Journal of Criminal Law and Criminology

Volume 75
Issue 1 *Spring*

Article 4

Spring 1984

The Attenuation Exception to the Exclusionary Rule: A Study in Attenuated Principle and Dissipated Logic

Brent D. Stratton

0091-4169/84/7501-139
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 75, No. 1

Printed in U.S.A.

THE ATTENUATION EXCEPTION TO THE EXCLUSIONARY RULE: A STUDY IN ATTENUATED PRINCIPLE AND DISSIPATED LOGIC

I. INTRODUCTION

For seventy years, courts have used the exclusionary rule to safeguard the constitutional rights of criminal defendants.[1] Broadly stated,

[1] The Supreme Court first employed the exclusionary rule in a federal criminal case in United States v. Weeks, 232 U.S. 383 (1914), and applied the exclusionary rule to the states through the due process clause of the fourteenth amendment in Mapp v. Ohio, 367 U.S. 643 (1961). The Supreme Court did not rule upon the admissibility of evidence obtained through a violation of constitutional rights until 1914 because the Court lacked express appellate jurisdiction over criminal cases until a century after the enactment of the fourth amendment. In United States v. Sanger, 144 U.S. 310, 319 (1892), the Court explained its appellate jurisdiction over criminal cases:

> The appellate jurisdiction of this court rests wholly on the acts of Congress. For a long time after the adoption of the Constitution, Congress made no provision for bringing any criminal case from a Circuit Court of the United States to this court by writ of error. . . . [In United States v. More, 7 U.S. (3 Cranch) 159, 173-74 (1805)] this court . . . held that it had no jurisdiction of a writ of error in a criminal case. . . .

Congress did not grant appellate jurisdiction to the Supreme Court in capital cases until 1889, Act of February 6, 1889, ch. 113, § 6, 25 Stat. 655, 656, for "otherwise infamous crime[s]" until 1891, Act of March 3, 1891, ch. 517, § 5, 26 Stat. 826, 827, *repealed by* Act of January 20, 1897, ch. 68, 29 Stat. 492, and finally for all criminal cases until 1911. Act of March 3, 1911, § 240, 36 Stat. 1087, 1157 (1911) (codified at 28 U.S.C. § 1254(3) (1976)).

In *Weeks*, state and federal law enforcement officials searched the defendant's home and seized personal papers and effects, all without a warrant. 232 U.S. at 386. The government introduced the seized items at the defendant's trial. *Id.* at 388. A unanimous Court held that the government's warrantless search and seizure violated the defendant's constitutional rights. *Id.* at 398. The Court further held that the trial court committed reversible error by receiving into evidence the illegally seized items. *Id.* The Court remanded the case for further proceedings without the use of the documents seized by the federal marshals. *Id.* at 398-99.

The Supreme Court used a three-part rationale to justify the exclusion of the unlawfully acquired evidence. First, the fourth amendment restrains both the police and the courts in their exercise of authority, and, correspondingly, obligates both the police and the courts to enforce fourth amendment protections. *Id.* at 391-92. Second, because a trial court can perpetuate a fourth amendment violation committed by the police, fourth amendment rights, by implication, exist both before and during trial. *Id.* at 398. Third, a remedy for fourth amendment violations, therefore, also must exist at trial: illegally seized evidence is inadmissible against the defendant. *See id.* at 393, 398.

The Court in *Weeks* believed that if trial courts admitted illegally obtained evidence, "the protection of the Fourth Amendment . . . is of no value . . . [and] might as well be

the exclusionary rule, or suppression doctrine, prohibits the government from using evidence obtained in violation of the fourth amendment against a defendant in criminal proceedings.[2] The exclusionary rule forbids the use of the direct and indirect evidentiary fruits of the government's misconduct. For example, if the government acquires a defendant's personal papers in an unconstitutional search and seizure, the exclusionary rule forbids the government from directly introducing the papers against the defendant at trial[3] or from using its knowledge of the existence of the papers to obtain them indirectly by subpoena.[4]

The Supreme Court has recognized two exclusionary rule exceptions that are based upon the circumstances surrounding the unconstitutional discovery of the evidence. The "independent source" exception allows the government to use illegally obtained evidence if the government also discovered the evidence by means independent of its misconduct.[5] The attenuation exception, in contrast, permits the use of

---

stricken from the Constitution." *Id.* at 393. Thus, full protection of fourth amendment rights requires that courts do nothing less than exclude illegally obtained evidence: to approve police conduct after the fact "would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution . . . ." *Id.* at 394.

[2] *Weeks*, 232 U.S. at 398. The exclusionary rule does not govern only fourth amendment violations. Courts have long suppressed evidence, typically confessions, obtained in violation of the fifth amendment. *See, e.g.*, Harrison v. United States, 392 U.S. 219 (1968); Bram v. United States, 168 U.S. 532 (1897). Likewise, the Supreme Court has required the suppression of evidence obtained in violation of a defendant's sixth amendment right to counsel. *See, e.g.*, Gilbert v. California, 388 U.S. 263 (1967), and United States v. Wade, 388 U.S. 218 (1967) (witnesses' in-court identifications of defendants must be excluded from trial where they are the product of pretrial lineups held in the absence of the defendants' lawyers). Although the Supreme Court has used the exclusionary rule to remedy fifth and sixth amendment violations, courts and commentators most often discuss the exclusionary rule as a remedy for fourth amendment violations. *See generally* Comment, *Trends in Legal Commentary on the Exclusionary Rule*, 65 J. CRIM. L. & CRIMINOLOGY 373 (1974) and cases and authorities cited therein.

[3] *See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914).

[4] *See, e.g.*, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). For further discussion of *Silverthorne*, see *infra* note 20.

[5] *Silverthorne*, 251 U.S. at 392. The independent source exception actually is more of a correlate than an exception to the exclusionary rule. The exclusionary rule states that the government cannot use illegally obtained evidence; the independent source exception states that the government can use illegally obtained evidence if the government also discovered the evidence by means independent of its misconduct. Thus, the independent source rule simply recognizes that the exclusionary rule does not apply where it was not meant to apply, to cases where the government's misconduct was not the source of the evidence. However, because the courts refer to the independent source rule as an exception to the exclusionary rule, *see, e.g.*, United States v. Crews, 445 U.S. 463, 470 (1980), this Comment will refer to it as such. For further discussion of the independent source exception, see *infra* notes 87-88 and accompanying text.

In the 1983 term, the Supreme Court recognized for the first time an inevitable discovery exception. In Nix v. Williams, 35 Cr. L. Rptr. 3119 (1984), the Court held that illegally obtained evidence is admissible if the evidence "ultimately or inevitably would have been discovered by lawful means. . . ." 35 Cr. L. Rptr. at 3123.

evidence discovered through the government's misconduct if the connection between the misconduct and the discovery of the evidence is sufficiently weak.[6]

This Comment will examine the courts' use of the attenuation exception to admit illegally obtained evidence at trial against criminal defendants. This Comment first will trace the origin and development of the attenuation exception.[7] In Section III, this Comment will argue that the Supreme Court did not intend to create an attenuation exception to the exclusionary rule because in *Nardone v. United States*,[8] the decision recognized as the origin of the attenuation exception,[9] the Supreme

---

[6] *See, e.g.*, United States v. Ceccolini, 435 U.S. 268, 274-75 (1978); Wong Sun v. United States, 371 U.S. 471, 487-88 (1963). The Supreme Court also has limited the application of the exclusionary rule based upon the government's proposed use of illegally obtained evidence. *See* United States v. Havens, 446 U.S. 620 (1980) (evidence inadmissible in the government's case-in-chief can be used to impeach the defendant); United States v. Salvucci, 448 U.S. 83 (1980) (evidence obtained in illegal search and seizure admissible against defendant whose fourth amendment rights were not violated by search and seizure); Michigan v. DeFillippo, 443 U.S. 31 (1979) (government obtained evidence in a search incident to arrest made pursuant to a statute found unconstitutional after the arrest; evidence held admissible); Stone v. Powell, 428 U.S. 465 (1976) (federal courts must not use exclusionary rule as basis for granting habeas corpus writ where the prisoner had a "full and fair" opportunity to litigate fourth amendment claim in state court); United States v. Janis, 428 U.S. 433 (1976) (evidence state police obtained in good faith violation of fourth amendment admissible in federal civil tax proceeding); Michigan v. Tucker, 417 U.S. 433 (1974) (despite inadmissibility of defendant's statements obtained in violation of *Miranda*, evidence discovered as a result of defendant's statements is admissible); United States v. Calandra, 414 U.S. 338 (1974) (government may use illegally obtained evidence as basis of questions for witness before federal grand jury).

Lower courts also have refused to extend the exclusionary rule to certain situations. *See* United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied,* 449 U.S. 1127 (1981) (evidence admissible where the police acted in good faith when they discovered evidence in violation of fourth amendment); People v. Finkey, 105 Ill. App. 3d 230, 434 N.E.2d 18 (1982) (illegally obtained evidence admissible to rebut the defendant's insanity defense).

While the above exceptions significantly limit the suppression doctrine, the attenuation exception most clearly illustrates the conflict betwen the rationales for excluding and admitting illegally acquired evidence. Unlike the other exceptions recognized by the Supreme Court, the attenuation exception involves evidence concededly acquired in violation of the defendant's constitutional rights and offered by the government in its case-in-chief against the defendant. Only a broadly stated good faith exception would allow the government to more easily convict defendants with unlawfully discovered evidence than is currently possible with the attenuation exception.

[7] *See infra* notes 14-59 and accompanying text.

[8] 308 U.S. 338 (1939).

