruit of the poisonous tree" doctrine comes into play when evidence is obtained as a result, at least in part, of a fourth amendment primary illegality committed by the police. *Wong Sun v. United States,* still represents the most comprehensive articulation of the doctrine as well as the primary authority for the mitigating circumstances of attenuation. The Court stated that the exclusionary rule has no application when "the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'"[11]

In *Wong Sun,* A, shortly after being illegally arrested (without probable cause), informed federal agents that B possessed narcotics. When confronted by the agents, B surrendered some heroin. Additionally, B, when arrested, made statements implicating C in the sale of narcotics. C's subsequent arrest was illegal for want of probable cause, although he was properly warned of his rights. Several days after having been lawfully arraigned and released on his own recognizance, C voluntarily returned to make an inculpatory statement. The federal agents conceded at trial that they would never have found the drugs that were seized from B without the information procured from A. The Court held that the narcotics seized from B were the fruit of both the illegal arrest and the subsequent statement of A, and should not have been admitted as evidence against A. With respect to C's confession, however, the Court held that in light of the fact that C had been warned of his rights, lawfully arraigned, released on his own recognizance, and then returned voluntarily several days later to make his statement, the independent

10. *Id.* at 488, *quoting* J. MAGUIRE, EVIDENCE OF GUILT 221 (1959).
11. *Id.* at 487, *quoting* Nardone v. United States, 308 U.S. 338, 341 (1939).

activity on C's part was sufficient to attenuate any connection between his unlawful arrest and the subsequent statement.

The *Wong Sun* decision, insofar as a determination of attenuation is concerned, was reaffirmed by the Supreme Court in *Brown v. Illinois.*[12] Following his illegal arrest, the defendant was taken to a police station where, after having been given the *Miranda*[13] warnings, he made an incriminating statement concerning the murder for which he was subsequently convicted. This incriminating statement was obtained less than two hours after his arrest. A second incriminating statement was obtained about five hours after the first statement; it also was preceded by properly administered *Miranda* warnings. The state supreme court held the statements admissible on the ground that the *Miranda* warnings alone broke the causal chain so that any subsequent statement, even one induced by the continuing effects of unconstitutional custody, was admissible as long as it was voluntary and not coerced in the traditional sense.[14] The Supreme Court rejected this per se rule and reversed, holding that *Miranda* warnings do not automatically attenuate the taint of a fourth amendment violation. The Court reasoned that:

> If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest . . . the effect of the exclusionary rule would be substantially diluted . . . . [Illegal arrests] would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all" . . . .[15]

12. 422 U.S. 590 (1975). "We could hold [the defendant's] first statement admissible only if we overrule *Wong Sun.* We decline to do so." *Id.* at 604-05. The Court employed the *Wong Sun* formulation of the rule in *Brown. Id.* at 599. This would seem to dispel the question of whether the Court had intended to weaken the rule in Morales v. New York, 396 U.S. 102 (1969) (per curiam), where the Court stated that on remand the state might show that the defendant's "confrontation with the police was voluntarily undertaken," or that "the confessions were not the product of illegal detention." *Id.* at 105.

13. Miranda v. Arizona, 384 U.S. 486 (1966).

14. People v. Brown, 56 Ill. 2d 312, 307 N.E.2d 356 (1974).

15. Brown v. Illinois, 422 U.S. at 602 (footnotes omitted). *Accord,* People v. Sesslin, 68 Cal. 2d 418, 439 P.2d 321, 67 Cal. Rptr. 409 (1968). This position has support among a large number of commentators. The following are cited in Brown v. Illinois, 422 U.S. at 602 n.7: Pitler, *"The Fruit of the Poisonous Tree" Revisisted and Shepardized,* 56 CALIF. L. REV. 579, 603-04 (1968); Ruffin, *Out on a Limb on the Poisonous Tree: The Tainted Witness,* 15

In determining whether there has been attenuation under *Wong Sun*, the facts of each case must be examined.[16] Although *Miranda* warnings are to be considered in determining whether a confession has been obtained by exploitation of an illegal arrest, neither that nor any other single fact is universally dispositive.[17] The *Brown* Court mentioned that other factors[18] to be considered include the temporal proximity of the primary illegality and the alleged fruit,[19] the purposefulness and offensiveness of the primary illegality,[20] the voluntariness of any confession, the causal connection, if any, between the primary illegality and the alleged fruit,[21] and intervening

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U.C.L.A.L. REV. 32, 70 (1967); Comment, 1 FLA. ST. L. REV. 533, 539-40 (1973); Note, *Admissibility of Confessions Made Subsequent to an Illegal Arrest: Wong Sun v. United States Revisited*, 61 J. CRIM. L.C. & P.S., 207, 212 n.58 (1970); Comment, *Scope of Taint Under the Exclusionary Rule of the Fifth Amendment Privilege Against Self-Incrimination*, 114 U. PA. L. REV. 570, 574 (1966).

The Supreme Court of California has distinguished instances where the primary illegality is an illegal search and seizure as opposed to an illegal arrest, with regard to the effect that *Miranda* warnings have upon attenuating a subsequent confession. People v. Johnson, 70 Cal. 2d 541, 450 P.2d 865, 75 Cal. Rptr. 401, *cert. denied*, 395 U.S. 969 (1969). In *Johnson*, the court stated that where the instance of primary illegality is an illegal arrest, *Miranda* warnings are one factor to be considered in determining whether the confession is inadmissible as "fruit." This is in accord with the *Brown* holding. However, in *Johnson*, the primary illegality was an illegal search and seizure. The court intimated, although not clearly, that in such a case, *Miranda* warnings were per se ineffectual in attenuating a subsequent confession because the evidence obtained in an illegal search induces the confession by showing the suspect the futility of remaining silent.

Although the *Brown* case dealt with an illegal arrest, and language in the opinion referred to an "illegal arrest," a clear distinction was never made as to whether the holding applied to only instances where the primary illegality was an illegal arrest, or whether it applied to illegal search and seizures as well. The spirit of the opinion would seem to indicate that the latter is the case. Thus, the continued efficacy of the *Johnson* suggestion is questionable. On policy grounds, the desirability of a per se no-attenuation rule is also questionable. Although the taint of an illegal search and seizure may spread further than an illegal arrest, when the suspected fruit is a confession it would seem wiser to vest the attenuation question upon the facts of each case, rather than confine it by presumptions, whether rebuttable or conclusive.

16. "Application of the *Wong Sun* doctrine will generate fact-specific cases bearing distinct differences as well as similarities, and the question of attenuation inevitably is largely a matter of degree." Brown v. Illinois, 422 U.S. at 609.

17. *Id.* at 603; *see* People v. Johnson, 70 Cal. 2d 541, 450 P.2d 865, 75 Cal. Rptr. 401 (1969); State v. Newell, 462 S.W.2d 794 (Mo. 1971); Pitler, *supra* note 15, at 601-04.

18. 422 U.S. at 603-04.

19. *Contra*, United States v. Williams, 436 F.2d 1166, 1171 (9th Cir. 1970), *cert. denied*, 402 U.S. 912 (1971).

20. The Court in *Brown* found the obvious impropriety of the arrest (an investigatory arrest) and apparent bad faith of the police quite relevant in determining the question of attenuation. 422 U.S. at 605. See the concurring opinion of Powell, J., *id.* at 606-08.

21. *See* United States v. Bacall, 443 F.2d 1050 (9th Cir.), *cert. denied*, 404 U.S. 1004 (1971) (evidence obtained without substantial resort to any clue or knowledge gained from

circumstances such as release and voluntary return as in *Wong Sun*.

Beyond a statement of the attenuation rule of *Wong Sun* and a general description of the various factors to be considered in determining whether the "taint has been purged," it is difficult to discuss the attenuation doctrine since it is so dependent upon the particular facts of each case.

An interesting fact pattern where attenuation came under consideration and which further illustrates the application of the doctrine was *United States v. Williams*,[22] where the defendant was illegally arrested on a charge unrelated to the bank robbery charge for which he was tried. The police went to a neighbor's apartment to ask her to care for defendant's pets. Voluntarily, the neighbor provided information that connected defendant with the bank robbery. The police conducted a second search of the apartment which produced other evidence connecting the defendant with the robbery. It was held that the evidence was sufficiently attenuated from the illegal arrest.

In analyzing this type of case, it is important to remember that the *Wong Sun* test is not a "but for" test.[23] Rather the question is whether the evidence has been obtained by means sufficiently distinguishable to be purged of the primary taint.[24] As applied to the facts in *Williams*, it is arguable that there was sufficient attenuation because the neighbor's statement leading to the evidence of the bank robbery was not obtained by exploitation of the illegality. The police had no investigative intent when they approached her, and, furthermore her statement was completely voluntary. In this particular fact pattern, given the clear break in the causal chain of events of the investigation, the temporal proximity of the illegal arrest to the alleged fruit is not material.[25]

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the illegal seizure); United States v. Stornini, 443 F.2d 833 (1st Cir.) (no causal nexus between the illegal search and the simultaneous legal search), *cert. denied*, 404 U.S. 861 (1971).

22. 436 F.2d 1166 (9th Cir. 1970), *cert. denied*, 402 U.S. 912 (1971).

23. "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." Wong Sun v. United States, 371 U.S. at 487-88.

24. *Id.* at 488.

25. *But see* Brown v. Illinois, 422 U.S. at 599, where temporal proximity was a material factor in determining the spread of the taint. *See also* Commonwealth v. Cephas, 447 Pa. 500, 509, 291 A.2d 106, 111 (1972) ("The primary question . . . when dealing with the taint issue, as herein presented, is not whether the witness voluntarily plead guilty and testified but rather it is *why* she chose to do this."); United States *ex rel.* Pugach v. Mancusi, 310 F.

