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HOW TO UNPOISON THE FRUIT—THE FOURTH AMENDMENT AND THE EXCLUSIONARY RULE

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Under the exclusionary rule, once evidence is "tainted" because it, in some way, is associated with a search or seizure made in violation of the fourth amendment, under what circumstances can the prosecution "untaint" the evidence and establish its admissibility? In the following article, Colonel Maguire shows that evidence can often be "untainted" where it did not actually result from the unlawful act, where it resulted in part from the unlawful act, and even where it resulted *solely* from that act. The author presents a critical evaluation of the significant decisions in the area and reviews the special problems involved in the confessions and admissions cases. In addition he analyses the various tests for "untainting" enunciated in the decisions and formulates a new test for "unpoisoning the fruit" which is conceived to serve the essential purpose of the exclusionary rule without conferring its benefits indiscriminately wherever "the constable has blundered."—EDITOR.

"We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[1] These twenty-five simple words, spoken by the Supreme Court in *Mapp v. Ohio*,[2] were destined to have a greater impact upon the administration of criminal justice by the several states than any other one pronouncement of the Court. It is not the purpose of this article to comment upon the respective merits of the five opinions handed down in that case,[3] or to discuss its possible effect upon the tests for legality of searches and seizures heretofore applied by the individual states,[4] or the many vexing procedural problems involved in the implementation of the newly announced rule.

The decision in *Mapp v. Ohio* requires the states to enforce the constitutional prohibition against unreasonable searches and seizures "by the same sanction of exclusion as is used against the Federal Government."[5] This "same sanction of exclusion" as developed in the federal courts requires the suppression, upon timely objection or motion by the defendant, of all evidence acquired *as the result of* an illegal search or seizure as well as any other

* The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's Corps or any other governmental agency.

[1] Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[2] *Ibid.*

[3] Majority opinion of Justice Clark; separate concurring opinions of Justices Black and Douglas; dissenting opinion of Justice Harlan; memorandum opinion of Justice Stewart.

[4] See Elkins v. United States, 364 U.S. 206 (1960), presaging the development of a minimum standard of "reasonableness" of searches and seizures, binding upon all the states.

[5] 367 U.S. 655.

evidence obtained as the result of such illegally acquired matter and thereby "tainted" by the initial illegality.[6] It is the purpose of this article to determine the precise meaning of the inherently ambiguous phrase "as a result of" and thereby to demonstrate that not every fruit of the poisoned tree is incurably tainted.

The Federal Exclusionary Rule

Simply stated, the purpose of the exclusionary rule is to ensure full compliance with the fourth amendment to the Constitution by law enforcement officials. The underlying rationale is that the civil liability of such officials for tortious invasions of the personal rights guaranteed by the fourth amendment has proved inadequate as a sanction where such invasions can effectively be used by these officials to assist them in the discharge of their official responsibilities for the investigation of crimes and the prosecution of criminals. It is believed that the exclusionary rule serves not only to deter unlawful conduct, negligent or otherwise, in this area but also to provide an added incentive for full compliance with all applicable rules of law. It is obvious that the rule confers a substantial benefit upon the defendant who successfully invokes it, but it is important to keep in mind that this bonanza is a regrettable by-product of the rule and not its objective.[7] The sole purpose of the rule is to require compliance with the constitutional provisions in order to maintain the free society contemplated by the founding fathers,[8] and this is sought to be accomplished by denying to the government in a criminal prosecution any advantage which it has obtained because of the wrongful acts of its agents. Therefore, the exclusionary rule casts its protective mantle over not only evidence secured during an unlawful search or seizure but also all other evidence discovered *because of* the unlawful act.[9]

A classic example of the "tainting" of evidence because of a prior illegal act of law enforcement authorities is found in the situation where information obtained during an illegal search thereafter is used to supply the probable cause for the issuance of an otherwise valid search warrant. In such a case all evidence acquired pursuant to the execution of the warrant is held inadmissible in like manner as the evidence found originally.

> "A federal agent cannot participate in an unlawful search, and then on the basis of what he observed in the course of that search, and on that basis alone, go to a United States Commissioner and swear out a search warrant. Such a search warrant, and the evidence procured in the course of a search thereunder, would be merely the illegal product of a previous unlawful search by the federal authorities."[10]

Just as an otherwise valid search warrant can be tainted by a prior unlawful search of which it is the product, so also can an otherwise legally effective consent to a search be vitiated by an earlier unlawful act. Thus, where officers requested permission to search the defendant's car solely because an earlier illegal search of the car had disclosed the presence therein of highly incriminating matter, the consent of the defendant to the second search was tainted by the original illegality.[11] The same reasoning applies to render inadmissible evidence obtained during an otherwise lawful search incident to the arrest of the defendant where the arrest itself was the product of a prior unlawful search.[12]

The *Silverthorne* and *Wong Sun* Dicta

Granted that the federal exclusionary rule operates against both evidence seized and information acquired during an unlawful search and so-called "derivative evidence," it does not follow that such evidence or information is rendered forever unus-

[6] Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[7] "Neither the Constitution nor any statute in terms prohibits the use of the truth, even though unlawfully discovered, as evidence in the prosecution of a crime; but it is a federal judicial policy not to allow the agents and officers of the United States to break the law themselves and then use information so acquired to prosecute others." Noro v. United States, 148 F.2d 696, 699 (5th Cir. 1949).

[8] "All these methods [of illegal search] are outlawed and convictions obtained by means of them are invalidated because they encourage the kind of society that is obnoxious to free men." Walder v. United States, 347 U.S. 62, 65 (1954).

[9] Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[10] McGinnis v. United States, 227 F.2d 598, 603 (1st Cir. 1955) (federal agent took part in search by state police under invalid John Doe warrant). *Accord*, Hair v. United States, 289 F.2d 894 (D.C. Cir. 1961) (police illegally entered defendant's home while pursuing his accomplice); Fraternal Order of Eagles v. United States, 57 F.2d 93 (3d Cir. 1932) (prohibition agents used forged membership cards to gain entry into private club).

[11] Mosco v. United States, 301 F.2d 180 (9th Cir. 1962) (first searcher found notebook under seat cushion with information concerning bank robbery; he replaced book and after defendant was arrested asked permission to search car).