[9] *See, e.g.*, United States v. Brookins, 614 F.2d 1037, 1041 (5th Cir. 1980); United States *ex rel.* Owens v. Twomey, 508 F.2d at 865; United States v. Evans, 454 F.2d 813, 817 (8th Cir.), *cert. denied*, 406 U.S. 969 (1972); Killough v. United States, 315 F.2d 241, 252 (D.C. Cir. 1962)(Wright, J., concurring); United States v. Alston, 311 F. Supp. 296, 298 (D.D.C. 1970); Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483, 545-46 (1963); Comment, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria*, 115 U. PA. L. REV. 1136, 1139 (1967); Comment, *Scope of Taint Under the Exclusionary Rule of the Fifth Amendment Privilege Against Self-Incrimination*, 114 U. PA. L. REV. 570, 576 (1966). *But see* Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. CRIM. L. CRIMINOL-

Court intended only to restate the independent source exception.[10]

This Comment will argue further in Section IV that the attenuation exception is inconsistent with the purposes of the fourth amendment and the suppression doctrine.[11] The suppression doctrine is designed to safeguard the fourth amendment right against unreasonable searches and seizures by denying the government the use of the evidentiary fruits of unconstitutional intrusions.[12] Because the attenuation exception allows the government to use evidence that the government discovered solely through an illegal search or seizure, the attenuation exception undermines the exclusionary rule's function as a safeguard of fourth amendment rights.[13] This Comment concludes that courts should not sanction the abridgement of constitutional rights based solely upon a finding of an attenuated connection between the government's misconduct and its discovery of evidence.

II. THE SUPREME COURT'S DEVELOPMENT OF THE ATTENUATION EXCEPTION

A. *NARDONE V. UNITED STATES*: THE ORIGIN OF THE ATTENUATION EXCEPTION

Courts cite the following passage in *Nardone v. United States* as the origin of the attenuation exception: "Sophisticated argument may prove a causal connection between information obtained through illicit wiretapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint."[14] This passage appears to mean that evidence discovered through the government's misconduct is admissible if the connection between the misconduct and the discovery of the evidence is attenuated—weakened—so as to make the evidence untainted by the government's misconduct.[15]

In *Nardone*, the government introduced into evidence testimony discovered as a result of illegal wiretapping.[16] The government, however,

---

OGY & POLICE SCI. 307, 310 (1964) (*Nardone* not cited as creating a separate attenuation exception).

[10] *See infra* notes 60-61 and accompanying text.

[11] *See infra* notes 76-118 and accompanying text.

[12] *See infra* notes 77-85 and accompanying text.

[13] *See infra* notes 89-96, 112-18 and accompanying text.

[14] Nardone v. United States, 308 U.S. 338, 341 (1939). For cases quoting this passage as the origin of the attenuation exception, see, for example, United States *ex rel.* Owens v. Twomey, 508 F.2d 858, 865 (7th Cir. 1974); United States v. Evans, 454 F.2d 813, 817 (8th Cir.), *cert. denied*, 406 U.S. 969 (1972).

[15] For further discussion of the argument that the Court merely restated the independent source exception in *Nardone*, see *infra* notes 60-61 and accompanying text.

[16] The law at issue in *Nardone* was § 605 of the Communications Act of 1934. Section 605

did not introduce the illegally wiretapped conversations themselves.[17] The question before the Court, therefore, was whether the federal wiretapping regulations prohibited the use of both the direct and indirect evidentiary fruits of illegal wiretaps.[18]

---

provided in pertinent part: "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . ." 48 Stat. 1064, 1104 (June 19, 1934). After Congress enacted comprehensive wiretapping regulations in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1976), Congress amended § 605 to read: "No person . . . shall intercept any *radio* communication. . . ." 47 U.S.C. § 605 (1976) (emphasis supplied).

The Court in *Nardone* applied § 605 instead of the fourth amendment because of Olmstead v. United States, 277 U.S. 438, 466 (1928), which held that wiretapping was not a search or seizure within the meaning of the fourth amendment. *See* United States v. Nardone, 106 F.2d 41, 43 (2d Cir.), *rev'd*, 308 U.S. 338 (1939) (circuit court stated that *Olmstead* removed case from application of fourth amendment). Although the Court in *Olmstead* suggested that Congress had the authority to make wiretapped conversations inadmissible as evidence, 277 U.S. at 465-66, Congress did not regulate the evidentiary uses of wiretapping. *See* Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. CRIM. L. CRIMINOLOGY 1, 11 & n.48 (1983). The Supreme Court, however, barred the use of conversations wiretapped in violation of § 605 as evidence in the first *Nardone* case, Nardone v. United States, 302 U.S. 379 (1937), despite the absence of any indication that Congress had intended § 605 to regulate wiretapping. *See* Goldsmith, *supra*, at 11-12 & n.50.

The Court has frequently applied *Nardone* in search and seizure cases without mentioning that *Nardone* did not involve a constitutional question. *See, e.g.*, United States v. Crews, 445 U.S. 463, 470 (1980); United States v. Ceccolini, 435 U.S. 268, 274 (1978); Brown v. Illinois, 422 U.S. 590, 598-99 (1975); Wong Sun v. United States, 371 U.S. 471, 487-88, 491 (1963).

Furthermore, the Court in *Nardone* clearly recognized the strong parallels between the federal wiretapping statute and the fourth amendment. When the Supreme Court reversed the *Nardone* defendants' convictions after their first trial, the Court stated:

> Congress may have thought it less important that some offenders go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved the Congress to adopt § 605 as evoked the guaranty of privacy, embodied in the Fourth and Fifth Amendments of the Constitution.

Nardone v. United States, 302 U.S. 379, 383 (1937). The Court's reliance upon *Silverthorne*, which did involve the fourth amendment, in the second *Nardone* case, *see* 308 U.S. at 340-41, also demonstrates that the Court considered § 605 to parallel the fourth amendment.

Finally, in 1967, the Supreme Court overruled *Olmstead* in Katz v. United States, 389 U.S. 347 (1967), holding that wiretapping can be a search and seizure under the fourth amendment.

[17] Although the Supreme Court did not refer to the nature of the government's evidence, the government apparently introduced "testimony which had become accessible by the use of unlawful 'taps.' . . ." United States v. Nardone, 106 F.2d 41, 44 (2d Cir.), *rev'd*, 308 U.S. 338 (1939).

[18] *Nardone*, 308 U.S. at 339. The Supreme Court had considered whether § 605 barred the use of the actual conversations obtained from illegal wiretapping at an earlier point in the case's long procedural history. The defendants were first convicted in 1936. *See* United States v. Nardone, 90 F.2d 630, 631 (2d Cir.), *rev'd*, 302 U.S. 379 (1937). On appeal, the Supreme Court reversed the defendants' convictions because the government had introduced into evidence the conversations obtained from its illegal wiretaps. Nardone v. United States, 302 U.S. 379 (1937). The government convicted the defendants a second time, using evidence derived from the illegal wiretaps. *See* United States v. Nardone, 106 F.2d 41, 42 (2d Cir.), *rev'd*, 308 U.S. 338 (1939). Following a second reversal by the Supreme Court, Nardone v.

The Court interpreted the statute to forbid the use of both the direct and indirect fruits of illegal wiretapping. The Court concluded that congressional regulation of wiretapping could only be effective if the government could not use illegal wiretaps to gather evidence indirectly.[19] The Court then cited an earlier Supreme Court decision, *Silverthorne Lumber Co. v. United States*,[20] as recognizing an independent source exception to the exclusionary rule.[21] The passage containing the

---

United States, 308 U.S. 338 (1939), the defendants were convicted a third time. *See* United States v. Nardone, 127 F.2d 521 (2d Cir.), *cert. denied*, 316 U.S. 698 (1942). In affirming the convictions, the Court of Appeals for the Second Circuit held that the illegal wiretaps "did not, directly or indirectly, lead to the discovery of any of the evidence used upon the trial, or to break down the resistance of any unwilling witnesses." *Id.* at 523.

[19] After explaining that Congress had prohibited "particular methods in obtaining evidence" because they were " 'inconsistent with ethical standards and destructive of personal liberty,' " the Court stated: "To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' " *Nardone*, 308 U.S. at 340 (quoting Nardone v. United States, 302 U.S. 379, 384 (1937) (citation omitted)). The Court then stated: "What was said in a different context in *Silverthorne* . . . is pertinent here: '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.' " *Nardone*, 308 U.S. at 340-41 (citation omitted).

[20] 251 U.S. 385 (1920). In *Silverthorne*, federal authorities unlawfully searched the defendants' office and seized the defendants' documents. *Id.* at 390. When the federal district court granted the defendants' motion for the return of the seized documents, the government issued subpoenas for the production of the same documents. *Id.* at 391. The defendants refused to obey the subpoenas and the trial court held them in contempt. *Id.*

The Supreme Court reversed the contempt citations, holding that the government could not use their illegally gained knowledge about the documents to obtain them by subpoena. *Id.* at 392. The Court restated the rule it had set out in *Weeks*, that the government cannot use the actual evidence obtained in violation of the fourth amendment. *Id.* at 391-92. The Court then rejected the government's argument that it could use derivative evidence, evidence that is the fruit of the government's illegally acquired knowledge:

> The [Government's] proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. Weeks v. United States, . . . to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words.

Id. at 391-92 (citation omitted).

The Court stated that the "essence" of the exclusionary rule is not just that the unlawfully seized evidence "shall not be used before the Court but that it shall not be used at all." *Id.* at 392. The Court thus extended the suppression doctrine announced in *Weeks*: both the direct and indirect fruits of unconstitutional searches and seizures are inadmissible against a defendant.

[21] The Court stated:

> Here, as in the *Silverthorne* case, the facts improperly obtained do not "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" simply because it is used derivatively.

language of attenuation immediately followed.[22]

The Court stated that trial courts should use a three-step procedure to determine whether the government's conduct tainted its evidence: first, whether the government used illegal wiretaps; second, whether a "substantial portion" of the government's case is a product of the illegal wiretaps; and third, whether the government's evidence had an origin independent of the illegal wiretaps.[23] Because the trial court had not conducted this three-step examination of the government's evidence, the Court reversed the defendants' convictions and remanded the case for further proceedings.[24]

B. *WONG SUN V. UNITED STATES*: ATTENUATION REVITALIZED

Courts and commentators initially did not interpret *Nardone* as announcing an attenuation exception to the exclusionary rule.[25] In fact, until the 1963 Supreme Court decision in *Wong Sun v. United States*,[26] the few federal circuit courts that applied *Nardone*'s attenuation language did so without clearly explaining the connection between attenuation and the exclusionary rule.[27] In *Wong Sun*, the Court elaborated upon the attenuation exception, both clarifying and confusing the doctrine in the process.