There is some authority to the effect that one aspect of the attenuation doctrine operates under distinct guidelines: Whether a tainted decision to focus an investigation on a particular suspect necessarily taints any further investigation and prosecution arising therefrom. In *United States v. Friedland,*[26] federal agents, through the use of an illegal wiretap, learned of certain criminal activities of the defendant (judge fixing and fencing), which were different from the illegality for which he was eventually prosecuted (counterfeit bond scheme). Assuming that the counterfeit securities squad was thus put on notice that the defendant was the type of person that would bear watching, the court nevertheless held that he was not immunized from "investigation of different criminal activities and from prosecution on the basis of facts about them learned in a lawful way."[27] The Court quoted with approval Judge Learned Hand's formula of the test in *United States v. Nardone:*[28]

> The question therefore comes down to this: whether a prosecution must show, not only that it has not used any information illicitly obtained, either as evidence, or as the means of procuring evidence; but that the information has not itself spurred the authorities to press an investigation which they might otherwise have dropped. We do not believe that the Supreme Court meant to involve the prosecution of crime in such a tenebrous and uncertain inquiry, or to make such a fetish of the [wiretapping] statute as so extreme an application of it would demand.[29]

Judge Friendly stated that Judge Hand's statement of the question in *Nardone* was not undermined by *Wong Sun.*[30] Although

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Supp. 691, 711 (S.D.N.Y. 1970) ("[T]he admissions were not the fruit of trespassing, but of the agents' representation that they would inform the police of information incriminating the petitioner."), *aff'd*, 441 F.2d 1073 (2d Cir.), *cert. denied*, 404 U.S. 849 (1971).

26. 441 F.2d 855 (2d Cir.), *cert. denied*, 404 U.S. 867 (1971). The *Friedland* court's misapplication of the independent source exception is discussed *infra* at text accompanying notes 41-53.

27. 441 F.2d at 859.

28. 127 F.2d 521 (2d Cir.), *cert. denied*, 316 U.S. 698 (1942).

29. *Id.* at 523, *cited in* United States v. Friedland, 441 F.2d at 859. Judge Hand's statement was also quoted with approval in United States v. Balistrieri, 403 F.2d 472, 477 (7th Cir. 1968), *vacated and remanded on other grounds*, 395 U.S. 710 (1969), in light of Alderman v. United States, 394 U.S. 165 (1969), and Giordano v. United States, 394 U.S. 310 (1969). The significance of the remand is discussed in United States v. Friedland, 441 F.2d at 860 n.7.

30. 441 F.2d at 859. "We see no basis for thinking that . . . the *Nardone* decision has been 'undermined' by any decision of the Supreme Court or this court." *Id.* Nonetheless, the

Judge Hand's formulation enunciates a situation in which attenuation must be found, in contrast to the more relative and nonconclusory nature of the *Wong Sun* formulation, both are in agreement on the point that the test for attenuation is not a "but for" test.[31] However, the Hand formulation is subject to criticism for being overly rigid and not designed to take into account the various facts of each case in determining the question of attenuation.[32] The difficulty is that the courts must balance the constitutional interest in deterring police misconduct with the societal interest in stopping crime.[33] The Court believed the deterrent effect of the exclusionary rule would not be impaired significantly enough by excluding the evidence to justify the cost to society of granting the defendants lifelong immunity from investigation and prosecution.[34]

B. *Independent Source*

As early as 1920 the Supreme Court in *Silverthorne Lumber Co. v. United States*[35] recognized the "independent source" exception. The Court later stated in *Wong Sun* the rule that the "fruit of the poisonous tree" doctrine has no application when the Government

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test announced in *Wong Sun*, which focuses on police exploitation of the illegality, does seem to significantly expand the area which can be tainted by an unlawful search and seizure. Some courts within recent years have felt it their duty to engage in what Judge Hand would have described as "tenebrous and uncertain inquiry" where constitutional rights are involved.

31. *See* United States v. Bacall, 443 F.2d 1050, 1057 (9th Cir.), *cert. denied*, 404 U.S. 1004 (1971); People v. Pettis, 12 Ill. App. 3d 123, 298 N.E.2d 372 (App. Ct. 1973).

32. If the Hand formualtion is carefully applied, it does seem to have certain elements of flexibility built in. But it is not clear where the demarcation is between evidence procured from the primary illegality and evidence ultimately obtained as a result of a "spurred investigation." Furthermore, it is not a simple matter to determine when an investigation is one that "might have been dropped." Thus, the greatest danger of the Hand formulation is in its application in a blind "if . . . then" fashion.

33. United States v. Friedland, 441 F.2d at 861. Analyzing the fruit of the poisonous tree issue in terms of deterrence theory has been advocated by Professor Robert M. Pitler. It is his belief that *Wong Sun's* formulation of the rule in terms of "purging the primary taint" obfuscates the relevant question—whether the admission of the secondary evidence will significantly encourage police misconduct in the future. Pitler, *supra* note 15, at 588-89. *See*, Note, 115 U. PA. L. REV. 1136, 1147 (1967).

34. United States v. Friedland, 441 F.2d at 861; *see* United States v. Cole, 325 F. Supp. 763 (S.D.N.Y. 1971), *aff'd*, 463 F.2d 163 (2d Cir.), *cert. denied*, 409 U.S. 942 (1972), holding that the Government's learning from electronic surveillance that an organized crime suspect habitually evaded his taxes did not taint evidence of tax violations that were committed in subsequent years, even though investigation of the suspect may have been intensified as a result of the eavesdropping.

35. 251 U.S. 385 (1920).

learns of the evidence from an "independent source."[36]

When the "independent source" is separate and distinct from the illegal source the courts have held, in a number of diverse situations in the 1970's, that the evidence need not be suppressed.[37] The rationale behind this is typified by Chief Judge Sobeloff's comments in *Sutton v. United States.*[38] "It is one thing to say that officers shall gain no advantage from violating the individual's rights: it is quite another to declare that such a violation shall put him beyond the law's reach even if his guilt can be proved by evidence that has been obtained lawfully."

The problem with the "independent source" exception arises when the illegal source and the legal source of the evidence are so comingled as to make it questionable whether the legal source is truly an "independent source."[39] There is some authority to the effect that "where the illegally obtained leads are the 'but for' cause of the investigation, the resultant evidence will be suppressed."[40]

The "but for" test in the area of "independent source" has apparently been rejected by the circuits in two cases, *United States v. Friedland*[41] and *United States v. Bacall.*[42] The question presented to the court in *Friedland* was whether evidence should be suppressed as the product of an investigation precipitated by information obtained through illegal eavesdropping. The prosecution contended that this was a case in which the "independent source" exception should apply, notwithstanding that the evidence had been the product of legal and illegal leads. The court agreed with

36. 371 U.S. at 487.

37. *E.g.*, United States v. San Martin, 469 F.2d 5 (2d Cir. 1972) (held that evidence from the subsequent surveillance of the defendant was not tainted by a prior illegal wiretap since the government had an independent source for evidence of defendant's involvement in the heroin operation); United States v. Brandon, 467 F.2d 1008 (9th Cir. 1972) (held that a preexisting report from an informant, which led to a proper search of defendant's home and the discovery of counterfeiting plates, was sufficient to purge the taint of an illegal search of defendant's automobile which led to discovery of counterfeit bills).

38. 267 F.2d 271, 272 (4th Cir. 1959).

39. There is a similar problem where courts are presented with both legal and illegal evidence to be used as probable cause for the issuance of a warrant. In this situation, the courts have not actually examined the question of whether the legal evidence is independent of the illegal evidence but have merely asked whether the legal evidence in and of itself provided probable cause sufficient for the issuance of a warrant. *See, e.g.*, United States v. Langley, 466 F.2d 27 (6th Cir. 1972); James v. United States, 418 F.2d 1150 (D.C. Cir. 1969).

40. 74 COLUM. L. REV. 88, 94 (1974).

41. 441 F.2d 855 (2d Cir. 1971).

42. 443 F.2d 1050 (9th Cir. 1971).

the prosecution's contention and held that it was unnecessary to show that the illegal information did not spur an investigation which might otherwise have been dropped.[43] Thus, the court rejected a "but for" test in the area of "independent source."

The Ninth Circuit in *Bacall* supported the Second Circuit in its apparent rejection of the "but for" test.[44] In *Bacall,* United States Customs agents illegally seized inventory (i.e. fabrics) from the defendant. The agents subsequently sent a letter to the French Customs Bureau which asked the French Bureau to investigate a matter relating to the defendant Bacall. In the course of their investigation, French agents seized certain letters and checks which implicated the defendant in certain crimes. At trial, the defendant attempted to suppress these checks and letters as "fruits" of the illegal seizure of the fabrics. The defendant argued that the American agent would not have requested the French investigation "but for" the information obtained through the seizure and subsequent inventory and that the French investigation would not have taken place "but for" the agent's request.

While assuming that the "but for" put forth by the defendant was true, the *Bacall* court held that it did not determine the issue of suppression.[45] The court then set down criteria to aid its determination of whether the evidence sought to be admitted could be purged of the primary taint. First, the evidence must "in fact" be obtained through an "independent source."[46] Second, the evidence must be obtained without resort to any clue or knowledge gained from the items unlawfully seized.[47] Third, the evidence must be discovered through "substantial" legal leads where the leads were both legal and illegal.[48] The question here is the precise role the illegal seizure "in fact" played in the subsequent discovery. Fourth, the evidence must be obtained through an investigation that was not intensified by reason of any tainted information.[49] Fifth, the evidence must not be the product of an offensive police action.[50]

43. 441 F.2d at 860.

44. 443 F.2d at 1056.

45. *Id.* The same point was made by the court in United States v. Friedland, 441 F.2d at 859-60.

46. 443 F.2d at 1056, *citing* Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).

47. 443 F.2d at 1056.*citing* Standard Oil Co. v. Iowa, 408 F.2d 1171, 1177 (8th Cir. 1969).

48. 443 F.2d at 1056, *citing* James v. United States, 418 F.2d 1150, 1152 (D.C. Cir. 1969).

49. 443 F.2d at 1057, *citing* United States v. Schipani, 414 F.2d 1262, 1266 (2d Cir. 1969).

50. 443 F.2d at 1057, *citing* Comment, *Fruit of the Poisonous Tree—A Plea for Relevant*

None of these criteria was itself deemed determinative of the issue.

The court applied the above criteria to the facts at hand and concluded that the discovery of the letters and checks was not *wholly* "independent" of the unlawful seizure. However, the evidence was obtained through substantial leads without resort to a clue or knowledge gained from the illegally seized items. Moreover, the inquiry was not intensified by reason of any tainted information nor was the initial illegality overly offensive.[51] Based on these findings, the court ruled against suppression of the evidence.[52]

The "independent source" exception was initiated only to protect the government where its source is developed through honest police efforts and not where its evidence is developed through a mixture of good and bad police work. Although the defendant should not be given life-long immunity from investigation, the police should not be able to profit from their wrongdoings. It is not a question of how "substantial" the legal leads are.[53] It is a matter of deterrence. If the police know that their initial illegality can be covered up later by legal police work, what is there to stop them from committing the initial illegality?

