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to be determined is how these programs can most significantly reduce recidivism. Even though rehabilitation today might not be a *direct* function of reduced recidivism rates, this does not mean that such programs should be discontinued. Rather, more experimentation and research is needed.

While a limited program of therapy is developed in the prisons, efforts should be made to arouse public support so more money can be made available from the state legislatures for more effective and expensive programs.[73] Private organizations—The American Bar Association for one—should conduct an extensive public relations campaign. Groups should also lobby in attempts to persuade the legislators themselves that improved conditions in the prisons will in the long run benefit society with a reduction in the recidivism rate. A positive approach to rehabilitation—while certainly ineffective by itself—is essential to the establishment of a therapeutic regime in the American prisons.

penologists understand the true nature of recidivism. *See also* Shohan, Kaufman & Menaker, *The Tel-Mond Follow-Up Research Project*, 5 HOUSTON L. REV. 36 1967). A. West in *Cultural Background and Treatment of the Persistent Offender*, 28 FED. PROB. 17 (June 1964), explains that the prisons must develop more sophisticated approaches to therapy programs, since most of the programs today are aimed at middle-class—not low-class—psychosis and neurosis. More research must be directed to determine the background and response of the prisoners.

[73] Interview with Kurt Konietzko.

INADMISSIBLE CONFESSIONS AND THEIR FRUITS: A COMMENT ON HARRISON V. UNITED STATES

STANLEY HIRTLE

Eddie Harrison and two co-defendants were tried and convicted of felony murder, but the conviction was set aside.[1] In his opening remarks at the second trial defense counsel announced that Harrison would not testify,[2] but after the prosecution introduced three confessions in which Harrison admitted having shot the victim during a robbery attempt,[3] Harrison took the stand. He admitted an accidental shooting but denied that there had been a robbery attempt.[4] The resulting conviction was overturned[5] because the confessions had been obtained in violation of *Mallory v. United States*[6] and *Harling v. United States*.[7] At the third trial the testimony Harrison had given at the second trial was introduced into evidence over counsel's objection, but Harrison did not testify.[8] He was again convicted.[9] In affirming, the Court of Appeals held that since Harrison's decision to testify in the earlier trial was a volitional exercise of an individual human personality, the testimony was sufficiently attenuated from the original illegality and hence admissible at the subsequent trial.[10] The Supreme Court reversed the conviction, holding that testimony impelled by the admission of a wrongfully obtained confession was inadmissible.[11]

[1] Harrison v. United States, 359 F.2d 214,216 (D.C. Cir. 1965). At the first trial, defendants had been represented by an impostor posing as an attorney.

[2] Harrison v. United States, 392 U.S. 219,225 (1968).

[3] *Id.* at 220.

[4] *Id.* at 221. Harrison claimed that the trio had gone to the victim's house to pawn the gun, which had discharged by accident. If believed, this would have entitled him to acquittal on the felony murder charge. 359 F.2d 214, 220, n.17.

[5] Harrison v. United States, 359 F.2d 214, 222, 224 (D.C. Cir. 1968).

[6] 354 U.S. 449 (1957). The case rendered inadmissible statements made during a detention where there was an "unnecessary delay" in bringing defendant before a magistrate, in violation of Rule 5(a) of the FEDERAL RULES OF CRIMINAL PROCEDURE, 18 U.S.C. *See also* Killough v. United States, 336 F.2d 929 (D.C. Cir. 1964). The Court of Appeals found that Harrison had confessed while being detained several hours after police had enough information to take him before the commissioner. 359 F.2d 214, 222.

[7] 295 F.2d 161 (D.C. Cir. 1961) This case rendered inadmissible at a criminal trial statements made by a juvenile before juvenile court waived jurisdiction over him. In the District of Columbia, juvenile court has original jurisdiction in cases where a person under twenty one is accused of having violated a law at the time he was under eighteen. D.C. CODE §11-1551 (1967), *formerly* Act of June 1, 1938, ch. 309 §6(b), 52 Stat. 596. Juvenile court may waive jurisdiction in cases where the offense would be punishable by death if committed by an adult. D.C. CODE §11-1553 (1967), *formerly* Act of June 1, 1938, ch. 309 §13, 52 Stat. 599. Harrison was under eighteen at the time of the shooting, but was eighteen at the time of his arrest. The confessions were made a week before juvenile court waived jurisdiction over the case. 359 F.2d at 223.

[8] 392 U.S. 219, 221.

