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Fourth Amendment--A Renewed Plea for Relevant Criteria for the Admissibility of Tainted Confessions

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FOURTH AMENDMENT—A RENEWED PLEA FOR RELEVANT CRITERIA FOR THE ADMISSIBILITY OF TAINTED CONFESSIONS

Taylor v. Alabama, 102 S. Ct. 2664 (1982).

I. INTRODUCTION

In *Taylor v. Alabama*,[1] the United States Supreme Court, in a five to four decision,[2] held a defendant's confession to be the "fruit" of an illegal arrest, and hence inadmissible at his trial[3] under *Brown v. Illinois*[4] and *Dunaway v. New York*.[5] The Court split over the proper application of the rules set forth in *Brown* when determining whether the police had purposefully exploited the illegal arrest to induce the confession, or whether the taint of the illegal arrest had become so attenuated as to purge the confession.[6] Applying the *Brown* test, the Court held that a confession given while a defendant is in police custody is inadmissible when it is obtained six hours after the illegal arrest, when no intervening events have ocurred, and when the police engineered the illegal arrest for investigatory purposes.[7]

Because the *Taylor* decision turns on its facts, it provides few, if any, manageable guidelines for consistent application of the *Brown* test. Thus, the decision leaves lower courts with substantial latitude to determine when the *Brown* test should be invoked, and how much weight should be accorded to each of its factors. This has encouraged some courts to utterly disregard the *Brown* test, and admit tainted confessions notwithstanding prior police illegality, under the rubric of a "good faith" exception to the exclusionary rule.[8]

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1 102 S. Ct. 2664 (1982).

2 Justice Marshall delivered the opinion of the Court, joined by Justices Brennan, White, Blackmun, and Stevens. Justice O'Connor filed a dissenting opinion in which Chief Justice Burger, Justice Powell, and Justice Rehnquist joined.

3 102 S. Ct. at 2669.

4 422 U.S. 590 (1975).

5 442 U.S. 200 (1979).

6 102 S. Ct. at 2667 (quoting Brown v. Illinois, 422 U.S. at 602).

7 102 S. Ct. at 2667-68.

8 *See* United States v. Williams, 662 F.2d 830 (5th Cir. 1980) (en banc) (per curiam), *cert. denied*, 449 U.S. 1127 (1981).

Confessions, as well as other evidence, which result from an illegal arrest, are suppressed in order to effectuate the fourth amendment[9] guarantee against illegal searches and seizures.[10] The premise underlying the exclusionary rule is that the police will be deterred from violating the fourth amendment if illegally obtained evidence is excluded from use at trial.[11] Effective deterrence, however, requires clear standards of acceptable police behavior and infallible exclusion when those standards are breached. The *Taylor* Court's failure to provide clear and manageable guidelines for the exclusion of improperly obtained confessions perpetuates uncertainty of application which is inconsistent with effective deterrence; hence, the fourth amendment guarantee against illegal searches and seizures is undermined.

II. FACTS OF *TAYLOR*

On the basis of an unsupported tip, and without a warrant or probable cause,[12] Alabama police arrested Omar Taylor for robbing a grocery store. The officers told Taylor why he was being arrested and gave him the warnings required under *Miranda v. Arizona*.[13] At the police station, Taylor again received *Miranda* warnings, and he signed an acknowlegement to that effect. The police fingerprinted him and placed him in a lineup, but he was not indentified by the victims of the robbery. Meanwhile, the police had determined that Taylor's fingerprints matched those on grocery items handled by the robbers. When they informed him of this fact, Taylor denied knowledge of the robbery. The police then filed an *ex parte* warrant for Taylor's arrest, based on the fingerprint analysis.[14]

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9 The pertinent part of the fourth amendment states: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." U.S. CONST. amend. IV.

10 "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." Mapp v. Ohio, 367 U.S. 643, 659 (1961).

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those placed are concerned, might as well be striken from the Constitution.

Weeks v. United States, 232 U.S. 83, 393 (1914).

11 The exclusionary rule is designed "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." 367 U.S. at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

12 During a police investigation Charles Martin, incarcerated on an unrelated charge of rape and a suspect in the robbery of the grocery store, told the police that he had heard that Omar Taylor was involved in the robbery. Martin did not offer any support for the accusation, and the police admitted to making no effort to ascertain the reliability of the tip. 102 S. Ct. at 2670 (O'Connor, J., dissenting).

13 384 U.S. 436 (1966).

14 102 S. Ct. at 2669.

Almost six hours after the arrest, a detective again advised Taylor of his *Miranda* rights, and again had him sign an acknowledgment. Though advised to cooperate, Taylor remained adamant in his denials. Shortly thereafter, Taylor met with his girlfriend and a male companion in the detective's office.[15] After the meeting, Taylor signed a waiver-of-rights form and confessed to his involvement in the robbery of the grocery store.

At trial, Taylor moved to suppress the confession, arguing that it was the tainted "fruit" of the illegal arrest. The trial court denied the motion and Taylor was convicted. The Court of Criminal Appeals of Alabama reversed, holding that the causal connection between the initial police illegality and the confession had not been severed, and hence that the confession was not admissible under the rule of *Brown v. Illinois*.[16] The Supreme Court of Alabama in turn reversed, reinstating the trial court verdict. It held that the confession was admissible because after the illegal arrest there had been a finding of probable cause, based on the fingerprint comparison, which broke the causal connection between the illegal arrest and the confession.[17]

III. CONTROLLING LAW

Any evidence which the police discover, directly or indirectly, as a result of an illegal search or seizure is inadmissible under the "fruit of the poisonous tree" doctrine.[18] The initially seized evidence (or the illegal search of a seized person) represents the "poisonous tree." All evidence subsequently derived from the illegally seized evidence is the "fruit" of the poisonous tree insofar as it has been tainted by the initial official illegality.[19] Under the exclusionary rule both primary and secondary evidence obtained in this manner is inadmissible in criminal prosecutions.

The exclusionary rule, while not an explicit requirement of the Constitution,[20] is a judicially created tool invoked to effectuate two related fourth amendment policy objectives: deterrence of unlawful police

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[15] It is not clear from the record whether they were alone or whether a policeman was present, nor is it certain whether the meeting was arranged by the police or if it was Taylor's own idea. Moreover, there is some controversy as to what actually transpired at the meeting. 102 S. Ct. at 2668 n.1; *id.* at 2670 n.2 (O'Connor, J., dissenting).

[16] Taylor v. State, 399 So. 2d 875, 880 (Ala. Crim. App. 1980), *rev'd*, 399 So. 2d 881 (1981), *rev'd sub nom.*, Taylor v. Alabama, 102 S. Ct. 2664 (1982).

[17] Taylor v. State, 399 So. 2d 881, 884-85 (Ala. 1981), *rev'd sub nom.*, Taylor v. Alabama, 102 S. Ct. 2664 (1982).