C. *Inevitable Discovery*

The "inevitable discovery" exception to the "fruits" doctrine is the most innovative and controversial exception. This exception is based on a showing that "the government undoubtedly would have (probably would have) (could have) (might have) lawfully discovered the "tainted" evidence"[54] by lawful means. Through this exception, the prosecutor is allowed to cure any original "taint" that might have attached to the evidence thus making it admissible in the face of the "taint."

The "inevitable discovery" exception gives rise to a two-level controversy. The first level is whether or not the inevitable discovery exception should be recognized in any form. Because the Supreme

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Criteria, 115 U. PA L. REV. 1136, 1151 (1967).

51. 443 F.2d at 1057-61.

52. *Id.* at 1061.

53. The *Bacall* court contended that the substantiality of the legal leads should be a criteria in determining independent source. 443 F.2d at 1056.

54. KAMISAR, LA FAVE, AND ISRAEL, MODERN CRIMINAL PROCEDURE 702 (4th ed. 1974). The reason for the choice of words in this definition will become evident later in the section.

Court has never issued a majority opinion dealing with this issue,[55] the lower courts are left to decide this issue in any manner they feel is appropriate.

A majority of the reported cases since 1970 have recognized the viability of the exception.[56] A problem arises when one examines the basis for these decisions. Several of the courts[57] based their acceptance of the exception on the language of the Supreme Court in *Wong Sun*.[58] The Seventh Circuit went so far as to claim that the Supreme Court itself had "added a third dimension, sometimes referred to as the *inevitability* test."[59]

It is arguable that these courts have misplaced their reliance on *Wong Sun*, in upholding this exception. The Court in *Wong Sun* appears to have emphasized positive actions as opposed to hypothetical probabilities. The Court spoke in terms of "whether . . . . the evidence . . . has been come at . . . by means sufficiently distinguishable to be purged of the primary taint,"[60] not whether the evidence "could or would have been come at." The majority of the courts[61] would have you believe that the *Wong Sun* Court meant the latter.

It is submitted that it is quite reasonable to assume that the *Wong Sun* Court would not have condoned this "liberal" interpretation of its holding. Justice White's dissent from the denial of certorari in *People v. Fitzpatrick*[62] supports this assumption. Justice

55. However, in a case wherein the majority denied certiorari, Justice White, joined by Justice Douglas, spoke to the issue in his dissent. People v. Fitzpatrick, 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793, *cert. denied*, 414 U.S. 1050 (1973).

56. *E.g.*, United States *ex rel.* Owens v. Twomey, 508 F.2d 858 (7th Cir. 1974); Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974); United States v. Falley, 489 F.2d 33 (2d Cir. 1973); United States v. Jackson, 448 F.2d 963 (9th Cir. 1971).

57. United States *ex rel.* Owens v. Twomey, 508 F.2d 858, 865 (7th Cir. 1974); United States v. Falley, 489 F.2d 33, 40-41 (2d Cir. 1973).

58. Wong Sun v. United States, 371 U.S. 471, 488 (1963).

59. United States *ex rel.* Owens v. Twomey, 508 F.2d 858, 865 (7th Cir. 1974).

60. 371 U.S. at 488.

61. United States *ex rel.* Owens v. Twomey, 508 F.2d 858, 865 (7th Cir. 1974); United States v. Falley, 489 F.2d 33, 40 (2d Cir. 1973).

62. 414 U.S. 1050 (1973). In *Fitzpatrick*, the highest court in New York applied the "inevitable discovery" rule to the facts at hand and found that

> it was entirely fortuitous that the police delayed the search of the immediate area where the defendant was discovered until they had begun questioning him and, as a result, very quickly learned where the gun was located. It is quite unreal to suggest that, but for the defendant's admission, the police would not have looked for incriminating evidence in the closet where he had been hiding. . . . Since,

White, joined by Mr. Justice Douglas, argued that it would be "a significant constitutional question whether the independent source exception to admissibility of fruits, *Wong Sun* . . . encompasses a hypothetical as well as an actual independent source."[63] The Justices did not seem to think that *Wong Sun* had decided the constitutional question of whether the "inevitable discovery" exception is viable. To condone this interpretation of *Wong Sun* would stretch too far the exceptions laid down in that case. It is one thing to have an exception based on fact, such as the independent source exception, and quite another to have it based on conjecture. A prominent New York judge rightly claimed that the acceptance of the "inevitable discovery" exception "results in a speculative theory with no discernable limits."[64] The judge further observed that "the normal course of police investigation differs greatly from one police department to another and even within departments, so theoretically at least the constitutional standard would differ from locale to locale."[65] If the question of admission of evidence is to turn on the "alleged" competence of the police department in question and their hypothetical ability to uncover the evidence *sans* illegality, is the court to first judge this degree of competence and then apply the degree to the facts at hand? Or, if the common standard of "normal use of police procedure" similar in application to the "reasonable man" standard used in negligence cases is to be applied, should a poorly operated police department be given the benefit of the standard or a highly successful police department be held back by this standard? It is submitted that when these types of guidelines are used, the police have no actual guidelines to follow in their work.[66] In the absence of guidelines, the deterrence theory that is normally

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> then, a search of the closet was inevitable regardless of the defendant's answers to questions put to him beyond its confines, it may not fairly be said that the police "exploited" the "illegality" involved in their interrogation.

32 N.Y.2d at 507, 300 N.E.2d at 142, 346 N.Y.S.2d at 797.

63. 414 U.S. at 1051.

64. People v. Fitzpatrick, 32 N.Y.2d 499, 513, 300 N.E.2d 139, 146, 346 N.Y.S.2d 793, 803 (Wachtler, J., concurring), *cert. denied*, 414 U.S. 1050 (1973).

65. *Id.* at 514, 300 N.E.2d at 146, 346 N.Y.S.2d at 803.

66. *Id.* Judge Wachtler cited other reasons for his rejection of the inevitable discovery rule: (1) the doctrine might be expanded too far; (2) the doctrine cannot be applied with any consistency on a case by case basis; and (3) "even if we could be fairly certain that a subsequent police search would turn up the evidence, we could not be certain that the search would have been conducted in a constitutional manner." *Id.* at 514, 300 N.E.2d at 146-47, 346 N.Y.S.2d at 803-04.

referred to as the basis of the exclusionary rule and the "fruits" doctrine[67] will not be served. The Fifth Circuit concurs with this opinion to the extent that: "To admit unlawfully obtained evidence on the strength of some judge's speculation that it would have been discovered legally anyway would be to cripple the exclusionary rule as a deterrent to improper police conduct."[68]

Assuming arguendo that the "inevitable discovery" rule is deemed viable, the second level of the controversy arises. The issue here is which word to use in defining "inevitable discovery": "could", "would", or "probably would." The decision of a court as to which word to use in the "inevitable discovery" test determines the degree of probability necessary to a finding that the exception is applicable in the case at hand.

The majority of the courts that have utilized the exception have tended to define the necessary probability in terms of "would."[69] The *Model Code of Pre-Arraignment Procedures,* a work published in an attempt to influence courts and legislatures, defined the same probability in terms of "probably would."[70]

As noted above, the authors are of the opinion that the "inevitable discovery" rule is not viable as being too speculative and as such should not be applied by the courts. If the rule is to be applied, the application should be in terms of the narrowest restriction which affords the least speculation. For this reason, if driven to a choice among the alternatives, "would" is the lesser of several "evils."[71] If the "probably" test were applied, rarely would any evidence derived from an illegality be excluded, and the "fruits" doctrine would lose virtually all its power as a deterrent.[72]

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67. Elkins v. United States, 364 U.S. 206, 217 (1960).

68. United States v. Castellana, 488 F.2d 65, 68 (5th Cir.), *modified,* 500 F.2d 325 (5th Cir. 1974) (en banc).

69. *E.g.,* United States *ex rel.* Owens v. Twomey, 508 F.2d 858 (7th Cir. 1974); Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974); United States v. Falley, 489 F.2d 33 (2d Cir. 1973); United States v. Jackson, 448 F.2d 963 (9th Cir. 1971).

70. MODEL PENAL CODE OF PRE-ARRAIGNMENT PROCEDURE § 290.2(3) (Official Draft No. 1, July 1972); MODEL PENAL CODE OF PRE-ARRAIGNMENT PROCEDURE § 150.4 (Tentative Draft No. 6, 1974). These sections provide that any fruits of unlawful searches and illegally obtained statements (confessions or otherwise) will be subject to suppression "unless the prosecution establishes that such evidence would probably have been discovered by law enforcement authorities irrespective of such (illegalities) and the court finds that exclusion of such evidence is not necessary to deter violations of this Code."

71. This is based on the assumption that the use of the word "would" calls for a lesser degree of speculation than the other two suggested words. Pitler, *supra* note 15, at 628.

72. The reasoning of Pitler *supra* note 15, is applicable here:

As the Supreme Court has not as yet addressed itself to the "inevitable discovery" issue,[73] it is interesting to speculate as to how the Court would decide the issue. The present Court has already evidenced a desire to restrict the exclusionary rule while expanding the exceptions to the "fruits" doctrine.[74] Using the "balancing test" espoused by this Court,[75] the Court would probably find that the added deterrent effect of letting in illegal evidence that would or could have been inevitably discovered is outweighed by the need served by the exception: the need being to recognize "potential" good police practice and not let another criminal loose on the streets (i.e. to protect society). This result would once again sacrifice an individual's rights for the so-called "good of society." It is questionable whether this should be done.

D. *Witness as Fruit*

"Witness" is not strictly speaking an exception to the "fruit of the poisonous tree" doctrine,[76] but it is an important area in which the courts have attempted to circumvent the doctrine.[77] The testimony of a witness is considered poisoned when his identity is discovered as a result of some initial illegality.

Some cases since 1970 have excluded testimony on this basis.[78]

> For the present, the exclusionary rule, designed to discourage illegal police activity, is useless if the police may unlawfully invade a man's home, illegally seize evidence and then claim "we would have obtained it anyway." The ability of police scientists, laboratory technicians, and investigators to discover, analyze, and develop substantial leads from minute materials appears to make even the most implausible discovery virtually inevitable. The exclusionary rule is designed to encourage the development of such methods, not make their theoretical availability a reason for admitting illegally-seized evidence.