[9] Harrison v. United States, 387 F.2d 203,206 (D.C. Cir. 1967).

[10] *Id.* at 210.

[11] 392 U.S. 219, 224–26.

There was a natural presumption, the Court stated, that Harrison would not have made such a damaging admission but for the admission of the confessions into evidence. The prosecution had the burden of proving this presumption false, and it did not do so.[12] Justices Harlan, Black, and White dissented.[13]

The basic issue in the case is whether testimony given by defendant in an attempt to overcome the effects of an illegally obtained confession should have been excluded from a subsequent trial[14] under the fruit of the poisonous tree doctrine.[15] The Supreme Court based its holding on *Silverthorne Lumber Co. v. United States*, which held that illegally obtained evidence could not be used indirectly,[16] and on California cases which applied the fruit of the poisonous tree doctrine to exclude testimony which was "impelled by the erroneous admission of illegally obtained evidence".[17] It found these cases a logical application of the rule it had set forth in *Silverthorne Lumber Co. v. United States*,[18] *Nardone v. United States*[19] and *Wong Sun v. United States*.[20] The dissenting Justices and the Court of Appeals believed that exclusion would be an unwarranted extension of the fruit of the poisonous tree doctrine.[21] It is useful to examine whether the doctrine is being extended at all, *i.e.*, whether there are meaningful distinctions between the situation in *Harrison* and those to which the doctrine has been applied in the past.

The courts exclude evidence obtained by unlawful police activity such as an unlawful search,[22] detention,[23] interrogation[24] or lineup identifica-

[12] *Id.* at 225.

[13] *Id.* at 226–28.

[14] The Court first held that Harrison had no claim based on the privilege against self-incrimination. 392 U.S. 219, 222. Courts have consistently held that testimony given by a defendant at a prior trial is admissible against him at a subsequent trial for the same offense and is not barred by the Fifth Amendment. Edmonds v. United States, 273 F.2d 108,112 (D.C. Cir. 1959); United States v. Grunewald, 164 F. Supp. 644, 646–48 (S.D.N.Y. 1958). They reason that prior trial testimony is indistinquishable from pretrial statements. United States v. Grunewald, *supra* at 648. The rule seems questionable, however, since the effect of reading defendant's entire testimony from a previous trial into evidence is to deprive him of his right not to testify at trial if he did not exercise it at his first trial. *See* Curtis v. State, 212 So. 2d 689,692 (Ala. 1968). This is contrary to the usual view that a new trial proceeds as if there had been no former trial. Orfield, *New Trial in Federal Criminal Cases*, 2 VILL. L. REV. 293,343 (1957); 39 AM. JUR. *New Trial* §217 (1942); 66 C.J.S. *New Trial* §230 (1950).

There was a distinct claim that Harrison was compelled to testify against himself by the introduction of the unlawfully obtained confession. The courts have used language indicating that the privilege against self-incrimination is violated when the state penalizes a person for remaining silent. Malloy v. Hogan, 378 U.S. 1, 6–8 (1964). But even though Harrison was in fact compelled to testify—if he did not, the jury would make its decision with an unrebutted confession before it—the Court was unwilling to find a violation of the privilege against self-incrimination. Since, as Justice White notes, 392 U.S. at 229–30 (dissent), compulsion will exist whether or not the evidence was lawfully obtained, allowing a Fifth Amendment claim would logically exclude all evidence harmful to defendant since he would be compelled to answer it. However, even though the Court does not recognize the harmful effects of the confessions as creating compulsion in the Fifth Amendment sense, it does recognize them as a kind of compulsion which forms the causal link between the police illegality and the testimony necessary for exclusion under the fruit of the poisonous tree doctrine.

[15] The doctrine is also known as taint, and as the derivative evidence rule. Nardone v. United States, 308 U.S. 338,341 (1939).

[16] 251 U.S. 385,392 (1920).