[12] Somer v. United States, 138 F.2d 790 (2d Cir. 1943).

able. This concept was first enunciated by the Supreme Court in 1920 in *Silverthorne Lumber Company v. United States*.[13] There the Court was confronted with a conviction of the corporate defendant for contempt arising out of the failure to comply with a subpoena for the production of certain corporate records. The defendant had earlier established that these records were in the possession of the government as the direct result of an unlawful seizure, and the records had been returned to it by court order. The government officials, however, had made copies of the records and used these copies as the basis for the issuance of a subpoena for the originals. The Court set aside the contempt conviction on the ground that the subpoena was the product of the prior seizure, saying:

> "The essence of a provision for bidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed."[14]

This principle—that it is possible for the prosecution to establish that although the evidence which it proffers may have followed an unlawful search or seizure, it is not tainted thereby—was again recognized in the recent case of *Wong Sun v. United States*,[15] where the Court stated:

> "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.' "[16]

Before proceeding to an exploration of the possible methods by which the prosecution can prove its evidence to be untainted, it is necessary to discuss briefly the manner in which the issue is presented for decision in an actual case. In the absence of an affirmative claim by the defendant that the prosecution's evidence is rendered inadmissible because of a prior illegal search, the government is not required to prove that the evidence had a lawful origin.[17] However, if the defendant does raise an issue as to the legality of a search or seizure, the prosecution must assume the burden of establishing that such action was not illegal.[18] If it does not successfully carry this burden, all evidence which the record shows to be "the product" of the unlawful act is inadmissible. It is important to note that a finding that a prior search was illegal does not per se make any evidence inadmissible. Inadmissibility must rest upon some showing of a possible causal connection between the search and the proffered evidence.[19] To this end the defendant must be given the opportunity to explore in detail the circumstances under which the government acquired the evidence at issue. In the words of the Supreme Court, he must be permitted to attempt "to prove that a substantial portion of the case against him was a fruit of the poisonous tree."[20] If he so desires he must be given "an opportunity to examine and re-examine witnesses at the trial to determine whether evidence derived from leads and clues furnished by materials . . . was used by the prosecution at the trial."[21] If the defendant establishes a reasonable possibility that the proffered evidence resulted from the unlawful search or seizure, it is inadmissible unless the prosecution can "convince the trial court that its proof had an independent origin,"[22] or "prove that the information so gained has not 'led', directly or indirectly, to the discovery of any of the evidence which it introduces."[23] This burden is placed on the government on the theory that "a wrongdoer who has mingled the consequences

[13] 251 U.S. 385.
[14] *Id.* at 392.
[15] 371 U.S. 471 (1963).
[16] *Id.* at 487, 488, quoting MAGUIRE, EVIDENCE OF GUILT 221 (1959).
[17] Morton v. United States, 147 F.2d 28 (D.C. Cir. 1945), *cert. denied*, 324 U.S. 875 (1945).
[18] United States v. Keleher, 2 F.2d 934 (D.C. Cir. 1924).
[19] Benetti v. United States, 97 F.2d 263 (9th Cir. 1938). See also Johnson v. United States, 290 F.2d 378 (D.C. Cir. 1961).
[20] Nardone v. United States, 308 U.S. 338, 341 (1939). Although this case involved illegal wiretapping, the exclusionary rule has been applied in that area in exactly the same manner as with respect to violations of the fourth amendment. For this reason many other wiretapping cases are used in the development of this article.
[21] Lawn v. United States, 355 U.S. 339, 355 (1958) (alleged illegal source was improper interrogation of defendant before grand jury).
[22] Nardone v. United States, 308 U.S. 338, 341 (1939).
[23] United States v. Coplon, 185 F.2d 629, 636 (2d Cir. 1950) (wiretapping). See also United States v. Sansone, 231 F.2d 887 (2d Cir.), *cert. denied*, 351 U.S. 987 (1956) (illegal arrest).

of lawful and unlawful conduct, has the burden of disentangling them . . . ."[24]

The Causation Problem

Granted that, upon a showing by the defendant that certain evidence possibly is the fruit of a poisonous tree, the government is given the burden of removing the taint, what test is to be applied in determining whether this burden has been carried successfully? The *Silverthorne* dictum states that it is necessary for the prosecution to prove that the evidence had a source "independent" of the unlawful act.[25] In a subsequent decision the Court noted that "in practice this generalized statement may conceal concrete complexites."[26] It is the purpose of this article to grapple with these "concrete complexities" in an effort to formulate a more meaningful test for determining how evidence may be "untainted."

Exactly what is required of the government? In the language of the opinions, the prosecution must prove that its evidence had an "independent source"[27] or an "independent origin";[28] that the connection with the unlawful act has "become so attenuated as to dissipate the taint";[29] that the unlawfully obtained information "has not 'led', directly or indirectly, to the discovery" of the proffered evidence;[30] that the evidence was not "derived from"[31] or "the fruit of"[32] the tainted information; that the evidence was not "come at by the exploitation of that illegality."[33] Obviously, these diverse formulations are all intended to require severance of a causal connection between the poisonous tree and its apparent fruit. But precisely what concept of causation is involved? Is it sufficient that the unlawful act or the information directly derived therefrom be a contributing cause toward the discovery of the allegedly tainted evidence? Or must it be the efficient or proximate cause? Assuming that there is in fact a causal connection sufficient to taint the proffered evidence, can this connection effectively be severed by a showing that, even if the unlawful act had not occurred, the evidence *would* have been available to the prosecution from lawful sources? Must the unlawful act have been literally a *sine qua non* of the discovery of the evidence? Unfortunately, the courts seem assiduously to have avoided squarely facing up to these all-important questions. The answers to them can be found in the reported cases only by viewing the expressions of legal principle apparently laid down therein through the spectacles supplied by the facts of the particular case.

De Facto Causation

One obvious means of eliminating the unlawful search or seizure as a tainting influence is to establish that the proffered evidence was, in fact, discovered as the result not of the unlawful act but rather of information lawfully known to the authorities completely independently of that act. In such a situation one can simply say that the proffered evidence is not the product of the unlawful act and, hence, is untainted. This principle lends itself easily to application in the situation where the proffered evidence consists of "derivative evidence," i.e., not evidence seized or information acquired during the illegal act but other matter allegedly discovered as the result of investigative leads furnished by the illegally obtained information. Here the prosecution need only show, for example, that the proffered evidence was in fact discovered as the result of a lead completely unrelated to the unlawful act. However, where the record shows that the very item being offered was in fact acquired during an unlawful search, a more difficult problem presents itself. How can one establish that what was in fact seen or seized during a search is not its product?

Oddly enough, the solution to this problem is not overly difficult. Let us assume that a Coast Guard cutter illegally halts and boards another ship on the high seas. During this operation the federal agents see several cases of contraband whiskey on the deck. It would appear that we have here a situation where the testimony of the agents as to the nature of the cargo is tainted by the illegal search and inadmissible. But let us assume further that the agents testify that before halting the "rum runner," they had observed and recognized

[24] United States v. Goldstein, 120 F.2d 485, 488 (D.C. Cir. 1941), *aff'd without discussion*, 316 U.S. 114 (1942) (wiretapping).

[25] See text accompanying note 14 *supra*.

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

[27] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

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

[29] *Ibid.*

[30] United States v. Coplon, 185 F.2d 629, 636 (2d Cir. 1950).

[31] Lawn v. United States, 355 U.S. 339, 355 (1958).

[32] United States v. Sansone, 231 F.2d 887, 891 (2d Cir. 1956).