Id. at 630.

73. As pointed out before in this section, some courts feel that the Supreme Court addressed this question in *Wong Sun; see* text accompanying notes 57-61, *supra.*

74. Brown v. Illinois, 422 U.S. 590 (1975); Michigan v. Tucker, 417 U.S. 433 (1974).

75. Brown v. Illinois, 422 U.S. 590, 603 (1975); Michigan v. Tucker, 417 U.S. 433, 448 (1974).

76. Unlike the other exceptions analyzed in this article (i.e., independent source, attenuation, inevitable discovery, and impeachment), the courts have never referred to it as an exception per se.

77. Michigan v. Tucker, 417 U.S. 433 (1974); United States v. Marder, 474 F.2d 1192 (5th Cir. 1973); United States v. Hoffman, 385 F.2d 501 (7th Cir. 1967); Smith v. United States, 324 F.2d 879 (D.C. Cir. 1963).

78. United States v. Barragan-Martinez, 504 F.2d 1155 (9th Cir. 1974); United States v. Guana-Sanchez, 484 F.2d 590 (7th Cir. 1973).

For example, in *United States v. Barragan-Martinez*[79] and *United States v. Guana-Sanchez*[80] the defendants were stopped by the police while operating motor vehicles. Passengers in the vehicle subsequently testified against the defendants. In each case the court ruled that the police did not have probable cause to stop the automobiles,[81] and therefore the passengers' statements incriminating the defendants must be suppressed as "fruits" of the illegality.[82] In *Guana-Sanchez* the prosecution had attempted to differentiate between those situations where the evidence derived is tangible and those where it is intangible[83] (i.e. witness' statements). Basing its ruling on *Wong Sun*,[84] the court refused to make this distinction and suppressed the passengers' statements.[85] The *Wong Sun* Court refused to distinguish between physical and verbal evidence because the policies underlying the exclusionary rule applied with equal force to both.[86] The *Barragan-Martinez* court suppressed the evidence to encourage the government "not to stop vehicles without at least a founded suspicion that the vehicle's occupants are or have been engaged in criminal conduct."[87]

In the majority of the cases reported prior to 1970, testimony derived from police misconduct has been excluded.[88] However, in

79. 504 F.2d 1155 (9th Cir. 1974).

80. 484 F.2d 590 (7th Cir. 1973).

81. Judge Kiley, who wrote the decision in *Guana-Sanchez*, wryly observed that there was no crime of "investigation" for which a person could be arrested, nor any crime in speaking Spanish or being Mexican or Puerto Rican. 484 F.2d at 592 n.3.

82. United States v. Barragan-Martinez, 504 F.2d 1155, 1157 (9th Cir. 1974); United States v. Guana-Sanchez, 484 F.2d 590, 592 (7th Cir. 1973).

83. This argument by the prosecution is supported by Judge Pell in his dissenting opinion. The Judge believes that the exclusionary rule should not be extended as to make witnesses to a crime incompetent to testify. He suggests that the rationale of the exclusionary rule will not be served to exclude this competent witness nor add to the deterrent effect. 484 F.2d at 593-94.

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

85. 484 F.2d at 592.

86. 371 U.S. at 485-86. Justice Egan of the Supreme Court of Pennsylvania went so far as to say that in some cases there is more reason for suppression based on the deterrence rationale because the testimony of the witness is more valuable to the government than is the fact that the appellant was in possession of certain tangible objects that could incriminate him. Commonwealth v. Cephas, 447 Pa. 500, 511, 291 A.2d 106, 112 (1972).

87. 504 F.2d at 1157-58.

88. *E.g.*, People v. Martin, 382 Ill. 192, 46 N.E.2d 997 (1942); *accord*, People v. Mickelson, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963); People v. Schaumloffel, 53 Cal. 2d 96, 346 P.2d 393 (1959); People v. Mills, 148 Cal. App. 2d 392, 306 P.2d 1005 (1957); Abbott v. United States, 138 A.2d 485 (D.C. Mun. Ct. App. 1958); People v. Schmoll, 383 Ill. 280, 48 N.E.2d 933 (1943).

several cases the courts have allowed its admission.[89] In one leading case, *Smith v. United States,*[90] it was quite clear that the police had exploited the initial illegality to procure the identity of the witness. Therefore, based on *Wong Sun,* the testimony should have been excluded.[91] Not wanting to exclude this testimony, the court looked to the "attenuation" doctrine as a basis for determining the effect of the exclusionary rule.[92] In this case, this "attenuation" was gleaned as a result of the witness' initial reluctance to testify.[93] This court reasoned that the witness' battle with his conscience to overcome his initial reluctance provided sufficient "attenuation." One court set down a test of "how great a part the particular manifestation of 'individual human personality' played in the ultimate receipt of the testimony in question."[94] Therefore, prior to 1970, the witness as a "fruit" exception was not a true exception but merely an aspect of the "attenuation" exception.[95]

This use of the "attenuation" exception continued in the 1970's. In 1973, the Fifth Circuit painstakingly tried to explain the use of the exception in this area.[96] In *United States v. Marder,* the identification of a key government witness was discovered by illegal search and seizure.[97] The court stated that it followed the "general rule" that if the identity of the witness and his relationship to the defendant were revealed because of an illegal search and seizure, then his testimony must be excluded.[98] The court based its conclusion upon the reasoning of Justice Holmes that:

89. United States v. Hoffman, 385 F.2d 501 (7th Cir. 1967); Smith v. United States, 324 F.2d 879 (D.C. Cir. 1963).

90. 324 F.2d 879 (D.C. Cir. 1963).

91. 371 U.S. at 485-86.

92. *See* section II,A, *supra,* for a more complete analysis of the "attenuation" doctrine.

93. In *Smith,* the witness originally refused to testify at a coroner's hearing or before a grand jury. The court used this "attenuation" exception to distinguish the case from *Wong Sun* finding that in *Wong Sun* the production of the narcotics was under the "compulsion" of the arrest whereas the witness in *Smith* made a voluntary choice after personal reflection. This attenuation exception was also utilized in United States v. Hoffman, 385 F.2d 501 (7th Cir. 1967). In *Hoffman,* the court observed that proof that the witness would have come forward by his own volition, regardless of his identification by the illegal search would be extremely relevant to a determination of "attenuation."

94. McLindon v. United States, 329 F.2d 238, 241 n.2 (D.C. Cir. 1964).

95. A true exception is one that exists on its own basis and rationale. *See,* Pitler *supra* note 15.

96. United States v. Marder, 474 F.2d 1192 (5th Cir. 1973).

97. The phone of the defendant Marder had been illegally wiretapped, and his conversation disclosed the names of the witnesses.

98. 474 F.2d at 1195, *citing* Williams v. United States, 382 F.2d 48 (5th Cir. 1967).

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court *but that it shall not be used at all.* Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.[99]

However, the court refused to "adopt a per se rule which would *ipso facto* preclude the utilization of all testimony of a witness identified as a consequence of an illegal search."[100] The court recognized that the rule espoused by Holmes had been somewhat qualified by the "attenuation" exception.[101]

The *Marder* court's refinement of this use of the "attenuation" rule came in its explanation of its application. The court suggested that the same basic rule of exclusion followed from an illegal search no matter what the derivative evidence is.[102] The court concluded that different types of evidence would be treated differently in one respect: "[T]he type of evidence seized will undoubtedly determine the circumstances that must be considered in determining whether the original taint has been so attenuated, that its exclusion is no longer mandated."[103] Where the evidence is "live testimony," the court refused to adopt "rigid rules" but enumerated two factors to be considered in each case: first, proof that the witness would have come forward by himself; second, evidence of the overcoming of the witness' initial reluctance to testify.[104] In setting down these factors, the court appears to have adopted the same test used in the 1960's.[105]

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99. 474 F.2d at 1195, *citing* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (emphasis added by the *Marder* Court).

100. 474 F.2d at 1196.

101. The court cited Justice Brennan's well known qualification of the fruits doctrine. Wong Sun v. United States, 371 U.S. at 487-88. The court held that the testimony must be excluded unless the government can show that the identity of the witness discovered from the original illegal seizure has become so attentuated as to remove the original taint.

102. 474 F.2d at 1196, *citing* Rogers v. United States, 330 F.2d 535, 540-41 (5th Cir. 1964). The evidence may be "animate or inanimate, tangible or intangible."

103. 474 F.2d at 1196.

104. *Id.* The court concluded that "each case must be examined on an ad hoc basis, considering the particular facts presented, rather than on any sweeping general concept of 'live testimony' as such." *Id., quoting* United States v. Evans, 454 F.2d 813, 818 (8th Cir. 1972).

105. The court appears to be following the rationale of United States v. Hoffman, 385

The arguments espoused against expansion of the "attenuation" rule are applicable here.[106] Furthermore, the admission of evidence upon proof that the witness would have come forward of his own volition appears to be an unwarranted extension of the "inevitable discovery" exception rather than a part of the "attenuation" exception. When one is asked to prove that the witness "would have come forward," he is being asked to prove a hypothetical and not a fact. The preservation of one's rights should not turn on a hypothetical, and the arguments against the "inevitable discovery" exception apply here.[107] Evidence that the witness' initial reluctance to testify has been overcome also should be disregarded as irrelevant to a finding of "taint" or "attenuation." When the witness is illegally uncovered, his discovery itself is tainted. His later decision to talk does not make him any less of a "tainted" witness in relation to the defendant.[108]

As noted herein, courts have not made "witness as a fruit" an exception in itself[109] when the illegality is of constitutional proportions. However, the Supreme Court in 1974 went so far as to make it an apparent exception in one certain area.[110] In *Michigan v. Tucker* the Supreme Court examined nonconstitutional illegalities as the "tree" of the "poisonous" witness. In *Tucker,* the defendant, who had been arrested for rape, was questioned by the police. Before the interrogation began, the defendant was advised of his right to remain silent and his right to counsel, but not of his right to the appointment of counsel, if he was indigent. Defendant named one Henderson as his alibi witness, but Henderson later gave information tending to incriminate the defendant. Before trial, the defendant moved to exclude Henderson's testimony because he had revealed Henderson's identity without having received the full warning mandated by the *Miranda* decision.[111] The motion was denied,

F.2d 501 (7th Cir. 1967) and Smith v. United States, 324 F.2d 879 (D.C. Cir. 1963); *see* Pitler, *supra* note 15, for a more complete discussion and analysis of the *Smith* test.