[17] People v. Dixon, 46 Cal. 2d 456,458, 296 P.2d 557,559 (1956). The California cases held that when it appeared that a defendant testified in order to rebut illegally obtained evidence, the testimony could not be segregated from the evidence. It did not make the admission of the evidence harmless error, People v. Spencer, 66 Cal. 2d 158,165–69, 57 Cal. Rptr. 163, 169–71, 424 P.2d 715,721–23 (1967); People v. Luker, 63 Cal. 2d 464,479, 47 Cal. Rptr. 209,218, 407 P.2d 9,18 (1965); People v. Polk, 63 Cal. 2d 443,448–49, 47 Cal. Rptr. 1, 4–5, 406 P.2d 641,644–45 (1965), *cert. den.* 384 U.S. 1010 (1966), nor could it be used at subsequent proceedings. People v. Polk, *supra* at 450–1, 7 Cal. Rptr. at 5, 406 P.2d at 645. People v. Jackson, 60 Cal. Rptr. 248,251, 429 P.2d 600,603 (1967). *See also* People v. Stockman, 63 Cal. 2d 494,502, 47 Cal. Rptr. 365,369–70, 407 P.2d 277,281–82 (1965); People v. Nye, 63 Cal. 2d 166,175–76, 45 Cal. Rptr. 328,334–35, 403 P.2d 736, 742–43 (1965); People v. Davis, 62 Cal. 2d 791, 796, 44 Cal. Rptr. 454,457, 402 P.2d 142,145 (1965). California case law on the exclusionary rule has influenced the Supreme Court before. People v. Cahan, 44 Cal. 2d 434,445, 282 P.2d 905,911 (1955) *quoted in* Mapp v. Ohio, 367 U.S. 643,651–2 (1961).

[18] 251 U.S. 385 (1920). Police illegally seized and photographed certain ledgers, then used the photographs to obtain a search warrant for the ledgers. The court excluded the ledgers.

[19] 308 U.S. 338 (1939). The Court gave defendant the right to inquire into the uses which the prosecution had made of an illegal wiretap.

[20] 371 U.S. 471,485–87 (1963). For relevant facts see text accompanying notes 29 and 30 *infra*.

[21] Justice White, the principal dissenter, believes that the purpose of the exclusionary rule is to deter police misconduct; the possibility that a confession would lead to incriminating testimony by defendant is too remote to influence the police one way or another. 392 U.S. at 231–2 (dissent). The Court of Appeals felt that the decision to testify was a volitional act of an individual human personality and therefor the testimony should have been admitted under the doctrine of attenuation. 387 F.2d at 210. These views are discussed below.

[22] Mapp v. Ohio, 367 U.S. 643 (1961).

[23] Mallory v. United States, 354 U.S. 449 (1957).

[24] Miranda v. Arizona, 384 U.S. 436 (1966).

tion.[25] The fruit of the poisonous tree doctrine is used to determine the admissibility of evidence in some way connected with the illegality.[26] The courts have not clearly defined the doctrine, but a few general principles do emerge. One, stated in *Silverthorne Lumber Co. v. United States*, is that evidence illegally obtained "shall not be used at all".[27] This requires the exclusion of evidence which the state obtained by making use of some other illegally obtained evidence. A similar provision, stated in *Wong Sun v. United States*, requires exclusion when the evidence "has been come at by exploitation of the . . . illegality".[28] Cases decided under these principles have been of two types. One involves evidence which comes to light during the illegal act itself. Thus, in *Wong Sun v. United States*, an incriminating statement made by defendant during an illegal search and arrest was excluded as fruit of the search and arrest.[29] The second type occurs when police utilize information discovered during the illegal act and, as a result of investigation, discover new evidence. In *Wong Sun*, defendant's incriminating statement revealed the location of hidden narcotics, which police then seized. These were also excluded as fruit of the search and arrest.[30]

Harrison does not fit clearly into either type, although it resembles the cases in which police follow up on information learned during the illegal act. The major distinction is the lack of police involvement with the testimony. The confession was exploited, not by the police, but by the prosecution which introduced the rebuttal testimony at the third trial. Moreover, Harrison made his decision to testify on his own, insulated from the presence of police and prosecution by the protections of court and counsel. But the Supreme Court was not bothered by this distinction. None of its cases suggested that only police were prohibited from exploiting illegally obtained evidence. And even if neither police nor prosecution were in Harrison's immediate presence when he made his decision to testify, the prosecution had made the decision necessary by confronting him with the devastating effects of an illegally obtained confession.[31] Thus the state was as causally involved in the procurement of the rebuttal testimony as it is when police utilize unlawfully obtained evidence and, by investigation, discover other evidence.

However, *Silverthorne* and *Wong Sun* also indicate that evidence is admissible if it is derived from an independent source,[32] or if it is obtained "by means sufficiently distinguishable [from the illegality]".[33] This reasoning is used in cases where police had access to both lawfully and unlawfully

[25] United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California 388 U.S. 263 (1967).