[33] Wong Sun v. United States, 371 U.S. 471, 478 (1963).

the cargo in full view on its deck. We now have a situation where knowledge of the cargo was obtained lawfully prior to, and therefore necessarily independently of, the illegal search, and the testimony of the agents is no longer tainted.[34] Similarly the illegal destruction of contraband whiskey by federal agents does not render inadmissible their testimony as to what they observed during the execution of a valid search warrant immediately prior to the illegal act.[35] Nor does the illegal seizure by Internal Revenue agents of certain records require that they be suppressed when the agents had, prior to the seizure, signed a valid summons covering the very same records.[36] Another instance of the application of this principle is found in *Zap v. United States*,[37] where agents investigating bookkeeping frauds in connection with cost-plus government contracts arranged to be present while the appropriate government officials exercised the government's contractual right to audit the defendant's books. During this audit, the agents learned of the existence of a certain check which had been drawn for a greater amount than actually was due to the payee. They directed the defendant to produce the check and carried it away with them for use as evidence. The Supreme Court noted that "neither the Fourth nor Fifth Amendment would preclude the agents from testifying at the trial concerning the facts [*re* the check] about which they had lawfully obtained knowledge .... Even though it be assumed in passing that the taking of the check was unlawful, that would not make inadmissible in evidence the knowledge which had been legally obtained."[38]

In each of these instances the evidence is admissible because the prosecution is able to establish that although it appears to be the product of the unlawful act, it is not so in fact. Therefore, the results in these cases are not inconsistent with the broad, and deceptively simple, rule that evidence is tainted if derived from an unlawful search or seizure—if such be the proper rule. Let us now consider some situations wherein evidence which has in fact resulted from an unlawful search or seizure is nevertheless admissible because the unlawful act merely contributed to the discovery of the evidence.

[34] United States v. Lee, 274 U.S. 559 (1927).
[35] McGuire v. United States, 273 U.S. 95 (1927).
[36] Lord v. Kelley, 223 F. Supp. 684 (D. Mass. 1963).
[37] 328 U.S. 624, *rehearing denied*, 329 U.S. 824 (1946), *vacated*, 330 U.S. 800 (1947).
[38] *Id.* at 629.

The Illegal Search As a Contributing Cause

There are few reported cases involving factual situations such that the proffered evidence clearly is the product of both legally and illegally acquired information. A situation which seems tailored to point up the principles here involved appears in a decision of the United States Court of Military Appeals.[39] While investigating a recent burglary of an army post exchange, the agents made a check of the contents of public lockers in the local train station by peering through existing openings in the doors. A new suitcase identical in appearance to the one reported stolen was seen in a certain locker, and two agents were instructed to maintain a watch over that locker and arrest anyone opening it. They exceeded their instructions, unlawfully obtained entry to the locker, and inspected the bag and its contents, which proved to be several other items taken in the burglary. They then repacked the bag and returned it to the locker. Subsequently, when the accused opened the locker he was placed under arrest and the bag seized. At his trial he claimed that all evidence as to the contents of the bag was tainted by the illegal search of the locker, on the theory that since the arrest itself had been based upon illegally obtained information, the search pursuant to the arrest could produce only tainted fruit. This contention was rejected by the court, which held that the agents had sufficient probable cause for the arrest wholly apart from the illegal search, stating simply, "the prior illegal search did not supply the information which led to the accused's apprehension."[40] The facts, however, indicate quite plainly that the illegal search did "lead to" the arrest in the sense that it made certain what had been merely "suspected," however reasonably, before. It transformed "probable cause" for an arrest into positive knowledge that the locker contained the stolen goods. To that extent, at the very least, the arrest was in fact based upon the illegally obtained knowledge, and it cannot be said that the search did not contribute to the arrest. The vital factor is the clear showing of record that the arrest would have been made even if the illegal search had not taken place. The search was only a contributing cause and not the effective cause of the arrest. For this reason, a holding that the evidence discovered as the result of

[39] United States v. Ball, 8 U.S.C.M.A. 25, 23 C.M.R. 249 (1957).
[40] *Id.* at 30, 23 C.M.R. at 254.

the otherwise lawful arrest is admissible does not permit the government to profit by the improper acts of its officials, and the reason for invoking the exclusionary rule disappears. Here again we have a forceful reminder that the rule does not exist for the express purpose of conferring a benefit upon an individual defendant. Whatever benefit he receives, and frequently it is a substantial one, is an unavoidable consequence of the means adopted by the Supreme Court to compel compliance by public officials with the provisions of the fourth amendment.

A situation analogous to that discussed above was involved in *Parts Manufacturing Co. v. Lynch.*[41] Federal agents had taken from the corporate defendant certain allegedly stolen auto parts. A federal district court held the seizure illegal and ordered the goods returned. The victim of the larceny then had the goods taken into custody under a writ of replevin based upon an inventory of the goods made by the federal agents after the first seizure. The government prosecutor then examined the goods in custody under the writ and used the information thereby obtained as a basis for issuance of a search warrant. The defendant claimed that the search warrant flowed from and was tainted by the original seizure. The court found the search warrant to be the product of information known to the agents prior to and independently of the seizure and, therefore, untainted, stating:

> "Actual examination of the property in the warehouse, therefore, simply confirmed what affiants already had reasonable cause to believe would be found .... It is too much to hold that in order to obliterate the original illegal seizure an otherwise exemplary procedure must be thrown over because the government did not close its eyes and lose track of the stolen goods."[42]

Here again we have a case in which the illegal act contributed to the ultimate seizure but where such seizure would have taken place even if the illegal act had never occurred.

A clear cut recognition of this principle that inadmissibility does not result unless the illegal search is the effective, not merely a contributary, cause of the discovery of the proffered evidence is to be found in *United States v. Giglio,*[43] where the court stated:

> "If a revenue agent testifies that the subject matter of his testimony came *only* from a record obtained in violation of a defendant's constitutional rights it can be suppressed or stricken by the trial judge. If on the other hand he testifies that the facts were developed from records lawfully obtained a jury question may result if there be conflicting testimony. And if the records lawfully obtained contained the information or leads from which the information was subsequently obtained there would be no basis for suppression merely because the same information might *also* have been found in suppressed records."[44]

A similar conclusion can be drawn from *Rouda v. United States,*[45] which involved the alleged tainting of a search warrant by a prior illegal search. The record showed that a prohibition agent had a certain building under surveillance as a suspected source of illicit whiskey. He saw a man carrying two five gallon cans of what appeared to be alcohol enter the building, and he followed the man inside where he observed the defendants filling whiskey bottles. The agent arrested them and then secured a search warrant for the whiskey based upon his affidavit to the above facts. The court held the arrest to have been lawful and then added that even if it were not, the search warrant was untainted. Speaking through Judge Learned Hand, the Court stated:

> "At the outset we note that, except for tasting the alcohol, Sassie could have learned, and perhaps did learn, all that he put in the affidavit, while he stood outside. As the affidavit would have equally supported the warrant without the allegation that he tasted the alcohol, the question arises whether it makes any difference even if his entry was unlawful. He gained by it no more than was available to him before entry. It is therefore at best extremely doubtful whether he can be said to be profiting by his unlawful entry, in the sense that the rule requires in order to have the evidence incompetent. That point we only raise, lest it be thought we imply the opposite."[46]

To the same effect is *Monroe v. United States,*[47] wherein it was held that even if police officers had unlawfully intercepted certain telephone calls made

[41] 129 F.2d 841 (D.C. Cir), *cert. denied,* 317 U.S. 674 (1942).

