

Court of Appeals Extends Attenuation Doctrine to Include Evidence Disclosed by a Defendant Within Seconds of an Illegal Seizure

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Recommended Citation

Coyle, Lorraine V.K. (1980) "Court of Appeals Extends Attenuation Doctrine to Include Evidence Disclosed by a Defendant Within Seconds of an Illegal Seizure," *St. John's Law Review*: Vol. 54 : No. 2 , Article 14.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol54/iss2/14>

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sible or actual conflicts that could be reasonably expected, even though unknown, in order that the inquiry remains a viable alternative to needless reversals for properly obtained convictions.²⁴⁸

Patricia A. O'Malley

Court of Appeals extends attenuation doctrine to include evidence disclosed by a defendant within seconds of an illegal seizure

To effectuate the fourth amendment's²⁴⁹ prohibition of unreasonable searches and seizures, the exclusionary rule mandates that evidence obtained as a direct or indirect result of an illegal search or seizure may not be used as proof against the victim of the search or seizure.²⁵⁰ Evidence so obtained may be admitted, however, if

sented an identification witness for the prosecution. *Id.* at 874, 387 N.E.2d at 610, 414 N.Y.S.2d at 678-79. The Court of Appeals upheld the order since "it appeared very likely that [the attorney's] continuance in the case would work unfair prejudice either to the prosecution or to the defendant." *Id.* at 875, 387 N.E.2d at 611, 414 N.Y.S.2d at 679; see *People v. Huggard*, N.Y.L.J., June 21, 1979, at 7, col. 3 (Sup. Ct. N.Y. County).

²⁴⁸ In *People v. Ortiz*, 49 N.Y.2d 718, 402 N.E.2d 139, 425 N.Y.S.2d 801 (1980), the Court of Appeals found that a defendant who waived his right to separate counsel at an inquiry could not later "contend that he was deprived of effective assistance of counsel because of a possible conflict of interest arising from [his] joint representation." *Id.* at 719, 402 N.E.2d at 140, 425 N.Y.S.2d at 801.

²⁴⁹ The fourth amendment provides in part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated

U.S. CONST. amend. IV, see N.Y. CONST. art. 1, § 12.

²⁵⁰ The Supreme Court first enunciated the exclusionary rule in *Weeks v. United States*, 232 U.S. 383, 392, 398 (1914), where it proscribed using letters and records illegally obtained by federal officials as evidence in federal courts. The rule was extended to state courts in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

The primary goal of the exclusionary rule is to deter unlawful police conduct rather than to protect the constitutional rights of the victim of the illegal search or seizure. *Elkins v. United States*, 364 U.S. 206, 217 (1960); see *Brown v. Illinois*, 422 U.S. 590, 599-600 (1975); *United States v. Calandra*, 414 U.S. 388, 347-48 (1974); *People v. McGrath*, 46 N.Y.2d 12, 31, 385 N.E.2d 541, 550, 412 N.Y.S.2d 801, 810-11 (1978), *cert. denied*, 440 U.S. 972 (1979). The mandate of *Mapp* was first complied with by the New York Court of Appeals in *People v. Loria*, 10 N.Y.2d 368, 371, 374, 179 N.E.2d 478, 481, 482, 223 N.Y.S.2d 462, 465, 467 (1961), *overruled in part*, *People v. McQueen*, 18 N.Y.2d 237, 221 N.E.2d 550, 274 N.Y.S.2d 886 (1966), and has been consistently followed in subsequent cases. See, e.g., *People v. Gonzalez*, 39 N.Y.2d 122, 130-32, 347 N.E.2d 575, 582, 383 N.Y.S.2d 215, 221-220 (1976); *People v. Williams*, 37 N.Y.2d 206, 208, 333 N.E.2d 160, 160, 371 N.Y.S.2d 880, 881 (1975).