[26] The fruit of the poisonous tree doctrine is one test which is applied to evidence to determine admissibility. Another is standing of the defendant to object to the evidence. *See* Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 NW. U.L. REV. 471 (1952). A third is whether the purpose of the evidence will be to impeach testimony or to prove guilt. *See* Walder v. United States, 347 U.S. 62,64–65 (1954); *but see* Groshart v. United States, 392 F.2d 172, 175–80 (9th Cir. 1968). For a discussion of this area, *see* Comment, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria*, 115 U. PA. L. REV. 1136 (1967).

[27] 251 U.S. 385,392 (1920): "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others. . . "

[28] 371 U.S. 471, 487–88 (1963). "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint'." MAQUIRE, EVIDENCE OF GUILT 221 (1959).

[29] 371 U.S. 471,484–87 (1963). It does not appear that any intermediate unlawfully obtained evidence was used to procure the statement and hence it would seem that the exploitation principle would have been preferable to the use principle of *Silverthorne*. However, the Court quoted *Silverthorne*, 371 U.S. 471, 485, and did not announce the exploitation doctrine until a later part of the case, *Id.* at 488.

[30] 371 U.S. 471, 487–88 (1963). This would logically have fit under either the use or exploitation principles. The Court did not cite the use principle here, but instead announced the exploitation principle. This consideration and that in note 29 *supra* make it appear that the *Wong Sun* Court saw no distinction between the two principles.

[31] Fahy v. Connecticut, 375 U.S. 85,91 (1963); Payne v. Arkansas, 356 U.S. 560,568 (1958); People v. Spencer, 66 Cal. 2d 158, 163–69, 57 Cal. Rptr. 163,169–71, 424 P.2d 715,721–23 (1967); People v. Schader, 62 Cal. 2d 716,728–30, 44 Cal. Rptr. 193,201–2, 401 P.2d 665, 673–74 (1965). Confessions have special prejudicial effects since both defendant and jury are likely to regard them as conclusive evidence of guilt. The psychological effects on a defendant are particularly important since the exclusionary rule operates by having criminals police the police by taking the initiative and objecting to evidence. A criminal will not act as a "private attorney general" if, because he had confessed, he decides his conviction is assured. He will probably choose to seek mercy and not antagonize anyone by objecting to evidence. Thus it can be argues that a higher degree of exclusion is needed to counteract the effects of confessions.

[32] 251 U.S. 385,392 (1920).

[33] 371 U.S. 471,487–88 (1963).

obtained information. For example, in *Harlow v. United States*[34] police, by lawful use of an informer and by unlawful search of defendant's mail, learned that a certain individual was participating in a bribery ring. This individual confessed during interrogation and implicated the defendant. As a result, a search warrant was issued and the mail, which police had previously opened unlawfully, was seized and introduced into evidence. The conviction was affirmed on the grounds that the knowledge was obtained through an independent source. Such cases are difficult and must be resolved by speculating what would have happened had there been no unlawful act and evaluating such speculation in terms of who bears the burden of proof.[35]

Evidence is also admissible under *Nardone v. United States* where "as a matter of good sense" the causal connection between the evidence and the illegality "is so attenuated as to dissipate the taint".[36] The attenuation doctrine is difficult to apply, since it says very little on its face. The language of *Nardone* suggests that it is designed to prevent extreme results, as measured by the intricacy of the argument claiming a causal connection.[37] As a practical matter it may merely give a court a reason not to exclude evidence when it doesn't want to.[38]

The Court of Appeals held Harrison's testimony admissible, relying on decisions which held that the causal connection is sufficiently attenuated when police learn the identity of a prosecution witness as a result of an illegal act.[39] The rationale behind these "tainted witness" cases depends on distinctions between the testimony of a witness and physical evidence. A witness might come forward voluntarily if he were not discovered; physical evidence could not.[40] A witness has control over his testimony, while physical evidence speaks for itself.[41] Thus in "an individual human personality . . . elements of will, perception, memory and volition interact" [42] in such a way that it may be uncertain that the police illegality caused the testimony of the "tainted witness".[43]

[34] 301 F.2d 361,372–3 (5th Cir. 1962), *cert. den.* 371 U.S. 814 (1962).