106. *See* section II,A *supra.*

107. *See* section II,C *supra.*

108. *Accord,* Commonwealth v. Cephas, 447 Pa. 500, 291 A.2d 106 (1972).

109. *See* notes 93 and 95 *supra,* and accompanying text.

110. Michigan v. Tucker, 417 U.S. 433 (1974).

111. *Id.* at 436-37, *citing* Miranda v. Arizona, 384 U.S. 436 (1966). Although the defendant was questioned prior to *Miranda* the Court acknowledged that he still had to be read his *Miranda* rights based on the Court's ruling in Johnson v. New Jersey, 384 U.S. 719 (1966), that the *Miranda* ruling was retroactive. 417 U.S. at 447-48.

defendant was convicted and his convictions affirmed by both the Michigan Court of Appeals[112] and the Michigan Supreme Court.[113] Defendant sought habeas relief, and it was granted by the district court which found that Henderson's testimony was inadmissible, being "fruits of the poisonous tree."[114] The United States Court of Appeals for the Sixth Circuit affirmed.[115]

The Supreme Court, per Justice Rehnquist, overturned the decision. The Court reasoned that the initial omission did not violate the fifth amendment and was therefore not a constitutional violation.[116] The *Miranda* warnings were held to be only a "set of specific protective guidelines . . . to provide practical reinforcement for the right against compulsory self-incrimination"[117] and were "not themselves rights protected by the Constitution."[118] The Court found that, under the facts of the case, the police conduct did not deprive defendant of his privilege against compulsory self-incrimination.[119]

However, the fact that there was no constitutional violation did not answer the question of whether the witness' testimony was to be excluded because there was still a violation of the *Miranda* rules. As the Court stated the issue: "The question for decision is how sweeping the judicially imposed consequences of this disregard shall be."[120]

In attempting to answer this question, the Court first looked to whether "the sanction serves a valid and useful purpose,"[121] and in

112. 19 Mich. App. 320, 172 N.W.2d 712 (1969).

113. 385 Mich. 594, 189 N.W.2d 290 (1971).

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

115. Tucker v. Johnson, 480 F.2d 927 (6th Cir. 1973).

116. The Court based its conclusion on a finding that the testimony of the defendant was not compelled even though he had not received the *Miranda* warnings. Furthermore, the defendant did not base his argument for relief on the sixth and fourteenth amendments, as he might have, and therefore the Court avoided any possible questions based on these amendments. 417 U.S. at 438.

117. Michigan v. Tucker, 417 U.S. 433, 444 (1974). The Court observed that the "safeguards were not intended to create a constitutional straight jacket."

118. *Id.* This holding is vigorously contested by Mr. Justice Douglas in his dissenting opinion. Douglas argued that the Court could not "prescribe preferred modes of interrogation absent a constitutional basis." *Id.* at 462. This whole question of whether a violation of *Miranda* rights is a constitutional violation is a separate area that is too extensive for this comment to attack. However, it is submitted that Douglas' reasoning is well placed.

119. *Id.* The Court at least conceded that there still cannot be a complete bad faith disregard of the *Miranda* "procedural rules."

120. *Id.* at 445.

121. *Id.* at 446.

doing so examined the deterrence factor. The Court put great emphasis on the fact that the arrest was pre-*Miranda* and that the officer was apparently acting in good faith under the standards then in existence.[122] The court determined that the deterrent effect would not be significantly augmented by the exclusion of the witness' testimony in this case.[123]

Apparently, the Court believed that there was some relation between "good faith" action and the deterrence factor.[124] Yet, it is arguable whether this relation should exist at all.[125] The claim of good faith or bad faith can always be made, and it is quite difficult to prove that the action was otherwise. If anything, the emphasis on good faith will vitiate the deterrence factor because the police officer will not be deterred when he knows that his later claims of "good faith" will negate any bad offspring from his violation. It is difficult to see how deterrence is served here.[126] This is yet another instance where the present Court has recognized the existence of a defendant's rights but taken away from the defendant any vindication of these rights by eroding the exclusionary rule.[127]

The *Tucker* Court also examined the facts in relation to a second justification for the exclusionary rule: protection of the courts from reliance on untrustworthy evidence. In holding that the evidence in this case was not untrustworthy, the Court emphasized that the evidence was the testimony of a third party and not that of the defendant.[128] The authors agree with the Court that "there was no reason to believe that the testimony of Henderson was untrustworthy simply because respondent was not advised of his right

122. *Id.* at 447. In doing so the Court obviously disregarded the holding in *Johnson*. If the court did not want the officer in pre-*Miranda* days to give a complete warning, it would not have decided as it did in *Johnson*. The Court in *Johnson* refused to absolve the police officers because they had acted in good faith in questioning.

123. *Id.* at 448.

124. *Id.* at 447. The Court stated: "Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

125. *See* section III *infra* for an extensive discussion on this question of the viability of a "good faith" standard.

126. Pitler rightly observed that: "[I]t is clear that if the police were permitted to utilize illegally obtained confessions for links and leads rather than being required to gather evidence independently, then the *Miranda* warnings would be of no value in protecting the privilege against self-incrimination." Pitler, note 15 *supra*, at 620.

127. The court has also done this in Brown v. Illinois, 422 U.S. 590 (1975). *See* text accompanying notes 180 and 187 *infra*.

128. Michigan v. Tucker, 417 U.S. 433, 449 (1974).

to appointed counsel."[129] This is simple logic.

In conclusion, the Court resorted to a "balancing test," weighing the strong interest of making all relevant and trustworthy evidence available to the trier of fact and society's interest in effective criminal prosecution against the need to deter violations of constitutional rights.[130] The balance in this case was weighted against the defendant.

It is arguable that the use of a "balancing test" in this context is without foundation. The need to provide the trier of fact with trustworthy evidence is of no value in a determination of the extent of exclusion necessary for the protection of an individual right. The Supreme Court has admitted in the past that even trustworthy evidence may have to be excluded.[131] The only question to be asked is whether the exclusion of the evidence provides a deterrent to police misconduct in the future. In *Tucker*, this question can be answered in the affirmative.

E. *The Use of Illegally Obtained Evidence For Impeachment Purposes*

The use of illegally obtained evidence for impeachment purposes acts as an exception to the exclusionary rule in its larger context, rather than to just the "fruit" doctrine. Nevertheless its ultimate effect upon whether "fruit of the poisonous tree" will be placed in evidence makes it a germane issue for discussion in this comment.

The general rule of admissibility for illegally obtained evidence for purposes of impeaching the credibility of a witness (generally the defendant) was enunciated in 1925 by a unanimous Supreme Court in the case of *Agnello v. United States*,[132] where it was held that a defendant who did not, in his direct examination, testify about an illegally seized item, could not be cross-examined about that item.[133]

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129. *Id.*

130. *Id.* at 450-51.

131. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963). The sentiments of Mr. Justice Black somewhat reflect this feeling: "It certainly offends my sense of justice to say that a State holding in jail people who were convicted by unconstitutional methods has a vested interest in keeping them there that outweighs the right of persons adjudged guilty of crime to challenge their unconstitutional convictions at any time." Linkletter v. Walker, 381 U.S. 618, 653 (1965) (Black, J., dissenting).

132. 269 U.S. 20 (1925).

133. In *Agnello*, the direct examination of the defendant, who was on trial for conspiring

An exception to the general rule was carved out in *Walder v. United States.*[134] In *Walder,* the defendant, on trial for the illicit sale of narcotics, took the stand and on direct examination denied that he had ever illegally purchased, sold, or possessed narcotics. In fact, the defendant had been previously indicted for purchasing and possessing heroin. However, the heroin capsule had been suppressed as a result of an unlawful search and seizure, and the case was subsequently dismissed on the Government's motion. After a subsequent indictment and conviction, the Court held that the Government could introduce evidence of the heroin capsule after the defendant had denied on cross-examination that any narcotics were taken from him at the time of the unlawful search, provided that the jury was instructed that the evidence was only to be considered for purposes of impeaching the defendant's credibility and not for proof of guilt of the crime for which he was then being charged.[135]

Walder was distinguished from *Agnello* on the basis that where the defendant "[o]f his own accord" goes "beyond a mere denial of complicity in the crimes of which he was charged" and makes a "sweeping claim," the government may "introduce by way of rebuttal evidence illegally secured by it . . . ."[136] However, the Court in *Walder* explicitly reaffirmed the general rule laid down in *Agnello:* that the defendant could not be impeached by illegally seized evidence about which he did not testify.[137]

A further distinction, unarticulated between *Agnello* and *Walder* is that *Agnello* concerned the very narcotics which the defendant was charged with conspiring to sell. Thus evidence of those narcotics was inextricably tied to the question of guilt or innocence, whereas in *Walder* the defendant had placed his character and reputation generally in issue. This distinction is well based in deterrence

to sell narcotics, did not include testimony about his possession of narcotics. The Government, after having failed in its efforts to introduce narcotics that had been unlawfully seized in its case-in-chief, asked the defendant on cross-examination if he had ever seen narcotics before. The question was answered in the negative, and the Government then attempted to introduce evidence of the narcotics. The *Agnello* Court rejected this attempt at impeachment, reasoning that the defendant had done "nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search." *Id.* at 35.

134. 347 U.S. 62 (1954).

135. *Walder* was recently followed in Cowan v. United States, 331 A.2d 323 (D.C. 1975).

136. 347 U.S. at 65.

137. *Id.*

theory. There is much less incentive for the police illegally to obtain evidence for impeachment purposes in a case that may or may not arise, than in a case in which the tainted evidence is related to an essential element of the charged crime.[138]

Walder was significantly extended in *Harris v. New York*[139] where it was held that trustworthy statements, though obtained in violation of *Miranda*,[140] may be used to attack the credibility of the defendant if he takes the stand.[141] The statements were regarded as trustworthy because the petitioner did not claim they were coerced or involuntary.[142] The Court relied primarily upon *Walder* in deciding *Harris*, suggesting that it was merely following a general rule laid down in the earlier case and slightly extending it. Only one

138. Pitler, *supra* note 15, at 631.

139. 401 U.S. 222 (1971).