[42] *Id.* at 843.

[43] 263 F.2d 410 (2d Cir.), *cert. denied,* 361 U.S. 820 (1959).

[44] *Id.* at 413 (dictum). (Emphasis added.) The court upheld the denial of an application *coram nobis* for a new trial.

[45] 10 F.2d 916 (2d Cir. 1926).

[46] *Id.* at 918.

[47] 234 F.2d 49 (D.C. Cir.), *cert. denied,* 352 U.S. 893, *rehearing denied,* 352 U.S. 937 (1956).

by the defendant, any taint upon the information thereby obtained was removed by evidence that the other party to the calls had personally reported the substance of the conversations to the authorities.[48]

Other examples of this principle in action are found in situations where the illegally obtained information is used together with other, lawfully acquired, evidence in perfecting the government's case or otherwise preparing for trial. In all of these cases the illegally obtained information is viewed as being merely a contributing cause and does not taint the evidence which it helps to produce.[49] Thus the testimony of a witness concerning a telephone conversation to which he was a party is not rendered inadmissible merely because prior to taking the stand he used an illegally obtained recording of the conversation to refresh his memory. "[S]ince he was himself the recipient of the messages, or a participant in the conversations, the connection between any possible violation of the statute and his testimony had 'become so attenuated as to dissipate the taint' in its relation to admissibility."[50] Similarly, the testimony of accomplices of the defendant is not tainted merely because illegally obtained recordings of telephone conversations were used, together with other information, during the interrogation which resulted in their confessions.[51]

A striking application of this same principle appears in *Warren v. Hawaii*.[52] A policeman gained entry to a suspected brothel by posing as a client and then blew a whistle as a prearranged signal to his brother officers outside to break in. As the first raider appeared in the doorway, the defendant threw a switch which activated an electrical device wired to the door and the policeman was electrocuted. The following day, the authorities searched the house without a warrant and removed the electric "trap." The defendant claimed that the use of this physical evidence during the pre-trial interrogation of the brothel employees rendered their testimony inadmissible at the trial. The court rejected this contention on the theory that the interrogations were "also" based upon the first hand knowledge of the electrocution possessed by other members of the raiding party.[53]

These authorities make it plain that the exclusionary rule does not come into play merely because the proffered evidence is in fact the product of an illegal act. If the prosecution can establish that the illegal act merely contributed to the discovery of the allegedly tainted information and that such information would have been acquired lawfully even if the illegal act had never transpired, the presumptive taint is removed, and the apparently poisoned fruit is made whole. In other words, if the government establishes that the illegal act was not an indispensable cause of the discovery of the proffered evidence, the exclusionary rule does not apply.

The Sine Qua Non Test

Earlier, it was pointed out that it is essential to the application of the federal exclusionary rule to keep constantly in mind that the benefit which it gives to a specific defendant is an unavoidable, and regrettable, consequence of the rule and not its purpose. This purpose frequently is stated to be to encourage full recognition of the fourth amendment by the authorities by "punishing" them when they violate its provisions. This formulation is somewhat misleading because it fails to include any reference to the one specific form which this "punishment" may take, *viz.*, refusal by the courts to allow the authorities to use in a criminal prosecution evidence which they would not have obtained if the violation had not taken place. In other words, the sanction is limited to preventing the authorities from "profiting" by their official misconduct. It does not extend so far as to allow an otherwise guilty defendant to go free *merely* because he has been the victim of an unlawful search or seizure. In the language of the Supreme Court, "A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to rule."[54]

This is the factor that permits the government to remove the taint from otherwise poisoned fruit by establishing that the unlawful act from which it resulted was not a *sine qua non* of its discovery.

[48] *Id.* at 57.

[49] This principle also applies generally where the defendant's confession is allegedly tainted by the use of illegally acquired information. However, this situation does create special problems which are considered separately *infra*.

[50] Monroe v. United States, 234 F.2d 49, 57 (D.C. Cir.), *cert. denied*, 352 U.S. 893, *rehearing denied*, 352 U.S. 937 (1956).

[51] United States v. Weiss, 34 F. Supp. 99 (S.D.N.Y. 1940).

[52] 119 F.2d 936 (9th Cir. 1941).

[53] "[K]nowledge of facts gained from a proper independent source such as here obtained may be used, though it also may be obtained from an illegal act." *Id.* at 938.

[54] McGuire v. United States, 273 U.S. 95, 99 (1927) (illegal destruction of whiskey after legal seizure).

As Judge Learned Hand so aptly stated, evidence is excluded by the fruit-of-the-poisonous-tree doctrine only because it "*would* not have been found if officials had not violated the laws designed to deny them access to it."[55] What is the precise meaning of this phrase "would not have been found"? How is it applied in the situation where the proffered evidence was in fact discovered solely as the result of an illegal search or seizure?

Earlier, we examined the tests applied where the allegedly tainted evidence is shown to be the joint product of an unlawful act and legally acquired information and concluded that such a showing removes the taint. Let us now assume a situation where the record shows, and correctly so, that the evidence challenged by the defendant originally was acquired by the authorities as the direct result of an unlawful search which was the sole effective cause of its discovery and that in the interval between the search and the trial of the issue the prosecution has not acquired the same evidence from legitimate sources of information.[56] In other words, let us assume a situation where there is no doubt that the proffered evidence was and has remained the fruit of the poisoned tree. Is it possible at this late date for the prosecution to "unpoison" the fruit? The reported cases indicate that this can be done by establishing that the original illegal act literally was not a *sine qua non* of the discovery of the proffered evidence.

In *Coplon v. United States*[57] the defendant, a federal government employee, contended that certain documents and testimony were tainted by a prior illegal wiretap. The facts indicated that by means of a tap placed on her telephone line because she was suspected of violations of national security, federal agents learned that she planned to take a certain train from the District of Columbia to New York City. As a direct result of this information she was followed until she kept a rendezvous in New York at which time she was arrested and the proffered documents found on her person. The record thus showed a clear causal connection between the wiretap and the arrest sufficient to taint the search incident to the arrest. The government did not show that its agents had in fact used any legally obtained information in addition to that derived from the wiretap. Nor did it establish that the proffered evidence was otherwise obtained from lawful sources. The evidence offered by it to remove the taint showed only that she had informed her supervisor of the departure time of her train and its destination and that he knew she was under investigation. The prosecution did not show that the supervisor had informed the agents of her projected trip. Nevertheless, the court held the evidence admissible, stating rather simply: "None of this evidence could have been the result of intercepted telephone conversations. It may be that the agents learned through wiretapping of the appellant's intentions to make the journey to New York City . . . but this information was also given to Foley [the supervisor] by the appellant herself."[58] This language becomes puzzling when viewed in the light of the facts as stated in the opinion. These show rather clearly that the agents acted upon the basis of the wiretap alone. How then could the court find that "none of the evidence could have been the result of" the illegal act? This statement becomes meaningful only if interpreted to imply a finding that the arrest would have been made even if the wiretap had not occurred. Under the facts of the case, such a finding could rest only upon a determination that, if the wiretap had not informed the agents of the prospective trip, they would have questioned the supervisor and received the same information from him. It seems, therefore, that the fruit was "unpoisoned" by a finding that it *would* have been discovered even if the unlawful act had never taken place.