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

[19] *Id.*

[20] Stone v. Powell, 428 U.S. 465, 482 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974).

misconduct and preservation of judicial integrity.[21] The Court originated the exclusionary rule in *Boyd v. United States*,[22] holding that the federal government could not use illegally seized evidence in a criminal trial.[23] The rule that derivative evidence is also tainted emerged in *Silverthorne Lumber Co. v. United States*.[24] The Court there held that all evidence derived from illegally seized evidence must likewise be excluded,[25] unless such derivative evidence would have been discovered inevitably, notwithstanding the official illegality, or if it was received from a collateral source unrelated to the official illegality.[26] Later, in *Nardone v. United States*,[27] Justice Frankfurter characterized evidence tainted by official illegality as the "fruit of the poisonous tree,"[28] and held that all such evidence must be excluded unless "[a]s a matter of good sense . . . such connection [between the illegal seizure and the proffered evidence] may have become so attenuated as to dissipate the taint."[29]

In *Wong Sun v. United States*,[30] the Court included verbal evidence under the umbrella of the exclusionary rule. Previously, if confessions were voluntary for the purpose of the fifth amendment, they were admissible notwithstanding any prior police illegality.[31] In extending the exclusionary rule to verbal evidence, the *Wong Sun* Court noted:

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21 *See generally* Elkins v. United States, 364 U.S. 206, 217 (1960) ("The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."). The rule preserves judicial integrity, since the admission of tainted evidence would be tantamount to condoning the illegal methods of its procurement. Wong Sun v. United States, 371 U.S. 471, 486 (1963). *See* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), *rev'd on other grounds*, Katz v. United States, 389 U.S. 347, 353 (1967); Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A. L. REV. 1129 (1973).

22 116 U.S. 616 (1886). *See also* Weeks v. United States, 232 U.S. 383 (1914).

23 The Court in *Boyd* acknowledged the close nexus between the fourth and fifth amendments: "The 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment . . . ." 116 U.S. at 633.

24 251 U.S. 385 (1919).

25 *Id.* at 392.

26 *Id.*

27 308 U.S. 338 (1939).

28 The *Nardone* Court indicated that a trial court should examine carefully the causal connection between an illegal arrest and evidence obtained subsequently, but proposed no specific guidelines for establishing attenuation of the taint of the illegal arrest. *Id.* at 341.

29 *Id.*

30 371 U.S. 471 (1963). In *Wong Sun* one of the defendants, Toy, made an incriminating statement shortly after federal agents illegally forced their way into his home. The Court ruled that Toy's inculpatory statements must be suppressed as the fruit of the agents' illegal actions. Toy's confession, however, led agents to Wong Sun, the other defendant in the case.

31 Culombe v. Connecticut, 367 U.S. 568 (1961); Smith v. United States, 254 F.2d 751, 758 (D.C. Cir. 1958); Balbo v. People, 80 N.Y. 484, 499 (1880).

> [T]he policies underlying the exclusionary rule [do not] invite any logical distinction between physical and verbal evidence. Either in terms of deterring lawless conduct by federal officers . . . or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained . . . the danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction.[32]

The Court held that Wong Sun's arrest was illegal because it resulted from his co-defendant's tainted confession. The Court also found that Wong Sun's release from police custody for several days and his voluntary return to confess, however, broke the presumption of a causal connection between the illegal arrest and the confession.[33]

Thus, the Court in *Wong Sun* not only included verbal evidence in the fruit of the poisonous tree doctrine, but also identified a determinative factor attenuating the primary taint: the release of a defendant from police custody. The *Wong Sun* Court eschewed the notion that all verbal evidence stemming from an illegal arrest should necessarily be excluded from evidence at trial.[34] Though there is a presumption that the illegal arrest is the cause of a subsequent confession, the presumption is rebuttable under *Wong Sun* if the confession is the result of "an intervening . . . act of a free will."[35] The failure of the Court in *Wong Sun* to define specific criteria for determining attenuation of the primary taint, however, left state and federal courts free to adopt widely differing thresholds of attenuation.[36]

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32 371 U.S. at 486. The Court's insistence in *Wong Sun* that there should be no distinction between verbal and tangible evidence created some immediate confusion. *See, e.g.*, Collins v. Beto, 348 F.2d 823, 835 (5th Cir. 1965) (Friendly, J., concurring):

> [T]he connection between the unconstitutional intrusion and the booty offered at trial is so automatic and inevitable that the latter is readily seen as the 'fruit' of the unconstitutional act. But when the object improperly seized is a person and the alleged 'fruit' is a statement by him, there intervenes the individual's own decision to speak.

33 371 U.S. at 491.

34 *Id.*

35 *Id.* at 486.

36 One line of cases considered the voluntariness of the defendant's statement, tending to admit the confession as an act of the defendant's free will notwithstanding the prior illegality. Ralph v. Peppersack, 335 F.2d 128 (4th Cir. 1964), *cert. denied*, 380 U.S. 925 (1965); Hollingsworth v. United States, 321 F.2d 342 (10th Cir. 1963); People v. Novak, 33 Ill. 2d 343, 211 N.E.2d 235 (1965), *cert. denied*, 384 U.S. 1016 (1966). Another line of decisions broadly excluded all confessions made subsequent to illegal arrests in order to advance the deterrent role of the exclusionary rule. Gatlin v. United States, 326 F.2d 666, 672 (D.C. Cir. 1963); People v. Sesslin, 68 Cal. 2d 418, 439 P.2d 321, 67 Cal. Rptr. 409 (1968), *cert. denied*, 393 U.S. 1080 (1969); State v. Thompson, 1 Ohio App. 2d 533, 206 N.E.2d 5 (1965). *See* Comment, *The Fourth Amendment and Tainted Confessions: Admissibility as a Policy Decision*, 13 HOUS. L. REV. 753, 759-60 (1976). "The split of authorities following *Wong Sun* occurred because the Court failed to specify the weight to be given each factor in determining admissibility. Some courts have refused to consider either factor exclusively; as a result admissibility has hinged on a balancing of several considerations." *Id.* at 760.

In *Brown v. Illinois*,[37] the Court attempted to coalesce the holding of *Wong Sun* into a multifactor test for determining when the taint of an illegal arrest has become so attenuated as to purge the confession. At the same time, however, it acknowledged the need for a flexible application of the exclusionary rule.[38] In *Brown*, without probable cause or a warrant, the police had entered Brown's apartment, searched it, and then arrested him when he returned home.[39] They gave Brown his *Miranda* warnings. At the station, the police confronted Brown with information about a shooting they were investigating, and within two hours of his illegal arrest, Brown confessed to the crime.[40] The Court in *Brown* rejected the Illinois Supreme Court holding that *Miranda* warnings alone purge the taint of an illegal arrest, and eschewed the adoption of any alternative *per se* rule.[41]

Instead, the Court set forth three factors for courts to consider when determining whether the taint of an illegal arrest has become so attenuated as to purge the confession. The first of these factors is the temporal proximity of the illegal arrest and the confession.[42] Brown had been in police custody for only two hours when he confessed. Though the Court did not directly relate this fact to the issue of temporal proximity,[43] such a brief detention would appear to raise the inference that sufficient time had not passed to permit attenuation of the taint of the illegal arrest. The second factor the *Brown* Court isolated is the presence of intervening circumstances.[44] In *Brown*, the giving of *Miranda* warnings did not constitute sufficient intervention to purge the taint.[45] The final factor set forth by the Court in *Brown* is the "purpose and flagrancy" of the

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37 422 U.S. 590 (1975).