140. In Michigan v. Tucker, 417 U.S. 433 (1974), the Court found it unnecessary to decide "the broad question" of whether the fruits of statements taken in violation of the *Miranda* rules must be excluded regardless of when the interrogation took place. It placed its holding on a narrower ground: Testimony of a prosecution witness discovered by the police as a result of a pre-*Miranda* interrogation of defendant without giving him all the warnings required thereby may be used in a post-*Miranda* trial. However, language in Justice Rehnquist's majority opinion strongly indicated that the Court would decline to apply the fruits of the poisonous tree doctrine to witnesses located as a result of post-*Miranda* questioning conducted in violation of that case, at least where the police acted in "complete good faith." *See* text accompanying notes 109-31, *supra*, and note 184 *infra*.

141. The relevant facts in *Harris* are as follows: Defendant was arrested and taken to police headquarters where he was questioned about alleged drug transactions. He was given "no warning of a right to appointed counsel." 401 U.S. at 224. During the questioning he indicated that he would "rather see a lawyer before I keep on." 401 U.S. 222, app. at 74. He subsequently indicated that he would be satisfied to see a lawyer "tomorrow." *Id.* Nevertheless, the questioning continued and the defendant made certain incriminating statements.

It should be noted that while the questioning took place before the Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966), the trial was held after it. Thus, under Johnson v. New Jersey, 384 U.S. 719 (1966), the *Miranda* rules were applicable.

At his trial for two counts of drug sale, petitioner took the stand and denied committing the alleged crimes. On cross-examination, and over defendant's objection, some incriminating statements from the pre-trial interrogation were read, and defendant was asked if he remembered them. He replied that he remembered some but not others. 401 U.S. 222, app. at 58-63. The jury was instructed that it could consider the contents of the pre-trial statement solely for purposes of evaluating the defendant's "believability." 401 U.S. 222, app. at 95. The jury convicted him on the second count but was unable to agree on the first. The New York appellate courts affirmed the conviction. People v. Harris, 31 App. Div. 2d 828, 298 N.Y.S.2d 245, *aff'd*, 25 N.Y.2d 175, 250 N.E.2d 349, 303 N.Y.S.2d 71 (1969) *(per curiam)*.

142. For an extensive analysis and sharp criticism of *Harris*, *see* Dershowitz and Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971). Therein, it is rather persuasively argued that the Court misstated the record and that there was a claim made that the statements were involuntary. *Id.* at 1201-05.

distinction between the two cases was acknowledged by the Court, and it was summarily dismissed:

> It is true that Walder was impeached as to collateral matters included in his direct examination, whereas petitioner here was impeached as to testimony bearing more directly on the crimes charged. We are not persuaded that there is a difference in principle that warrants a result different from that reached by the Court in *Walder*.[143]

It would appear that the Court should have attached greater significance to this distinction.

The risk that the jury might interpret the impeaching evidence as indicating the defendant's guilt is substantially reduced when the evidence does not relate to the crime charged.[144] Indeed, this is the very difference that was successfully argued by the Government in *Walder*. The Government pointed out in their brief that in *Agnello*

> the suppressed evidence was so closely related in point of time to the offense charged that there was a real danger that the suppressed evidence would be considered by the jury as proof of guilt, as of affirmative benefit to the Government. No such danger existed here, since the suppressed evidence related to a point in time remote from the offenses charged.[145]

Although it may be contended that any infirmity may be remedied by limiting instructions to the jury, the Court has wisely, in past decisions, stated that "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored,"[146] and consequently a limiting instruction cannot be relied upon when a confession or admission of the crime at issue is involved.[147]

A second distinction between *Walder* and *Harris* (which the majority did not recognize) is that in *Harris* the defendant simply took the stand to deny the elements of the crime charged while in

143. 401 U.S. at 225.

144. Dershowitz and Ely, *supra* note 142, at 1215-16.

145. Brief for the United States at 32-33, Walder v. United States, 347 U.S. 62 (1954), *appearing in* Dershowitz and Ely, *supra* note 142, at 1216.

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

147. Bruton v. United States, 391 U.S. 123 (1968); Jackson v. Denno, 378 U.S. 368 (1964).

Walder the defendant went beyond that to the considerable extent of perjury on direct examination on matters collateral to the crime charged.[148] There should be a difference between these two situations in regard to where illegally obtained evidence can be used to impeach a defendant. It is this very distinction that Justice Frankfurter relied upon in carving the *Walder* exception out of the general rule of *Agnello.*[149] In short, the evidence in *Walder* tended solely to impeach the defendant's testimony and was completely unrelated to the indictment and did not interfere with his freedom to deny any of the elements of the crime with which he was charged, whereas the statement used for impeachment in *Harris* was directly related to the case against the defendant.

Therefore, it appears that *Harris* is factually much more like *Agnello* than *Walder.* Accordingly, *Agnello* should have been followed. Although the *Harris* Court stated that it was extending *Walder,* it was actually overruling *Agnello sub silentio.*[150]

A third distinction between *Walder* and *Harris* is that *Walder* involved impeachment by means of evidence obtained in violation of the fourth amendment which does not have its own exclusionary rule but rather a court-fashioned one to be implemented in cases of illegal searches and seizures.[151] *Harris,* on the other hand, involved a statement illegally obtained in violation of the fifth amendment, which has its own exclusionary rule.[152] Accordingly, the Court would

148. *Harris* seems to put to rest a questionable rule under which a distinction was drawn between statements which were inculpatory per se and those which were not *(i.e.,* dealing with collateral matters) in regard to their admissibility for impeachment purposes. *See, e.g.,* Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960). This distinction, however, showed itself to be elusive in subsequent cases where it was no easy matter to decide whether the defendant's testimony bears on the central issues of the case or pertains to collateral matters. *See* State v. Brewton, 247 Ore. 241, 422 P.2d 581 (rejecting the middle ground suggested by *Tate* and holding that a defendant who takes the stand may not be impeached with the fruits of an unconstitutional interrogation), *cert. denied,* 387 U.S. 943 (1967). The *Tate* exception to the exclusionary rule had been held by many courts not to apply to statements obtained in violation of *Miranda. E.g.,* Proctor v. United States, 404 F.2d 819 (D.C. Cir. 1969); Blair v. United States, 401 F.2d 387 (D.C. Cir. 1968); United States v. Fox, 403 F.2d 97 (2d Cir. 1968); Groshart v. United States, 392 F.2d 172 (9th Cir. 1968); Wheeler v. United States, 382 F.2d 998 (10th Cir. 1967); Commonwealth v. Padgett, 428 Pa. 229, 237 A.2d 209 (1968). *Harris,* however, takes the opposite pole, admitting all statements for impeachment purposes if not coerced, regardless of any central-collateral issue distinction.

149. 347 U.S. at 65.

150. It has been suggested that *Harris* squarely overruled *Agnello.* Dershowitz and Ely, *supra* note 142, at 1213.

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

152. *See, e.g.,* Brown v. Walker, 161 U.S. 591 (1896). The relevant portion of the fifth

seem less justified in carving exceptions out of the fifth amendment's exclusionary rule than the fourth's.

Furthermore, the fact that evidence was secured in violation of the fourth amendment does not cast doubt upon its reliability; but the trustworthiness of evidence obtained in violation of the fifth amendment is highly suspect. Although this is somewhat less true for statements obtained in violation of the *Miranda* rules as contrasted to cases where actual coercion is present, an important purpose of the *Miranda* rules was "to guarantee that the accused gives a fully accurate statement to the police."[153]

Harris is also subject to criticism as constituting an erosion of *Miranda*. *Miranda* had explicitly rejected distinctions based on the manner in which a statement is used or the degree to which it is helpful to the prosecution: The Court regarded those statements as "incriminating in any meaningful sense of the word," and required the same warnings and effective waiver as with other statements.[154] Thus, it would seem that *Miranda's* references to "exculpatory" statements were intended to cover the type of statement at issue in *Harris*. Therefore, *Harris* constitutes an exception to *Miranda* where statements are used for impeachment purposes.[155] The Harris decision was influenced by policy considerations. The Court believed that the benefit of increasing the jury's ability to assess the petitioner's credibility outweighed any speculative cost of increasing police misconduct. The Court reasoned that the state's inability to use the evidence for nonimpeachment purposes would act as a sufficient deterrent.[156] This reasoning is subject to the criticism that "there is no reason to expect an exclusionary rule to deter deliberate

amendment reads as follows: "nor shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. Thus, the fifth amendment seems on its face to prohibit the Government from using compelled statements "against" the defendant. Dershowitz and Ely, *supra* note 142, at 1214-15. *See* Pitler, *supra* note 15, at 619-20. In Counselman v. Hitchcock, 142 U.S. 547, 586 (1892), the fifth amendment was held to protect "against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of the crime, and of sources of information which may supply other means of convicting the witness or party." *Cf.* Harrison v. United States, 392 U.S. 219 (1968), discussed in Note, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 220-22 (1968).

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

154. 384 U.S. at 476-77.

155. The *Harris* Court did not believe that *Miranda* precluded use of the statement at issue in *Harris*. 407 U.S. at 224. *See* Dershowitz and Ely, *supra* note 142 at 1208-11.

156. 401 U.S. at 225.

violations unless it has eliminated all significant incentives toward such conduct."[157] The result arrived at in *Harris* creates a situation whereby once the police feel that they have enough admissible evidence to establish a prima facie case, they have an incentive to carry out questioning in violation of *Miranda* when they determine that the probability is low of obtaining any useful statements or admissions if the *Miranda* warnings are given.[158] If the defendant then makes a statement, the police will have in their possession evidence that they would not have obtained had they complied with *Miranda*, and which can be used to impeach the defendant if he takes the stand. In this way, the defendant may be effectively deterred from testifying in his own behalf.

The Court further justified the use of evidence for impeachment purposes on the ground that the petitioner did not have the right to commit perjury.[159] Of course there is no "right to commit perjury." To state this is merely to avoid the issue. The problem is where to strike the balance between the state's interest in challenging the

157. Dershowitz and Ely, *supra* note 142, at 1219. However, it has been contended that a random percentage exclusion in search and seizure cases would provide a sufficient deterrent. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 388-91 (1964). *But see* note 158 *infra*.