Often referred to as the "fruit of the poisonous tree" doctrine, *Wong Sun v. United States*, 371 U.S. 471, 488 (1963), the exclusionary rule not only proscribes the use of unlawfully seized evidence, but also prohibits the police from using information obtained as a result of their illegal conduct. *Id.* at 484-86; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920); *People v. Robinson*, 13 N.Y.2d 296, 301, 196 N.E.2d 261, 262, 246

the connection between its discovery and the unlawful search or seizure is "so attenuated as to dissipate the taint" of the illegality.²⁵¹ Apparently broadening the application of the attenuation

N.Y.S.2d 623, 625 (1963). See also *Nardone v. United States*, 308 U.S. 338, 341 (1939).

It is worthwhile to note that there exists no empirical evidence to substantiate the deterrent effect of the exclusionary rule. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 415-16 (1971) (Burger, C.J., dissenting); *Elkins v. United States*, 364 U.S. 206, 218 (1960); *Oaks, Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 670-72 (1970). Moreover, the exclusionary rule has never been interpreted as a per se prescription against any use of illegally obtained evidence. See *Stone v. Powell*, 428 U.S. 465, 486 (1976); *Brown v. Illinois*, 422 U.S. 590, 603 (1975); notes 251 & 281 *infra*. For example, the rule is not invoked when its purpose would not be effectuated. See *United States v. Calandra*, 414 U.S. 338, 348-52 (1974) (illegal evidence admissible in grand jury); *Walder v. United States*, 347 U.S. 62, 65-66 (1954) (illegal evidence admissible to impeach a witness).

²⁵¹ *Wong Sun v. United States*, 371 U.S. 471, 487 (1963) (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)). In *Wong Sun*, the Court articulated a test for determining whether to apply the attenuation exception to the exclusionary rule. The Court stated:

[N]ot . . . 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.

371 U.S. at 487-88 (quoting *J. MAGUIRE, EVIDENCE OF GUILT* 221 (1959)). Addressing the issue whether *Miranda* warnings per se will attenuate the taint of an illegal search or seizure and render admissible a statement made during an unlawful detention, the Court further elaborated on the attenuation doctrine in *Brown v. Illinois*, 422 U.S. 590 (1975). In *Brown*, the Court declared that the factors that must be considered in every case are "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances . . . and, particularly, the purpose and flagrancy of the official misconduct." *Id.* at 603-04 (citations and footnotes omitted); see *Dunaway v. New York*, 442 U.S. 200 (1979). For a discussion of the possible implications of the Court's decision in *Dunaway* on New York criminal procedure, see *Kelder, Criminal Procedure - 1978 Survey of New York Law*, 30 SYRACUSE L. REV. 15, 76-100 (1978). The New York approach has been to follow the Supreme Court's test of attenuation. See *People v. Townes*, 41 N.Y.2d 97, 359 N.E.2d 402, 390 N.Y.S.2d 893 (1976); *People v. Martinez*, 37 N.Y.2d 662, 339 N.E.2d 162, 376 N.Y.S.2d 469 (1975).

Since the effect of the exclusionary rule often is to suppress credible evidence, courts have carved out two other exceptions. Evidence that has been obtained through a separate investigation, independent of the illegal search or seizure, is admissible under the "independent source" exception. See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920); *People v. Dentine*, 21 N.Y.2d 700, 703, 234 N.E.2d 462, 464, 287 N.Y.S.2d 427, 429-30 (1967) (Fuld, C.J., dissenting), *cert. denied*, 393 U.S. 967 (1968). Moreover, if the evidence ineluctably would have been obtained in another manner, the "inevitable discovery" exception permits the evidence to be admitted despite the illegal seizure. *People v. Payton*, 45 N.Y.2d 300, 313, 380 N.E.2d 224, 230-31, 408 N.Y.S.2d 395, 401-02, *rev'd on other grounds*, 100 S. Ct. 1371 (1980), *discussed in The Survey*, 53 ST. JOHN'S L. REV. 146 (1978); *People v. Fitzpatrick*, 32 N.Y.2d 499, 506, 300 N.E.2d 139, 141-42, 346 N.Y.S.2d 793, 797, *cert. denied*, 414 U.S. 1033 (1973); *People v. Roberts*, 47 App. Div. 2d 664, 664-65, 364 N.Y.S.2d 43, 45 (2d Dep't 1975). *But compare* *United States v. Griffin*, 502 F.2d 959 (6th Cir.), *cert. denied*, 419 U.S. 1050 (1974) *with* *United States v. Seohnlein*, 423 F.2d 1051 (4th Cir.), *cert. denied*, 399 U.S. 913 (1970). Although the Supreme Court has yet to

