Criminal Procedure - Exclusionary Rule - Brown v. Illinois, Miranda Warnings Do Not per se Attenuate the Taint of an Illegal Arrest

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CRIMINAL PROCEDURE—EXCLUSIONARY RULE—Brown v. Illinois, Miranda Warnings Do Not per se Attenuate the Taint of an Illegal Arrest

“It would be nonsense to pretend that our decision today reduces the Fourth Amendment to complete order and harmony.”

In light of the Supreme Court’s recent decision in Brown v. Illinois, there is not a more apt description of the state of the law surrounding the Fourth Amendment. That amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In order to “give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials,” the Court has developed the so-called exclusionary rule which requires the exclusion of evidence obtained in violation of the fourth amendment. Generally well-received at its inception, the exclusionary rule is presently the subject of a vigorous debate concerning its efficacy and usefulness as an evidentiary tool in criminal proceedings. Critics and supporters alike are at a loss to pinpoint any internal consistency or coherence in the body of decisions dealing with the controversy surrounding the rule which is central to the continued vitality of the fourth amendment. Moreover, the Court’s attempt to delineate the scope and application of the rule has in no little measure fueled the debate.

At the core of the debate lie the two rationales proffered by the Court as justification for the imposition of the exclusionary rule: first, that exclusion of evidence is essential to the maintenance of judicial integrity and, second, that the exclusionary sanction serves to deter future official misconduct. This latter rationale has assumed paramount importance in the Court’s recent decisions, virtually to the preclusion of the former. Considering the repeated

2. 95 S.Ct. 2254 (1975).
3. U.S. Const., amend IV.
5. The history and evolution of the exclusionary rule is discussed at text accompanying notes 26 through 71 infra.
claims that the exclusionary rule is entirely inadequate as an effective deterrent, it would appear that the demise of the rule is imminent. In fact, Brown provided the Court the opportunity to deal a crushing blow to the rule by effectively undermining its operation with respect to confessions. The Court, however, declined the open invitation. At least for the present, the exclusionary rule remains intact.

Given the obvious dissatisfaction of some members of the Court with the operation of the exclusionary rule, proponents of the rule may be surprised, and somewhat heartened by the Court's decision in Brown. However, a closer inspection of the decision's underpinnings reveals that its net worth is far less than its face value.

**FACTS**

On May 6, 1968, Roger Corpus was murdered with a .38 caliber revolver in his Chicago West Side apartment. A detective from the Chicago police force obtained petitioner Richard Brown's name, among others, from the deceased's brother who identified Brown as an acquaintance, but who in no way implicated him in the murder because "nobody asked." Further information placed Brown in the building where the deceased lived on the day of the murder. On May 13, two detectives and a police officer arrived at Brown's apartment and, upon finding no one home, broke in and searched it. The two detectives then stationed themselves at the front and rear doors while the third officer covered the front entrance to the building. When Brown arrived home around 7:45 p.m., he was confronted by the detective inside the rear entrance pointing a revolver at him. He was informed that he was under arrest for the murder of Roger Corpus, handcuffed and transported to the Maxwell Street police station. At no time did the officers seek to obtain a warrant, either to search Brown's apartment or to arrest him for murder.

Upon arrival at the station Brown was placed in an interrogation room with the two detectives. He was warned of his rights under

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8. Although they are few and far between and tend to be somewhat less vociferous than their counterparts, proponents of the rule exist. See Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 Ky. L.J. 681 (1973) [hereinafter cited as Canon]; Bennett, Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule, 20 U.C.L.A. L. Rev. 1129 (1973); Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349 (1974) [hereinafter cited as Amsterdam].

Miranda, and confronted with evidence linking him to an incident in a poolroom where he had fired a shot from a revolver into the ceiling. The detectives stated that the bullet had been taken from the ceiling and sent to the crime laboratory to be compared with bullets taken from Corpus' body. When asked if he wished to make a statement, Brown replied that he did. After answering questions put to him by the detectives, Brown signed a statement to the effect that he had been an unwilling accomplice and that the actual murderer was a man named Jimmy Claggett.

Approximately 9:30 p.m. the two detectives and Brown set out in search of Claggett. They ultimately succeeded in locating the latter around 11 p.m. and the four men returned to the station at approximately 12:15 a.m. Brown was again placed in the interrogation room to wait for the Assistant State's Attorney, who arrived at 2 a.m. Brown was informed of his Miranda rights by the Assistant State's Attorney and again, approximately one-half hour later, when the court reporter arrived. He made a second statement, substantially similar to the first, but refused to sign it. At 9:30 a.m., about 14 hours after his arrest, Brown appeared before a magistrate.

At the pre-trial hearing Brown moved to suppress the two statements. He alleged that he had been arrested without a warrant, without probable cause and that the statements taken during his subsequent detention were therefore in violation of his constitutional rights. At trial, the contents of the first statement were attested to by one of the detectives, but the writing itself was not introduced into evidence. The second statement was introduced and read to the jury. Brown was found guilty of murder and sentenced to imprisonment for not less than 15 years nor more than 30 years.

THE ILLINOIS DECISION

The Illinois Supreme Court concluded that there existed no probable cause for Brown's arrest at the time of his apprehension, thus rendering his arrest unlawful. The court then passed on to the crucial issue: "whether the statements were the product of the illegal arrest and, therefore, improperly admitted into evidence."

The State contended that, even assuming the illegality of the

10. Miranda v. Arizona, 384 U.S. 436 (1966). The required warnings are as follows: the accused must be warned that he has a right to remain silent and that anything he does say may be used against him in court; he must also be told that he has a right to consult with counsel and that, if he is indigent, counsel will be appointed for him. 384 U.S. at 479.

11. 95 S.Ct. at 2257. It was later stipulated at trial that if expert testimony were taken, it would be to the effect that the bullet taken from the ceiling was not ballistically comparable to the bullets taken from the body of the deceased. Id. at 2257 n.3.

12. 56 Ill. 2d at 315, 307 N.E.2d at 357.
arrest, the giving of the *Miranda* warnings "served to break the causal chain so as to sufficiently attenuate and dissipate the taint of the unlawful arrest." A unanimous court, with no discussion of the merits of Brown's claim, agreed with this proposition and held that Brown's decision to make the statements was "sufficiently an act of free will to purge the primary taint of the unlawful invasion."

**THE SUPREME COURT DECISION**

The United States Supreme Court unanimously rejected the "per se" rule promulgated in *People v. Brown.* In contrast to the Illinois court's treatment of the confessions in terms of traditional "voluntariness," essentially a fifth amendment issue, the Supreme Court focused on the fourth amendment standards in determining whether Brown's statements were admissible at trial.