158. The *Miranda* situation is unlike the typical search and seizure situation in that it is tailor-made for a sequential "try it legally—if you fail, try it illegally" approach. That is, the police can attempt to obtain a statement admissible in the case in chief by giving the required warnings. If, however, the suspect requests a lawyer, they can then (instead of honoring the request and thereby losing the statement [because once the lawyer arrives there is little chance that further questioning will be permitted]) go on—given *Harris*—to try for an uncounseled statement to use for impeachment.

Dershowitz and Ely, *supra* note 142, at 1220 n.90; *see* Oregon v. Hass, 420 U.S. 714 (1975), discussed *infra* in text accompanying notes 163-67. Therefore, a random percentage exclusion is not suited for fifth amendment *Miranda* violations, since the elimination of all incentives is necessary in cases of deliberate misconduct, where the police know that the only way of securing evidence is to violate the rules.

Where the primary illegality is a fourth amendment search and seizure violation, there is a greater probability that the police misconduct was unintentional. Since these cases do not present the situation where the police have much to gain and very little to lose, and do not involve a conscious "yes-no" decision on the part of the police, sufficient deterrence might be accomplished by a random percentage exclusion. However, the random percentage exclusion is less responsive even in those instances where the search and seizure violation has intentional elements to it. Moreover, by increasing the probability of exclusion, there is a significant likelihood that a greater measure of deterrence would result through the general educative process of sensitizing the police to the limits of the fourth amendment and the exclusionary rule which is the force that gives it effect.

159. 401 U.S. at 225.

defendant's credibility and the defendant's interest in excluding illegally secured evidence.[160]

Although a strong case can be made for the proposition that the *Harris* decision is analytically deficient and arrives at an undesirable result, as well as for the correlative proposition that *Walder* should have been confined to its narrow grounds, *Harris* is the law of the land. It should be borne in mind, however, that a statement obtained in violation of *Miranda* is, under the interpretation given *Harris* by most courts, not admissible for impeachment purposes unless the statement is shown to have been given voluntarily and free from coercion[161] in light of traditional notions of due process—totality of circumstance standards.[162] Therefore, case by case adjudication now appears to be the rule rather than the exception when it comes to *Harris*-type situations.

Harris was extended by the Court in *Oregon v. Hass*,[163] which

160. It should be noted that *Harris* did not purport to extend *Walder* in the context of fourth amendment cases where the primary illegality is an unlawful search and seizure, *i.e.*, where the defendant has placed his character in issue by his perjury by going beyond a mere denial of the elements of the crime charged on direct examination. *See* Pitler, *supra* note 15, at 633-36.

However, the possibility that a broad interpretation will be given to *Harris* so as to include fourth amendment situations should not be dismissed, *i.e.*, evidence and the fruits thereof that have been arrived at through a fourth amendment violation would be admissible for purposes of impeachment if the defendant takes the stand when (a) proper limiting instructions are given to the jury, and (b) the evidence is vested with indicia of "reliability" as was the case in *Harris* (not coerced). The interesting questions arise in connection with (b). First, physical evidence which is the product of an illegal arrest or search and seizure does not generally present the questions that a coerced or involuntary confession presents. Thus, upon this reasoning, such physical evidence would be even more likely to be admissible for impeachment purposes than a statement obtained in the face of a *Miranda* violation, since the requirement of *Miranda* warnings was predicated on the inherently coercive nature of custodial interrogation which may give rise to unreliability. Second, a statement or confession that is the fruit of an illegal search and seizure is open to serious questions as to reliability. The suspect is likely to assume the frame of mind that "they've got the goods on me so I might as well talk." Since this type of situation has an inherently coercive coloring to it, the reliability of any statement arising out of it should be suspect. People v. Johnson, 70 Cal.2d 541, 450 P.2d 865, 75 Cal. Rptr. 401 (1969). Unreliability, of course, would be heightened if there were oppressive circumstances surrounding the fourth amendment violation since it would enhance the coercive atmosphere.

161. *E.g.*, LaFrance v. Bohlinger, 499 F.2d 29 (1st Cir. 1974), *cert. denied*, 419 U.S. 1080 (1975); United States v. McQueen, 458 F.2d 1049 (3d Cir. 1972); State v. Williams, 271 So. 2d 857 (La. 1973); State v. Gabler, 294 Minn. 457, 199 N.W.2d 439 (1972); State v. Kassow, 28 Ohio St. 2d 141, 277 N.E.2d 435 (1971); Upchurch v. State, 64 Wis. 2d 553, 219 N.W.2d 363 (1974). *But see* Rooks v. State, 250 Ark. 561, 466 S.W.2d 478 (1971).

162. Spano v. New York, 360 U.S. 315 (1959); *see* Garrity v. New Jersey, 385 U.S. 493 (1967).

163. 420 U.S. 714 (1975).

held admissible for impeachment purposes a statement made after full *Miranda* warnings were given. The arrestee requested to speak with his attorney but was not allowed to do so until after he reached the police station.[164]

The reasoning that the Court relied upon was the same as in *Harris*—application of the exclusionary rule would promote perjury and defeat the truth-finding purposes of the trial while providing an insufficient deterrent to future *Miranda* violations. The majority also appeared to find it important that any follow-up investigation by the officer was conducted in an absence of bad faith even though it contravened the defendant's *Miranda* rights. This is analagous to the finding in *Harris* that the statements were not involuntary or coerced, and thus the impeaching evidence in both *Harris* and *Hass* was not unreliable. The dissenters protested that the police would now have an incentive to continue questioning after the suspect has made a request for a lawyer.[165] However, the majority termed this possibility as merely "speculative," and stated that since there was no intentional abuse in *Hass,* such a determination would have to await scrutiny in a later case.

Although critics of *Harris* will no doubt be even more unhappy with *Hass,* the two opinions, taken together, seem to indicate that the Court will draw the line, as far as admissibility for impeachment purposes is concerned, when the police engage in bad faith or coercive conduct. Thus, proponents of these opinions may contend that the pronouncements of the Court are not invitations to blatant police misconduct, and therefore do not impinge upon the deterrent effect of the exclusionary rule. However, it is not unreasonable to argue that even if the police misconduct is inadvertent, such future

164. The relevant facts in *Hass* were as follows: The officer arrested the defendant at his home for the theft of two bicycles. After properly giving the defendant his *Miranda* warnings, the officer proceeded to question him about the theft of one of the two bicycles. The defendant admitted that he had taken two bicycles, but stated that he was not sure which one the officer was referring to. He further stated that he had returned one of them and that the other one was where he had left it. The officer then requested the defendant to accompany him to the site where the bicycle had been left. The defendant agreed, and they departed in the patrol car. On the way to the site, the defendant had some misgivings, indicating that he "was in a lot of trouble" and wanted to telephone his attorney. The officer responded that he could telephone the attorney as soon as they got to the station. They proceeded with the investigation by continuing to drive to the site, whereupon the defendant pointed out a place in the brush where the bicycle was found. 420 U.S. at 715-17.

165. 420 U.S. at 724 (Brennan, J., dissenting); *see* note 158 *supra,* where this situation is discussed in detail.

misconduct would be deterred by barring the fruits thereof from admissibility regardless of whether they are inadmissible in the case-in-chief or on cross-examination when used for impeachment purposes.

Moreover, it has been compellingly argued that the judiciary must "avoid even the slightest appearance of sanctioning illegal government conduct."[166] "[I]t is monstrous that courts should aid or abet the law-breaking police officer. It is abiding truth that '[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.' "[167]

Miranda warnings within the impeachment context came before the Court again in *United States v. Hale.*[168] In *Hale,* the Court held that it was reversible error to permit attempted impeachment of the defendant on cross-examination concerning his silence during police interrogation after having been advised of his *Miranda* right to remain silent. The Court did not reach the constitutional question of whether *Miranda* mandates such a result, but decided the case in exercise of its supervisory authority over the lower federal courts. The Court reasoned that silence during custodial interrogation, in light of the inherent pressures of in custody interrogation and the fact that defendant was particularly aware of his right to remain silent, having just been given his *Miranda* warnings, was just as probative of defendant's reliance upon the right to remain silent as to support the conclusion that the defendant's testimony at trial was a later fabrication inconsistent with his prior silence. In the midst of the emotional and confusing circumstances surrounding custodial interrogation, the innocent and guilty alike might very well remain silent as a psychological reaction.[169] Furthermore, the fact of defendant's silence when he was arrested generally is not a good indication of his credibility. There is also the risk that the jury

166. United States v. Calandra, 414 U.S. 338, 360 (1974) (Brennan, J., dissenting); *quoted in* Oregon v. Hass, 420 U.S. 714, 724, (1975) (Brennan, J., dissenting).

167. Harris v. New York, 401 U.S. 222, 232 (1971) (Brennan, J. dissenting), *quoted in* Oregon v. Hass, 420 U.S. at 724 (Brennan, J., dissenting).

168. 422 U.S. 171 (1975), *noted in* 30 U. MIAMI L. REV. 773 (1976).

169. 422 U.S. at 176-80; *see* Grunewald v. United States, 353 U.S. 391 (1957); Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial,* 33 U. CHI. L. REV. 657, 676 (1966).

may attach greater significance to defendant's silence than it deserves.[170]

It is submitted, however, that it would have been appropriate for the Court to decide *Hale* on constitutional grounds.[171] As Justice Douglas stated in his concurring opinion,[172] there is no circumstance in which the Government would be justified in using the constitutional privilege of the right to remain silent[173] to discredit, impeach, or ultimately convict a person who asserts it.[174] Therefore, this case should have been controlled by *Miranda*. The Court there ruled that "it is impermissible to penalize an individual for exercising his fifth amendment privilege . . . ."[175] This is consistent with the Supreme Court's proscription of judicial or prosecutorial comment on defendant's failure to testify at trial, on the ground that such comment "cuts down on the privilege by making its assertion costly."[176] Analogously, where the defendant was informed of and exercised his right to remain silent during custodial interrogation, prosecutorial comment on defendant's silence, as an attack upon his trial testimony, does not comport with any notion of due process.[177]

Nor would it appear that *Harris*, or its progeny *Hass*, would mandate a contrary result. *Harris* is distinguishable because it dealt with prior statements unquestionably inconsistent, in part at least, with that which the defendant later testified to at the trial. The Court in *Hale* did not find inconsistency between the defendant's silence during custodial interrogation and his alibi at the trial.[178]

170. 422 U.S. at 180. "When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." Shepard v. United States, 290 U.S. 96, 104 (1933).