doctrine, the Court of Appeals, in *People v. Boodle*,²⁵² recently permitted a gun that the defendant had discarded within seconds of his illegal arrest²⁵³ to be admitted into evidence, upon determining that the defendant's act was not a "direct and immediate response" to the unlawful arrest.²⁵⁴

In *Boodle*, two plainclothes detectives investigating a homicide approached the defendant in their unmarked car after an informant had told them that Boodle might have information about the crime.²⁵⁵ At the request of the police officers, the defendant entered the car and one of the officers started to drive.²⁵⁶ Asked whether he was "clean," the defendant answered in the affirmative and then was ordered to keep his hands where they could be seen.²⁵⁷ Seconds later, the defendant threw a loaded revolver out the car window.²⁵⁸ After retrieving the discarded weapon, the officers took the defendant to the police station, searched him, and found narcotics.²⁵⁹ Charged with possession of a weapon²⁶⁰ and a controlled substance,²⁶¹ the defendant sought to suppress both the gun and the drugs, but the motion was denied.²⁶² The defendant pleaded guilty to the narcotics charge and was convicted by a jury of the weapons

recognize the validity of the inevitable discovery exception, the Court has suggested that it may be a workable alternative to attenuation to admit derivative evidence. *Brewer v. Williams*, 430 U.S. 387, 406 n.12 (1977) (dictum).

²⁵² 47 N.Y.2d 398, 391 N.E.2d 1329, 418 N.Y.S.2d 352 (1979), *aff'g*, 62 App. Div. 2d 966, 404 N.Y.S.2d 598 (1st Dep't 1978), *cert. denied*, 100 S. Ct. 461 (1979).

²⁵³ See 47 N.Y.2d at 404-05, 391 N.E.2d at 1333, 418 N.Y.S.2d at 356.

²⁵⁴ *Id.* at 402, 391 N.E.2d at 1331, 418 N.Y.S.2d at 354.

²⁵⁵ *Id.* at 400-01, 391 N.E.2d at 1330, 418 N.Y.S.2d at 353.

²⁵⁶ *Id.* at 401, 391 N.E.2d at 1330, 418 N.Y.S.2d at 353-54. For a discussion of police questioning in public places, see LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 MICH. L. REV. 40 (1968).

²⁵⁷ 47 N.Y.2d at 401, 391 N.E.2d at 1330, 418 N.Y.S.2d at 354. It must be noted that in his dissenting opinion, Judge Fuchsberg added a fact not mentioned by the majority. According to Judge Fuchsberg, the police officers also had informed the defendant "that he was being taken to the nearest police station." *Id.* at 406, 391 N.E.2d at 1334, 418 N.Y.S.2d at 357 (Fuchsberg, J., dissenting).

²⁵⁸ *Id.* at 401, 391 N.E.2d at 1330, 418 N.Y.S.2d at 354.

²⁵⁹ *Id.* No evidence existed to suggest that the defendant was involved in the homicide under investigation, Brief for Respondent at 10; Petitioner's Brief for Certiorari at 3, 5, nor was any evidence adduced indicating that the gun was involved in any other crime. *Id.* at 5. Interestingly, in *Boodle*, the state used the absence of any evidence suggesting that the defendant was involved in any other crime as evidence of the good intentions of the police, Brief for Respondent at 16-17, while the defendant used it as evidence that the police actions were intended to be unlawful. See Petitioner's Brief for Certiorari at 7-8.