A more overt recognition of this principle is found in *Sullivan v. United States*,[59] where the defendant claimed that evidence of a narcotics offense had been discovered as the result of the unlawful interception of a telephone conversation. It was established that the police had learned of the impending sale of heroin by listening in on a telephone call made to the defendant by an informer who made the call at the request of the police. The trial court found no illegality in this procedure.[60]

[55] United States v. Coplon, 185 F.2d 629, 640 (2d Cir. 1950). (Emphasis added.)

[56] See United States v. Sheba Bracelets, 248 F.2d 134 (2d Cir.), *cert. denied*, 355 U.S. 904 (1957), where any taint arising from the seizure of defendant's books was removed by evidence that the same books later came lawfully into the possession of internal revenue agents who delivered them to the prosecutor. See also Lawn v. United States, 355 U.S. 339, 355 (1958), concerning the removal of taint from a certain check by a showing that a lawfully obtained copy of the same check was in the possession of the federal authorities at the time of the trial.

[57] 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 920 (1952).

[58] *Id.* at 757.

[59] 219 F.2d 760 (D.C. Cir. 1955).

[60] 116 F. Supp. 480 (D.D.C. 1953). Judge Holtzoff

On appeal, the circuit court held that even if the interception had been illegal, the evidence discovered solely as the result thereof was nevertheless admissible. This holding was based upon an explicit finding that if the police had not listened in on the call, they *would* have questioned the informer, who made the call in their presence, and been informed by him as to the details of the planned sale.

The *sine qua non* test was also utilized in *Somer v. United States*.[61] There it appeared that during a search of defendant's apartment by federal agents they were told by his wife that he was expected home in a short time. Acting on this information, the agents waited outside the building and arrested him when he drove up. A search of his car produced large quantities of sugar and contraband alcohol. The trial court held the search of the apartment illegal but admitted evidence as to the contents of the car as having been obtained during a lawful search incident to the arrest. The circuit court held that on these facts the arrest, and therefore the subsequent search of the car, were the product of and tainted by the prior illegal search. However, it expressly recognized the possibility that the prosecution could remove the taint.

> "[I]t does not follow that the seizure was inevitably invalid. Possibly, further inquiry will show that, quite independently of what Somer's wife told them, the officers *would* have gone to the street, have waited for Somer and arrested him exactly as they did. If they can satisfy the court of this, so that it appears that they did not need the information, the seizure may have been lawful. The proceeding will therefore be remanded with leave to the prosecution to retry the issue in accordance with the foregoing."[62]

In these situations the prosecution is required to show that it *would* have obtained the otherwise tainted evidence even if the unlawful act had not occurred. The significance of the word "would" cannot be overemphasized. It is not enough to show that the evidence "might" or "could" have been otherwise obtained. Once the illegal act is shown to have been in fact the sole effective cause of the discovery of certain evidence, such evidence is inadmissible unless the prosecution severs the causal connection by an affirmative showing that it *would* have acquired the evidence in any event. In order to avoid the exclusionary rule, the government must establish that it *has not* benefitted by the illegal acts of its agents; a showing that it *might not* have so benefitted is insufficient.

Unfortunately, language can be found in some opinions which appears to support the principle that a showing that the government "could" have found the otherwise tainted evidence is sufficient. However, close examination of the facts as reported in these cases reveals that the government did establish that it *would* and not merely *could* have obtained the evidence. In *United States v. O'Brien*,[63] the defendant had been lawfully arrested in close proximity to a locked truck containing stolen goods and at that time denied any connection with it. The arresting officer persuaded the defendant to give him the keys to the truck, which proved to be in the defendant's pocket, by promising to report that the keys had been found in the street. The court held that even if it be assumed that the method of obtaining the keys would otherwise render inadmissible the evidence derived therefrom, the taint was removed by the showing of record that "since Keating was under arrest for probable cause for the commission of a felony, the police officers had a right to search him and they *could* have found the keys on such authorized search."[64] It seems rather obvious that since the officer already knew that the truck contained stolen goods and had reasonable grounds to suspect the defendant of a connection with it, a refusal by him to surrender the keys would have led inevitably to his being searched. Since the keys were in fact on his person, the search *would* have produced the keys. Therefore, the prosecution did carry its burden of showing that even if the assumedly illegal act had not occurred, the evidence would have been obtained.

In *Parts Manufacturing Co. v. Lynch*,[65] the defendant contended that a search warrant was the product of a prior illegal seizure. The evidence established that the warrant had in fact been issued in reliance upon a detailed inventory of certain stolen goods made while they were in custody under the illegal seizure. The court indicated its belief that the warrant was not tainted because de-

anticipated the subsequent holding of Rathbun v. United States, 355 U.S. 107 (1957), that the Federal Communications Act does not prohibit listening to a telephone call by means of an existing extension with the consent of either party to the call.

[61] 138 F.2d 790 (2d Cir. 1943).

[62] *Id.* at 792. (Emphasis added.)

[63] 174 F.2d 341 (7th Cir. 1949).

[64] *Id.* at 346. (Emphasis added.)

[65] 129 F.2d 841 (2d Cir.), *cert. denied*, 317 U.S. 674 (1942).

tailed information concerning the stolen goods was available to the government from their owner and therefore an affidavit sufficient to support the warrant "*could* easily have been supplied" without actual examination of the goods.[66] Here again, close examination of the reported facts supports the conclusion that the warrant *would* have been obtained in any event. The investigators knew the location of the goods and did have sufficient information to obtain an untainted warrant. Obviously, they would have done so had not the illegal seizure intervened.

Similar reasoning explains an apparent holding by another circuit court that the prosecution can "untaint" evidence merely by showing that it *could* have obtained the same evidence from lawful sources. This opinion appeared in a case where the court held illegal a raid by Treasury Department agents which resulted in the seizure of certain records of the corporate defendant. It ordered the return of the records to the defendant, but denied the motion to suppress the information learned therefrom. The denial appears to be based upon a finding that, since under Treasury Department regulations governing the manufacture of alcohol, the agents *could* have inspected the records upon the defendant's premises, the taint of the illegal seizure was inoperative. "But the removal from the premises of papers which government agents were, under the circumstances, entitled to inspect upon the premises did not render sacrosanct information secured from the papers because it was lawfully open to the government."[67] In and of itself this statement appears to recognize the rather startling principle that otherwise tainted evidence is rendered admissible by a mere showing that it was available to the officials from legitimate sources. However, if it is read in conjunction with the sentence that follows it, it becomes clear that such was not the intent of the court. That sentence reads: "It is only knowledge gained by the government's own wrong which cannot be used."[68] Therefore, the government must establish that it has not in fact benefitted from the wrongful act, which can be done only by a showing that discovery of the proffered evidence was inevitable.