In discussing this issue, the *Brown* Court relied heavily on *Wong Sun v. United States.* In that case the Court dealt with two statements used to convict two defendants on a narcotics charge. The first statement was made by defendant Toy and occurred simultaneously with the unlawful entry and arrest. The Court considered this statement a direct result of the unlawful invasion and therefore held that it could not be admitted into evidence. Wong Sun's statement, however, was not made until several days later when he voluntarily returned to the station after being released on his own recognizance. In this instance, the Court reasoned that Wong Sun's act in making the statement was a choice freely made so that the statement itself had been purged of the taint of the illegal arrest. In formulating a test to be applied in such circumstances, the Court stated:

> We need not hold that all evidence is "fruit of the poisonous tree"

13. *Id.* at 315, 307 N.E.2d at 358.
14. The substance of Brown's claim before the court was essentially the same as his claim at the pre-trial hearing.
16. It is doubtful whether the Illinois court in its brief opinion actually intended such a radical interpretation. The holding reads:

> From our examination of the record, in light of the circumstances shown by the testimony, we conclude that the giving of the *Miranda* warnings, in the first instance by the police officer and in the second by the assistant State's Attorney, served to break the causal connection between the illegal arrest and the giving of the statements.

56 Ill. 2d at 317, 307 N.E.2d at 358. However, since the only "circumstances" discussed were the giving of the *Miranda* warnings, the United States Supreme Court had no alternative but to interpret the holding as it did.
simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case 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." Maguire, Evidence of Guilt, 221 (1959) 18

In applying this test to the case before it, the Brown Court emphasized the distinction between the fourth and fifth amendments in terms of the policies served by the application of the exclusionary rule. When utilized in the context of a fourth amendment violation, the exclusionary rule "is directed at all unlawful searches and seizures, and not merely those that happen to produce incriminating material or testimony as fruits. In short, exclusion of a confession made without Miranda warnings might be regarded as necessary to effectuate the fifth amendment, but it would not be sufficient fully to protect the fourth." 20 Therefore, to allow the Miranda warnings, in and of themselves, to attenuate the taint of an illegal arrest would substantially dilute the effect of the exclusionary rule as a remedy for fourth amendment violations. Indeed, such an interpretation of Miranda would, in effect, negate any protection afforded by the fourth amendment itself since the violation of its guarantees could be so easily rectified by the mere recitation of the prescribed warnings. The Court hinted that Miranda warnings alone may, under certain circumstances, dissipate the taint of an unlawful invasion.21 However, in a more general context, they are an important factor, but only one of several to be considered when determining whether a confession has been obtained by exploitation of an illegal arrest. The Court then enumerated other relevant considerations: "The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." 22

The Court went on to hold that the circumstances surrounding Brown's first statement, given less than two hours after his illegal arrest, were substantially similar to those surrounding defendant Toy's statement in Wong Sun.23 Therefore, the statement was inadmissible as the "fruit of the poisonous tree." Similarly, the Court

18. Id. at 487-88.
19. Brown, important for its handling of the exclusionary rule, gains additional significance in that it is the first case to apply Wong Sun to the states.
20. 95 S.Ct. at 2260.
21. Id. at 2261.
22. Id. at 2261-62.
23. Id. at 2262.
held that the second statement was clearly the product of the first since Brown had no reason to believe the first statement would not be used against him. In addition, the Court stated that this particular arrest carried with it an aura of purposefulness:

The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion.

**HISTORY AND EVOLUTION OF THE EXCLUSIONARY RULE**

In *Boyd v. United States*, the Court first noted the intimate relationship between the fourth and fifth amendments in according a liberal construction to the protection afforded by both:

Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condensation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

The Court realized that evidence seized in violation of the fourth amendment resulted in the type of compelled self-incrimination condemned in the fifth amendment. The next logical step therefore was the imposition, in the fourth amendment context, of the exclusionary sanction expressly provided for in the fifth. This the Court accomplished in *Silverthorne Lumber Co. v. United States* where

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24. *Id.*
25. *Id.*
26. 116 U.S. 616 (1886). *Boyd* involved the constitutionality of a procedure whereby the government attempted to issue a *subpoena duces tecum* to the petitioner compelling him to produce documents which would later be used against him in a quasi-criminal forfeiture proceeding.
27. *Id.* at 630.
28. The exclusionary rule was originally applicable only to federal officials and agencies. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the rule, which had been theretofore voluntarily adopted in approximately one-half the states, was made uniformly applicable to all states. No state had come up with a feasible alternative to the rule and the Court felt that the time for unregulated experimentation with remedies for fourth amendment violations had come to an end:

Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be a "form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."

*Id.* at 655.
29. 251 U.S. 385 (1920).
the government sought to compel production of corporate books and papers, which had been illegally seized earlier but returned. In denying the government the use of the evidence the Court stated: "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."  

When the official illegality results in statements made by the accused, the operation of the exclusionary rule becomes exceedingly complex. Admissibility of statements made in custodial surroundings is generally subject to the fifth amendment test of "voluntariness." However, the privilege against unreasonable searches and seizures would mean little if the same evidence obtained in violation of the fourth amendment could be introduced at trial on the ground that it was not the product of compulsion. The scope of the inquiry under the fifth amendment is limited: it seeks to ascertain whether statements sought to be admitted have been wrung from the accused by the relatively direct application of pressure, whether physical or psychological. In this context, a statement obtained subsequent to a fourth amendment violation may legitimately meet the "voluntariness" requirement absent any evidence of coercion following the illegal search or seizure. In order to adequately enforce the protection accorded by the fourth amendment, the inquiry must be expanded to include an assessment of the events which resulted in the accused initially being placed in the position of potentially incriminating himself. In such situations, the parameters of the two amendments overlap. The guarantees against unreasonable searches and seizures and the privilege against self-incrimination are not separate and distinct provisions, capable of independent existence and treatment. Thus, courts evolved the notion that a fourth amendment violation may "taint" subsequent statements ostensibly protected by the fifth amendment. As a practical matter, however, courts have taken the position that the taint of an illegal search or seizure does not extend indefinitely so as to require exclu-

30. Id. at 392.

To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action. Weeks v. United States, 232 U.S. 383, 394 (1914).

sion of all statements arguably derived therefrom.\textsuperscript{32} When the incriminating statements are contemporaneous with the illegal search or seizure the result is clear: the statements are the "fruit" of the illegal invasion and must therefore be excluded. However, the case is rarely susceptible to such an obvious solution. The test articulated in \textit{Wong Sun}\textsuperscript{33} was an attempt by the Court to set rational bounds to the consequences accompanying an illegal arrest. The Court expressly declined to adopt a "but for" test which would exclude all evidence which "would not have come to light but for the illegal actions of the police."\textsuperscript{34} Rather the test is characteristic of a "proximate cause" approach with its attendant negation by intervening causes.