Wong Sun involved the admissibility of confessions and tangible evidence against two defendants. The Supreme Court held that the government agents' unlawful invasion of the first defendant's home tainted

---

Id. at 341 (quoting *Silverthorne*, 251 U.S. at 392).

22 *Id.* The passage is quoted *supra* at text accompanying note 14.

23 *Nardone*, 308 U.S. at 341.

24 *Id.* at 342-43. Upon retrial, the defendants were again convicted and their convictions were upheld. *See supra* note 18.

25 *See, e.g.*, United States v. Nardone, 127 F.2d 521 (2d Cir.), *cert. denied*, 316 U.S. 698 (1942); United States v. Goldstein, 120 F.2d 485 (2d Cir. 1941); United States v. Weiss, 34 F. Supp. 99 (S.D.N.Y. 1940); Bernstein, *The Fruit of the Poisonous Tree: A Fresh Appraisal of the Civil Liberties Involved in Wiretapping and Its Derivative Use*, 37 ILL. L. REV. 99 (1942); 14 FLA. L.J. 373 (1940); 2 LA. L. REV. 759 (1940); 14 S. CAL. L. REV. 82 (1940); 18 TEX. L. REV. 504 (1940). Observers probably did not interpret *Nardone* as creating an attenuation exception because *Nardone* involved a wiretapping statute that fell outside the scope of the fourth amendment, *see supra* note 16, and fourth amendment exclusionary principles. *See generally* Bernstein, *supra*.

26 371 U.S. 471 (1963). The Supreme Court cited the attenuation language in only two cases prior to *Wong Sun*. *See* Lanza v. New York, 370 U.S. 139 (1962) (legislative committee's questions of petitioner were based upon information known independent of illegal eavesdropping; *Nardone* distinguished as applying to criminal prosecutions); Costello v. United States, 365 U.S. 265 (1961) (grand jury's questions of petitioner were based upon information known prior to and independent of the illegal wiretaps).

27 *See, e.g.*, Tindle v. United States, 325 F.2d 223 (D.C. Cir. 1963), *cert. denied*, 379 U.S. 883 (1964); Jackson v. United States, 313 F.2d 572 (D.C. Cir. 1962); United States v. Place, 263 F.2d 627 (2d Cir.), *cert. denied sub nom.*, Canty v. United States, 360 U.S. 919 (1959); Gregory v. United States, 231 F.2d 258 (D.C. Cir.), *cert. denied*, 352 U.S. 850 (1956).

the statements he made immediately thereafter.[28] The Court also ruled that the government could not introduce the heroin seized from a third person against the first defendant because the agents learned of the heroin's existence from the statement unlawfully obtained from the first defendant.[29] The Court, however, held that the second defendant's confession, made several days after his arrest, was admissible because "the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.' "[30]

Although the Court in *Wong Sun* did not expressly recognize the attenuation doctrine as a separate exception to the exclusionary rule,[31] the Court identified two elements that attenuation might include. First, the Court appeared to define attenuation as the government's nonexploitation of its misconduct: if the government did not exploit its wrongdoing, the connection between the government's wrongdoing and its discovery of evidence is attenuated, and the evidence is admissible.[32] Second, the Court suggested that the intervening act of the defendant's free will may be one source of attenuation.[33] The Court, however, did not explain whether the exploitation formulation was a restatement of, a replacement of, or an alternative to the attenuation doctrine suggested in *Nardone*.[34] The Court also did not describe how the defendant's free

---

28 *Wong Sun*, 371 U.S. at 486.

29 *Id.* at 488.

30 *Id.* at 491 (quoting United States v. Nardone, 308 U.S. 338, 341 (1939)). The defendant, previously released on his own recognizance, voluntarily went to the police station a few days after his arrest and gave a statement. *Wong Sun*, 371 U.S. at 491.

31 The Court cited *Silverthorne* and *Nardone* for different applications of the exclusionary rule, *id.* at 487, but did not explain whether the two cases created two different exceptions to the exclusionary rule or merely provided two different phrasings of the same exception. Despite the lack of clarity in the Court's discussion of *Nardone* and *Silverthorne*, lower courts inferred that the Court in *Wong Sun* either recognized *Nardone* as creating an attenuation exception or created the exception itself in *Wong Sun*. *See, e.g.*, United States v. Larios, 640 F.2d 938, 941 (9th Cir. 1981); Durham v. United States, 403 F.2d 190, 196 (9th Cir. 1968), *vacated on other grounds*, 401 U.S. 481 (1971) (per curiam); Rogers v. United States, 330 F.2d 535, 541 (5th Cir.), *cert. denied*, 379 U.S. 916 (1964).

32 *Wong Sun*, 371 U.S. at 488. The Court derived this formulation from J. MAGUIRE, EVIDENCE OF GUILT 221 (1959): "[T]he issue . . . 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."

33 *Wong Sun*, 371 U.S. at 486. The Court stated that, under the circumstances of the agents' invasion of the first defendant's home, "it is unreasonable to infer that [the defendant's] response was sufficiently an act of free will to purge the primary taint of the [agents'] unlawful invasion." *Id.* (footnote omitted). With this conclusion, the Court appeared to establish a rule that a defendant's statement would be admissible if an act of the defendant's free will intervened between the government's misconduct and the defendant's statement, and the defendant's act of free will was sufficient to remove the taint of the government's misconduct. The Court, however, did not elaborate upon the application of this standard.

34 Although the Court distinguished between *Nardone*'s attenuation passage and Maguire's exploitation passage, it did not explain whether each formulation applied in different factual

will attenuates an illegal connection. The Court did not resolve these questions until 1975, in *Brown v. Illinois*.[35]

C. *BROWN V. ILLINOIS*: CONSTRUCTING A FOUR-FACTOR TEST OF ATTENUATION

In *Brown v. Illinois*, the Court reviewed an Illinois Supreme Court decision that "*Miranda* warnings in and of themselves" attenuated the connection between the defendant's illegal arrest and his statements to the police.[36] The Court first held that *Miranda* warnings do not *per se* break the causal connection between the police misconduct and a defendant's confession.[37] The Court then ruled that courts should consider four factors in determining whether a "confession is obtained by exploitation of an illegal arrest":[38] first, whether the police gave *Miranda* warnings;[39] second, "the temporal proximity of the arrest and the confession";[40] third, "the presence of intervening circumstances";[41] and fourth, "the purpose of and flagrancy of the official misconduct. . . ."[42]

---

situations. The Court, however, applied Maguire's formulation to find the heroin inadmissible against the first defendant, 371 U.S. at 488, and applied *Nardone*'s attenuation doctrine to affirm the receipt of the second defendant's confession. *Id.* at 491.

35 422 U.S. 590 (1975). Between *Wong Sun* and *Brown*, the Supreme Court did not apply *Wong Sun*'s statement of the attenuation exception but continued to rely upon the independent source exception. *See* Alderman v. United States, 394 U.S. 165 (1969) (Court cited *Wong Sun* for the Maguire language but quoted *Nardone* for the requirement that the government must establish the existence of an independent source); Harrison v. United States, 392 U.S. 219, 225 & n.12 (1968) (Court held that the government had not proved "that the defendant's testimony was not produced by the illegal use of his confessions at trial"); Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 & n.18 (1964) (Court held that federal prosecutor may not use witness' testimony or its fruits when the witness testified under a state grant of immunity, unless the government established "an independent, legitimate source for the disputed evidence").

36 422 U.S. 590, 597 (1975).

37 *Id.* at 603. The Court held that *Miranda* warnings do not *per se* attenuate because *Miranda* warnings are designed to safeguard only the fifth amendment right against self-incrimination against the coercive influences of custodial interrogation. *Id.* at 600. Thus, while *Miranda* warnings may ensure that a confession is admissible under the fifth amendment, they may not sufficiently protect the defendant's fourth amendment rights. *Id.* at 601. Even if a statement is voluntary under the fifth amendment, the fourth amendment exclusionary rule requires that the government prove that the statement is not connected to an illegal arrest. *Id.* at 601-02. The Court stated that to allow *Miranda* warnings to cure an illegal arrest would "substantially dilute[]" the exclusionary rule's protection of the fourth amendment; the police would know that *Miranda* warnings would protect from suppression at trial all evidence derived from a previously illegal arrest. *Id.* at 602.

38 *Id.* at 603.

39 *Id.* The Court stated that the giving of *Miranda* warnings is "an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest." *Id.*

40 *Id.* (footnote omitted).

41 *Id.* at 603-04 (citing Johnson v. Louisiana, 406 U.S. 356 (1972) (intervening circumstance was the defendant's appearance before a magistrate)).

42 *Brown*, 422 U.S. at 604 (citing *Wong Sun*, 371 U.S. at 491). The Court identified the

The Court found that the connection between the illegal arrest and the defendant's confession was not attenuated because the defendant's statements followed his illegal arrest by less than two hours, no significant circumstances intervened between the arrest and the confession, and the police's misconduct "had a quality of purposefulness."[43] The Court accordingly found the defendant's statements inadmissible.[44]

In *Brown*, the Court elaborated upon its discussion in *Wong Sun* of confessions as tainted fruits of police misconduct. The Court clearly stated in *Brown* that the question is whether the confession is sufficiently an act of free will to remove the taint of the unlawful arrest.[45] The Court also used the attenuation and exploitation formulations interchangeably, thus implying that the two formulations were but different expressions of the same attenuation exception.[46] Although the Court in *Brown* applied the four-factor test only to a defendant's confession, later courts, including the Supreme Court in *United States v. Ceccolini*,[47] extended the test to cases in which defendants challenged evidence other than confessions as the product of police misconduct.[48]

D. *UNITED STATES V. CECCOLINI*: THE LATEST ELABORATION UPON THE ATTENUATION EXCEPTION

In *United States v. Ceccolini*, a police officer discovered evidence in an illegal search that implicated the defendant in criminal activity, and the officer informed a federal agent of his discovery.[49] Four months after the illegal search, the federal agent interviewed an employee of the defendant who had witnessed the illegal search.[50] The employee later testified before a grand jury about the police officer's search. Largely on the basis of the employee's testimony, the defendant was indicted and

---

"purpose and flagrancy of the official misconduct" as a "particularly" relevant factor. *Brown*, 422 U.S. at 604.