²⁶⁰ N.Y. PENAL LAW § 265.02 (McKinney Supp. 1980).

²⁶¹ *Id.* § 220.03.

²⁶² 47 N.Y.2d at 400, 391 N.E.2d at 1330, 418 N.Y.S.2d at 353.

offense.²⁶³ The Appellate Division, First Department, affirmed.²⁶⁴

On appeal, a divided Court of Appeals affirmed.²⁶⁵ Writing for the majority, Judge Wachtler²⁶⁶ acknowledged that the initial actions of the police officers constituted an illegal seizure of the defendant.²⁶⁷ Thus, Judge Wachtler observed that if the production of the gun had occurred as a direct result of the unlawful seizure, the gun would have to be suppressed.²⁶⁸ The Court found, however, that in revealing the weapon himself, the defendant had acted independently of, and not in direct response to, the illegal detention.²⁶⁹ The Court characterized the defendant's act as the result of a calculated strategy to dispose of incriminating evidence "[r]ather than [as] a spontaneous reaction to a sudden and unexpected confrontation with the police."²⁷⁰ Finally, the majority concluded that

²⁶³ *Id.*

²⁶⁴ 62 App. Div. 2d 966, 967, 404 N.Y.S.2d 598, 598 (1st Dep't 1978), *aff'd*, 47 N.Y.2d 398, 391 N.E.2d 1329, 418 N.Y.S.2d 352, *cert. denied*, 100 S. Ct. 461 (1979).

²⁶⁵ 47 N.Y.2d at 405, 391 N.E.2d at 1333, 418 N.Y.S.2d at 356.

²⁶⁶ Chief Judge Cooke and Judges Gabrielli and Jones joined Judge Wachtler in the majority. Judge Fuchsberg wrote a dissenting opinion in which Judge Jasen concurred.

²⁶⁷ 47 N.Y.2d at 401, 391 N.E.2d at 1331, 418 N.Y.S.2d at 354. The Court found that although the defendant was not forced to enter the police car, *see* note 256 and accompanying text *supra*, the order to keep his hands in view constituted an arrest because "his freedom of movement was significantly restrained." *Id.* at 401, 391 N.E.2d at 1331, 418 N.Y.S.2d at 354 (citing *Terry v. Ohio*, 392 U.S. 1, 16 (1968); *People v. Jennings*, 45 N.Y.2d 998, 999, 385 N.E.2d 1045, 1045-46, 413 N.Y.S.2d 117, 118 (1978); *People v. Cantor*, 36 N.Y.2d 106, 111, 324 N.E.2d 872, 876, 365 N.Y.S.2d 509, 515 (1975)). Since there was no evidence to establish probable cause that the defendant had engaged in criminal activity, *see* note 259 *supra*, the Court concluded that the detention "was clearly unlawful." 47 N.Y.2d at 401, 391 N.E.2d at 1331, 418 N.Y.S.2d at 354. *See* *B.T. Prods., Inc., v. Barr*, 44 N.Y.2d 226, 236, 376 N.E.2d 171, 176, 405 N.Y.S.2d 9, 14 (1978); *People v. Stewart*, 41 N.Y.2d 65, 68-69, 359 N.E.2d 379, 382, 390 N.Y.S.2d 870, 873 (1976); *People v. Vaccaro*, 39 N.Y.2d 468, 470-71, 348 N.E.2d 886, 888-89, 384 N.Y.S.2d 411, 413 (1976).

²⁶⁸ 47 N.Y.2d at 401-02, 391 N.E.2d at 1331, 418 N.Y.S.2d at 354 (citing *People v. Buttery*, 25 N.Y.2d 159, 250 N.E.2d 340, 303 N.Y.S.2d 57 (1969)); *see* *People v. Cantor*, 36 N.Y.2d 106, 324 N.E.2d 872, 365 N.Y.S.2d 509 (1975); *People v. Baldwin*, 25 N.Y.2d 66, 250 N.E.2d 62, 302 N.Y.S.2d 571 (1969); *People v. Loria*, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961), *overruled in part*, *People v. McQueen*, 18 N.Y.2d 337, 344, 321 N.E.2d 550, 553, 274 N.Y.S.2d 886, 890 (1966).