In \textit{Brown} the Court was once again faced with the problem of attenuation. However, the \textit{Brown} Court's effort to determine attenuation under the directives of \textit{Wong Sun} was further complicated by the intervening decision in \textit{Miranda v. Arizona}.\textsuperscript{35} The \textit{Miranda} warnings were formulated for the express purpose of dispelling the "compulsion inherent in custodial surroundings."\textsuperscript{36} Indeed, if this is the goal, should it make any difference whether the preceding arrest is legal or illegal, especially when the accused is generally unaware of the legal status of his detention? In fact, the State in \textit{Brown} did argue that \textit{Wong Sun}'s approach to verbal evidence obtained in violation of the fourth amendment must be modified to reflect the paramount importance of the \textit{Miranda} warnings in relation to the privilege against self-incrimination.\textsuperscript{37} However, there is a distinction between the interests protected by \textit{Miranda} and those protected by the exclusionary rule.

The \textit{Miranda} warnings insure that statements made meet the traditional "voluntariness" test required by the fifth amendment. However, they do not, in conjunction with a fourth amendment

\begin{footnotesize}
\footnote{32. Sophisticated argument may prove a causal connection between information obtained through [an illegal search and seizure] and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.}
\footnote{Nardone v. United States, 308 U.S. 338, 341 (1939).}
\footnote{33. \textit{See note 18 supra} and accompanying text.}
\footnote{34. 371 U.S. at 488.}
\footnote{35. 384 U.S. 436 (1966).}
\footnote{36. \textit{Id.} at 458.}
\footnote{37. While the Court in \textit{Wong Sun}, given the then-current status of the law, could, in referring to the fourth amendment exclusionary rule, say, "Nor do the policies underlying the exclusionary rule invite logical distinction between physical and verbal evidence" (371 U.S. at 486), that statement, in the narrow factual situation presented here, is no longer accurate, given \textit{Miranda}.}
\end{footnotesize}
violation, guard against statements made by an accused who falsely believes himself to be legally arrested. It is in the prosecution's best interests to obtain any statements whatsoever from the accused. Under the ever-changing law concerning search and seizure, whether particular police conduct will be deemed "unreasonable" is rarely a clear-cut question. Therefore, the admissibility of a statement will usually not be determined until trial. On the other hand, the accused is apprised only that whatever he says may be used against him. For any number of reasons, he may choose to confess, whereas, if he were aware that the legality of his arrest were questionable, he would almost invariably choose to remain silent and await determination of that issue before proceeding to incriminate himself. He has nothing to lose and nothing less than his freedom to gain. The dimensions of the problem are brought into sharper focus by a reminder that ninety percent of all criminal cases are disposed of on pleas of guilty. The accused, unaware of a possible fourth amendment violation, pleads guilty in the hope of receiving a lenient sentence. If there was, in fact, a violation, it has served its purpose and, in addition, escaped judicial review.

Official disregard of constitutionally guaranteed rights not only tends to promote short-cut law enforcement methods, but also seriously erodes one of the foundations of a democratic society devoted to the "accusatorial," as opposed to the "inquisitorial," system of law enforcement—"the right to be let alone." An examination of the prevailing opinion concerning the operation of the criminal justice system will reveal why such objectionable tendencies on the part of law enforcement officials flourish unchecked.

**Popular Bias: The Guilty Defendant**

"It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." Nowhere is this more true than in cases involving the suppression of evidence. The majority of cases involving judicial review of fourth amendment violations concern evidence which is relevant, trustworthy and conclusive proof of the defendant's guilt. Brown's confession was true and it implicated him as an accomplice to murder. Yet, because the "constable has

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blundered," the defendant escapes unscathed. The majority of people, including members of the legal profession and the judiciary, view this as a frustration of justice. According to popular opinion, the chain of events culminating in the release of the criminal is without rhyme or reason. The status of the defendant, coupled with the widespread alarm over the steadily increasing crime rate, tends to obscure the underlying principle which the Court is trying to articulate. In fact, on the trial court level, the judge, while giving lip-service to the exclusionary rule by apologetically excluding the evidence, oftentimes simultaneously commends the officer on his "good police work." This tension, manifested externally by public disapproval and internally by many judges' ambivalent attitude toward the operation of the exclusionary rule, reveals a central issue in the controversy over the rule's efficacy.

The Trial's Purpose: Truth or Principle?

Several critics of the exclusionary rule maintain that the primary purpose of a trial is the determination of the defendant's guilt or innocence. The inquiry into the alleged police misconduct, they say, is a diversion from this purpose and should be discounted as irrelevant. At first glance, the argument seems palpable. After all, it is

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43. Clarence M. Kelley, Director of the Federal Bureau of Investigation, has stated:
   I suggest that there are cases in which the exclusionary rule has been invoked which
   were not in the interests of our society. . . . If the exclusionary rule provides no
   leeway for human error, even when the error does not deny the accused a fair
   investigation, the application of the rule appears needlessly harsh and would seem
   to require that a police officer's conduct during an investigation be absolutely
   perfect.
   Letter from Mr. Clarence M. Kelley to Mary Anne Mason, September 19, 1975. See also D.
   [hereinafter cited as Oaks]:
   Only a system with limitless patience with irrationality could tolerate the fact that
   where there has been one wrong, the defendant's, he will be punished, but where
   there have been two wrongs, the defendant's and the officer's, both will go free.
   Id. at 755. Chief Justice Burger, dissenting in Bivens v. Six Unknown Fed. Narcotics Agents,
   403 U.S. 388 (1971), stated that:
   Judges cannot be faulted for being offended by arrests, searches and seizures that
   violate the Bill of Rights or statutes intended to regulate public officials. But we
   can and should be faulted for clinging to an unworkable and irrational concept of
   law.
   Id. at 420.
44. Interview with Robert Isaacson, counsel for Petitioner in Brown, in Chicago, Illinois,
   Sept. 18, 1975.
45. To allow the criminal proceedings to be transformed into a court of inquiry
   concerning the alleged police illegality is nothing less than evasion by the courts of
   their responsibility in the case.
   Wingo, Growing Disillusionment With the Exclusionary Rule, 25 S.W. L. J. 573, 584 (1971)
   [hereinafter cited as Wingo].
the defendant and not the policeman who is on trial. But when rights fundamental to a free society are involved, is the court not bound to give credence to those rights regardless of the fact that the person asserting them is socially undesirable? If those talismanic phrases "Due Process" and "Equal Protection" retain meaning, here lies the opportunity for proof positive. Articulation of lofty constitutional ideals by those uninvolved in their practical functioning is quite distinct from application of those principles even-handedly in a society as diversified as the one in which we live. But, although it is a task not susceptible to swift and simple execution, it remains imperative. The perspective essential to an appreciation of the necessity for the exclusionary rule is difficult to attain in the tension-filled atmosphere of the courtroom. Mr. Justice Holmes articulated the dilemma:

We must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end all available evidence should be used. It is also desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.46

In this same vein, an additional fallacy is generated by the tendency of critics to treat the two offenses, the defendant's and the policeman's, as similar in kind. Again, taken at face value, the argument appears sound: surely a murder, rape or armed robbery is more blameworthy than a warrantless search or seizure. From a general social perspective, can it be said that the greater fault should attach to the policeman's misconduct so that the judge, in balancing wrong against wrong, must ultimately conclude that rejection of the evidence is warranted?47 The defendant's crime is the act of an isolated individual; the policeman's is not. As a law enforcement official, he acts under the authority of the government and any latitude accorded such practices is an invitation to the government to diminish the scope of personal liberty one more degree.

In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government

is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. 44

The exclusionary rule does have a place in the scheme of criminal justice. But once it is in the door, is it destined to be emasculated by judicial compromise? The rule, in its present state, represents just such a compromise. An appraisal of the twofold justification for the rule—deterrence and judicial integrity—will determine the basis for this intermediate hybrid form of the exclusionary rule.

Deterrence: Wishful Thinking?

The first rationale underlying imposition of the exclusionary rule is that its supposed effect will be to deter official misconduct. 49

The exclusionary rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved. It follows that "the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." 50

Under this theory, the relevant inquiry is whether the exclusion of evidence in the particular case at hand will serve to prevent similar future violations of the fourth amendment. If not, the evidence should be admitted. The use of the word deterrence is unfortunate; implicit in it is the connotation of a judicial review board overseeing the conduct of the police. This approach reduces the Court's function to policing the police. 51

Critics of the rule have sought to demonstrate that it does not, in fact, deter law enforcement officials. First, the sanction of exclusion is, in practice, an appropriate sanction for prosecutorial misconduct. 52 But, of course, it is not the prosecutor who has engaged in

49. The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it. Elkins v. United States, 364 U.S. 206, 217 (1960).
51. See Amsterdam, supra note 7, at 370.
52. See Oaks, supra note 43, at 726.
Exclusionary Rule

such conduct. And the prosecutor has very little, if any, control over police practices. Therefore, the effect of the suppression of evidence upon the offending officer is remote, at best.

If prisons do not deter forbidden conduct, how can we think that a policeman will be deterred by a judicial ruling on suppression of evidence which never affects him personally, and of which he learns, if at all, long after he has forgotten the details of the particular episode which occasioned suppression?53

Secondly, there appear to be irreconcilable differences between the official's conception of effective law enforcement and the courts' notion of conduct consonant with the commands of the fourth amendment. The policeman's first allegiance is to the policies promulgated by his department. In his day-to-day activities, his behavior is controlled by those accepted norms which value the arrest itself over the manner in which it is effected. The police officer, even if aware of considerations such as judicial interpretations of legality, remains unaffected by them. In addition, the policeman constantly faces a variety of crucial situations which demand immediate action and which offer no opportunity to even consider whether or not the necessary action is constitutional.54 Finally, the Supreme Court, in reviewing a fourth amendment violation, is concerned with isolated instances of police misconduct and not with the wider context in which they occur.

The court is generally unaware of the relevant department policy, and by no stretch of the imagination can it be said to have reviewed it. And the ultimate sanction, loss of the prosecution, affects the department even less than the officer himself.55

Finally, assuming that the exclusionary rule does deter to some limited extent, the percentage of police activities affected by exclusion of evidence is minimal. Fourth amendment violations are frequent in the context of crimes involving weapons and narcotics. Here the seizure is an end in itself. Its purpose is simply to get dangerous objects off the streets. It does not matter whether the

54. The exclusionary rule is unlikely to have a controlling effect upon a wide range of police behavior that is violative of the rules of arrest and search and seizure because any direct effect of the rule is neutralized by the keenly felt needs of the situation and the competing norms of police behavior.
55. Id. at 729.
seizure renders the evidence inadmissible because there will be no trial.56

In addition to these *common sense* observations, two recent studies have attempted to accumulate empirical data to support the proposition that the exclusionary rule, as a mechanism of deterrence, simply does not work.57 Both studies cite the increase in the number of motions to suppress, especially in cases involving narcotics and weapons, as indicative of the fact that police practices have not been significantly altered by uniform imposition of the exclusionary rule.58 In addition, Professor Oaks points to the disturbing

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56. The object is "the maintenance of order rather than the prosecution of crime." *Oaks, supra* note 43, at 723. Professor Oaks enumerates other areas in which the exclusionary rule is ineffectivie:

\[
\text{[I]t is unlikely to deter physical abuse of persons in custody, unnecessary destruction of property, illegal detentions (unless leading to acquisition of evidence), taking or soliciting bribes, and extorting money on threat of arrest or other sanction.}
\]

*Id.* at 721.


58.

| TABLE 1 |
|—— | ——— | ——— |

| Offense | No. of Dels. | Defs. with Motion to Suppress (a) | Motions Granted (b) | Defs. with Motions Granted (a) X (b) |
|—— | ——— | ——— | ——— | ——— |
| All gambling offenses | 5,858 | 77% | 99% | 76% |
| Narcotics | 288 | 19 | 100 | 19 |
| Carrying concealed weapons | 513 | 28 | 91 | 25 |
| All above offenses | 6,649 | 70 | 98 | 69 |

*Source: Comment, Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy, 47 Nw.U.L.Rev. 493, 498 (1952).*

| Offense | No. of Dels. | Defs. with Motion to Suppress (a) | Motions Granted (b) | Defs. with Motions Granted (a) X (b) |
|—— | ——— | ——— | ——— | ——— |
| All gambling offenses | 312 | 52% | 86% | 45% |
| Narcotics | 457 | 34 | 97 | 33 |
| Carrying concealed weapons | 188 | 36 | 68 | 24 |
| All above offenses | 957 | 40 | 87 | 35 |

possibility that the exclusionary rule invites perjury on the part of the arresting officer. It is suggested that the arresting officer may oftentimes alter his testimony at trial so that the actual circumstances of the arrest appear to be in compliance with the requirements of the fourth amendment.  