[43] *Brown*, 422 U.S. at 604-05.

[44] *Id.* at 604.

[45] *Id.* at 599, 600, 602, 603.

[46] *Id.* at 592, 602, 603.

[47] 435 U.S. 268 (1978).

[48] *See Ceccolini*, 435 U.S. at 280-81 (Court used *Brown* factors to find attenuation of connection between illegal search and discovery of witness); United States v. Jones, 608 F.2d 386 (9th Cir. 1979) (court used *Brown* factors to find attenuation of connection between illegal arrest and discovery of tangible evidence). For further discussion of the misapplication of the *Brown* factors, see *infra* note 53.

[49] *Ceccolini*, 435 U.S. 268, 270 (1978). The police officer, Biro, was in the defendant's store talking with one of the defendant's employees, Lois Hennessey, when Biro saw "an envelope with money sticking out of it lying on the drawer of the cash register behind the counter." *Id.* Biro examined the envelope and found that it contained gambling slips. *Id.* Biro asked Hennessey about the envelope, and she said that it belonged to the defendant. *Id.*

[50] *Id.* at 272.

convicted of perjury.[51] The Supreme Court affirmed the defendant's conviction, finding that, although the search was unconstitutional, the connection between the search and the witness' testimony was attenuated.[52]

The four-factor test set out in *Brown* required courts to consider the circumstances surrounding the unconstitutional procurement of a confession to determine whether the connection between the confession and the police misconduct was attenuated. In *Ceccolini*, the Court elaborated upon the attenuation test set out in *Brown*, adding factors other than the circumstances surrounding the acquisition of the evidence.[53] The first factor the Court added was whether the evidence derived from the government's misconduct was a witness' testimony or another type of evidence. The Court stated that its analysis would consider different attenuation factors in a case involving an illegally discovered witness than in a case involving a defendant's confession or tangible evidence.[54] Second, the Court stated that the cooperation of an illegally discovered witness is relevant to attenuation: if the witness, once discovered, freely agrees to testify, the Court will likely find the connection between the government's misconduct and the witness' testimony attenuated.[55]

---

[51] *Id.* Following the defendant's conviction, the federal trial court suppressed the witness' testimony as fruit of the illegal search. The court then granted the defendant's motion to set aside the guilty verdict, concluding that, without the witness' testimony, there was insufficient proof of the defendant's guilt. *Id.* at 270. The Court of Appeals for the Second Circuit affirmed the district court's ruling. United States v. Ceccolini, 542 F.2d 136, 140-42 (2d Cir. 1976), *rev'd*, 435 U.S. 268 (1978).

[52] *Ceccolini*, 435 U.S. at 279-80.

[53] *Id.* at 275-79. The Court's application of the *Brown* factors to a case involving an unlawfully discovered witness was improper. Although the Court in *Brown* did not expressly state that the four-factor test could not be used with derivative evidence other than confessions, the factors logically bear upon attenuation only with confessions. The passage of time, the presence of intervening circumstances, and the flagrancy of the government's misconduct following an illegal arrest all could affect the government's ability to extract a confession from a defendant. If an examination of these factors revealed a strong connection between the illegal arrest and a defendant's confession, the confession should be suppressed.

None of the factors from *Brown*, however, affect the strength of the connection between governmental misconduct and the discovery of a witness who later testifies against a defendant. The passage of time or the occurrence of intervening events between the discovery of the witness and the witness' testimony does not weaken the connection between the misconduct and the *discovery* of the witness. *See Ceccolini*, 435 U.S. at 289 (Marshall, J., dissenting). The absence of flagrant police misconduct likewise does not change the fact that the government discovered the witness because of its misconduct. For further discussion of the application of the *Brown* factors to the discovery of witnesses, see *infra* note 97.

[54] *Ceccolini*, 435 U.S. at 275, 279.

[55] *Id.* at 276-77. The Court's argument for the relevance of the witness' free will to the determination of attenuation rested upon two questionable propositions. The Court first asserted that "[t]he greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means. . . ." *Id.* at 276. Thus, because the police need not conduct illegal searches to discover willing witnesses, the courts do not need to

The third consideration added by the court was that a finding of no attenuation forever prevents an illegally discovered witness from testifying about "relevant and material facts," thus frustrating the truthseeking function of the trial.[56] Because of this "cost" to the search for truth, the Court ruled that trial courts must find an especially close connection between a witness' testimony and the government's misconduct before excluding the testimony.[57] The fourth factor was whether suppressing the testimony of an illegally discovered witness would deter police officers from engaging in the misconduct that uncovered the witness.[58] Thus, at least in applying the attenuation exception to witness testimony, courts after *Ceccolini* must evaluate more than the causal connection between governmental misconduct and the testimony of a witness discovered by that misconduct.[59] Courts also must consider the witness'

---

deter the police from such misconduct by suppressing the testimony of witnesses who are discovered illegally. *Id.* Justice Marshall, in dissent, responded to the Court's observation:

> The somewhat incredible premise of this statement is that the police in fact refrain from illegal behavior in which they would otherwise engage because they know in advance both that a witness will be willing to testify and that he or she "will be discovered by legal means." . . . This reasoning surely reverses the normal sequence of events; the instances must be very few in which a witness' willingness to testify is known before he or she is discovered. In this case, for example, the police did not even know that Hennessey was a potentially valuable witness, much less whether she would be willing to testify, prior to conducting the illegal search.

Id. at 288 (Marshall, J., dissenting).

Second, the Court stated that "[w]itnesses can, and often do, come forward and offer evidence entirely of their own volition." *Id.* at 276. Justice Marshall responded that, while the Court's observation was accurate, it was not relevant to the question of attenuation: the independent source exception "would plainly apply to a witness whose identity is discovered in an illegal search but who later comes to the police for reasons unrelated to the official misconduct." *Id.* at 286-87 (Marshall, J., dissenting).

[56] *Id.* at 277. Justice Marshall replied in dissent that the exclusion of any evidence exacts a cost from the search for truth. Because the suppression of illegally discovered tangible evidence is as "costly" as the suppression of illegally discovered witness testimony, witness testimony does not deserve special treatment under the attenuation exception. *Id.* at 288-89 (Marshall, J., dissenting).

The Court's argument that the value of witness testimony justifies a less restrictive exception also is internally inconsistent. The Court was reluctant to exclude witness testimony because preventing "knowledgeable witnesses" from testifying about "relevant and material facts" seriously obstructs " 'the ascertainment of truth.' " *Id.* at 277 (quoting C. MCCORMICK, LAW OF EVIDENCE § 71 (1954)). At the same time, however, the Court recognized that tangible evidence is likely to be more reliable than witness testimony. *Id.* at 278. The Court thus favored witness testimony even though the reason for favoring witness testimony—its value to the search for truth—applied with greater force to tangible evidence, which received no added protection from the application of the exclusionary rule.

[57] *Id.* at 278.

[58] *Id.* at 275, 280. For a discussion of the relationship between the attenuation exception and the deterrent purpose of the exclusionary rule, see *infra* notes 96-118 and accompanying text.

[59] The Court in *Ceccolini* interpreted *Nardone*'s language as "mak[ing] it perfectly clear . . . that the question of causal connection . . . cannot be decided on the basis of causation in the logical sense alone, but necessarily includes other elements as well." *Ceccolini*, 435 U.S. at

willingness to testify and the "cost" and deterrent effect of suppressing the testimony in determining whether the connection between the governmental misconduct and the testimony is attenuated.

III. THE MISINTERPRETATION OF *NARDONE*'S ATTENUATION LANGUAGE

As Part II of this Comment described, the Supreme Court derived the attenuation exception to the exclusionary rule from a passage in *Nardone v. United States*. An examination of the attenuation passage, however, demonstrates that the Court in *Nardone* did not intend to create a new exception to the suppression doctrine.

A. THE INDEPENDENT SOURCE CONTEXT OF THE ATTENUATION PASSAGE

The context of the attenuation language in *Nardone* reveals that the Court intended to restate the exclusionary rule for derivative evidence and the independent source exception set out in *Silverthorne Lumber Co. v. United States*:

> What was said in a different context in *Silverthorne* . . . is pertinent here: "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." . . .
>
> Here, as in the *Silverthorne* case, the facts improperly obtained do not "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" simply because it is used derivatively.[60]

The attenuation passage immediately followed and also showed the Court's adherence to *Silverthorne*'s independent source exception:

> Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. . . . [T]he trial judge must give opportunity . . . to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the government to convince the trial court that its proof has an independent origin.[61]

The concluding sentence of this passage thus demonstrates that the

---

274. The Court conceded that "the particular knowledge to which [the illegally discovered witness] testified at trial can be logically traced back to" the police officer's unconstitutional search of the defendant's envelope. *Id.* at 279.

60 Nardone v. United States, 308 U.S. 338, 340-41 (1939) (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)) (citations omitted).

61 *Id.* at 341 (emphasis supplied).

Court did not set out a new exception to the exclusionary rule. Rather, the Court posed the same determinative question asked in *Silverthorne*: does the government's evidence have an independent origin?