²⁶⁹ 47 N.Y.2d at 404, 391 N.E.2d at 1332-33, 418 N.Y.S.2d at 356. *See also* *People v. Townes*, 41 N.Y.2d 97, 359 N.E.2d 402, 390 N.Y.S.2d 893 (1976).

²⁷⁰ 47 N.Y.2d at 404, 391 N.E.2d at 1332, 418 N.Y.S.2d at 356. In determining whether the defendant had acted spontaneously, the *Boodle* Court invoked a rationale similar to that used to assess the spontaneity, and thus the admissibility, of hearsay declarations. *Id.* at 404, 391 N.E.2d at 1332-33, 418 N.Y.S.2d at 356. *See generally* *People v. Edwards*, 47 N.Y.2d 493, 392 N.E.2d 1229, 419 N.Y.S.2d 45 (1979), *discussed in* *The Survey*, 54 *ST. JOHN'S L. REV.* 137, 209 (1979); *People v. O'Neill*, 47 N.Y.2d 952, 393 N.E.2d 1023, 419 N.Y.S.2d 950 (1979); *People v. Caviness*, 38 N.Y.2d 227, 342 N.E.2d 496, 379 N.Y.S.2d 695 (1975); *People v. Marks*, 6 N.Y.2d 67, 160 N.E.2d 26, 188 N.Y.S.2d 465 (1959). Character-

since the police had not seized the defendant in order to discover evidence to use against him,²⁷¹ the basic purpose of the exclusionary rule—to deter unlawful police conduct²⁷²—would not be furthered by suppressing the gun.²⁷³

In a dissenting opinion, Judge Fuchsberg maintained that the defendant's act of throwing the gun out the car window was a spontaneous and direct reaction to his unlawful detention.²⁷⁴ In view of the short period of time that had elapsed between the arrest and the discarding of the gun, Judge Fuchsberg stated that "[f]or all practical purposes . . . spontaneity and attenuation had merged."²⁷⁵ Moreover, the dissent contended that notwithstanding that the evidence obtained was not sought initially by the police, the exclusionary rule required suppression of the products of the "deliberate and unlawful" police conduct.²⁷⁶

ized as "impulsive or instinctive reaction[s]," spontaneous declarations have been recognized as exceptions to the evidentiary rule barring the admission of hearsay. Spontaneous declarations are admissible because the declarant is deemed to have uttered the statement without the opportunity to think and therefore to contrive. RICHARDSON ON EVIDENCE §§ 281-82 (10th ed. 1973); see *id.* § 200. The *Boodle* Court concluded that although there was only a brief period of time between the defendant's initial encounter with the police and his divestiture of the gun, the defendant had had an opportunity to contemplate his act. The Court held, therefore, that the defendant's act was independent of, and not proximately caused by, his illegal seizure. 47 N.Y.2d at 404, 391 N.E.2d at 1332-33, 418 N.Y.S.2d at 356. See generally *People v. Hall*, 260 App. Div. 421, 22 N.Y.S.2d 973 (3d Dep't 1940); *Handel v. New York Rapid Transit Corp.*, 252 App. Div. 142, 297 N.Y.S. 216 (2d Dep't 1937), *aff'd*, 277 N.Y. 548, 13 N.E.2d 468 (1938).