38 The Court expressed its desire for a flexible application of the exclusionary rule as early as 1928 in *Nardone v. United States*: "Such a system as ours must, within the limits here indicated, rely on the learning, good sense, fairness, and courage of federal trial judges. . . . The civilized conduct of criminal trials cannot be confined within mechanical rules." 308 U.S. at 342.

39 422 U.S. at 592. The police had obtained Brown's name from the victim's brother as an acquaintance of the victim, not as a suspect.

40 *Id.* at 595.

41 *Id.* at 603. ("No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test.").

42 *Id.*

43 The Court in *Brown* considered only the question of whether *Miranda* warnings *per se* purge the taint of an illegal arrest. Though it set out the multifactor test for determining whether attenuation has occurred, it never actually applied the test to the facts of the case. In fact, the Court limited its holding to the facts of the case and the issue of *Miranda* warnings. *Id.* at 605.

44 *Id.* at 604.

45 *Id. See* Johnson v. Louisiana, 406 U.S. 356 (1972) (when a defendant is represented by counsel and brought before a magistrate for a determination of probable cause and appropriate bail, the primary taint of the illegal arrest is purged).

official misconduct.[46] The Court found that the police, with information far less than probable cause, arrested Brown for investigatory purposes only. Thus, the underlying sense of purposefulness strongly demonstrated serious police misconduct. The Court also considered, to a lesser degree, the manner of Brown's arrest, which was "calculated to cause surprise, fright, and confusion."[47]

The Court in *Brown* did not delineate the relationship among these factors to set forth a clear test of when taint of an illegal arrest may become purged. Rather, the Court explicitly acknowledged that its approach relies to a large degree upon judicial discretion.[48] It is clear from *Brown* that exclusion of a confession is almost certain where flagrant and purposeful police conduct has occurred; the deterrence rationale of the exclusionary rule demands that much, as does the preservation of judicial integrity. Still, *Brown* left unresolved the question of whether confessions should be excluded if the police misconduct was technical or non-purposeful.[49] Further, since there were no intervening circumstances in *Brown*, the decision did not establish a standard of what constitutes a sufficient intervening cause; it merely acknowledged the findings of intervention in *Wong Sun* and *Johnson v. Lousiana*.[50]

The Court in *Dunaway v. New York*[51] found the facts there to be virtually indentical to those in *Brown*,[52] and accordingly applied the *Brown* multifactor test. Finding that the temporal proximity between the defendant's illegal arrest and the confession was only two hours, that there were no significant intervening circumstances, and that the police acted with an attitude of purposefulness, the Court in *Dunaway* excluded the confession.[53] It reaffirmed *Brown*'s holding that *Miranda* warnings alone do not purge the taint of an illegal arrest, but it did not clarify the factors of temporal proximity and intervening circumstances. It did, however, narrow the interpretation of the official misconduct, determining that this factor is relevant only in terms of the flagrancy of the fourth amendment violation, not in terms of the manner in which the illegal arrest is accomplished.[54]

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46 422 U.S. at 604.

47 *Id.* at 605.

48 *Id.* at 604 n.10. *See supra* note 38.

49 *See* Comment, *supra* note 36, at 767-70.

50 406 U.S. 356 (1972). *See supra* notes 30 & 45 and accompanying text.

51 442 U.S. 200 (1979). The Court in *Dunaway* primarily considered the legality of the defendant's detention. Having determined that the detention was illegal, it applied the *Brown* test cursorily.

52 *Id.* at 218 ("The situation in this case is virtually a replica of the situation in *Brown*.").

53 *Id.* at 218-19.

54 *Id. See* Note, *Fourth Amendment—Admissibility of Statements Obtained During Illegal Detention*, 70 J. CRIM. L. & CRIMINOLOGY 446, 457 (1979).

In 1980, the Court in *Rawlings v. Kentucky*[55] applied the *Brown* test in dicta. While subjected to an illegal detention and search, the petitioner admitted to owning illegal drugs. The petitioner subsequently claimed that his admission should be suppressed as the fruit of his illegal detention.[56] The Court applied the first factor of the *Brown* test, temporal proximity, and noted that only forty-five minutes had elapsed between the arrest and the admission. Determining that this by itself was inconclusive,[57] the Court proceeded to the factor of intervening circumstances. Because the defendant confessed to the ownership of the drugs contemporaneously with the discovery of the drugs, Justice Rehnquist concluded for the majority that the confession was motivated by the intervening event of the discovery of the drugs themselves and not the illegal arrest.[58] Justice Rehnquist gave the least weight to the purpose and flagrancy of the police misconduct: "The conduct of the police here does not rise to the level of *conscious* or flagrant misconduct requiring prophylactic exclusion of petitioner's statements."[59]

The Court's decision in *Rawlings* cast a shadow of ambiguity upon the holdings in *Brown* and *Dunaway*. Nowhere in *Brown* or *Dunaway* did the Court suggest that the absence of *conscious* flagrancy on the part of the police should, in itself, lead to the admission of confessions made subsequent to an illegal arrest. Insofar as the Court in *Rawlings* determined that the arrest and detention of the defendant was legal, its decision on the admissibility of the confession was dicta. Also, since the search which lead to the discovery of the drugs directly resulted from the initial illegality, it could hardly be construed thereafter as an independent intervening event which "contributed to [petitioner's] ability to consider carefully his . . . options and . . . excercise his free will."[60] The Court's dicta in *Rawlings* raises even greater confusion in that if the arrest and detention of the defendent were illegal, then the subsequent search was tainted. Thus, the defendant's admission, which resulted

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55 448 U.S. 98 (1980).

56 The police entered the defendant's home pursuant to a valid arrest warrant for one Marquess. They did not find him there. While searching for him, however, the police smelled marijuana, and two of the officers left to get a search warrant. The remaining officers detained the occupants. When the officers returned with the search warrant, they read the occupants their *Miranda* rights. The police emptied a purse and discovered illegal drugs. The defendant admitted to ownership of the drugs. The police searched the defendant, and then arrested him. Though the Court found that the detention and search were lawful, they discussed the admissibility of the tainted confession *in arguendo*. *Id.* at 100-10.

57 A forty-five minute interval should probably raise a strong presumption of taint since the interval in both *Brown* and *Dunaway* was only two hours. *See infra* text accompanying notes 63-64.

58 448 U.S. at 108.

59 *Id.* at 110 (emphasis added).

60 102 S. Ct. at 2668.

from the disclosure of drugs found during the search, was thereby tainted, and inadmissible.[61] The *Rawling* Court's application of the *Brown* test in dicta is inconsistent with the holding in Brown and the policies underlying the exclusionary rule.