When the exclusionary rule is justified by the Court in terms of its deterrent effect, these facts and figures are difficult to counteract. There are three possible approaches that may be taken by proponents of the rule: (1) accumulation of data which supports the proposition that the exclusionary rule does deter, (2) a redefinition of the concept of deterrence in light of the Court's role in enforcing fourth amendment guarantees and (3) altogether shifting the emphasis from "deterrence" to "judicial integrity." Each approach will be discussed separately.

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<tr>
<th>Offense</th>
<th>No. of Defs.</th>
<th>Defs. with Motion to Suppress (a)</th>
<th>Motions Granted (b)</th>
<th>Defs. with Motions Granted (a) X (b)</th>
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<tbody>
<tr>
<td>All gambling offenses</td>
<td>824</td>
<td>32%</td>
<td>76%</td>
<td>24%</td>
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<tr>
<td>Narcotics</td>
<td>2,060</td>
<td>43</td>
<td>84</td>
<td>36</td>
</tr>
<tr>
<td>Carrying concealed weapons</td>
<td>929</td>
<td>36</td>
<td>62</td>
<td>22</td>
</tr>
<tr>
<td>All above offenses</td>
<td>3,813</td>
<td>39 b</td>
<td>77</td>
<td>30</td>
</tr>
</tbody>
</table>

Source: Compiled from examination of court records in Branches 25, 27, and 57 of the First District of the Municipal Department of the Circuit Court of Cook County for April, May, June of 1971.

a "No. of defs." means number of defendants disposed of during the period, and does not include those whose cases were continued. For example, the total number of defendants in narcotics cases during April-May-June, 1971 would be 10,369 while the number of dispositions was 2,060.

b The number of motions to suppress during April-May-June, 1971 was as follows: Narcotics—878; Guns—335; Gambling—255; and other felony offenses—84.

Spitto, supra note 57 at 247.


60. Indeed, it seems as if some members of the Court are simply taking a "never say die" approach to the whole problem, thus elicting these comments from Chief Justice Burger:

Some of the most recent cases in the Supreme Court reveal, almost plaintively, an unspoken hope that if judges say often and firmly that deterrence is the purpose, police will finally take notice and be deterred. . . . I suggest that the notion that suppression of evidence in a given case effectively deters the future action of the particular policeman or of policemen generally was never more than wishful thinking on the part of courts.


62. Amsterdam, supra note 7.
**Affirmative Data**

In a study published in 1974, Professor Bradley C. Canon undertook to demonstrate, by the use of empirical data, that the ineffectiveness of the exclusionary rule was not, as so many believe, a foregone conclusion. He prefaced his findings with the admonition that “in situations such as this immediate compliance is not the norm; old habits and local policies are quite likely to continue relatively unchanged for some time.” Those who expected Mapp to have the immediate effect of drastically reducing the number of illegal searches and seizures were bound to be disappointed.

Canon points out that the use of motions to suppress as an indicator of the effectiveness of the exclusionary rule has several drawbacks. First, anticipating a successful motion, the police or prosecutor may drop charges at an early stage of the proceedings. Secondly, as a result of defendants’ ignorance or out of strategy considerations, meritorious motions, which would otherwise result in suppression of the evidence, may never be made. Finally, judges either ignorant of the law or lacking in sympathy for the exclusionary rule, may deny motions that should be granted. Nevertheless, in view of the fact that more precise methods of research have not yet been discovered, the data obtained are as accurate as can be hoped for. Professor Spiotto’s results revealed that, in Chicago in 1969, 87 percent of all motions to suppress were granted. That figure had only decreased by ten percent in 1971. This meant that, of all defendants, 35 percent in 1969 and 30 percent in 1971 were released because of illegal police searches. In contrast, Canon’s figures, derived from prosecutors and public defenders in 65 cities, reveal quite a different trend, possibly leading to the conclusion that Chicago’s experience with

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63. Associate Professor and Chairman of the Department of Political Science, University of Kentucky.
64. See Canon, supra note 7.
65. Id. at 701.
66. And in the case of critics, hoping to be disappointed, any author’s bias, pro or con, is almost inescapably reflected in the interpretation accorded relatively neutral statistics.
67. Canon, supra note 7, at 718.
68. Spiotto, supra note 57, at 247.
motions to suppress is atypical.69

The evidence revealed by Canon’s study is admittedly inconclusive. However, at least a tentative inference may be drawn: the exclusionary rule is not as wholly ineffective as its critics would have us believe. Even if it be conceded that the exclusionary rule is, to date, far from achieving its purported goals, the little affirmative evidence available far outweighs the evidence of the fact that proposed alternatives have proven more illusory than real.70 This, of course, begs the question. But it does point up the fact that the judiciary should be reluctant to discard the rule on the basis of inadequate and inconclusive data.71

DETERRENCE: A DIFFERENT PERSPECTIVE

The notion that the primary purpose of the exclusionary rule is deterrence of official misconduct places the Court in the rather awkward position of substituting “its own notions of how things should be done”72 for the official’s judgment. Under our constitutional

69. See Kamisar, Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts, 43 Minn. L. Rev. 1083, 1150 (1959). Much discussion could be devoted to the relative merits and disadvantages of the proposed alternatives to the exclusionary rule. However, since the main thrust of this article is that there are no acceptable alternatives, such discussion would serve no purpose. For an outline of possible alternatives to the exclusionary rule see Wingo, supra note 45, at 579-582; Edwards, Criminal Liability for Unreasonable Searches and Seizures, 41 Va. L. Rev. 621 (1955); Foote, Tort Remedies for Police Violation of Individual Rights, 39 Minn. L. Rev. 493 (1955).

70. This is particularly the case where constitutional policies are involved. By definition as well as by tradition, such policies should be stable. Stability should not be equated with inflexibility. But stability does mean that constitutional policies should be more than mere reflections of prevailing ideological winds, and it suggests that the consideration which goes into the promulgation of these policies extends beyond the casual or emotional reaction to particular events or short-term political pressures.

scheme the Court does not, and cannot, sit as a supervisory committee promulgating instructions to local police departments specifying which law enforcement techniques should be employed. However, this is precisely what the Court appears to attempt when it fails to articulate its own role in enforcing fourth amendment guarantees. A re-examination of “deterrence” may clarify the situation.