171. Chief Justice Burger, who concurred separately, viewed the case as "something of a tempest-in-a-saucer" and felt that the Court rightly avoided placing the result on constitutional grounds. 422 U.S. at 181. "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

172. 422 U.S. at 182, (Douglas J., concurring).

173. "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V; *see* Miranda v. Arizona, 384 U.S. 436 (1966).

174. Grunewald v. United States, 353 U.S. 391, 425 (1957) (Black, J., concurring).

175. Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966).

176. Griffin v. California, 380 U.S. 609, 614 (1965) (dictum); United States v. Anderson, 498 F.2d 1038, 1043 (D.C. Cir. 1974), *aff'd sub nom.* United States v. Hale, 422 U.S. 171 (1975).

177. 422 U.S. at 182-83 (White, J., concurring). *Cf.* Johnson v. United States, 318 U.S. 189, 196-99 (1943).

178. In the *Hale* opinion, it was stated that as a basic rule of evidence, the court must

Harris is also distinguishable on the grounds that therein the accused spoke rather than exercise his constitutional right to remain silent. In contrast, in *Hale,* the defendant explicitly availed himself of his right to remain silent.[179]

III. The Emerging Significance of the Purposefulness of the Primary Illegality in Determining the Extent of the Taint

The recent Supreme Court decision of *Brown v. Illinois*[180] signaled the emerging significance of the purposefulness of the official misconduct with respect to determining how far the taint has spread. As the Court stated "particularly, the purpose and flagrancy of the official misconduct [is] relevant."[181] Moreover, in *United States v. Peltier,*[182] a case decided the day before *Brown,* the Court, in an opinion by Justice Rehnquist, signaled that the exclusionary rule in search and seizure cases should be applied only if it can be said that the officer had knowledge, or can be charged with knowledge, that the search was unconstitutional under the fourth amendment.[183] Justice Rehnquist's majority opinion in *Michigan v.*

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be persuaded that the statements at issue were indeed inconsistent before an asserted prior inconsistent statement can be admitted into evidence to impeach the credibility of a witness. 422 U.S. at 176; 3A J. Wigmore, Evidence § 1040 (Chadbourn rev. 1970). It was further stated that "[i]f the Government fails to establish a threshold inconsistency between silence at the police station and later exculpatory testimony at trial, proof of silence lacks any significant probative value and must therefore be excluded." 422 U.S. at 176. The Court subsequently found that this threshold inconsistency was not demonstrated. *Id.* at 177-79. This would certainly seem to be close enough to the concept of "no inconsistency" so as to provide a valid basis for distinction.

179. United States v. Anderson, 498 F.2d 1038, 1043 (1974). In pointing out this distinction, the authors do not indicate approval of the *Harris* decision.

180. 422 U.S. 590 (1975).

181. *Id.* at 604; *see* United States v. Edmons, 432 F.2d 577 (2d Cir. 1970). *See also* United States, *ex rel.* Gockley v. Myers, 450 F.2d 232, 236 (3d Cir. 1971), *cert.denied,* 404 U.S. 1063 (1972); United States v. Kilgen, 445 F.2d 287, 289 (5th Cir. 1971). The *Brown* Court, in dicta, applied the criteria of purposefulness to the facts of the case.

> The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives . . . . The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which [the defendant's] arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion.

422 U.S. at 605.

182. 422 U.S. 531 (1975).

183. *Id.* at 542. *Cf.* United States v. Calandra, 414 U.S. 338, 347-48 (1974); Schneckloth

Tucker[184] also emphasized in dicta that the Court would decline to apply the "fruit of the poisonous tree doctrine" to witnesses located as a product of custodial interrogation conducted in violation of *Miranda*, at least in those instances where the police acted in "complete good faith."

The desirability of injecting "purposefulness" into the *Wong Sun* determination is contingent upon how it is used. If it is merely used as another factor, along with and coequal to other factors, in determining the spread of the taint, any deleterious effect will probably be minimal.[185] In some situations, it might arguably take more to attenuate a causal chain that has had as its impetus a flagrant and purposeful violation of the fourth amendment than one which did not. For instance, where the primary illegality is a flagrant and abusive arrest or search and seizure which induces the defendant to confess, subsequent confessions and/or inculpatory trial testimony of the defendant are more likely to be tainted than if the primary illegality was of a less oppressive nature.[186]

To give preeminence to the purposeful nature of the violation[187] over other factors to be considered in resolving the attenuation question, however, will seriously distort the careful case-by-case inquiry mandated by *Wong Sun*.[188] Indeed, in *Wong Sun* Justice Brennan

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v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring). Although similar, the application of a purposefulness-bad faith requirement to the *Wong Sun* attenuation question on one hand and as a threshold requirement to the invocation of the exclusionary rule on the other, raises two separate and distinct issues, the latter of which is beyond the scope of this comment. In relation to the exclusionary rule, such a requirement has met with strong criticism. United States v. Peltier, 422 U.S. 531, 551-52 (1975) (Brennan, J., dissenting). It nevertheless seems to stand a very good chance of becoming the law of the land. *Id.*

184. 417 U.S. 433 (1974); *see* note 144 *supra*, and text accompanying notes 110-31.

185. *See* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 290.2(2) (Off. Draft No. 1, 1972) *cited as* § 8.02(2) (Tent. Draft No. 4, 1971) in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 424 (Appendix to Opinion of Burger, C.J., dissenting), which takes into account a number of factors besides "the extent to which the violation was willful" in determining whether the exclusionary rule should be invoked.

186. *See* People v. Johnson, 70 Cal. 2d 541, 450 P.2d 865, 75 Cal. Rptr. 401, (1969).

187. In light of the word "particularly" which prefaced the Court's remarks on purposefulness, *see* text accompanying note 181 *supra*, as well as the general high regard in which the majority of the Court holds this concept in relation to the invocation of the exclusionary rule as a whole, *see* text accompanying notes 182-84 *supra*, this prospect might very well be more than mere scholastic conjecture. Such misgivings are also strongly suggested by Justice Powell's concurring opinion in Brown v. Illinois, 422 U.S. 590, 606-16 (1975). Hopefully, however, the Court will follow its *Brown* holding and not make any single factor determinative of the attenuation issue.

188. People v. Johnson, 70 Cal. 2d 541, 450 P.2d 865, 75 Cal. Rptr. 401 (1969).

clearly indicated that the "oppressive circumstances" surrounding a declaration are not to be seized upon to distinguish the case.[189] Moreover, such a revision would require the judge in each case to determine the threshold question of what the official's state of mind was at the time of the commission of the primary illegality. This distinction would make the application of the *Wong Sun* doctrine hinge upon highly nebulous criteria and add a new layer of mandatory fact-finding upon courts presented with motions to suppress.[190] Such a rule would permit excessive subjectivity and discretion on the part of the trial judge. Furthermore, it would be extremely difficult to draw any meaningful lines of distinction between purposeful and nonpurposeful violations. Such an approach would generate widespread uncertainty as to what activity would result in the exclusion of evidence. Law enforcement officials, as a result, would find it difficult to establish workable rules and convenient to disregard constitutional proscriptions.[191] Such uncertainty as to what is purposeful would add to the difficulty of proving that a police officer deliberately violated fourth amendment rights, thereby giving rise to the undesirable possibility of the wholesale affirmance of violations.[192]

An additional consideration is that questions of purposefulness or good faith do not lend themselves to adequate appellate review, since the testimony and demeanor of the police officer could be reflected on appeal only by a "cold record."[193]

> The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences

189. 371 U.S. at 486, n.12 (1963). A number of courts have interpreted *Wong Sun* to exclude incriminating statements following an unlawful arrest only when oppressive events cause the statements and the arrest to become inextricably intertwined. *See* Pitler, *supra* note 15, at 595 and cases cited at n.80. *See also* Ruffin, *Out On a Limb of the Poisonous Tree: The Tainted Witness*, 15 U.C.L.A.L. REV. 32, 65-66 & n.120 (1967). "[F]lagrantly abusive violations of Fourth Amendment rights, on the one hand, and 'technical' Fourth Amendment violations, on the other . . . call for significantly different judicial responses." Brown v. Illinois, 422 U.S. 590, 610 (1975) (Powell, J., concurring in part).

190. United States v. Peltier, 422 U.S. 531 (1975) (Brennan, J., dissenting); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1045 (1974).

191. Pitler, *supra* note 15, at 583.

192. *Id.* at 584.

193. *Id.* at 583-84. *See* Kaplan, *supra* note 190, at 1045.

> to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law.[194]

The argument that only fruit which is the product of purposeful violations should be suppressed, because only these cases further the deterrent purpose behind the exclusionary rule, is not convincing. The reasoning behind this argument is as follows: Under the fourth amendment, the essence of the constitutional wrong lies in the initial invasion of person or property; the exclusionary rule, as originally conceived, was a means of deterring this invasion; if the invasion was purposeful the officer had knowledge that an improper act was being committed; since the officer knew that he was committing a constitutional violation, imposing the sanction of suppression will be meaningful and deter similar violations in the future.

The exclusionary rule, however, does not depend on the punishment of individual law enforcement officials. Deterrence can operate in several ways, the simplest being special or specific deterrence—punishing an individual so that *he* will not repeat the same behavior. But

> [t]he exclusionary rule is not aimed at special deterrence since it does not impose any direct punishment on a law enforcement official who has broken the rule. . . . The exclusionary rule is aimed at affecting the wider audience of law enforcement officials and society at large. It is meant to discourage violations by individuals who have never experienced any sanction for them.[195]

The exclusionary rule focuses upon general, not specific, deterrence. It depends not upon threatening a sanction for lack of compliance but upon removing an *inducement* to violate fourth amendment rights.[196] To admit the fruits of an unconstitutional search and seizure into evidence, regardless of whether they were obtained purposefully, is not merely to tolerate but also to induce such unconstitutional conduct by the police.

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194. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 756 (1970).

195. *Id.* at 709-10. *See also* Amsterdam, *supra* note 157, at 431.

196. Elkins v. United States, 364 U.S. 206, 217 (1960); United States v. Peltier, 422 U.S. 531, 556-57 (1975) (Brennan, J., dissenting).