A clear-cut recognition of the significant distinction between "would" and "could" is found in *United States v. Paroutian*,[69] a prosecution for dealing in narcotics. Certain evidence crucial to the case had been acquired under the following circumstances. Treasury Department agents received information from Interpol that *X*, a suspected narcotics smuggler, was using a certain apartment in New York City to store smuggled drugs. The agents searched the apartment with the active cooperation of the rental agent for the building. During the search the rental agent called the attention of the searchers to a cedarwood lining in a clothes closet and told them that it must have been installed by *X*. They tried unsuccessfully to remove this lining. Two days later they returned and resumed the search, at which time they found papers indicating that the defendant was a co-tenant of the apartment. Two months later, and after *X* had been evicted by the landlord for nonpayment of rent, the federal agents returned and, with the consent of the owner, removed the cedarwood paneling from the closet, thereby revealing a cache of heroin and an incriminating letter in the defendant's handwriting. All members of the court agreed that the first two searches were illegal and that these illegal acts were in fact the effective cause of the third search, but they differed as to whether the evidence was sufficient to remove the taint.

The majority rejected the government's contention that the evidence showed that the agents would have conducted the last search even if the prior illegal ones had not occurred, finding a showing of no more than a possibility that this would have happened.

> "[A] showing that the government had sufficient independent information available so that in the normal course of events it *might* have discovered the questioned evidence without an illegal search cannot excuse the illegality or cure tainted matter . . . . The test must be one of actualities, not possibilities . . . . As the government failed to show any source for its information other than the illegal search . . . [it was error not to suppress the evidence]."[70]

The dissenter appeared to disagree with the rejection by the majority of the "might have" test, stating at one point that the government need only

[66] *Id.* at 842. (Emphasis added.) This comment is *obiter* since the court, in effect, held that the illegal seizure only contributed to the warrant and was not its sole effective cause.

[67] *In re* Sano Labs., 115 F.2d 717, 718 (3d Cir. 1940), *cert. denied*, 312 U.S. 688 (1941).

[68] *Ibid.*

[69] 299 F.2d 486 (2d Cir. 1962).

[70] *Id.* at 489. (Emphasis added.) The conviction was set aside. At the new trial, the Government was permitted to offer additional evidence on the matter and established that the third search was based upon information supplied by an undercover agent. United States v. Paroutian, 319 F.2d 661 (2d Cir. 1963).

'show that the evidence was available through a completely independent source.'"[71] However, he subsequently indicated to the contrary that his disagreement was on the interpretation of the facts and did not extend to the legal principles involved. As he viewed the facts, they clearly showed that the third search would have been made, solely on the basis of the letter from Interpol, even without any information supplied by the illegal searches. "A realistic appraisal of the facts . . . compels the conclusion that the narcotics *would* have been found on June 19th, even if there had not been a search on April 18th."[72]

An apt illustration of successful taint-removing appears in *Wayne v. United States*.[73] There the defendant, charged with attempted abortion terminating in death, maintained that the autopsy report on the victim and expert testimony as to the cause of her death were the product of an unlawful entry by the police into his apartment. The evidence established that the victim's sister, who was present at and aware of the attempted abortion, became alarmed at her condition. She fled the scene to seek help and notified the police through an intermediary that there was an "unconscious woman" in the defendant's apartment. The police went to the scene and when their knock upon the door produced no response they broke down the door and entered the apartment wherein they found the defendant and the decedent. On a pre-trial motion, the district judge held the entry to have been illegal. Despite this ruling, the autopsy report and testimony as to the cause of death were admitted into evidence at the trial.

A majority of the appellate court held that even if the search was illegal, the evidence was not tainted thereby. Looking to the undisputed testimony that, prior to the entry by the police into the apartment, the police had been informed that the victim was there, the majority found that this legally acquired information would have led to the discovery of the allegedly tainted evidence even if the search had never taken place.

> "It was *inevitable* that, even had the police not entered appellant's apartment at the time and in the manner they did, the coroner would sooner or later have been advised by the police of the information reported by the sister, would have obtained the body, and would have conducted the post-mortem examination prescribed by law . . . . Thus, the necessary causal relation between the illegal activity and the evidence sought to be excluded is lacking in this case."[74]

The *Paroutian* and *Wayne* cases point up admirably the unique nature of the burden of proof which the prosecution must successfully carry in order to establish that the illegal act was not a *sine qua non* of the discovery of the otherwise tainted evidence. It must satisfy the court, as a fact, that the proffered evidence *would* have been acquired through lawful sources of information even if the illegal act had never taken place. Since such act did in fact occur and, further, did in fact produce the evidence, this is not a simple task. However, there are occasions on which it can be done, as shown by the cases discussed above. One cannot help but speculate as to the number of cases in which a proper invocation and application of these principles might have avoided the unfortunate result of a guilty defendant going free merely because of the unlawful act of a police officer. The *sine qua non* test, if properly administered, serves well the *raison d'etre* of the exclusionary rule by denying to the government the use of evidence "come at by the exploitation of . . . illegality"[75] and at the same time minimizes the opportunity for the defendant to receive an undeserved and socially undesirable bonanza.[76]

Confessions As Poisoned Fruit

The exclusionary rule embraces any and all evidence which is the result of an unlawful search or seizure, including a confession or admission of a defendant. However, the application of the principles of causation discussed above poses special problems when the issue is the tainting of a statement made by the defendant. Such a statement is inadmissible under other principles of law unless it was made voluntarily by the defendant.[77] Therefore, the issue of the possible tainting of a confession under the fruit-of-the-poisonous-tree doctrine is not important unless it is sufficiently

[71] 299 F.2d at 491.
[72] *Id.* at 493. (Emphasis added.)
[73] 318 F.2d 205 (D.C. Cir. 1963).
[74] *Id.* at 209. (Emphasis added.) The dissenter would hold the evidence inadmissible because "it resulted more directly from knowledge obtained through subsequent illegal action of the police." *Id.* at 218.
[75] Wong Sun v. United States, 371 U.S. 471, 478 (1963).
[76] "The owner of the records is entitled to be as well off as if Flattery had not unlawfully seized those papers, but he is not entitled to be any better off. He is not entitled to gain perpetual immunity . . . ." Lord v. Kelley, 223 F. Supp. 684, 691 (D. Mass. 1963).
[77] See opinion of Justice Frankfurter in Culombe v. Connecticut, 367 U.S. 568 (1961), for a comprehensive discussion of the meaning of the term "voluntariness."

voluntary to be admissible under the rules pertaining to confessions. As we have seen, the defendant must take the initiative in raising a search and seizure issue by showing a probability that the allegedly tainted evidence is the product of the unlawful act. How does he make such a showing with regard to a statement which, by definition, was made of his own free will and volition? If he does establish a prima facie case for inadmissibility, how can the prosecution carry its burden of establishing that the illegal act was not a *sine qua non* of the statement being made? How can the motivation that induced the statement be established apart from the testimony of its maker? If the defendant does testify that he made the statement only because of the prior unlawful act, how can the prosecution prove the contrary?