First, it must be remembered that the fourth amendment speaks in terms of the “right of the people.” It is a right accorded to a nation as a whole, not just criminal suspects. When the Court holds that certain police conduct is inconsistent with the fourth amendment, it seems to be saying that the accused, though guilty, is entitled to have his charges dismissed because he was fortunate enough to be arrested by a careless policeman. Viewed from this angle, the equation looks lopsided indeed. However, there is another rationale which balances the equation. When the Court denounces police misconduct, it is simply saying that were such conduct put beyond the reach of that amendment’s scope, “the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.” The status of the defendant or the crime he has committed is, or should be, irrelevant. The fourth amendment is a command; a command to government in general. And when the government seeks to disregard that command, it is the Court’s province, not to punish the offender, but to re-evaluate basic notions of freedom and articulate the bounds beyond which no government official may go.

In this respect “deterrence” is not the meting out of punishment

73. At least one member of the Court has faulted the majority on this basis:
The inference I gather from these repeated statements is that the rule is not a right or privilege accorded to defendants charged with crime but is a sort of punishment against officers in order to keep them from depriving people of their constitutional rights. In passing I would say if that is the sole purpose, reason, object and effect of the rule, the Court’s action in adopting it sounds more like lawmaking than construing the Constitution.


74. The Court, however, cannot be blamed for this misconception since it must confine itself to the particular persons and facts before it.

75. Amsterdam, supra note 7, at 403.

76. The Bill of Rights in general and the fourth amendment in particular are profoundly anti-government documents. They deny to government—worse yet, to democratic government—desired means, efficient means, and means that must inevitably appear from time to time throughout the course of centuries to be the absolutely necessary means, for the government to obtain legitimate and laudable objectives.

Amsterdam, supra note 7, at 353.
in the hopes of accomplishing some sort of behavior modification through repetition. There is nothing inherently wrong with zealous law enforcement—at least nothing that society, in general, would seek to eradicate through punishment. The conflict lies in the area of value judgments or, rather, pre-judgments. Our Constitution relegates a “free and open society” to a higher place in the scheme of values than swift and efficient law enforcement. Were it otherwise, there would be no fourth amendment. A necessary adjunct to enforcement of the mandates of that amendment is the regulation of police behavior inconsistent with the values manifested therein.\(^7\)

The exclusion of evidence does not indicate that what the official has done is wrong; it simply demonstrates that his method conflicts with the constitutional framework within which law enforcement must operate. Exclusion of evidence may appear to be a windfall to the defendant; it is, however, the Court’s only method of guarding against jeopardy of all persons, guilty and innocent alike.\(^7\)

In this context, when it becomes clear that the Court is not punishing but rather regulating, policing the police takes on a different meaning. It simply represents the Court’s primary function of lending credibility to constitutional guarantees. Viewed in this light, policing the police is not only appropriate, it is inevitable.\(^7\)

Some argue that the legislature would be a more appropriate agency to regulate law enforcement practices. Ultimately, this assertion may prove correct; however, at the present time, such action by the legislature is highly improbable, given the prevalent attitude toward crime control on the part of politicians and the public.\(^8\) The Court, being politically isolated, is the appropriate body to undertake the task of keeping law enforcement within the bounds of the Constitution. This would not, however, operate to straight-jacket law enforcement agencies, for to include any particular conduct within the scope of the fourth amendment “is to do no more than to say it must be conducted in a reasonable manner.”\(^8\)

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77. *Id.* at 371-72.
78. “Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty.” *Brinegar v. United States*, 338 U.S. 160, 181 (1949).
80. Legislatures have not been, are not now, and are not likely to become sensitive to the concern of protecting persons under investigation by the police. Even if our growing crime rate should level off, there will remain more than enough crime and fear of it in American society to keep our legislatures from the politically suicidal undertaking of police control.
81. *Id.* at 378-79.
A Return to Judicial Integrity

One final factor, completely apart from deterrence,\(^{82}\) justifies the continued application of the exclusionary rule: the imperative of judicial integrity.\(^ {83}\) The phrase is self-explanatory; maintenance of judicial integrity is an absolute necessity. The dispensation of criminal justice is not a one-sided affair. Justice, in the first instance, runs from the Court to the parties. But the parties have the concurrent right to demand a just and fair trial; "fair" in the procedural sense and "fair" by reason of the fact that the adversaries meet each other on equal ground. Evidence obtained by unconstitutional means gives the government an advantage. It cannot be contended that a conviction obtained by the use of such evidence is "fair" under any accepted meaning of the word. Courts which recognize and accept illegally obtained evidence are no less parties to official lawlessness than the original malefactor.\(^ {84}\)

While the exclusionary rule as a means of deterrence is arguably inappropriate, its function of assuring the credibility of the judicial process is nothing less than essential. The operation of the rule "gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."\(^ {85}\) The proposition that the exclusionary rule does or does not deter is simply irrelevant here. The vindication of rights secured by the Constitution is an end in itself and if it serves no other purpose than to reassess and reaffirm the basic tenets of democracy, the court has accomplished its task.

Law enforcement and personal liberties do not occupy opposite ends of the spectrum. The web of misconceptions surrounding the term "deterrence" carries with it the implied belief that law enforcement techniques must be curbed and officials involuntarily re-

\(^{82}\) In fact, any time the exclusionary rule is rationalized in terms of its "deterrent effect," it admits of alternatives. If deterrence is the sole purpose of the rule, then a feasible alternative, demonstrably more effective in terms of modifying police behavior, would be acceptable.


\(^{84}\) It is no answer to say that an action, civil or criminal, may lie against the official where evidence is wrongfully obtained. The notion of a remedy implies an attempt to return the aggrieved party to the position he occupied before the wrong occurred. In a typical civil suit, the amount of damages awarded approximates the extent of the injury. What amount of money, however, will compensate a person, not only for the lawless invasion of his privacy, but also for the fact that his literal freedom was lost thereby? There is something fundamentally wrong with a system which would permit its most cherished principle, freedom, to be accorded a dollar amount.

strained. But compliance, not restraint, is the goal, and integration, not imposition, of constitutional commands is the mean. The maintenance of judicial integrity is essential if the goal is ever to be reached. The exclusionary rule serves to demonstrate that society attaches serious consequences to the invasion of constitutional rights; it reflects the moral and educative force of the law. In the long run its effect may be to raise the value system or norms of behavior of law enforcement agencies to a level paralleling the values which form the basis of the fourth amendment. Without the exclusionary rule as a vital part of the criminal process, the educative impact of the law is nil. Courts cannot demand that law enforcement agencies, in particular, and society, in general, take note and give effect to fourth amendment guarantees when those guarantees are robbed of their vitality through the acceptance, by those same courts, of illegally obtained evidence.