IV. OPINIONS IN *TAYLOR*

In *Taylor*, five members of the Court relied exclusively upon *Brown* and *Dunaway* when arriving at their decision to suppress the confession of Omar Taylor. Justice Marshall, writing for the majority, applied *Brown's* multifactor test to determine whether Taylor's confession resulted from police exploitation of the illegal arrest, or whether the taint of the illegal arrest had become so attenuated as to purge the confession and render it admissible for the purposes of the fourth amendment.[62]

The temporal proximity of the illegal arrest and the confession is the most ambiguous of the three factors of the *Brown* test,[63] and the Court declined to hold that the six hour detention by itself was sufficient to attenuate the taint of the illegal arrest. Though *Brown* and *Dunaway* each involved only two-hour detentions, "a difference of a few hours is not significant where, as here, petitioner was in police custody, unrepresented by counsel, fingerprinted . . . and subjected to a lineup."[64] Thus, temporal proximity by itself will rarely prove sufficient attenuation; rather, it is the quality of the detention and the presence of intervening events which are determinative.[65] The majority's cursory disposition of the temporal proximity factor indicated their dissatisfaction with it as a reliable indicator of attenuation.

The *Taylor* majority also followed *Brown* in weighing the factor of intervening circumstances which might break the causal connection between the illegal arrest and the confession. Possible intervening circumstances in *Taylor* included repeated *Miranda* warnings. The *Taylor* majority reaffirmed the reasoning set forth in *Brown* that *Miranda* warnings address the fifth amendment issue of voluntariness, and that a "finding of 'voluntariness' for purposes of the Fifth Amendment is merely a threshold requirement for Fourth Amendment analysis."[66]

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[61] *See* Davis v. Mississippi, 394 U.S. 721 (1969) (fingerprints obtained during an illegal detention were not admitted into evidence at trial).

[62] 102 S. Ct. at 2667.

[63] 442 U.S. at 220 (Stevens, J., concurring).

[64] 102 S. Ct. at 2668.

[65] 442 U.S. at 220 (Stevens, J., concurring) ("If there are no relevant intervening circumstances, a prolonged detention may well be a more serious exploitation of an illegal arrest than a short one. Conversely, even an immediate confession may have been motivated by a prearrest event . . . .").

[66] 102 S. Ct. at 2668. Justice Marshall further discounted the intervention effect of giving *Miranda* warnings, quoting *Mapp v. Ohio*: "If *Miranda* warnings were viewed as a talisman

While the *Brown* Court had found *Miranda* warnings an important although not a conclusive factor in determining attenuation, the *Taylor* majority considered them virtually irrelevant.[67]

The majority also rejected the contention that Taylor's visit with his girlfriend and a male companion was an intervening event which broke the chain of causation between the illegal arrest and the confession. Justice Marshall declared that an intervening event will only break the chain of causation when it "contributed to [the defendant's] ability to consider carefully . . . his options and to exercise his free will."[68] This indicates that the event must, in effect, dissipate the aura of coercion surrounding the illegal arrest; it cannot simply substitute one source of coercion for another. The majority also held that the *ex parte* warrant, filed after Taylor's arrest and based upon the comparison of Taylor's fingerprints with those found at the scene of the crime, did not purge the taint of the illegal arrest. Because the fingerprints themselves were the fruit of the illegal arrest, the police could not use them to purge the taint of the initial illegality.[69]

Lastly, the majority addressed the third factor of the *Brown* test: the flagrancy and purposefulness of the official misconduct. As in *Dunaway*, the majority applied this factor in terms of the flagrancy of the fourth amendment violation, not in terms of whether the defendant was subjected to intimidating police misconduct thereafter.[70] Since the police arrested Taylor without a warrant or probable cause, and for purely investigatory reasons, the Court found that the official misconduct was flagrant.[71]

In her dissenting opinion, Justice O'Connor, joined by Chief Justice Burger and Justices Powell and Rehnquist, pointed out that Taylor's arrest was neither violent, nor designed to "cause surprise, fright, and confusion."[72] Justice O'Connor argued that this absence of police cul-

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that cured all Fourth Amendment violations, then the constitutional guarantee against unlawful searches and seizures would be reduced to a mere 'form of words.' " *Id.* at 2668 (quoting 367 U.S. 643, 648 (1961)).

67 The rationale behind this, though it is not clearly articulated by the Court, is that *Miranda* warnings are given to protect a defendant's fifth amendment right against self-incrimination, while the purpose of the exclusionary rule is to effectuate the underlying policies of the fourth amendment by deterring the police from engaging in illegal searches and seizures. *See supra* note 23 and accompanying text.

68 102 S. Ct. at 2668. *See id.* at 2668 n.1.

69 *Id.* at 2669. *See, e.g.*, Davis v. Mississippi, 394 U.S. 721, 727 (1969) ("Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment.").

70 102 S. Ct. at 2669 ("In this case, as in *Dunaway*, the police effectuated an investigatory arrest . . . in the hope that something would turn up. The fact that the police did not physically abuse petitioner . . . does not cure the illegality of the initial arrest.").

71 *Id.*

72 *Id.* at 2672 (O'Connor, J., dissenting) (quoting 422 U.S. at 605).

pability should be weighed in favor of admission of the confession. Notwithstanding the *Dunaway* Court's rejection of the relevance of the manner in which the illegal arrest is accomplished, Justice O'Connor seemed to suggest that good faith on the part of the police should militate against suppression of the evidence.[73] In response, the majority simply commented that it would not at this time recognize a "good faith" exception to the exclusionary rule.[74]

The dissent chiefly disagreed with the majority's interpretation of the facts.[75] Justice O'Connor also disagreed with the thresholds that the majority attached to the factors of the *Brown* test. The dissent contended that the majority erred in failing to consider the three *Miranda* warnings given to Taylor, since *Brown* had held *Miranda* warnings to be an important factor in the analysis.[76] Further, the dissent construed the visit of the girlfriend and the male companion as an intervening event which broke the chain of causation, because Taylor's confession followed hard on the heels of that visit.[77] Finally, the dissent implied that, because Taylor was alone during most of his six hours in detention,[78] while in *Brown* and in *Dunaway* the defendants had been interrogated throughout their detentions until they confessed, Taylor's confession was not obtained by exploitation of his illegal arrest.[79] The dissent then accused the majority of applying the three factors of the *Brown* test separately rather than cumulatively, thereby ignoring the context of the case as a whole.[80]

V. ANALYSIS AND RAMIFICATIONS

Since *Wong Sun*[81] the Court has applied the "fruit of the poisonous tree" doctrine on a case-by-case basis. The *Brown* test, which was supposed to coalesce the factors of attenuation into a precise and practical test, still requires the trial court to make an implicit judgment about the efficacy of the exclusionary rule before it can apply the test. The Court's adoption of the *Brown* test in *Dunaway* without further clarification perpetuated the confusion over the proper standards of attenuation neces-

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73 Id. ("[I]n contrast to the facts in *Brown*, the facts in the present case show that the petitioner was not subjected to intimidating police misconduct.").

74 *Id.* at 2669.

75 *Id.* at 2670 n.2 (O'Connor, J., dissenting) ("[I]n an effort to support its holding, the Court has parsed through the petitioner's story and plucked those tidbits that the police did not expressly contradict.").