Sandwiched between approving references to *Silverthorne*'s independent source exception, the attenuation exception merely referred to the application of the independent source exception. The court of appeals in the *Nardone* case had noted that the Supreme Court had not defined the boundaries of the exclusionary rule for derivative evidence or provided the procedures and burdens of proof for applying the suppression doctrine to derivative evidence.[62] The Supreme Court provided the guidance requested by the court of appeals, outlining the proper application of the exclusionary rule and independent source exception in the attenuation passage and throughout the opinion.[63] Thus, far from creating a new exception to the exclusionary rule, the Court's language in *Nardone* suggests that the Court merely acknowledged the independent source exception and applied it to a case not then governed by the fourth amendment.[64]

B. DIVINING THE MEANING OF ATTENUATION

Although the Supreme Court demonstrated its adherence to the independent source exception throughout the *Nardone* opinion, the plain

---

[62] *Id.*

[63] Writing for the circuit court, Judge Learned Hand posed four questions regarding the manner in which a trial court is to determine the admissibility of derivative evidence. In *Nardone*, the Supreme Court answered each of Judge Hand's questions.

The first two questions were: "Did the [unlawful wiretaps] taint all other evidence procured through them? . . . Did the burden rest upon the accused or the prosecution, to show to what the taint extended?" United States v. Nardone, 106 F.2d 41, 43 (2d Cir.), *rev'd*, 308 U.S. 338 (1939). The Supreme Court answered these questions immediately after the attenuation passage. The defendant must first prove that the government used illegal wiretaps and that a "substantial portion" of the government's case was a fruit of the illegal wiretapping. If the government does not then prove that its evidence had an independent origin, the evidence is tainted. United States v. Nardone, 308 U.S. at 341.

Judge Hand then asked: "How should the [taint] inquiry be conducted?" United States v. Nardone, 106 F.2d at 43. Beyond specifying the burdens of production and the burdens of proof described above, the Supreme Court did not require any set procedures for a taint determination. Rather, the Court entrusted questions of the admissibility of evidence to the discretion of trial judges. The Court stated: "Such a system as ours must, within the limits here indicated, rely on the learning, good sense, fairness and courage of federal trial judges." Nardone v. United States, 308 U.S. at 342.

Finally, Judge Hand asked, "Was it too late to leave [the taint determination] until the trial?" United States v. Nardone, 106 F.2d at 43. In response, the Supreme Court stated that a defendant may raise during trial a claim that the government's evidence is tainted by government misconduct if the trial judge is "satisfied that the accused could not at an earlier stage have had adequate knowledge to make his claim." Nardone v. United States, 308 U.S. at 342.

[64] See *supra* note 16 for an explanation of the inapplicability of the fourth amendment to the *Nardone* case.

meaning of the attenuation passage suggests an exclusionary rule exception different from the independent source exception. To fully understand the *Nardone* opinion, therefore, it is necessary to more closely examine the attenuation language.

The critical sentence is: "As a matter of good sense, however, such connection [between information obtained through illegal wiretapping and the government's proof] may have become so attenuated as to dissipate the taint."[65] "Attenuated" means: "Weakened in intensity, force, effect, or value."[66] "Dissipate" means: "[T]o destroy or dissolve completely, undo, annul. . . ."[67] Using these definitions, the quoted passage suggests that if the connection between the government's misconduct and its evidence is weakened, then the evidence will not be tainted and will be admissible. This result is inconsistent with the independent source exception, which requires evidence to have an origin completely independent of the unlawful governmental conduct, not merely proof that the unlawful connection is weakened.

The use of the verb "become" in the attenuation passage creates another inconsistency with the independent source exception. "Become," as a linking verb,[68] suggests the passage of time.[69] The passage of time between the discovery and use of evidence, however, does not affect whether the government establishes an independent source for its evidence.[70] Once the government learns facts through illegal means, it will not unlearn those facts simply because time passes. Unless the government establishes an independent source, the unlawfully discovered evidence is inadmissible.

One can reconcile the plain meaning of the attenuation passage with the independent source context of the rest of the *Nardone* opinion by imparting a legal, not physical, definition to "attenuated." A court will consider an independent source, as a matter of law, to weaken or even break the connection between the government's misconduct and its evidence, despite the continued causal connection between the misconduct and the evidence.[71] Thus, the independent source dissipates, by

---

65 *Nardone*, 308 U.S. at 341.

66 1 THE OXFORD ENGLISH DICTIONARY 550 (1970).

67 3 THE OXFORD ENGLISH DICTIONARY 510 (1970).

68 B. EVANS & C. EVANS, A DICTIONARY OF CONTEMPORARY USAGE 56-57 (1957).

69 *Id.* at 277: "[L]inking verbs['] . . . most valuable contribution is in showing time differences. . . ."

70 *See* United States v. Ceccolini, 435 U.S. 268, 289 (1978) (Marshall, J., dissenting) (passage of time between discovery and introduction of evidence is irrelevant to question whether discovery of evidence was illegal). The passage of time may affect the admissibility of an illegally obtained confession, as in Wong Sun v. United States, 371 U.S. 471 (1963), discussed *supra* notes 28-34 and accompanying text. The relationship between the independent source exception and illegally obtained evidence is discussed further at *infra* note 97.

71 The Supreme Court appeared to reconcile the independent source and attenuation lan-

the time of trial, the taint created by the government when it illegally discovered the evidence.

It is also possible to explain the attenuation and independent source language in *Nardone* without reconciling their inconsistent meanings. The Court affirmed the independent source exception but injected a passage that, according to the passage's plain meaning, suggests a different exception. The Court, however, did not explicitly state a new exception in *Nardone*,[72] and the Court did not recognize *Nardone* as the source of an attenuation exception until at least a quarter of a century later.[73] Thus, the Court's use of the attenuation language in *Nardone* likely had no doctrinal significance at the time but was only an idiosyncratic turn of phrase, inappropriate to an explication of the contours of the fourth amendment exclusionary rule.[74] The passage gained consti-

---

guage in several earlier cases. In Costello v. United States, 365 U.S. 265 (1961), the Court held that the government had proven an independent source for its evidence, and held that any connection between the illegal conduct and the evidence was "too attenuated to require the exclusion" of the evidence. *Id.* at 280. Because the Court found an independent source, it needed to go no further. Thus, the Court seemed to use the attenuation language to restate its conclusion that an independent source existed.

Similarly, in United States v. Wade, 388 U.S. 218 (1967), in which the Court held that the sixth amendment guarantees defendants the right to counsel at post-indictment lineups, the Court considered whether an improper lineup tainted an in-court identification of the defendant. The Court stated that

> the proper test to be applied . . . is that quoted in Wong Sun v. United States, 371 U.S. 471, 488, " '[W]hether, 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)."

Id. at 241. At the conclusion of the opinion, however, the Court stated that, on remand, the lower court must "determine whether the in-court identifications had an independent source. . . ." *Id.* at 242. Thus, the Court used the *Wong Sun*-Maguire formulation of attenuation, *see supra* note 68 and accompanying text, and the independent source exception interchangeably as equivalent statements of the same exclusionary rule principle.

72 In contrast, the Court explicitly reaffirmed the independent source exception three times in *Nardone*. Nardone v. United States, 308 U.S. 338, 341, 342 (1939).

73 Wong Sun v. United States, 371 U.S. 471 (1963), was the first case in which the Court relied upon *Nardone*'s attenuation language for its holding. It is not clear whether the Court in *Wong Sun* recognized *Nardone* as creating an attenuation exception, or whether the Court used *Nardone*'s language to create the exception in *Wong Sun*. *See supra* note 31 and accompanying text.

74 Although one can only speculate about why the Court used the phrases "attenuated" and "dissipate the taint" in *Nardone*, there is evidence that the author of the *Nardone* opinion, Justice Frankfurter, had a penchant for using odd and often inexplicable language in his opinions. One biographer wrote:

> Justice Frankfurter's opinions are the repositories for some of the most exotic words in the English language. His interest in words, their history and slightest gradations in meaning, finds an outlet in his writings. It is not unusual to come across such brain-teasers as "palimpsest" or "gallimaufry" in the middle of a technical discussion. He also loves figures of speech that are colorful but at the same time meaningful. His references range from the nautical Plimsoll line to Elizabethan sonnets.

H. THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 343 (1960). Thomas also noted

tutional significance only when later courts seized upon the curious phrasing to assist their decisions not to extend the exclusionary rule.[75]

IV. THE CONFLICT BETWEEN THE ATTENUATION EXCEPTION AND THE FOURTH AMENDMENT EXCLUSIONARY RULE

The attenuation exception conflicts with the exclusionary rule's protection of fourth amendment rights. As originally conceived, the right to the exclusion of illegally obtained evidence was part of the defendant's right to be free from unreasonable searches and seizures.[76] Thus, when a court admits through the attenuation exception evidence obtained in violation of the defendant's fourth amendment rights, the court perpetuates the violation of the defendant's constitutional rights. As currently applied, the exclusionary rule seeks to safeguard fourth amendment rights by deterring unlawful police behavior. The attenuation exception also undermines the deterrent effect of the exclusionary rule by permitting the government to gain the benefit of the direct and indirect fruits of its unlawful searches and seizures.

Frankfurter's inclination to "soar to unlimited heights in his use of allegorical or figurative references in his opinions." *Id.* at 345. For a poetic exploration of the most well-known example of Frankfurter's ability to confuse by metaphor—"the Plimsoll line of 'due process,' " Fikes v. Alabama, 352 U.S. 191, 199 (1957) (Frankfurter, J., concurring)—see Field, *Frankfurter, J., Concurring . . .*, 71 HARV. L. REV. 77 (1957).

More specifically, Professor Amsterdam has noted the confusing nature of Justice Frankfurter's attenuation language:

> Some causal connections are said, however, to " 'become so attenuated as to dissipate the taint.' " Frankly, even the iron discipline that has led me single-mindedly almost to the end of my black-letter statement of the law of the fourth amendment—even my fixed purpose never to question whether black is grey or whether some monstrous anti-doctrine leers behind the arras of the rules—fails me now in this last extremity. The subject of derivative evidence, that land of poetry, of "fruits" and "dissipations" and their bacchanalian train, utterly resists my best efforts at cartography.

Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 361 (1974) (footnotes omitted).