[35] The burden of proof, rather than the language of the independent source principle may be the decisive issue in these cases, since the facts of a case rarely indicate what influence illegally obtained evidence had on police decisions, even in cases where lawfully obtained evidence was logically sufficient to excite reasonable suspicion. In *Harlow v. United States*, 301 F.2d 361, 372–3 (5th Cir.), *cert. den.* 371 U.S. 814 (1962), defendant claimed that another's confession had been induced by confronting him with knowledge obtained from the unlawful search of defendant's letters. The Court held that the participant might have confessed anyway, and that defendant had the burden of proving that he would not have. Cases like *United States v. Paroutian*, 299 F.2d 486,489 (2d Cir. 1962), *Chapman v. California*, 386 U.S. 18,23–24 (1967), and *Harrison*, 392 U.S. 219,224–26 (1968), indicate that the State should bear the burden since its illegal act has caused the difficulty. This problem is related to the question of harmless error. *See generally* Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. CRIM. L.C. & P.S. 307,320–21 (1964).

[36] 308 U.S. 338,341 (1939) "Sophisticated argument may prove a causal connection between information obtained through [illegality] and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint." *Nardone* itself did not exclude or admit any evidence, but granted defendant a hearing to inquire into the use which the Government had made of a wiretap.

[37] *Id.*

[38] Many of the cases where evidence has been admitted under the doctrine of attenuation were based on *Mallory* violations. *See* Brown v. United States, 375 F.2d 310,319 (D.C. Cir. 1967); Smith v. United States, 324 F.2d 879,881 (D.C. Cir. 1963), *cert. den.* 377 U.S. 954 (1964); Payne v. United States, 294 F.2d 723,726 (D.C. Cir.), *cert. den.* 368 U.S. 883 (1961). It may be that the courts wish to avoid extending the controversial *Mallory* rule. *See* Ruffin, *Out on a Limb of the Poisonous Tree: The Tainted Witness*, 15 U.C.L.A. L. REV. 32,45 (1967).

[39] 387 F.2d 203,209–10 & n.28 (1967) *citing* Brown v. United States, 375 F.2d 310 (D.C. Cir. 1967); McLindon v. United States, 329 F.2d 238,240–41 (D.C. Cir. 1964); Smith v. United States, 224 F.2d 879,881 (D.C. Cir. 1963), *cert. den.* 377 U.S. 954 (1964); Payne v. United States, 294 F. 2d 723, 726–27 (D.C. Cir.), *cert. den.* 368 U.S. 883 (1961).

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

[41] Smith v. United States, 324 F.2d 879,881 (D.C. Cir. 1963), *cert. den.* 377 U.S. 954 (1964).

[42] *Id.*

[43] This does not mean that the testimony should be admitted in all such cases, just because causation is uncertain. The issue is really the burden of proof. *See* note 35 *supra*. *Wong Sun v. United States*, 371 U.S. 471,486 (1963), held that the policies behind the exclusionary rule do not distinguish physical and verbal evidence. The case can be distinguished from *Harrison* in that there the verbal evidence was a statement made during an illegal search and arrest, not strategic testimony given later in court. The tainted witness cases have the additional problem of basing the admissibility of testimony on whether or not the witness felt like testifying at the time the police found him. *Compare* Smith v. United States, 324 F.2d 879 (D.C. Cir. 1963), *cert. den.* 377 U.S. 954 (1964) (witness who changed his mind as a result of conscience, admissible) *with* Williams v. United States, 382 F.2d 48,51 (5th Cir. 1967) (witness presumably willing, inadmissible) *and* Brown v. United States, 375 F.2d 310 (D.C. Cir. 1967) (witness presumably willing, admissible). *See also* Smith v. United States, 344 F.2d 545,547 (D.C. Cir. 1965) (witness pressured by police, inadmissible); United States v. Tane, 329 F.2d 848

The "tainted witness" cases should not apply to *Harrison*.[44] There are significant differences between a prosecution witness whose identity was discovered through police illegality and a defendant who took the stand to rebut wrongfully obtained evidence. Harrison was facing the death penalty[45] and was protected by the privilege against self-incrimination. It is clearly unreasonable to believe that he would have come forth voluntarily and admitted so much had the confessions not been introduced. The causal connection between the confessions and the testimony is very clear. Will, perception, memory and volition are only relevant as they provide meaningful alternatives in the causal chain, not as mystical qualities which in themselves invoke the doctrine of attenuation. Thus the fact that Harrison made a tactical decision to testify on the advice of counsel should not be conclusive.[46] Volition, reflection and advice of counsel are irrelevant, since they could not have helped to counteract the effects of the confessions.[47] The government should not escape by claiming that Harrison made a voluntary act, when that act was in fact necessitated by the introduction of the confessions.[48] Nor should it escape because the decision was made as a matter of trial tactics.[49] Thus the Court of Appeals decision appears erroneously based.[50]