76 *Id.* at 2671 (O'Connor, J., dissenting).

77 *Id.* at 2672 (O'Connor, J., dissenting).

78 *Id.* at 2673 (O'Connor, J., dissenting).

79 *Id.*

80 *Id.* at 2673 n.7 (O'Connor, J., dissenting).

81 371 U.S. 471 (1963).

sary to purge the taint of official illegality. The *Taylor* majority's failure to provide substantive guidelines as to how much weight each of the factors of the *Brown* test should be accorded will surely exacerbate the vagaries surrounding the notion of attenuation.

The absence of clear standards has encouraged courts to marshal facts according to their perception of the police misconduct and the efficacy of the exclusionary rule in deterring it. The fifth circuit's adoption of a "good faith" exception poses an extreme example. The "good faith" exception provides for the admission of illegally obtained evidence if the police had acted upon a reasonable good faith belief that their actions were proper.[82] Such attempts to eviscerate the exclusionary rule by undermining its deterrent effect through the use of the good faith exception will not be stemmed by the Court's decison in *Taylor*. The fourth amendment's protection against illegal searches and seizures will become unenforceable without the deterrent arm of the exclusionary rule. The *Taylor* decision does uphold the exclusionary rule insofar as it ruled against the admission of a confession tainted by official illegality. Yet, it allows so much flexibility in determining the sufficiency of attenuation that it has virtually granted "home rule" to the state and federal courts to assign their own weights and measures to the importance of the fourth amendment. Of course, a body of law is emerging as the Court decides more cases on the issue which, by the sheer diversity of fact situations, should gradually clarify the factors of attenuation. If, however, the *raison d'etre* of the exclusionary rule is effective deterrence of fourth amendment violations,[83] then the Court must bring the lower courts in line to a common standard by clearly delineating the relationship among the three factors of the *Brown* test.

To determine whether the taint of an illegal arrest has been purged under the *Brown* test, a court must find: whether sufficient time has passed between the illegal arrest and the confession; whether an independent intervening event has broken the causal chain; and whether the official misconduct was flagrant or purposeful.[84] It is not clear whether these factors are to be considered cumulatively or individually. The *Taylor* majority examined each factor in isolation to see if it alone would be sufficient to purge the taint of the illegal arrest. The dissent accused the majority of attempting to "divide and conquer" the *Brown* test by failing to consider the circumstances of the case as a whole.[85] The dissent's criticism, however, was misplaced. The majority

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82 United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc) (per curiam), *cert. denied*, 449 U.S. 1127 (1981).

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

84 *See supra* text accompanying notes 42-50.

85 102 S. Ct. at 2673 n.7 (O'Connor, J., dissenting).

presumed flagrant police misconduct from the initial fourth amendment violation. It required a demonstrably effective break in the causal chain between the arrest and the confession to refute the presumption of the official misconduct.[86] The dissent, on the other hand, examined the facts from the perspective that the police misconduct was neither flagrant nor purposeful, and it marshalled facts to support the admission of the confession.[87]

The Court has decided whether various circumstances are sufficient to break the chain of causation between an illegal arrest and a confession. In *Wong Sun*, release from police custody was sufficient.[88] In *Brown*, *Miranda* warnings were insufficient.[89] In *Johnson v. Louisiana*, being brought before a magistrate with counsel for a determination of probable cause was sufficient.[90] In *Taylor*, a visit with a girlfriend was insufficient,[91] as was confrontation with fingerprint evidence obtained after an illegal arrest.[92] The problem with such fact specific rules is that these precedents provide little direction for determining and applying a manageable standard of attenuation outside of those infrequent fact scenarios which resemble an already decided case. Certainly, the source of the intervention must be beyond the instrumentality of the police.[93] Yet the question remains as to what sort of intervention attenuates the taint.

There appear to be two distinct standards. The higher standard is that the intervening event must not itself cause the confession, but that the confession must originate outside the aura of coercion that surrounds the illegal detention.[94] The clearest example of this is *Wong Sun*, where the defendant confessed only after leaving police custody and returning voluntarily. The higher standard is the standard implicitly adopted by the *Taylor* majority. Justice Marshall particularly doubted that Taylor's visit with his girlfriend amounted to sufficient intervention because the visit itself could have caused Taylor to confess.[95] The lower standard

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86 *Id.* at 2667.

87 *Id.* at 2671 (O'Connor, J., dissenting).

88 371 U.S. at 491.

89 422 U.S. at 603.

90 406 U.S. at 365.

91 102 S. Ct. at 2668.

92 *Id.* at 2669.

93 422 U.S. at 602. *See supra* note 60.

94 *See supra* note 48; Collins v. Beto, 348 F.2d 823, 835 (5th Cir. 1965) (Friendly, J., concurring) ("If the objective of obtaining maximum deterrence of arrests by state officers in violation of the Fourth Amendment overrode all other considerations, a narrow test of what breaks the causal chain would be appropriate in every case.").

95 102 S. Ct. at 2668 ("The State fails to explain how this five to ten minute visit, after which petitioner immediately recanted his former statements that he knew nothing about the robbery and signed the confession, could possibly have contributed to his ability *to consider carefully and objectively his options and to exercise his free will.*") (emphasis added).

would permit a finding of attenuation if it is the intervention itself which causes the defendant to confess. Justice O'Connor adopted this standard in her dissent when she contended that the meeting should have constituted an intevening circumstance because it, and not the initial illegality, caused Taylor to confess.[96]

The higher standard, implicitly adopted by majority is both more objective and less prone to manipulation because it requires a clear showing that the defendant was outside of the influence of the police custody for a significant amount of time. It ensures that the source of the intervention is beyond the instrumentality of the police, and that it is therefore beyond the reach of sophisticated prosecutorial argument. The lower standard, on the other hand, encourages conjecture as to the cause of the confession, and thus allows ample room for the courts to marshal the facts to generate a plausible intervention. The lower standard has generally been applied when a defendant confesses because he is confronted with evidence of a crime.[97] One court even held that a brief phone call was sufficient intervention to purge the taint of an illegal arrest.[98]

Even though the *Taylor* majority applied the higher standard to the facts, the lower courts will not necessarily follow its lead. The Supreme Court limited its holding to the facts, and is not in a position to review the many cases on the issue. To preserve the deterrent effectiveness of the exclusionary rule and to effectuate the commands of the fourth amendment, the Court should have clearly required the higher standard for intervention that it itself applied.

The *Taylor* majority also left unclear how courts, in determining whether the taint of the illegal arrest has been purged, should interpret the flagrancy of the official misconduct. The facts in *Taylor* suggest that the absence of malicious motivation on the part of the police should not militate against suppression, since the majority refused to recognize a "good faith" exception. Further, the *Taylor* decision suggests that if there is any flagrantly unconstitutional behavior by government officials beyond the actual fourth amendment violation, confessions must be suppressed, in spite of arguable intervening circumstances, in order to deter such official misconduct. These conclusions, however, must be gleaned from the opinion because the majority did not explicitly set forth guidelines for the interpretation of the relevance of official misconduct.