In one type of situation it is relatively simple to establish that a confession of the defendant, no matter how voluntarily made, is the product of an illegal search. It is not uncommon for an individual who is present while his home is being searched, lawfully or otherwise, to make remarks to the searchers during the course of the search. Clearly, any such remarks are the result of the search and, if it is illegal, are tainted by it.[78] The difficult problems arise with regard to statements made by the defendant after the search or seizure has been completed. Let us consider first the situation where the police have interrogated the defendant in the interval between the illegal act and the making of the confession. Thereafter, we will take up the case where there has been no such interrogation.

If the defendant establishes that he was the victim of an illegal search or seizure, that within a reasonable time thereafter he was interrogated about an offense to which the illegal act was relevant, and that such interrogation resulted in his making a statement, it would seem that he has made a prima facie showing that the confession is the product of and tainted by the illegal act. The confession then is inadmissible unless the prosecution removes the taint by showing that the illegal act was not the sole effective cause of the confession. The most effective means of accomplishing this would be to show that the search had been completely fruitless, producing no information whatsoever, and thus there could be no causal connection between the search and the confession.

Let us suppose, however, that although the search did result in the discovery of evidence highly incriminating to the defendant, the prosecution is able to establish that even if the search had not occurred they *would* have interrogated the defendant on the basis of information already in their possession from lawful sources. Such a showing would eliminate the illegal search as the sole producing agent of the interrogation itself, and on this state of the record, the confession should be held not to be tainted. Thus, in *Harlow v. United States*,[79] any taint upon the defendant's confession resulting from a showing that he was interrogated after federal agents illegally intercepted certain letters was removed by prosecution evidence that, prior to the interception, the agents had information which in and of itself warranted the interrogation. In the language of the court, "The investigating agents were not forever precluded from interrogating McLane and pressing him to confess merely because they thereafter illegally seized other evidence tending to implicate McLane in the bribery scheme."[80] In *Harlow* the untainted information was actually known to the interrogators prior to the illegal act. In *United States v. Ellwein*,[81] the United States Court of Military Appeals was confronted with a classic situation for the application of the *sine qua non* test. There, the unlawful monitoring of certain telephone lines led to the arrest of the accused in the very act of making an obscene call. There was no doubt that the illegal act was the sole factual cause of both the arrest and the interrogation which immediately followed it. However, the prosecution was able to establish that in the routine

[78] Wong Sun v. United States, 371 U.S. 471 (1963) (statements made by defendant when arrested in his bedroom after illegal entry by police). *Accord*, Gibson v. United States, 149 F.2d 381 (D.C. Cir.), *cert. denied*, 326 U.S. 724 (1945) (confession made when narcotics found); Nueslein v. District of Columbia, 115 F.2d 690 (D.C. Cir. 1940) (entry into home without warrant while investigating hit-and-run offense; police made purpose known and defendant admitted guilt); United States v. Rutheiser, 203 F. Supp. 891 (S.D.N.Y. 1962) (illegal search of defendant's home for stolen goods; defendant made incriminating remarks when goods found). See also Brock v. United States, 223 F.2d 681 (5th Cir. 1955), where statements made by an awakening defendant in response to questions put to him by agents illegally on his premises were held inadmissible because involuntary. The facts also show a direct causal connection with the illegal entry.

However, if the statement of the defendant is made as part of the commission of a crime unrelated to that under investigation by the searchers, the exclusionary rule does not apply. United States v. Morrison, 10 U.S.C.M.A. 525, 28 C.M.R. 91 (1959) (evidence of offer of bribe by defendant to searchers made during illegal search held admissible).

[79] 301 F.2d 361 (5th Cir. 1962).

[80] *Id.* at 373.

[81] 6 U.S.C.M.A. 25, 19 C.M.R. 151 (1955).

course of investigation the agents *would* have come across information giving sufficient cause to suspect the accused and to require that he be interrogated. The court found this evidence sufficient to render the interrogation untainted, saying that the accused "would ultimately have been interviewed by law enforcement officers regarding the obscene phone calls which had been the subject of complaint."[82]

Assuming that the prosecution thus succeeds in removing the taint from the mere fact of interrogation, what if the defendant then establishes that the interrogators made use of the illegally obtained information during the interrogation, as, for example, by displaying to him highly incriminating items with a demand that he explain his possession of them or by using information gained during the search as a basis for questions? The presence or absence of this factor is highly significant in determining whether the confession is tainted. Once it has been established that the interrogation is not per se tainted, only one question remains to be answered, *viz.*, Did the agents use the improperly obtained information or evidence to obtain the confession? We must not forget that the purpose of the fruit-of-the-poisonous-tree doctrine is to prevent the government from "using" the illegally acquired matter. The doctrine was first announced by the Supreme Court in these words: "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."[83] The test then for determining whether evidence is derived from illegally obtained information is whether the latter was used to obtain the former.

The determination of whether the improperly obtained information was used to obtain the confession requires that two inquiries be made. First, was it used at all, and second, if it was used, did the confession result from its use? The first inquiry poses no substantial legal problems. It is relatively simple to decide whether items obtained through an illegal search or seizure were displayed to the defendant or his attention otherwise directed to them during his interrogation. Somewhat more difficult is the determination as to whether illegally obtained information was used as a basis for specific lines of interrogation even though the questions themselves made no specific reference to such information. However, resort to the same principles governing the burden of persuasion that apply elsewhere in this particular area of the law furnishes the solution to this particular problem. If the defendant establishes that a certain line of inquiry reasonably could have been based upon tainted information, the prosecution must then satisfy the court that the questions were based upon lawfully obtained information. Thus, in *Wiggins v. United States*,[84] the defendant, charged with tax evasion, claimed that his confession was tainted because his interrogators used as a basis for their questions information gained by a study of his illegally seized records, but his claim was rejected upon a showing by the prosecution that the agents had received the same information from a lawful source.[85]

Let us assume, however, that the undisputed evidence shows that the tainted information or objects were in fact used by the interrogators. In such a situation the confession bears the same taint and is inadmissible unless the prosecution can establish that such use was not the sole effective cause of the confession being made.[86] It can discharge this burden by showing that the confession had another, and lawful, cause. Thus, in a case where the defendant claimed that his confession to the possession of stolen goods was tainted because his interrogators made use of their knowledge that the goods had been found in his home during an illegal search, the court was able to find that the confession was the product not of this circumstance but rather of the confrontation of the defendant by the one who had sold the goods to him. "This statement has no apparent connection with the illegally seized evidence and stems from Rutheiser's alleged purchase of stolen goods from Jones. This statement was based upon facts developed independently of the illegal search . . . ."[87]

It is of great importance to note that, as a practi-

[82] *Id.* at 31, 19 C.M.R. at 157.

[83] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). (Emphasis added.)

[84] 64 F.2d 950 (9th Cir.), *cert. denied*, 290 U.S. 657 (1933).

[85] "[I]t should be noted that the officials had received similar information from defendant's secretary; this alone sufficed as a basis for their questions." *Id.* at 951. *Accord*, Hollingsworth v. United States, 321 F.2d 342 (10th Cir. 1963). (Contraband rifle seized during illegal search of automobile. Defendant confessed when questioned about it. Prosecution established that prior to the search, the agents had been informed that defendant possessed the weapon.)