[75] For example, in *Ceccolini*, the Court recognized that the unlawfully discovered witness testimony did not have an origin independent of the government's misconduct. United States v. Ceccolini, 435 U.S. 268, 273 (1978). Thus, the Court was able to find the evidence admissible only by using the malleable attenuation exception.

[76] Professors Schrock and Welsh state that the fourth amendment

> recognizes an exclusionary *right* in the defendant, a right that is conceptually and morally part and parcel with the right to be free from unreasonable searches and seizures. . . . [T]he basic right is to be free from the entire transaction; the right to exclusion and the right to be free from the original invasion are coordinate components of that embracing right.

Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 301 (1974) (emphasis in original).

A. THE ATTENUATION EXCEPTION'S DENIAL OF A DEFENDANT'S RIGHT TO EXCLUSION

1. The Personal Right to Exclusion

Although the fourth amendment does not grant an explicit right to the exclusion of illegally obtained evidence, the exclusionary right is implicit in the fourth amendment's safeguard against governmental misconduct. The fourth amendment prohibits every branch of the government from violating a citizen's personal security.[77] The police and the courts are but different agents of a unitary government that have inseparable roles in the same governmental conduct.[78] For example, the police would have no reason to pursue wrongdoers unless courts existed to finalize the police's enforcement of the law; likewise, the courts could not operate unless the police gathered evidence of wrongdoing for the courts to adjudge.[79] Because the police and the courts participate in the same governmental conduct, the courts can perpetuate the police's violation of a defendant's fourth amendment rights by ad-

---

[77] The fourth 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.

U.S. CONST. amend. IV. Although the police may be the only government officials who actually conduct searches and seizures, *but see* Lo-Ji Sales v. New York, 442 U.S. 319 (1979) (Town Justice issued warrant and participated in search), the fourth amendment directs all branches of government to safeguard the right to be secure against unreasonable searches and seizures. The courts, by their issuance of warrants and their evidentiary rulings, thus may violate the security of the people from government misconduct. *See* United States v. Peltier, 422 U.S. 531, 558 n.18 (1975) (Brennan, J., dissenting); LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 353 n.247 (1982).

[78] Schrock & Welsh, *supra* note 76, at 300. Professor Amsterdam also has argued that, for fourth amendment purposes, the government must be considered a single institution with a singular goal:

> [I]t is unreal to treat the offending officer as a private malefactor who just happens to receive a government paycheck. It is the government that sends him out on the streets with the job of repressing crime and of gathering criminal evidence in order to repress it. It is the government that motivates him to conduct searches and seizures as a part of his job, empowers him and equips him to conduct them. If it also receives the products of those searches and seizures without regard to their constitutionality and uses them as the means of convicting people who the officer conceives it to be his job to get convicted, it is not merely tolerating but inducing unconstitutional searches and seizures.
>
> The admission of unconstitutionally seized evidence is therefore not, as the critics of the exclusionary rule assume, merely something that happens after "a violation" of the fourth amendment has occurred, and when it is too late to prevent, impossible to repair, and senseless to punish the government for that violation. It is the linchpin of a functioning system of criminal law administration that produces incentives to violate the fourth amendment.

Amsterdam, *supra* note 74, at 432 (footnotes omitted).

[79] Schrock & Welsh, *supra* note 76, at 300.

mitting at trial the evidentiary fruits of an unlawful search or seizure.[80]

This "unitary" theory of a defendant's right to exclusion was at the core of the Supreme Court's creation of the exclusionary rule in *Weeks v. United States*.[81] The Court stated in *Weeks* that the fourth amendment limits the power of both courts and law enforcement officials and that "the duty of giving to the [fourth amendment] force and effect is obligatory upon all intrusted . . . with the enforcement of the laws."[82] The Court also said that the fourth amendment protections would be "of no value" if private papers could be "seized and held and used in evidence against a citizen accused of an offense. . . ."[83] Finally, the Court held that the trial court had violated the defendant's constitutional rights by refusing to return the seized papers: "In holding them and permitting their use upon trial, . . . prejudicial error was committed."[84] Through-

---

80 Professors Schrock and Welsh explain:

> Search, seizure, and use are all part of one "evidentiary transaction," and every such transaction presupposes a court as well as a policeman. Because the court is integral to the evidentiary transaction, it cannot insulate itself from responsibility for any part of that transaction, and specifically not from responsibility for the manner in which evidence is obtained. The only way the court can avoid consummating an unconstitutional course of conduct in which, wittingly or unwittingly, it has been involved from the beginning, is to abort the transaction by excluding the evidence. To admit the evidence is for the court to implicate itself in the unconstitutional police misconduct and to violate the Constitution.

Id. at 298-99 (footnote omitted). Professors Schrock and Welsh also advance a second, "constitutional[ly] equal" right to exclusion. *Id.* at 309. They first contend that the principle of judicial review established in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), obligates all courts to apply the "law of the land"—the Constitution—in the cases brought before them. Schrock & Welsh, *supra* note 76, at 309. When a defendant alleges that the government has violated the fourth amendment, courts must determine, as they must do with all challenged governmental conduct, *id.* at 325, whether the particular search or seizure passes constitutional muster. *Id.* at 308-09.

Second, Schrock and Welsh maintain that all defendants have a due process right not to be deprived of "life, liberty, or property, without due process of law," U.S. CONST. amend. V, XIV, which means, conversely, that all such deprivations must be consistent with the commands of the Constitution. Schrock & Welsh, *supra* note 76, at 361-62; Sunderland, *Liberals, Conservatives, and the Exclusionary Rule*, 71 J. CRIM. L. & CRIMINOLOGY 343, 372 (1980) ("[T]he due process clause of the fifth amendment would allow no deprivation of life, liberty, or property except insofar as the commands of the Constitution are followed throughout the proceedings."). Thus, when a court finds that a search or seizure violates the fourth amendment, it must exclude the evidentiary fruits of the search or seizure. To admit the illegally obtained evidence would be to approve a deprivation of the defendant's liberty by means that violated the Constitution. Schrock & Welsh, *supra* note 76, at 326. The court also would be disregarding its judicial review duty to approve only that governmental conduct that conforms to constitutional requirements. *Id.* at 308-09, 351; *see* Sunderland, *supra*, at 375.

81 See *supra* note 1 for a discussion of *Weeks* and the origin of the exclusionary rule.

82 Weeks v. United States, 232 U.S. 383, 391-92 (1914).

83 *Id.* at 393.

84 *Id.* at 398. Professors Schrock and Welsh maintain that the Court's holding

> makes it clear that the *Weeks* Court recognized *two* violations, one by the marshal and one by the court, neither of which was regarded as "more" or "less" unconstitutional than the other. And presumably these words leave no doubt that the reason the court

out the *Weeks* opinion, therefore, the Court obligated trial courts to enforce fourth amendment rights. More specifically, the Court held that trial courts violate the defendant's fourth amendment rights by failing to suppress illegally obtained evidence.[85]

2. *The Conflict Between the Right to Exclusion and the Attenuation Exception*

Assuming that a defendant has a constitutional right to the exclusion of illegally obtained evidence,[86] the conflict between the exclusionary right and the attenuation exception is apparent. The exclusionary right requires the suppression of all evidence obtained in violation of the fourth amendment. The independent source exception, but not the attenuation exception, is consistent with this right to exclusion.

A court that applies the independent source exception finds that, although the government violated the fourth amendment, the government discovered the challenged evidence independent of the fourth amendment violation.[87] Proof of an independent source allows the court to admit the evidence without approving the fourth amendment violation. Conceptually, the unlawful source and the independent source run parallel to one another from the discovery of the evidence to its offer at trial. The independent source, however, ends the fourth amendment violation's effect upon the admissibility of the evidence. Evidence with an independent source, therefore, is admissible without violating a defendant's right to exclusion.[88]

---

does not have the right to admit the evidence is that the defendant has a fourth amendment right to its suppression.

Schrock & Welsh, *supra* note 76, at 301 (emphasis in original).

85 *See Weeks*, 232 U.S. at 398.

86 See *supra* notes 76-85 and accompanying text for an argument that suppression of illegally obtained evidence is a personal constitutional right. The Supreme Court currently does not consider the exclusion of illegally obtained evidence "a personal constitutional right of the party aggrieved." United States v. Calandra, 414 U.S. 338, 348 (1974). See *infra* notes 98-111 and accompanying text for a discussion of the Court's position that the exclusionary rule is designed primarily to deter police misconduct.

87 *See, e.g.*, Lanza v. New York, 370 U.S. 139, 146-47 (1962) (state legislative committee's questions of defendant were based upon information learned independent of unlawful eavesdropping); Costello v. United States, 365 U.S. 265, 279-80 (1961) (grand jury's questions of defendant were based upon information learned independent of illegal wiretaps); United States v. Houltin, 566 F.2d 1027, 1031 (5th Cir.), *cert. denied*, 439 U.S. 826 (1978) (identifications of challenged witnesses learned independent of illegal wiretaps); United States v. Kennedy, 457 F.2d 63, 66 (10th Cir.), *cert. denied*, 409 U.S. 864 (1972) (search that produced evidence was based upon valid warrant obtained independent of illegal arrest); Durham v. United States, 403 F.2d 190, 195-96 (9th Cir. 1968), *vacated on other grounds*, 401 U.S. 481 (1971) (per curiam) (location of evidence learned from independent source, not from illegal search).