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96 *Id.* at 2672 (O'Connor, J., dissenting).

97 *See* Fahy v. Connecticut, 375 U.S. 85, 91 (1963) (the defendant should be given an opportunity to "show that his admissions were induced by being confronted with the illegally seized evidence.").

98 *E.g.*, United States v. Rodriguez, 585 F.2d 1234 (5th Cir. 1978), *aff'd on rehearing*, 612 F.2d 906, *cert. denied*, 449 U.S. 835 (1980).

In addition to the ambiguity in *Brown*, *Dunaway*, and *Taylor* on this point, several of the justices of the Court have themselves advocated the adoption of a good faith exception.[99] Justice Powell, concurring in part in *Brown*, suggested distinguishing between differing degrees of fourth amendment violations and applying a sliding threshold of attenuation to each.[100] At one end of Powell's sliding scale would be cases in which there is flagrantly unconstitutional behavior by government officials,[101] based upon the officer's unreasonable ascertainment of probable cause, or upon the use of the arrest as a pretext for collateral objectives.[102] In those cases, Powell would apply the traditional *Brown* test, requiring some "demonstrably effective break in the chain of events,"[103] e.g., intervening circumstances previously acknowledged by the Court.[104] At the other end of the scale, Powell would relegate purely "technical" violations where officers acted in violation of the fourth amendment, but nonetheless did so reasonably and in good faith.[105] To admit a confession stemming from such a "technical" violation, Powell would require no more than proof that the police gave the defendant effective warning under *Miranda*.[106]

For support, Powell referred to *Michigan v. Tucker*:[107] "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which was deprived the defendant of some right."[108] Thus, the good faith proposal rests on the behavioral assumption that there cannot be deterrence un-

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99 *See* Dunaway v. New York, 442 U.S. at 226 (Rehnquist, J., dissenting); Stone v. Powell, 428 U.S. 465, 501 (1976) (Burger, C.J., concurring); *id.* at 538 (White, J., dissenting); Brown v. Illinois, 422 U.S. at 609 (Powell, J., concurring in part); Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635, 635 (1978). *See also* United States v. Peltier, 422 U.S. 531, 542 (1975): "If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the . . . officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." Clearly, this statement is not the bold proclamation that it appears to be since all law enforcement officers are charged with knowledge of the Constitution, regardless of their ignorance of it.

100 422 U.S. at 609 (Powell, J., concurring in part) ("[T]he point at which the taint can be said to have dissipated should be related . . . to the nature of that taint.").

101 *Id.* at 610 (Powell, J., concurring in part).

102 *Id.* at 611 (Powell, J., concurring in part).

103 *Id.*

104 *See* Johnson v. Louisiana, 406 U.S. 356 (1972) (where the presentation of the defendant before a magistrate for a finding of probable cause broke the causal connection between the illegal arrest and the subsequent confession); Wong Sun v. United States, 371 U.S. 471 (1963) (where release of the defendant from police custody broke the causal connection).

105 422 U.S. at 611 (Powell, J., concurring in part).

106 *Id.* at 612 (Powell, J., concurring in part).

107 417 U.S. 433 (1974).

108 422 U.S. at 612 (Powell, J., concurring in part) (quoting 417 U.S. at 447).

less the person being deterred knows with certainty when he is acting wrongly, and what the consequences of his misconduct will be. Moreover, Powell's good faith proposal seems to require a malice threshold for invoking the *Brown* test; unless the police have acted with malice, the confession will be admitted, unless, of course, the defendant had not been given his *Miranda* rights.[109]

Police officers who are acting in reliance upon a holding or statute which is later reversed or amended should not be penalized by the exclusion of evidence thereby obtained.[110] Yet, the blanket adoption of a good faith exception to the exclusionary rule would be both unworkable and ineffective, for three reasons. First, a good faith exception requires a fact specific, case-by-case determination of whether to suppress evidence. This would create a myriad of incomprehensible standards for the police and the lower courts to follow.[111] Second, the good faith exception would diminish the deterrent effect of the exclusionary rule, both by increasing the uncertainty of its application, and by excusing law enforcement officers from learning the commands of the fourth amendment.[112] Third, the good faith exception utterly disregards the right of the private citizen to be free from illegal searches and seizures.[113]

Proponents of the good faith exception contend that it is "grounded in objective reasonableness,"[114] and requires a showing of bona fide good faith on the part of the offending officer.[115] Insertion of the phrase "bona fide" before "good faith" hardly guarantees objectivity. The application of a good faith exception would necessarily require a judicial determination not only of the officer's conduct, but of his belief as well.[116]

> The beliefs which will be scrutinized, however, will generally be fact-specific and it is doubtful that a ruling on one officer's belief will have any relevance on the reasonableness of another officer's beliefs. Each court deciding upon the reasonableness of a belief will engage in its own definition

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109 "In cases in which this underlying premise [that only willful misconduct on the part of the police can be deterred] is lacking, the deterrence rationale of the exclusionary rule does not obtain, and I can see no legitimate justification for depriving the prosecution of reliable and probative evidence." *Id.*

110 United States v. Peltier, 422 U.S. 531, 542.

111 Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. CRIM. L. & CRIMINOLOGY 896-900 (1982).

112 Schlag, *supra* note 111, at 901.

113 *Id.* at 910.

114 Jensen & Hart, *"The Good Faith Restatement of the Exclusionary Rule,"* 73 J. CRIM. L. & CRIMINOLOGY 916, 929 (1982). *See also* Ball, *supra* note 91, at 635 ("[W]hen an officer acts in the good faith belief that his conduct is constitutional and where he has a reasonable basis for that belief, the exclusionary rule will not operate.").

115 Jensen & Hart, *supra* note 114, at 929.

116 Schlag, *supra* note 111, at 896.

> of reasonableness and then apply that standard to a belief which likely will never be encountered again in any fourth amendment case.[117]

It is therefore not speculative to assume that the good faith exception, by adding yet another factor to the already fact burdened *Brown* test, would enhance the discretionary power of the trial judge and thus cast further uncertainty into the application of the exclusionary rule.

The difficulty of judicial determination, however, is not sufficient to repudiate the good faith exception. The ultimate test for any proposed modification of the exclusionary rule is whether it would successfully deter law enforcement officers from violating the commands of the fourth amendment.[118] The good faith exception would diminish the deterrent effect of the exclusionary rule for two reasons. First, by requiring a determination of the officer's state of mind at the time he or she violated the fourth amendment, a good faith exception would create a myriad of fact specific decisions which would provide little guidance for an officer in the field.