The proper result of the case and the proper scope of the fruit of the poisonous tree doctrine should be determined by considering the policies behind the exclusionary rule[51]—deterrence of police misconduct and preservation of the moral force of the law.[52] To deter police misconduct effectively, the courts must consider the psychology of the policeman. Presumably the police will be less

(2d Cir. 1964) (witness pressured by police, inadmissible). This may make some sense in terms of causation in fact but, evidentiary problems aside, the disposition of the witness when the police arrive seems to be pure chance, unrelated to any policy behind the exclusionary rule. *See* Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CAL. L. REV. 579,623–24 (1968). It may be that many distinctions in this area are purely arbitrary. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378,390–91 (1964). *See generally* Ruffin, *Out on a Limb of the Poisonous Tree: The Tainted Witness*, 15 U.C.L.A. L. REV. 32 (1967).

[44] Noted by the Supreme Court. 392 U.S. at 223 n.9.

[45] 387 F.2d at 210.

[46] *Id.*

[47] *Id.* at 215–16 (Bazelon, J. dissenting, *pet. for reh. en banc*).

[48] For a discussion of the self-incrimination aspects of the case *see* note 14 *supra*.

[49] The harmful effects that police illegality can have on defendant's trial tactics have not been ignored. The facts of *Fahy v. Connecticut*, 375 U.S. 85,91 (1963), are not unlike those in *Harrison* in that there evidence illegally seized and confessions induced by the seizure were introduced, and defendants took the stand in the hope of mitigating them. The Court recognized the limitations this placed on their case as an example of the prejudice caused by the admission of the evidence, but did not rule on the testimony itself. *See also* United States v. Wade, 388 U.S. 218,240–41 (1967). There the Court recognized the harm done to defendant's case if counsel had to dwell on lineup identifications by prosecution witnesses in the hope of finding some illegality.

[50] The Court of Appeals also held "[i]t would be rash to assume that defendants ... would be induced to testify favorably to the Government by either the introduction of the prior confessions or their procurement three years previously." 387 F.2d at 210. The Court ignored the fact that testimony is favorable or unfavorable relative to the evidence already before the court. Thus Harrison's testimony admitting the shooting but denying the robbery attempt was favorable to him in the presence of the confession admitting both the shooting and the robbery attempt. It was unfavorable to him at the third trial where there was little other evidence connecting him with the shooting. 387 F.2d at 210–12.

[51] Theoretically the doctrine should cease to be applied at the point of diminishing returns where the social cost in terms of police illegality which could have been deterred and public respect for the law which could have been preserved is outweighed by the social cost of releasing criminals instead of jailing them. *See* Comment, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria*. 115 U. PA. L. REV. 1136, 1140 (1967). This paper will not attempt to measure such social cost. Instead it will assume that any substantial deterrence of police illegality or furtherance of the integrity of the law will outweigh whatever harm may be done by releasing Harrison and any others similarly situated. This assumption seems reasonable in view of the willingness of courts to exclude evidence in the past and the limited scope of *Harrison* in comparison with other decisions such as *Miranda*. Justice White agrees with this approach in his dissent, although not with the result. He says that the only purpose of the exclusionary rule is to deter the police and that exclusion in *Harrison* does not substantially deter the police because they will not foresee the use of the confession. 392 U.S. at 231–2. Of course one determines how much deterrence is substantial by evaluating the social costs mentioned above. This is probably a matter of individual point of view and more empirical evidence is needed. *See* Comment, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L. J. 1519 (1967); Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283 (1965).

[52] Harrison v. United States, 392 U.S. 219,224 n.10 (1968); Miranda v. Arizona, 384 U.S. 436, 479–80 (1966); Elkins v. United States, 364 U.S. 206,222–23 (1960); Olmstead v. United States, 277 U.S. 438,485 (1928) (Brandeis, J. dissenting). The *Mallory* rule is based on these considerations. Mallory v. United States, 354 U.S. 449,452–53 (1957). *Harling v. United States*, 295 F.2d 161,163–64 & n.12 (D.C. Cir. 1961), is based on these considerations and another, the *parens patriae* function of the juvenile court. *Harling* is probably obselete in view of *In re Gault*, 387 U.S. 1,55 (1967), which held that the privilege against self-incrimination applies to juvenile court proceedings.