88 *See supra* note 5. For cases illustrating the application of the independent source exception consistent with the personal right to exclusion, see United States v. Humphries, 636 F.2d

The attenuation exception, in contrast, denies a defendant's exclusionary right. Courts that apply the attenuation exception concede that the government's misconduct led to the discovery of the evidence admitted against the defendant.[89] The courts acknowledge but refuse to give "force and effect"[90] to the defendant's fourth amendment rights when the government offers the evidentiary fruits of unlawful searches and seizures.[91] Instead, courts admit illegally obtained evidence because the connection between the government's misconduct and its discovery of the evidence has become weakened by the passage of time,[92] human volition,[93] the government's good intentions,[94] or serendipity.[95] Finally, in an even more "attenuated" application of the attenuation exception, the courts admit illegally obtained evidence when the illegal connection is "broken" by the perceived need for relevant evidence or by the perceived futility of deterring police misconduct.[96]

Because the attenuation exception abridges the constitutional right to exclusion, courts should no longer use the attenuation exception to

---

1172, 1179 (9th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981) (evidence gained through lawful surveillance, not from unlawful detention); *Houltin*, 566 F.2d at 1031; *Kennedy*, 457 F.2d at 66; *Durham*, 403 F.2d at 195-96; McGarry's, Inc. v. Rose, 344 F.2d 416, 418-19 (1st Cir. 1965) (agents had prior knowledge of illegally seized documents and had issued a summons for them before the illegal seizure); Bynum v. United States, 262 F.2d 465 (D.C. Cir. 1958), *after remand*, 274 F.2d 767 (D.C. Cir. 1960), *cert. denied*, 379 U.S. 908 (1964) (defendant's first conviction reversed where government used as evidence set of defendant's fingerprints obtained during illegal detention; defendant's conviction upon retrial affirmed where government used set of fingerprints in existence at time of illegal detention).

89 For example, in United States v. Miller, 666 F.2d 991, 995 n.3 (5th Cir.), *cert. denied*, 456 U.S. 964 (1982), the court stated: "We do not address the independent source argument because the government admits . . . that the leads to the witnesses were developed in fact from information found in the [illegally seized] diary." *See also* United States v. Ceccolini, 435 U.S. 268, 273 (1978); United States v. Jones, 608 F.2d 386, 391 (9th Cir. 1979); United States v. Carsello, 578 F.2d 199, 203 (7th Cir.), *cert. denied*, 439 U.S. 979 (1978); United States v. Bacall, 443 F.2d 1050, 1057 (9th Cir.), *cert. denied*, 404 U.S. 1004 (1971).

90 Weeks v. United States, 232 U.S. 383, 392 (1914).

91 *See* cases cited *supra* note 89.

92 *See, e.g., Ceccolini*, 435 U.S. at 275, 279; United States v. One 1979 Mercury Cougar XR-7, 666 F.2d 228, 230 (5th Cir. 1982).

93 *See, e.g., Ceccolini*, 435 U.S. at 276-79; *Miller*, 666 F.2d at 995-96; *Jones*, 608 F.2d at 391; *Carsello*, 578 F.2d at 203 & n.3; *Houltin*, 566 F.2d at 1032.

94 *See, e.g., Ceccolini*, 435 U.S. at 279-80; *Jones*, 608 F.2d at 391; *Carsello*, 578 F.2d at 204 & n.4.

95 *Bacall*, 443 F.2d at 1057; United States v. Williams, 436 F.2d 1166, 1170-71 (9th Cir. 1970), *cert. denied*, 402 U.S. 912 (1971).

96 *See, e.g., Ceccolini*, 435 U.S. at 277-80; *Jones*, 608 F.2d at 391; *Carsello*, 578 F.2d at 204. In fact, Justice Powell, concurring in Brown v. Illinois, 422 U.S. 590 (1975), so injected policy considerations into the determination of attenuation that he converted the question of attenuation from an examination of the factual connection between misconduct and the discovery of evidence into a balancing test of the social desirability of the exclusionary rule: "The notion of the 'dissipation of taint' attempts to mark the point at which the detrimental consequences of illegal police action becomes so attenuated that the deterrent effect of the exclusionary rule no longer justifies the cost." *Id.* at 609 (Powell, J., concurring).

admit illegally obtained evidence. Instead, courts should apply the exclusionary rule solely in conjunction with the independent source exception, allowing the government to use illegally obtained tangible or verbal evidence[97] only when discovered independent of the government's misconduct.

B. THE ATTENUATION EXCEPTION'S FRUSTRATION OF THE DETERRENT EFFECT OF THE EXCLUSIONARY RULE

The Supreme Court currently considers that the exclusionary rule's "prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unlawful searches and seizures. . . ."[98] As a result, the Court has not applied the exclusionary rule where the Court believes that the suppression of evi-

---

97 The exclusionary rule and independent source exception, formulated in cases involving tangible evidence, do not precisely fit cases involving illegally obtained verbal evidence. For example, the governmental misconduct may only directly produce the discovery or detention of a defendant; any subsequent statement is derivative evidence. The intervention of a defendant's volition, however, may make the statement independent of the misconduct. A defendant's volition can be the independent source of the statement because a defendant's fifth amendment right against self-incrimination protects a defendant from making incriminating statements even if illegally arrested and detained. Therefore, if, after an illegal arrest, a defendant voluntarily waives his fifth amendment right and makes a statement, the defendant's volition truly is a source independent of the government's misconduct. *See* Wong Sun v. United States, 371 U.S. 471 (1963) (analyzed under independent source exception, defendant's decision to voluntarily make a statement three days after illegal arrest would constitute independent source).

The fact that a defendant's statement is voluntary under the fifth amendment, however, would not necessarily make the statement admissible under the fourth amendment. The Court stated in Brown v. Illinois that the voluntariness of a statement under the fifth amendment was only a "threshold requirement" for determining admissibility under the fourth amendment. 422 U.S. at 601-02, 604. Thus, courts should use the four factors set out in *Brown* bearing upon the attenuation of the connection between misconduct and a defendant's statement to determine whether a defendant's volition is an independent source.

Although illegally discovered witness testimony and defendants' statements are both verbal evidence, courts should not consider the volition of an illegally discovered witness as an independent source for the witness' testimony. Because of the right against self-incrimination, the illegal discovery of a defendant's identity will not guarantee the acquisition of a voluntary confession. The fifth amendment, however, does not protect non-defendant witnesses from making statements that only incriminate a defendant. Unless illegally discovered witnesses have particular reasons not to cooperate with the police and cannot be persuaded by immunity grants or threats of contempt, the witnesses will testify voluntarily against the defendant. *See, e.g.*, *Ceccolini*, 435 U.S. at 279. The discovery of the witness, therefore, is tantamount to obtaining the testimony either through the witness' cooperation or the government's persuasion. *Id.* Under exclusionary rule principles, therefore, the government's misconduct, not the witness' volition, is the source of the witness' testimony. *Id.* at 287-88 (Marshall, J., dissenting). Thus, courts should evaluate the testimony of illegally discovered witnesses as they evaluate tangible evidence: the witness' testimony should be inadmissible unless the government discovered the witness independent of its misconduct.

98 United States v. Calandra, 414 U.S. 338, 347 (1974).

dence will not deter police misconduct.[99] The Court also has refused to apply the exclusionary rule where the Court perceives that the "costs"[100] of exclusion outweigh the "incremental" deterrent benefits of exclusion.[101]

Assuming that the Court correctly believes that deterrence is the primary purpose of the exclusionary rule,[102] the Court misunderstands the deterrent potential of the suppression doctrine. Consequently, the Court's application of the attenuation exception undermines the deterrent purpose of the exclusionary rule.

1. The Court's Misunderstanding of the Deterrent Effect of Exclusion

The Court, at least in its application of the attenuation exception, interprets the exclusionary rule's deterrent effect too narrowly. In *Ceccolini*, for example, the Court assessed whether the suppression of a certain type of illegally obtained evidence—witness testimony—would deter a particular type of fourth amendment violation—an unintentional search for tangible evidence.[103] The Court's conception of the

---

[99] *E.g.,* Stone v. Powell, 428 U.S. 465, 493 (1976) (Court states that application of exclusionary rule in federal habeas corpus proceedings will not deter misconduct by state police); United States v. Janis, 428 U.S. 433, 454 (1976)(Court states that use of exclusionary rule in federal civil tax proceeding will not deter misconduct by state police).

[100] The "costs" weighed by the Court include: the loss of reliable and probative evidence, Stone v. Powell, 428 U.S. at 490; "deflect[ing] the truthfinding process and often free[ing] the guilty," *id.*; "generating disrespect for the law and administration of justice," *id.* at 491; "impeding the role of the grand jury," *Calandra*, 414 U.S. at 352; and hampering the enforcement of the law. *Janis*, 428 U.S. at 447. For a discussion of the Court's balancing in *Ceccolini*, see *supra* note 92.

[101] *E.g.*, Stone v. Powell, 428 U.S. at 493-94; *Janis*, 428 U.S. at 453-54; *Calandra*, 414 U.S. at 351-52. The Court has created a "no-lose" formula for determining whether the exclusionary rule's deterrent effect justifies suppressing evidence. In *Janis*, for example, the Court stated that, if extending the exclusionary rule to civil proceedings will deter police misconduct,

> the additional marginal deterrence . . . surely does not outweigh the cost to society of extending the rule to that situation. If, on the other hand, the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted. Under either assumption, therefore, the extension of the rule is unjustified.

Janis, 428 U.S. at 453-54. For a discussion of balancing interests in applying the exclusionary rule, see Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 600, 642-50 (1982-1983) (arguing that balancing is impossible or determined by predisposed values, and that the fourth amendment itself already embodies a balance of interests).

[102] The suppression doctrine's primary purpose is the protection of fourth amendment rights, which include a right of exclusion. *See supra* notes 77-85 and accompanying text. Deterrence is but a means to accomplish the purpose of the exclusionary rule. *See* Schrock & Welsh, *supra* note 76, at 359 n.272 ("[D]eterrence is 'only a hoped-for effect of the exclusionary rule, not its ultimate objective.' ") (quoting *Calandra*, 414 U.S. at 356 (Brennan, J., dissenting)).

[103] The Court stated in *Ceccolini*, 435 U.S. at 279-80, that

> [t]here is . . . not the slightest evidence to suggest that [the policeman] Biro entered the

suppression doctrine, as stated in *Ceccolini*, is flawed in two respects.