> Whenever exceptions to the exclusionary rule are made, the deterrence effect of the rule is in one sense diminshed. The rule becomes harder to understand, and the visitation of its consequences more uncertain . . . . By complicating the message of its holding, an attempt to be exact in the particular case may very well lead to confusion in general . . . . The deterrence value of the rule would be reduced because the ability of law officers to predict when the rule applies would be diminished.[119]

Unless the officer's actions were conspicuously flagrant, the result would likely be a tacit affirmance of fourth amendment violations,[120] because of the difficulty of proving scienter on the part of police, and also because a great many police errors are simply the result of a lack of experience, an excess of zeal, or both.[121] Deterrence would also be diminished because the good faith exception would likely "depress fourth amendment compliance to the level of our tolerance for the lowest standards of the least informed officer. And there would be no incentive to do better."[122] The good faith exception would judge the officer's conduct at the time of the violation. Hence, it ignores the fact that even if officers act in good faith when they violate the fourth amendment, exclusion of evidence thereby obtained will deter them from future viola-

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117 *Id.*

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

119 Schlag, *supra* note 111, at 901.

120 Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579, 584 (1968).

121 *Id.*

122 *Bills to Limit the Exclusionary Rule in Federal Criminal Proceedings and to Eliminate and Establish a Damage Alternative to the Rule: Hearings Before the Subcomm. on Criminal Law of the Senate Judiciary Comm.*, 97th Cong., 1st Sess. 6 (1981) (statement of Stephen H. Sachs, Attorney General of Maryland).

tions, and will spur them on to learn the necessary intricacies of the fourth amendment.[123]

Third, the good faith exception is utterly insensitive to the rights of citizens to be secure from illegal searches and seizures. It would judge the intrusion upon the privacy of the innocent and guilty alike, not on the basis of the victim's response to the intrusion, nor on the basis of whether the officer's conduct violated the fourth amendment, but solely on what the officer believed to be the implications of his actions. To the victim of a fourth amendment violation it matters little whether or not the officer acted in good faith.[124] Nowhere does the fourth amendment speak of a law enforcement officer's belief in the rightness of his actions in terms of mitigating the severity of the command that a person has the right "to be secure . . . against unreasonable searches and seizures."[125] Proponents of the good faith exception argue that it would enhance the public safety by denying the guilty an opportunity to be released when the police err. A study made by the Comptroller General of the United States shows that in only 1.3% of over 2,000 cases studied was evidence excluded as a result of a fourth amendment motion.[126] If a search or seizure violates the fourth amendment it is *per se* unreasonable. Unless the defendant admits, or acts in such a way as to indicate decisively, that his or her confession was not the product of that illegality, then the presumption against the admission of the confession should stand.

The *Taylor* decision, while providing ample grist for the detractors of the exclusionary rule, does little in the way of setting the uniform

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123 *See* Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 401 (1981) ("even if prosecutors cannot always find the time to explain the fourth amendment to the police, many of the larger police departments hire legal counsel to make legal standards intelligible to the policeman on patrol."). *See also* Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?*, 62 JURICATURE 66, 70-72 (1978) (on the reluctance of the police to abide by the commands of the fourth amendment).

> [T]he constitutional status of the exclusionary rule rests not merely on the fact that the rule deters misconduct, but also on the fact that the rule provides assurance that misconduct is being deterred. Because the good faith type tests place so much confidence in the ability of the courts to define and determine when a law enforcement agent has acted upon a reasonable good faith (though erroneous) belief, these tests undermine the safeguard function of the exclusionary rule.

Schlag, *supra* note 111, at 914-15.

124 The flagrancy of the official misconduct is relevant . . . only insofar as it has a tendency to motivate the defendant. A midnight arrest with drawn guns will be equally frightening whether the police acted recklessly or in good faith. Conversely, a courteous command has the same effect on the arrestee whether the officer thinks he has probable cause or knows that he does not. In either event, if the Fourth Amendment is violated, the admissibility question will turn on the causal relationship between that violation and the defendant's subsequent confession.

442 U.S. at 220 (Stevens, J., concurring).

125 U.S. CONST. amend. IV.

126 COMPTROLLER GENERAL OF THE UNITED STATES, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS, REP. NO. GGD-79-45 (1979).

standards which are a prerequisite for effective deterrence. While the *Taylor* majority refused to recognize a good faith exception, it still deemed it necessary to characterize the police misconduct as "flagrant" and "purposeful."[127] Detractors of the exclusionary rule argue that if the flagrancy of the official misconduct should be weighed heavily, then non-flagrant violations should militate against suppression. In this light the *Taylor* majority's decision not to recognize a good faith exception falls short of a clear and effective repudiation.

In the absence of clearly controlling standards of attenuation, lower courts have begun to construct their own alternatives. Most dramatically, the Court of Appeals for the Fifth Circuit, sitting en banc in *United States v. Williams*,[128] adopted a good faith exception in no uncertain language:

> [W]e now hold that evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized. We do so because the exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good-faith ones.[129]

The support for the holding in *Williams* was fourfold: First, the fifth circuit contended that a wooden application of the exclusionary rule to good faith mistakes cannot have its intended deterrent effect.[130] Second, citing to dissenting opinions and dicta, the *Williams* court argued that four of the Supreme Court justices have supported a good faith exception.[131] Third, the fifth circuit relied upon Supreme Court cases which allowed for the admission of illegally obtained evidence in certain circumstances.[132] Finally, the court cited to various commentators for support.[133]

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127 102 S. Ct. at 2669.

128 622 F.2d 830 (5th Cir. 1980).

129 *Id.* at 840. In *Williams*, the fruit of the illegal search was not a confession. An officer made a warrantless search of a defendant jumping bail. Since violation of a bond condition is not an offense for which the suspect can be arrested and searched without a warrant, the defendant contended that the heroin uncovered in the search must be suppressed as the fruit of the official illegality. *See also* United States v. Miller, 666 F.2d 991 (5th Cir.), *cert. denied*, 102 S. Ct. 2043 (1982).

130 The fifth circuit's reasoning echoed the familiar assertion that "a police officer will not be deterred from an illegal search if he does not know that it is illegal." 622 F.2d at 842 (quoting Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736, 740 (1972)).

131 622 F.2d at 841.

132 *Id.*

133 *See, e.g.*, Wright, *supra* note 130, at 740; 622 F.2d at 849 (Rubin, J., specially concurring). Rubin ascerbically commented that if four of the Supreme Court justices support a good faith rule, that leaves a majority of justices who oppose it. Furthermore, it is clear that the evidence in *Williams* would have been admitted notwithstanding the bold proclamation of the good faith rule; the 'illegal' arrest was made in reliance upon a statute which was later reconstrued. "The announcement of the rule as an alternative ground for decision in a case

State courts and legislators have exploited the ambiguous attenuation standard to advance a good faith exception. The New York Court of Appeals recently allowed the admission of evidence that the police had acquired in searching a home after reasonably relying upon the consent of a party who was not a resident of the premises.[134] In 1981, Colorado became the first state to pass legislation adopting a good faith exception to the exclusionary rule.[135] Currently, several bills are pending before the United States Senate which advocate various versions of a good faith exception.[136] Most importantly, it appears that the United States Supreme Court will be directly considering the merits of the good faith exception in *Illinois v. Gates*.[137]

Still other courts, while not explicitly advancing a good faith exception, have avoided the exclusion of evidence by subtly altering the presumption against admission. These courts have emphasized that a causal connection between the illegal arrest and the confession must be proven in order to exclude the confession.[138] In *State v. Barry*[139] the New Jersey Supreme Court recently allowed the admission of a confession of a defendant allegedly involved in a policeman's murder.[140] The court in *Barry* placed great emphasis on the assertion that "[t]he facts, while short of establishing probable cause for the . . . arrest of Edward Barry, provide the basis for an innocent although unreasonable belief in its

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where all the court agrees . . . virtually immunizes this case from Supreme Court review." *Id.* at 851. As Judge Rubin predicted, the Court denied certiorari. 449 U.S. 1127 (1981).