Judicial integrity does not admit of alternatives. To say that judicial integrity is a matter of choice is to ignore the fact that the Constitution was created by the people through Government. Our Constitution expressly entrusts the judiciary with the task of enforcing its provisions. When a court accepts evidence obtained in violation of the fourth amendment, it is not performing this task. The founders chose to place limitations upon themselves as government officials. These limitations are not self-actualizing; by their own terms they require judicial supervision. Judicial integrity is not merely another form of the "clean hands" doctrine. It represents a concern not only for the credibility of the judicial system, but also for the integrity of the government itself—a government purportedly dedicated to the preservation of democracy through laws which reflect its highest ideals. To say that courts may choose to recognize evidence obtained by techniques overtly destructive of these ideals is to imply that the Government may rewrite the Constitution at will.

**Brown: Plus or Minus?**

Where does Brown fit in this maze of "deterrence," "judicial integrity," "freedom" and "law enforcement?" It does not. The Court was indeed correct in holding that the giving of the Miranda warnings could not, in and of itself, dissipate the taint of the illegal arrest. But the Court did not stop there; three additional factors were enumerated: "The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and particu-

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86. See Oaks, supra note 43, at 756.
larly, the purpose and flagrancy of the official misconduct.”

It is suggested that these also should be considered in determining whether the causal connection between the illegal arrest and subsequent confession has become sufficiently attenuated so as to render the confession admissible. It is submitted that the first of these factors is entirely irrelevant and the second is utterly in conflict with both the concept of “deterrence” and “judicial integrity.” The third factor, labeled “intervening circumstances,” has, as yet, been accorded no concise definition capable of practical application.

In addition to the basic requirement of the Miranda warnings, the first of the Court’s relevant factors is “the temporal proximity of the arrest and the confession.” This is a direct offshoot of the two extremes faced by the Court in Wong Sun. Consider the literal definition of the word “attenuate”: “1: to make thin or slender. 2: to lessen the amount, force, or value of: WEAKEN. 3: to reduce the severity, virulence or vitality of.” Does the Court mean to say that the effect of an illegal arrest becomes somehow diluted, less severe, as the time period between the arrest and subsequent confession increases? This temporal factor is accorded some, if minimal weight: “Brown’s first statement was separated from his illegal arrest by less than two hours.” Discussion of “temporal proximity” has no place in the context of a fourth amendment violation. It is safe to assume that no member of the present Court would be content to find the requisite attenuation at, say, twelve hours, as opposed to ten or six or four. As a separate and distinct factor, “temporal proximity” is inapposite.

The Court also mentions “the purpose and flagrancy of the official misconduct” as bearing on the issue of attenuation. This criterion is also inapropos although not because it is irrelevant. Its principle flaw is that it involves the assessment of factors which, if taken to their logical extreme, would result in a multifaceted fourth amendment violation “splendid in its flexibility, awful in its unintelligibility, unadministrability, unenforcibility and general ooziness.” An approach which takes into account “purpose” and “flagrancy” and all

87. 95 S.Ct. at 2261-62.
88. The clearest example of an “intervening circumstance” may be found in Wong Sun. It was considered sufficient to attenuate the taint of the illegal arrest that the defendant had been released on his own recognizance and had voluntarily returned to make a confession.
89. 95 S.Ct. at 2261.
90. See note 18 supra and accompanying text.
91. WEBSTER’S NEW COLLEGIATE DICTIONARY (1973 ed.).
92. 95 S.Ct. at 2262.
93. Id.
94. Amsterdam, supra note 7, at 415.
their attendant variables would result in such a fragmented analysis of the concept of attenuation that neither basis for the exclusionary rule, deterrence or judicial integrity, would be adequately served. First, if police are to be deterred at all, they must know what it is they are to be deterred from. A system which introduces such variables as the policeman's purpose in effecting the arrest and the degree of flagrancy involved in the particular misconduct invites case-by-case analysis resulting in pigeon-holing to the nth degree.

If some discipline is not enforced, if some categorization is not done, if the understandable temptation to be responsive to every relevant shading of every relevant variation of every relevant complexity is not restrained, then we shall have a fourth amendment with all of the character and consistency of a Rorschach blot.95

Secondly, inclusion of these two variables in the consideration of attenuation may, in the long run, erode the concept of "judicial integrity" as surely as if the exclusionary rule were abandoned altogether. The assessment of flagrancy, in particular, hearkens back to Mr. Justice Frankfurter's oft-quoted phrase, "conduct which shocks the conscience."96 Conduct, to be unreasonable, need not necessarily be flagrant, or vice versa. Protection afforded by the Constitution is not measured by degrees, i.e., the wronger the wrong, the more protection the aggrieved party may expect. Either the Constitution is violated or it is not. If the Court finds that it is, it need go no further. Any consideration of degree, leading to the admission of evidence obtained as a result of "minor" violations, as opposed to "flagrant" ones, inexorably leads to a corresponding diminution of judicial integrity.97

Solutions

The result reached in Brown is another effort at compromise.98 As such it detracts from the vitality of the exclusionary rule. This is unsurprising, since the rule's pallbearers have been waiting in the wings for some time now. But criticism is altogether worthless when unaccompanied by an attempt to substitute feasible alternatives. The remainder of this article is devoted to a discussion of possible alternatives the Court should adopt in seeking to inculcate law enforcement agencies, and society in general, with the essential values

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95. Id. at 375.
97. This is not to say that there is no such thing as a technical violation of the fourth amendment as, for example, a search warrant containing the wrong date or misspelling the defendant's name. In such a situation, the doctrine of "harmless error" should apply.
which lie at the foundation of the exclusionary rule.