²⁷¹ 47 N.Y.2d at 404-05, 391 N.E.2d at 1333, 418 N.Y.S.2d at 356 (citing *Brown v. Illinois*, 422 U.S. 590, 605 (1975)). To effectuate the goal of the exclusionary rule, see note 250 *supra*, it has been suggested that the activities of the police should be analyzed under a good faith standard in order to determine whether illegally seized evidence should be excluded. See *Stone v. Powell*, 428 U.S. 465, 540 (1976) (White, J., dissenting); *Bator & Vorenberg, Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 76-77 (1966). But see *People v. Cantor*, 36 N.Y.2d 106, 113, 324 N.E.2d 872, 877, 365 N.Y.S.2d 509, 516 (1975); *People v. Chestnut*, 69 App. Div. 2d 41, 46, 418 N.Y.S. 2d 390, 392 (1st Dep't 1979). See also *Smith v. County of Nassau*, 34 N.Y.2d 18, 23-24, 311 N.E.2d 489, 492-93, 355 N.Y.S.2d 349, 353 (1974). This standard has been criticized, however, in view of the potential for perjury, the inability of an appellate court to observe an officer's demeanor, and the probable difficulty in proving that a police officer did not act in good faith. Pitler, "*The Fruit of the Poisonous Tree*" Revisited and Shepherded, 56 CAL. L. REV. 579, 583-84 (1968).

²⁷² See note 250 *supra*.

²⁷³ 47 N.Y.2d at 404-05, 391 N.E.2d at 1333, 418 N.Y.S.2d at 356.

²⁷⁴ *Id.* at 406, 391 N.E.2d at 1334, 418 N.Y.S.2d at 357 (Fuchsberg, J., dissenting).

²⁷⁵ *Id.* at 407, 391 N.E.2d at 1334, 418 N.Y.S.2d at 358 (Fuchsberg, J., dissenting).

²⁷⁶ *Id.* (Fuchsberg, J., dissenting). Judge Fuchsberg maintained that, in *Boodle*, the purpose of the exclusionary rule would be furthered by suppressing the gun because "it was not the defendant's almost inevitable response, but the illegal police conduct, against which the rule was directed." *Id.* at 407, 391 N.E.2d at 1335, 418 N.Y.S.2d at 358 (Fuchsberg, J.,

By focusing on the defendant's state of mind rather than the nature of the act that brought about the disclosure of the evidence,²⁷⁷ the *Boodle* Court has expanded significantly the scope of the attenuation exception to the exclusionary rule. The Court apparently has ruled that where a defendant's response to unlawful police conduct can be deemed to have emanated from the defendant's own volition, as opposed to a spontaneous impulse, the act will serve to attenuate the illegality that may have precipitated it. Previously, where the defendant himself revealed the challenged evidence,²⁷⁸ the Court had invoked the attenuation doctrine only when the defendant's act was dangerous or criminal in nature.²⁷⁹

dissenting).

²⁷⁷ See notes 269-270 and accompanying text *supra*.

²⁷⁸ *People v. Townes*, 41 N.Y.2d 97, 359 N.E.2d 402, 390 N.Y.S.2d 893 (1976); *People v. Cantor*, 36 N.Y.2d 106, 324 N.E.2d 872, 365 N.Y.S.2d 509 (1975); *People v. Baldwin*, 25 N.Y.2d 66, 250 N.E.2d 62, 302 N.Y.S.2d 571 (1969); *People v. Butterly*, 25 N.Y.2d 159, 250 N.E.2d 340, 303 N.Y.S.2d 57 (1969).

²⁷⁹ See, e.g., *People v. Townes*, 41 N.Y.2d 97, 102, 359 N.E.2d 402, 405-06, 390 N.Y.S.2d 893, 897 (1976). Two Court of Appeals cases provide a useful analogy. In *People v. Cantor*, 36 N.Y.2d 106, 324 N.E.2d 872, 365 N.Y.S.2d 509 (1975), three plainclothes police officers in an unmarked car had followed the defendant home at approximately 3:00 a.m. *Id.* at 109, 324 N.E.2d at 875, 365 N.Y.S.2d at 513. Without identifying themselves, the policemen approached the defendant after he had parked and alighted from his vehicle. *Id.* at 109-10, 324 N.E.2d at 875, 365 N.Y.S.2d at 513. Cantor pulled a gun and pointed it at the officers who, at that point, identified themselves. *Id.* at 110, 324 N.E.2d at 875, 365 N.Y.S.2d at 513. The defendant then returned the weapon to his back pocket and complied with the officers' demands. *Id.* After finding that the seizure of the defendant constituted an unlawful arrest, *id.* at 111-14, 324 N.E.2d at 876-78, 365 N.Y.S.2d at 515-17, the Court held that the gun should have been suppressed, because it "was revealed as a direct consequence of the illegal nature of the stop." *Id.* at 114, 324 N.E.2d at 878, 365 N.Y.S.2d at 517.