134 People v. Adams, 53 N.Y.2d 1, 422 N.E.2d 537, 439 N.Y.S.2d 877 (1981).

135 COLO. REV. STAT. §16-3-308 (Supp. 1981).

136 S. 751, 97th Cong., 1st Sess. (1981) (would abolish the exclusionary rule, but would permit a tort action against the federal government for fourth amendment violations with severely restricted damage limits); S. 101, 97th Cong., 1st Sess. (1981) (would limit the circumstances under which evidence obtained illegally would be excluded).

137 Illinois v. Gates, 85 Ill. 2d 376, *cert. granted*, 102 S. Ct. 997 (1982). The Court ordered reargument on the following issue:

> [T]he parties are requested to address the question whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

Illinois v. Gates, 103 S. Ct. 436, 436 (1982) (citations omitted).

138 *See* United States v. Bailey, 628 F.2d 938 (6th Cir. 1980); State v. Lehnen, 403 So. 2d 683, 686 (La. 1981).

139 86 N.J. 80, 429 A.2d 581, *cert. denied*, 454 U.S. 1017 (1981).

140 The court held that the defendant's confrontation with the confessions of the co-conspirators and with the weapons used in commission of the crime were sufficient intervening events to purge the taint of the illegal arrest. Justice Pashman noted in dissent that although the Supreme Court has not yet defined "intervening circumstances," the decision in *Barry* was a clear attempt to undermine the Court's holding in *Brown*. "[Nowhere do they suggest] that mere confrontation with evidence . . . is sufficient to attenuate the taint of an illegal arrest." *Id.* at 97, 429 A.2d at 589 (Pashman, J., dissenting).

existence . . . .[141] In addition to this thinly veiled good faith argument, the *Barry* court apparently placed the burden of proving taint upon the defendant: "Statements following an illegal arrest must be excluded only if they are causally related to the invasion of the suspect's rights."[142] The *Taylor* Court's failure to establish clear and manageable guidelines for the interpretation of intervening circumstances and police misconduct will further encourage lower courts to define their own thresholds, and thereby subtly alter the presumption against the admission of tainted evidence.[143]

VI. ALTERNATIVES AND CONCLUSIONS

The Court in *Taylor v. Alabama* affirmed a vigilant conception of the exlusionary rule insofar as it applied the *Brown* test in a manner sensitive to the imperative of deterring fourth amendment violations. Yet the Court did not provide the guidelines necessary to ensure that other courts will apply the test in a like manner. The haphazard application of the *Brown* test has created the kind of uncertainty which is inconsistent with effective deterrence. Because application of the *Brown* test is highly fact specific, manageable standards are nonexistent. It might be years before the courts and the police will begin to have a reasonable idea of what constitutes attenuation in the multitudinous fact scenarios possible in fourth amendment cases. The likelihood of effective deterrence has been further diminished because the absence of manageable standards has encouraged courts to set up their own rules. Though the *Taylor* majority refused to recognize a good faith exception, the fifth circuit has capitalized on the ambiguous standard of attenuation in order to advocate just such an exception. By excusing law enforcement officers from learning the commands of the fourth amendment, and by generating a plethora of fact specific decisions, a good faith exception to the exclusionary rule will undermine its deterrent effect, and leave the fourth amendment guarantee against illegal searches and seizures an empty shell.

While some commentators have suggested various alternative methods of enforcing police compliance with the fourth amendment,[144]

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[141] *Id.* at 90, 429 A.2d at 585.

[142] *Id.* at 89, 429 A.2d at 585.

[143] United States v. Rodriguez, 585 F.2d 1234 (5th Cir. 1978), *aff'd on rehearing*, 612 F.2d 906, *cert. denied*, 449 U.S. 835 (1980) (a phone call made by the defendant from the police station was held to be sufficient intervention); Commonwealth v. Bradshaw, 385 Mass. 244, 431 N.E.2d 880 (1982) (a statement made to the defendant by the defendant's "friend," who was working with the prosecution, was sufficient intervention).

[144] For a thorough analysis of the various alternatives, see Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U.L.Q. 621, 684-722. *See also* Davidow, *Criminal Procedure Ombudsman Revisited*, 73 J. CRIM. L. & CRIMINOLOGY 939 (1982)

many of the exclusionary rule's harshest critics acknowledge the ineffectiveness of the proposed alternatives.[145] The exclusionary rule, while problematic, is apparently the fairest and most effective way to deter fourth amendment violations.[146] Had the *Taylor* majority clearly modified the *Brown* test by establishing a high standard for intervention and severely limiting the relevance of the flagrancy of the official misconduct, the result would more effectively deter fourth amendment violations.[147] Unfortunately, since the *Taylor* Court did not so clarify the interpretive ambiguities of the *Brown* test, application of the exclusionary rule in cases where confessions may be tainted by illegal arrests will remain inconsistent and the deterrent effect will continue to be dissipated.

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(suggests providing "an independent government official . . . who would investigate instances of alleged police misconduct, publicize the results of such investigations, and authorize the appointment of private counsel . . . to sue the offending official . . . when the ombudsman found probable cause to believe that an aggrieved person had been subjected to a deprivation of constitutional rights"). *But see* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 420-21 (1971) (Burger, C.J., dissenting) ("I can see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials. . . . I do not propose, however, that we abandon the suppression doctrine until some meaningful alternative can be developed.").

[145] *See* McGarr, *The Exclusionary Rule: An Ill Conceived and Ineffective Remedy*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 266, 268 (1961). *But see* Schlag, *supra* note 111, at 888 (Certainly one can conceive of any number of deterrents that might be as effective as the exclusionary rule; the problem is that such deterrents would impose other grave costs on society).

[146] Mapp v. Ohio, 367 U.S. 643, 656 (1961).

[147] Perhaps the *Taylor* majority intended to do this, since it held the visit to Taylor was insufficient intervention, and that, though the police misconduct was characterized as "flagrant," it was not nearly as deliberate as the police misconduct in *Brown* and *Dunaway*. In a searing dissent in *Rawlings*, Justice Marshall eloquently warned:

> A slow and steady erosion of the ability of victims of unconstitutional searches and seizures to obtain a remedy for the invasion of their rights saps the constitutional guarantee of its life just as surely as would a substantive limitation. Because we are called on to decide whether evidence should be excluded only when a search has been 'successful,' it is easy to forget that the standards we announce determine what government conduct is reasonable in searches and seizures directed at persons who turn out to be innocent as well as those who are guilty.

448 U.S. at 121 (Marshall, J., dissenting).