First, the Court is the only body which can be expected to lend any force and effect whatsoever to the exclusionary rule.\textsuperscript{99} However, an ad hoc approach to delineating the scope of the fourth amendment, which involves resolution of the issues on the basis of unique fact situations, leads to a limitless variety of variables incapable of categorization. The Court cannot even attempt categorization because the incalculable situations which face the policemen on the beat are not before it. The contours of the rules regarding search and seizure, from an adjudicatory standpoint, must be kept flexible so that they may be adaptable to new and untried law enforcement techniques.\textsuperscript{100} Yet the necessary fluidity of judicially promulgated rules inevitably defeats the goal of apprising law enforcement agencies of precisely what activities they are to refrain from. Only the law enforcement agency itself is capable of appreciating the shades of differentiated activity involved in the detection of crime. If the Court is unsuccessful in promulgating guidelines, the policemen themselves must formulate them. The police command structure should be required to assume responsibility for articulating and evaluating particular techniques as a general mode of departmental operation. Were this the case, many practices condoned in individual cases, and particularly some of those questionable practices which often surface in the context of fourth amendment litigation, would not be officially ratified.\textsuperscript{101} This would remove the Court from the province of rulemaking and delegate that responsibility to those who can most effectively shoulder it. Of course, the guidelines thus articulated would be ultimately subject to judicial review to test their compliance with the requirements of the fourth amendment.\textsuperscript{102}

Second, any derivative use of evidence obtained by means of an illegal search and seizure must be expressly forbidden. This would

\textsuperscript{98} The dangers of compromise are apparent. Under the test articulated in \textit{Brown}, there will inevitably arise cases where evidence seized in violation of the fourth amendment will be admitted because the conduct of the officer involved was not sufficiently "purposeful" or "flagrant." In such situations the defendant is left without any remedy whatsoever. It is doubtful whether a \textit{Bivens} action would prove successful if the plaintiff were actually guilty—jury prejudice would be a virtually insurmountable obstacle. Even Chief Justice Burger, one of the rule's most ardent critics, has stated, "I would hesitate to abandon it (the exclusionary rule) until some meaningful substitute is developed." \textit{Bivens} v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 415 (1971).

\textsuperscript{99} See note 79 \textit{supra} and accompanying text.

\textsuperscript{100} See \textit{Amsterdam}, \textit{supra} note 7 at 386.

\textsuperscript{101} \textit{Id.} at 421.

\textsuperscript{102} \textit{Id.} at 417.
necessitate the overruling of *Harris v. New York*,\(^{103}\) where the Court held that although an improperly obtained confession may not be used in the prosecution's case-in-chief, it may be used for impeachment purposes if the accused testifies in his own behalf.\(^{104}\) The Court reasoned that while the accused may demand that the statements not be introduced as direct evidence of his guilt, he does not have the additional right to perjure himself. But as a practical matter, impeachment evidence is often more damning than the same evidence used on direct, as *Harris* demonstrates, and it cannot be said that the government's case is not strengthened by this circumvention of the exclusionary rule.\(^{105}\) This derivative use of the evidence is as damaging to the notion of judicial integrity as receiving the evidence outright. The fact that the use is derivative rather than direct does not change the essential character of the evidence as unconstitutionally obtained. In addition, the *Harris* Court mentions a threshold requirement of "trustworthiness,"\(^{106}\) a concept inimical to and inconsistent with a consideration of the scope of the fourth amendment. The Court itself has recognized that the consideration of "trustworthiness" is inapplicable:

Our decisions recognize no exception to the rule that illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof. The exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment. To make an exception for illegally seized evidence which is trustworthy would fatally undermine these purposes.\(^{107}\)

Finally, the factors to be considered when determining whether or not the taint of an illegal arrest has been attenuated are crucial. By definition, attenuation occurs after the fact. Antecedent events, 

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103. 401 U.S. 222 (1971). Although this case involved a failure to give the *Miranda* warnings, it may be assumed that the same reasoning would apply with equal force to violations of the fourth amendment.

104. Brown did not take the stand at his trial. Had he done so, there would have been no legitimate objection, given *Harris*, to the State confronting him with the contents of his statements to impeach his own version of the facts.

105. The Court today tells the police that they may freely interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of *Miranda* cannot be used on the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution.

106. 401 U.S. at 224.

that is, "the purpose and flagrancy of the official misconduct,"108 should have no bearing on this issue. Also, as has been shown, "temporal proximity"109 is irrelevant. We are left, then, with the third factor, "intervening circumstances."110 In order to adequately protect the rights accorded by the fourth amendment, these circumstances must be narrowly defined and strictly interpreted. It is submitted that exactly two elements are sufficient to complete the list.

The first circumstance sufficient to attenuate the taint of an illegal arrest is a release from custody. If the accused then voluntarily confesses, there can be no claim that the illegal detention in any way induced him to incriminate himself. This position was ratified by the Court in Wong Sun.111

The second circumstance is somewhat more complex and undeniable more controversial. Consultation with counsel will attenuate the taint of an illegal arrest with regard to any subsequent confession. Realistically, this is the only means by which an accused can knowingly and intelligently112 decide to waive his fifth amendment privilege against self-incrimination. The Miranda warnings assume that if the accused decides to speak, his statements will be admissible at trial. In other words, they assume a valid arrest.113 In the situation involving an antecedent fourth amendment violation, can it be said that an accused has voluntarily waived the protection of the Constitution when he is unaware that there is no legal basis for his detention in the first instance? Of course, this approach would effectively preclude the use of any confession obtained subsequent to an illegal search and seizure, but it must be remembered that its use is not something to which law enforcement is legally or constitutionally entitled.

A situation involving multiple confessions necessarily entails the same result. Each confession, in the absence of intervening consultation with counsel, is inadmissible as a product of the first.

It would be neither conducive to good police work, nor fair to a suspect, to allow the erroneous impression that he has nothing to

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109. Id. at 2261.
110. Id. at 2262.
111. See note 18 supra and accompanying text.
113. The Miranda warnings advise a defendant of his rights to remain silent and to counsel. They do not advise him whether the evidence he is confronted with is unlawfully obtained or whether it will be admissible at trial. People v. Johnson, 70 Cal. 2d. 541, 546, 450 P.2d. 865, 870 (1969).
lose to play the major role in a defendant's decision to speak a second or third time.\textsuperscript{114}

*Miranda* accords an accused the right to counsel. It cannot be contended the formulation of this right was predicated on the assumption that it would not be exercised. There is simply no valid objection to the widespread assertion of the right to counsel or, for that matter, any other right contained in the *Miranda* warnings. In order that *Miranda* itself may not become a "mere form of words,"\textsuperscript{115} the accused must be given every opportunity to effectively exercise the rights contained therein.

No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.\textsuperscript{116}

**CONCLUSION**

*Brown* leaves the exclusionary rule in a state of flux. Neither goal of the rule, deterrence or judicial integrity, will be reached by the circuitous path the Court has chosen. The time has come for an honest and pragmatic reappraisal of the exclusionary rule in light of the desired ends: effective law enforcement and appreciation of the guarantees of the Bill of Rights. This article gives priority to the latter consideration; however, the rights guaranteed by the Constitution were intended to be constant and immutable. The quality and credibility of a system of law enforcement which operates within the limits of these guarantees can only be enhanced thereby.\textsuperscript{117}

MARY ANNE MASON


\textsuperscript{117} We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observation by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness.

Miller v. United States, 357 U.S. 301, 313 (1958).