In *People v. Townes*, 41 N.Y.2d 97, 359 N.E.2d 402, 390 N.Y.S.2d 893 (1976), the defendant was approached by a plainclothesman who had identified himself as a police officer. 41 N.Y.2d at 98-99, 359 N.E.2d at 403-04, 390 N.Y.S.2d at 895. The defendant drew a gun and attempted to shoot. *Id.* at 99, 359 N.E.2d at 404, 390 N.Y.S.2d at 895. Concluding that Townes had been unlawfully arrested, *id.* at 101, 359 N.E.2d at 405, 390 N.Y.S.2d at 896, the Court, nevertheless, upheld the denial of the defendant's motion to suppress. *Id.* at 101-02, 359 N.E.2d at 405-06, 390 N.Y.S.2d at 897. Distinguishing *Cantor*, the *Townes* Court emphasized that Townes knew he was dealing with police officers when he produced the weapon, and, rather than reholstering it and obeying police orders, the defendant tried to fire the gun. *Id.* at 101-02, 359 N.E.2d at 405, 390 N.Y.S.2d at 897. The Court stated that "under those circumstances Townes' act was unjustified and criminal in nature . . . and unrelated to the initial albeit unlawful action on the part of the police." *Id.* at 102, 359 N.E.2d at 405, 390 N.Y.S.2d at 897 (citations omitted). The defendant's "free and independent" act of drawing and attempting to fire his weapon "after and in spite of, or perhaps because of, the plainclothesman's identification of himself as a police officer," was held to attenuate the taint of his illegal seizure. *Id.* at 102, 359 N.E.2d at 406, 390 N.Y.S.2d at 897.

Analyzing *Cantor*, the *Boodle* Court emphasized that the police had "actively provoked [the defendant's] reaction of self-defense" by approaching him without identifying themselves. 47 N.Y.2d at 403, 391 N.E.2d at 1332, 418 N.Y.S.2d at 355. It should be noted; how-

For example, had the defendant in *Boodle* attempted to fire his loaded revolver, that act clearly would have attenuated the taint of the illegality of his detention.²³⁰ In contrast, the *Boodle* Court implicitly characterized any thought processes of the defendant as intervening circumstances sufficient to purge the primary taint.²³¹ In so doing, it is suggested that *Boodle* significantly diluted the deterrent effect of the exclusionary rule.²³²

ever, that this factor was never mentioned by the *Cantor* Court. Indeed, apart from the conclusion that *Cantor* produced the weapon as a direct result of his unlawful arrest, 36 N.Y.2d at 114, 324 N.E.2d at 878, 365 N.Y.S.2d at 517, the opinion contains no discussion of the Court's reasons for requiring suppression. It is suggested that the *Cantor* Court might have considered further elaboration unnecessary, since it had been well-established that evidence discovered during an illegal detention must be suppressed. See, e.g., *People v. Buttery*, 25 N.Y.2d 159, 250 N.E.2d 340, 303 N.Y.S.2d 57 (1969); *People v. Baldwin*, 25 N.Y.2d 66, 250 N.E.2d 62, 302 N.Y.S.2d 571 (1969); *People v. Loria*, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961), *overruled in part*, *People v. McQueen*, 18 N.Y.2d 337, 344, 221 N.E.2d 550, 553, 274 N.Y.S.2d 886, 890 (1966). It is further suggested that central to the *Townes* Court's denial of suppression was the egregious nature of the defendant's conduct. See 41 N.Y.2d at 102, 359 N.E.2d at 405-06, 390 N.Y.S.2d at 897. The *Townes* Court apparently was compelled to refuse suppression, since to hold otherwise would have encouraged criminals not only to resist unwarranted arrests but also to carry and use weapons in the course of such arrests. It is submitted that, in *Townes*, the Court implicitly held that the deterrent purpose of the exclusionary rule had to yield to society's interest in preventing such hazardous consequences.