likely to act illegally if the evidence obtained can not be used in court. But it is not conclusive to note, as Justice White does, that the police who detained Harrison could not have forseen that incriminating testimony would result.[53] Exceptions to the exclusionary rule may defeat the rule by encouraging the police to act illegally in the hope that a conviction will result, even if some evidence may be excluded.[54] The policeman, in deciding whether to act legally or illegally, may be motivated by emotional zeal as well as by the desire to obtain a conviction. He may also evaluate the alternative benefits of harassment as a means of controlling criminals,[55] as well as the likelihood of getting a conviction if the rules are observed. In the latter sense, it is possible that too many exclusionary rules will deter the police from trying to get convictions at all and encourage them to adopt harassment as an alternative policy. Thus, as the courts have admitted, any attempt to predict the effect that exclusion in a particular set of circumstances will have on police conduct may be speculation.[56]

The policy of preserving the moral force of the law is clearer. The state's law enforcement machinery should act as adversary to the criminal in such a way as will earn the respect of the public.[57] As such it should not benefit from its own wrongdoing,[58] especially consciously or deliberately. In the language of *Wong Sun v. United States*, it should not exploit illegality.[59] If it attempts to do so the judge must preserve the moral force of the law by negating any benefit which it may have received.[60] Even though it may be impossible to put defendant and prosecution in the position they would have been had the police acted lawfully,[61] official disapproval of police lawlessness is of great importance.[62] In *Harrison* the police obtained the confessions unlawfully; the prosecutor introduced them at the second trial and, deprived of them at the third trial by the exclusionary rule, built his case around the testimony which Harrison had given in what appears to have been a desperate attempt to rebut the confessions. In this sense the testimony caused by the confessions was being used as a substitute for them. Because this practice is such an exploitation of illegality as to be inconsistent with judicial integrity, the Supreme Court's decision appears to be correct.

The effects of the case are expressly limited by the Court to the peculiar facts which the case presents,[63] but they will no doubt extend into cases with similar facts. The Court did not base its holding on the kind of police illegality,[64] implying thereby that exclusion based on *Mallory* will go as far as exclusion based on any other rule. It did give weight to the special prejudicial effects of confessions.[65] However, it is likely that any unlawfully obtained evidence which is so damaging as to cause a conviction if not rebutted will be subject to the same considerations. A more difficult question is presented if there were both lawfully and unlawfully obtained incriminating evidence present when defendant testified, since the prosecution would claim that the evidence came from an independent source. In view of the recognized prejudicial effects of confessions, the courts are likely to exclude any testimony which is a rebuttal of an unlawfully obtained confession, even though there is other evidence on the same point. A harder question is whether all of defendant's testimony might be excluded in such a case. The California cases suggest that it might not be.[66] The key question may be to what extent the prosecution must show that the testimony was not induced by the

[53] 392 U.S. at 231–32 (dissent).

[54] People v. Bilderbach, 62 Cal. 2d 757,766–67, 44 Cal. Rptr. 313, 318–19, 401 P.2d 921, 926–7, (1965).

[55] *See* Comment, *Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy*, 47 Nw. U.L. Rev. 493,498, 502 (1952).

[56] Harrison v. United States, 392 U.S. 219,224 n.10 (1968); Elkins v. United States, 364 U.S. 206,218 (1960). For empirical attempts to deal with the problem, *see* note 51 *supra*.

[57] "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law." Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1,26 (1956) *quoted in* Miranda v. Arizona, 384 U.S. 436,480 (1966).

[58] People v. Bilderbach, 62 Cal. 2d 757,763, 44 Cal. Rptr. 313,316, 401 P.2d 921,924 (1965).

[59] 371 U.S. 471,487–88 (1963).

[60] This is "the imperative of judicial integrity." Elkins v. United States, 364 U.S. 206,222 (1960).

[61] United States v. Bayer, 331 U.S. 532, 540 (1947).

[62] Olmstead v. United States, 277 U.S. 438,485 (1928) (Brandeis, J. dissenting). Official disapproval of police lawlessness is more important than official disapproval of individual lawlessness, since the police, as servants of the state, claim power and authority superior to that of the individual.

[63] 392 U.S. at 223 n.9.

[64] *Similarly* People v. Schader 62 Cal. 2d 716, 728–31, 44 Cal. Rptr. 193, 200–02, 401 P.2d 665, 672–74, (1965). *But see* Hoffa v. United States, 385 U.S. 293, 308 (1966).