First, the exclusionary rule is not designed to deter individual officers from committing specific types of violations.[104] The exclusionary rule seeks to deter in a broader way. Rather than attempting to educate each individual police officer who violates the fourth amendment, the exclusionary rule seeks to instruct law enforcement officers as a group that fourth amendment violations will produce no benefit.[105] More specifically, the exclusionary rule seeks to regulate governmental conduct through "systemic deterrence," that is, "through a police department's institutional compliance with judicially articulated fourth amendment standards."[106] Thus, the extent of the exclusionary rule's deterrent effect depends upon the extent to which law enforcement officers understand that fourth amendment violations produce no benefit.[107] The exclusionary rule's success as a deterrent and the Court's decision to apply the exclusionary rule, therefore, does not and should not depend upon the particular misconduct of a particular police officer.[108]

Second, the exclusionary rule does not seek to deter by punishing individual officials for their misconduct.[109] Rather, the exclusionary

---

shop or picked up the envelope with the intent of finding tangible evidence bearing upon an illicit gambling operation, much less any suggestion that he entered the shop and searched with the intent of finding a willing and knowledgeable witness to testify against respondent. Application of the exclusionary rule in this situation could not have the slightest deterrent effect on the behavior of an officer such as Biro.

104 *See* Amsterdam, *supra* note 74, at 431; Kamisar, *supra* note 101, at 659; Schlag, *Assault on the Exclusionary Rule: Good Faith Exceptions and Damage Remedies*, 73 J. CRIM. L. & CRIMINOLOGY 875, 881-82 & n.36 (1982).

105 *See Peltier*, 422 U.S. at 556-58 & nn.15-18 (Brennan, J., dissenting); Kamisar, *supra* note 101, at 660-61 & n.531; Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 709-12 (1970); Schlag, *supra* note 104, at 882 & n.39.

106 Mertens & Wasserstrom, *Foreword: The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 394 (1981); *see* Kamisar, *supra* note 101, at 660-61; *The Exclusionary Rule Bills: Hearings on S. 101, S. 751, and S. 1995 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 21-23 (1982) (statement of Stephen H. Sachs, Attorney General of Maryland) [hereinafter cited as *Exclusionary Rule Hearings*].

107 *See* Oaks, *supra* note 105, at 710.

108 The Court's focus in *Ceccolini* upon the particular circumstances of the fourth amendment violation to determine the deterrent effect of suppression may result in courts admitting illegally obtained evidence whenever the police found the evidence inadvertently. *See, e.g.*, *Jones*, 608 F.2d at 391 (exclusionary rule would not deter "under these circumstances" because police were not looking for specific evidence they discovered during an unlawful search). Because, in every case in which the admissibility of evidence is challenged, the possibility of suppression did not in fact deter the police from conducting the illegal search or seizure, courts will always have grounds for holding that suppression will not deter the specific misconduct committed in the particular circumstances of the case. *Accord* Schlag, *supra* note 104, at 901 & n.99 (focusing on particular facts of a case may reflect the type of violations "susceptible to deterrence" but will reduce general deterrent effect of suppression doctrine).

109 *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting) ("The [exclusionary] rule does not apply any direct

rule creates a disincentive to conduct illegal searches and seizures.[110] By devaluing the evidence obtained through misconduct, the exclusionary rule removes one reason for conducting illegal searches or seizures.[111]

2. *The Attenuation Exception Undermines the Deterrent Effect of Exclusion*

If the suppression of evidence removes an incentive to violate the fourth amendment,[112] the attenuation exception encourages governmental misconduct. The attenuation exception communicates to law enforcement officers that fourth amendment violations will not affect the admissibility of illegally obtained evidence if the government uses remotely derivative evidence,[113] the government unintentionally discovers evidence,[114] or the government discovers a witness who agrees to testify against the defendant.[115] Even if the government did not try to obtain evidence in an "attenuated" fashion, the government knows that

---

sanction to the individual official whose illegal conduct results in the exclusion of evidence. . . ."); *c.f. Ceccolini*, 435 U.S. at 280; Michigan v. Tucker, 417 U.S. 433, 447 (1974); Amsterdam, *supra* note 74, at 431; Schlag, *supra* note 104, at 881-82 & n.36.

110 *See* Elkins v. United States, 364 U.S. 206, 217 (1960) ("[The exclusionary rule's] purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."); Amsterdam, *supra* note 74, at 431-32; Kamisar, *supra* note 101, at 659 n.529, 661, & n.539; Schlag, *supra* note 104, at 882.

111 *See* Amsterdam, *supra* note 74, at 431-32.

112 The exclusionary rule's success as a deterrent is oft-debated but uncertain. The Court has, at different times, doubted the deterrent effect of suppression, *Bivens*, 403 U.S. at 416-18 (Burger, C.J., dissenting), assumed that suppression deters, *Janis*, 428 U.S. at 453, and declined to consider suppression's potential success as deterrence. *Calandra*, 414 U.S. at 348 n.5. The Court's reluctance to reach a conclusion about the deterrent efficacy of suppression is understandable considering the available evidence on suppression as a deterrent. First, it is doubtful that the deterrent effect of suppression can be empirically established. Morris, *The Exclusionary Rule, Deterrence and Posner's Economic Analysis of Law*, 57 WASH. L. REV. 647, 653-57 (1982); Oaks, *supra* note 105, at 716; *see also* Kamisar, *supra* note 101, at 621 & n.304.

Second, the evidence that does exist is, not surprisingly, mixed. The empirical evidence tends to conclude that suppression does not deter. *See, e.g.,* Kamisar, *supra* note 101, at 657 & n.532; Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1267 & n.170 (1983). Anecdotal evidence, on the other hand, generally indicates that suppression directly and systemically deters misconduct. *See, e.g.,* Kamisar, *supra* note 101, at 618-20, 660-61 & nn.300-01; Morris, *supra*, at 652 n.22; *Exclusionary Rule Hearings, supra* note 106, at 21-23 (statement of Stephen H. Sachs, Attorney General of Maryland).

Third, commentators argue that, whatever its precise deterrent effect, suppression is the most effective deterrent; alternative responses to governmental misconduct deter either too much or too little. Loewy, *supra*, at 1265-66; *Exclusionary Rule Hearings, supra* note 106, at 22 (statement of Stephen H. Sachs, Attorney General of Maryland); *see also* Kamisar, *supra* note 101, at 618-20; Schlag, *supra* note 104, at 907-13. Finally, some argue that abolishing the exclusionary rule, or creating new exceptions to the rule, would encourage misconduct, whatever may be the exclusionary rule's current success in discouraging misconduct. *See* Kamisar, *supra* note 101, at 662-64; Schlag, *supra* note 104, at 901-02.

113 *See, e.g., Carsello*, 578 F.2d at 203.

114 *See, e.g., Ceccolini*, 435 U.S. at 280; *Jones*, 608 F.2d at 391.

115 *See, e.g., Ceccolini*, 435 U.S. at 279; United States v. Miller, 666 F.2d 991, 996 (5th Cir.), *cert. denied*, 456 U.S. 964 (1982).

the courts will be more likely to find attenuation if the challenged evidence is relevant and probative.[116]

Finally, the attenuation exception gives the government an incentive to continue an investigation after it has committed a fourth amendment violation. Although any evidence the government initially discovers will be inadmissible, the length of an investigation and any intervening circumstances may attenuate the connection between the initial misconduct and any subsequently discovered evidence.[117] The attenuation exception's many incentives to engage in misconduct thus reduce the potential deterrent effect of the exclusionary rule.[118] Because the attenuation exception erodes the protections of the fourth amendment, it should be abandoned.

V. CONCLUSION

The attenuation exception to the exclusionary rule derives from a passage in an opinion that otherwise appears only to restate the independent source exception. To borrow from Justice Frankfurter's description of another phrase, the attenuation language "was never used . . . to express a technical legal doctrine or to convey a formula for adjudicating cases. It was a literary phrase not to be distorted by being

---

116 *See Ceccolini*, 435 U.S. at 277-78, 280.

117 In *Carsello*, for example, police officers unlawfully seized personal business records belonging to the defendant. Agents from the Federal Bureau of Investigation and the Internal Revenue Service (IRS) examined the records and used them in their investigations of the defendant. IRS agents interviewed individuals listed in the records, and these individuals led the agents to other people and businesses associated with the defendant. With the cooperation of some of these people, the IRS obtained the evidence introduced against the defendant at trial. *Carsello*, 578 F.2d at 200-03. The circuit court affirmed the finding of attenuation, even though a "causal nexus" existed between the initial misconduct and the challenged evidence, and even though the government did "exploit" the misconduct in conducting its investigation. *Id.* at 202, 203. The court held that the link between the misconduct and the evidence was insignificant, and that only the agents' "initiative and ingenuity" and the cooperation of informants maintained the improper connection. *Id.* at 203 & n.3.

118 Professor Kamisar argues that the Court wrongly creates exceptions to the exclusionary rule on the ground that the "cost" of suppression in a particular case outweighs the incremental deterrence gained through suppression. *See* Kamisar, *supra* note 101, at 664. Each new exception reduces the general deterrent effect of suppression by communicating to law enforcement officials that any one of several loopholes will later admit illegally obtained evidence: "Although the police may not be thinking about any particular one of [the] permissible collateral uses of unlawfully-seized evidence, they may well go ahead with the unlawful search, confident that in one way or another it is likely to pay off." Mertens & Wasserstrom, *supra* note 106, at 388. Multiple exceptions not only create multiple incentives to violate constitutional rights, Kamisar, *supra* note 101, at 664, they complicate the exclusionary rule and make it more difficult for the police to follow the constitutional requirements. *See* Schlag, *supra* note 104, at 901-02. The cumulative effect of the many exceptions, therefore, is to deprive the suppression doctrine of any deterrent effect it may have had. *See* Kamisar, *supra* note 101, at 664.

taken from its context."[119] Once taken from its context, the attenuation exception has violated the personal constitutional right of defendants to the suppression of illegally obtained evidence, and has undermined the deterrent purpose of the exclusionary rule. As the Supreme Court initially required for illegally obtained evidence, therefore, the attenuation exception should not be used at all.

BRENT D. STRATTON

[119] Pennekamp v. Florida, 328 U.S. 331, 353 (1946) (Frankfurter, J., concurring) (referring to Justice Holmes' "clear and present danger" test).