[86] For an example of the use of illegally obtained information as a basis for questions see Brock v. United States, 223 F.2d 681 (5th Cir. 1955).

[87] United States v. Rutheiser, 203 F. Supp. 891, 893 (S.D.N.Y. 1962).

cal matter, the prosecution frequently has the assistance, however reluctant, of the defendant in carrying its burden of proof in this area. The crucial factor in resolving the issue of what in fact caused the defendant to make his statement is his own motive, to which he himself is obviously the best witness. Although he cannot be called as a witness on this matter by the prosecution, he has the right to elect to testify on the limited issue of the admissibility of his statement. If he remains silent, although the court is not permitted to draw any inferences from his silence, he runs the risk that a showing by the prosecution that his statement—at this point apparently completely voluntary—was *probably* the result of some factor other than the use of tainted information, will satisfy the court that it is admissible. However, if he elects to attack the prima facie showing of voluntariness by testifying on that issue, and it is common knowledge that such an attack rarely succeeds unless the defendant does so testify, he opens himself to cross-examination on all the circumstances surrounding the interrogation, including specific questions concerning the influence upon him of the illegally obtained information. Furthermore, in order to establish involuntariness, if such be his purpose, he must seek to show that some misconduct of the interrogators, such as duress, the making of promises of benefit, etc., was the principal producing cause of the statement. In so doing, he necessarily tends to weaken any prior showing that the statement was the product of the illegal search or seizure. On the other hand, if he attempts to strengthen the evidence tending to show that the statement is the fruit of the poisonous tree, he pro tanto weakens any showing of involuntariness. If he attempts to testify that the statement is both involuntary and tainted, he necessarily undermines to some extent both assertions. These are factors that must be considered very carefully by defense counsel in advising his client on whether or not to testify on these issues.

When the accused does testify as to the manner in which his statement was obtained, a failure on his part to make a specific assertion that he confessed solely because of the use by his interrogators of the unlawfully obtained information is given great significance. Thus, in *Harlow v. United States*,[88] the defendant testified that during his interrogation the agents informed him that they already had much incriminating evidence against him because they had intercepted certain letters between his co-conspirators. In holding his confession nonetheless admissible the court placed great stress upon his failure to testify to *why* he made the statement, saying: "McLane did not indicate that he would not have confessed if he had not been told of the interceptions of Wilson's mail by the investigating agents. For all we know, McLane would have told all regardless of whether this information was imparted to him by the investigating agents."[89] A similar approach is found in *Gibson v. United States*.[90] There, the accused's confession as to one narcotics charge had been suppressed and the charge dismissed because of an illegal search of his home which had resulted in the discovery of the drugs involved. However, a confession as to a second narcotics charge was held untainted even though he had made it while in custody immediately after the illegal search. At that time he was asked by the police if he knew anything about a cache of drugs at another address, and he gave them a detailed statement about it. At the trial his only testimony concerning this second confession was that he had made it voluntarily. The court noted: "Why he volunteered this information [the second confession] does not appear .... [W]e think that fact [the illegal arrest] does not require the rejection of evidence volunteered by him for reasons sufficient to himself and made without force or compulsion or promise of reward."[91]

It seems that in this latter limited area, the *sine qua non* test for admissibility also governs, but with one very significant change. Elsewhere in the principles which have evolved with regard to the fruit-of-the-poisonous-tree doctrine, it is necessary for the defendant to establish only a probable causal connection between the illegal act and the proffered evidence. The prosecution must then assume the burden of proving that the illegal act was not the sole effective cause of the acquisition of the evidence.[92] However, when the issue is what motivated the accused to confess, the allocation of the burdens is reversed. The prosecution need es-

[88] 301 F.2d 361 (5th Cir. 1962).

[89] *Id.* at 373.

[90] 149 F.2d 381 (D.C. Cir.), *cert. denied*, 326 U.S. 724 (1945).

[91] *Id.* at 384.

[92] As in Wong Sun v. United States, 371 U.S. 471, 491 (1963), where the record showed no more than that after having been illegally arrested, Wong Sun was released on his own recognizance after a lawful arraignment. He then returned to the police of his own volition several days later and made a statement.

tablish only that the tainted information or evidence probably was not the sole effective cause of the accused's confession, and the defendant then has the burden of proving otherwise. Although the reported cases fail to discuss the reasons for this reversal, it is not difficult to explain it. A confession is never admissible unless the prosecution establishes that it was made voluntarily by the accused. Such a showing tends in and of itself also to show that the confession was not the product of the tainted evidence. Furthermore, even with regard to the issue of voluntariness, the prosecution is not given the almost impossible task of showing what actually did influence the accused to confess. It is required, in the first instance, only to establish that the interrogators employed no improper means during the interrogation. The accused is the best witness as to his own motives, and there is no injustice in a rule which requires him, in this limited area, to prove what his motive was in confessing if he wishes to invoke the strong medicine of the exclusionary rule.

There remains for consideration the possible tainting effect of an illegal search or seizure upon a subsequent confession when there has been no interrogation of the defendant in the interim. It is obvious that this situation can be presented to a court for decision only if the defendant takes the stand and testifies that he made the confession solely because he knew that the authorities were in possession or aware of the illegally obtained evidence. Otherwise, there would be no showing whatsoever of any possible causal connection between the illegal act and the confession. Let us assume that he so testifies, that there is no evidence to the contrary, and that his testimony is not rejected as being inherently incredible but is accepted as true by the court. In other words, let us assume that the illegal act was in fact the sole effective cause of the confession being made. Should the confession be held tainted and excluded? I think not. As has been pointed out earlier,[93] so-called derivative evidence is excluded because government officials are not permitted to "use" the illegally obtained evidence in developing their case against the defendant. In the situation now before us there has been no use whatsoever by the authorities, and the reason for the application of the exclusionary rule disappears. The factor motivating the defendant is his anxiety, or pangs of conscience, arising from his knowledge that the police are aware of his unlawful activities. One could say with deceptive simplicity that the defendant is charged with knowledge of the fact that the investigators cannot make use of their illegally obtained information and, therefore, that there is no causal connection between the search and the confession. A more realistic approach would be to recognize that the purposes of the exclusionary rule would be ill served by extending it to cover this situation. The rule simply is not designed for the purpose of giving the victim of an illegal search immunity against prosecution for all crimes uncovered by the search. The sole purpose of the rule is to deter unlawful actions by police officers and thereby benefit society as a whole. This deterrence is accomplished by forbidding the *use* of unlawfully acquired information as a means of law enforcement and criminal investigation.

[93] See text accompanying note 83 *supra*.

Conclusion

The federal exclusionary rule, including the fruit-of-the-poisonous-tree doctrine, is now "the law of the land," binding on all criminal courts, federal and state alike. Prosecutors and defenders should be thoroughly familiar with the principles involved in its application. The reported cases indicate that attorneys for the defense are well aware of the existence of the rule and its potentialities. One hopes that prosecutors will be equally aware of the many ways in which the tainted fruit can be unpoisoned and thereby do their part to avoid the perversion of a rule designed to protect society as a whole into an unlimited gaol delivery of criminals.