[65] 392 U.S. at 222–3. *See* note 36 *supra*.

[66] People v. Mathis, 63 Cal. 2d 416,432–34, 406 P.2d 65,76,46 Cal. Rptr. 785,796 (1965), *cert. den.* 385 U.S. 857 (1966); People v. Nye, 63 Cal. 2d 166, 175–6, 403 P.2d 736,742–3, 45 Cal. Rptr. 328,334–5 (1965). These cases held that testimony was not impelled in that situation.

confession. If the unlawfully obtained evidence were not a confession, the court might not find that it was necessary for defendant to rebut it.

It is probable that *Harrison*, like the impelled testimony rule in California, will apply only to testimony given subsequent to the admission of the unlawfully obtained evidence,[67] not to the use of tainted evidence for impeachment purposes[68] or to any situation where the evidence was not introduced, but only anticipated.[69] It does not appear to overrule the doctrine of attenuation, nor is it inconsistent with the tainted witness cases.[70] Indeed the California courts, whose impelled testimony rule is precedent for *Harrison*, have allowed a tainted witness to testify[71] and have expressly stated that an act of free will can render evidence admissible under the doctrine of attenuation.[72]

Harrison also deals with the practical problem of who bears the burden of proving that certain evidence is tainted. *Nardone* held on this point that once the illegality was established, the defendant must be allowed "to prove that a substantial portion of the case against him was fruit of the poisonous tree. This leaves ample opportunity for the government to convince the court that its proof had independent origin." [73] Maguire interprets this to mean that defendant need only show a reasonable possibility that the evidence was derived from the illegality, at which time the prosecution must prove that it was not.[74] *Harrison* seems to take this a step further and require the prosecution to prove there was no taint any time the court can infer that there was.[75] If this is true, then as a practical matter the burden of proof is on the prosecution in any close case. On the other hand, it can be argued that in *Harrison*, the burden of raising a reasonable possibility of taint was on the defendant and he met this burden by inference. If this is true then the old rules still apply. In any case, the spirit of *Harrison* is clearly to put a special burden on the wrongdoer to prove that his wrong was harmless.[76] The result should be more acquittals in cases where evidence appears tainted, even though the language of attenuation and independent source remain the same.

[67] Gafford v. State, 440 P.2d 405,412 (Alaska 1968).

[68] This exception to the general exclusionary rule is permitted under *Walder v. United States*, 347 U.S. 62,64–5 (1954), although it has recently been limited and criticized by the Court of Appeals, Ninth Circuit. Groshart v. United States, 392 F.2d 172, 175–80 (9th Cir. 1968).

[69] Justice White is bothered by problems of this kind. 392 U.S. at 234 (dissent). He fears that a confession obtained during a Mallory violation would taint a guilty plea or later testimony by defendant, regardless of whether it was introduced. This need not follow. The psychological defeatism caused by the confession will be overcome if counsel enters the case at a sufficiently early time and informs defendant that the confession is inadmissible. In this situation no harm will have been done by the confession. The situation in *Harrison* is different since the confession was before the court.

[70] The distinctions between the tainted witness situation and *Harrison* were discussed above. *See* text accompanying note 44 *supra*.

[71] People v. Stoner, 65 Cal. 2d 595, 602, 55 Cal. Rptr. 897,901, 422 P.2d 585,589, (1967).

[72] People v. Sesslin, 67 Cal. Rptr. 409,416–17, 439 P.2d 321,328–9, (1968).

[73] Nardone v. United States, 308 U.S. 338,341 (1939).

[74] Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. CRIM. L.C. & P.S. 307,309–10 (1964). Note that Maguire finds an exception in cases involving the motives of defendant, of which defendant would have special knowledge. *Id.* at 321. *Harrison* is clearly a contrary holding. 392 U.S. at 224–6. Indeed it is difficult to imagine how a prosecutor could prove that a defendant was in fact not motivated by the confessions.

[75] 392 U.S. 219,224–25 (1968). "But, having illegally placed his confessions before the jury, the Government can hardly demand a demonstration by the petitioner that he would not have testified as he did if his inadmissible confessions had not been used. 'The springs of conduct are subtle and varied,' Mr. Justice Cardozo once observed. 'One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others.' Having 'released the spring' by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony."

[76] 392 U.S. at 224–25. *See* note 75 *supra*. *See also* Chapman v. California, 386 U.S. 18,23–24 (1967).