²³⁰ See *People v. Townes*, 41 N.Y.2d 97, 102, 359 N.E.2d 402, 406, 390 N.Y.S.2d 893, 897 (1976).

²³¹ See note 270 and accompanying text *supra*. See generally *Wong Sun v. United States*, 371 U.S. 471, 487 (1963); *Nardone v. United States*, 308 U.S. 338, 341 (1939); note 251 and accompanying text *supra*. See also *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975) (discussed at note 251 *supra*). It is submitted that the *Brown* Court did not contemplate mere seconds as satisfying the test of intervening circumstances. Indeed, the *Brown* Court suppressed a confession that had been given two hours after the illegal seizure and subsequent to the giving of *Miranda* warnings. 422 U.S. at 604-05. The *Brown* Court noted that a contrary holding would allow the admission of "any subsequent statement, even one induced by the continuing effects of unconstitutional custody . . . so long as, in the traditional sense, it was voluntary" *Id.* at 597.

²³² See note 250 *supra*. It is submitted that the Court's analogy to the use of spontaneous statements, see note 270 and accompanying text *supra*, fails to consider the distinctions between the policies and justifications underlying the spontaneous declaration exception to the hearsay rule and those of the exclusionary rule. In refusing to admit statements that might possibly have been calculated, the courts seek to protect third parties from the consequences of malevolent and untruthful statements by the declarants. In the instant case no such fear is warranted because the act—even if it is accepted as nonspontaneous—could only inculcate the actor. Additionally, it is submitted that the Court's analysis undermines the deterrent goal of the exclusionary rule. See generally note 250 *supra*. It would seem that bringing the act of the defendant under the umbrella of the attenuation doctrine could encourage police to conduct illegal searches and seizures in the hope that their acts will precipitate voluntary disclosure of contraband, especially in high-crime areas. The paradox is that a voluntary disclosure will bring criminal penalties, but nondisclosure by a more patient and perhaps more sophisticated criminal, who allows a police search to uncover the illegal goods,

The *Boodle* decision underscores a recent trend advocating that the costs exacted by the operation of the exclusionary rule often may outweigh its deterrent value and that its application therefore should be circumscribed.²⁸³ Although in the past, the Court had applied the attenuation doctrine in order to strike a balance between these competing considerations,²⁸⁴ it appears that in *Boodle*, by emphasizing the defendant's opportunity to reflect, the Court overlooked valid reasons and justifications for suppressing evidence disclosed by an act of the defendant.²⁸⁵ It is submitted that only by examining the nature of the defendant's act, in addition to "the purpose and flagrancy" of the police conduct,²⁸⁶ will the primary justification for the exclusionary rule be fulfilled.

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will be protected by the fourth amendment.

²⁸³ Recent United States Supreme Court decisions limiting the exclusionary rule have questioned its continuing vitality. See, e.g., *Rakas v. Illinois*, 439 U.S. 128, 137-38 (1978); *United States v. Ceccolini*, 435 U.S. 268, 280 (1978); *Stone v. Powell*, 428 U.S. 465, 489-91 (1976). See generally *Burns*, *Mapp v. Ohio: An All-American Mistake*, 19 DE PAUL L. REV. 80 (1969); Miles, *Decline of the Fourth Amendment: Time to Overrule Mapp v. Ohio?*, 27 CATH. U.L. REV. 1 (1977); Note, *Fruits of Warrantless Automobile Inventory Search Admissible*, 60 MARQ. L. REV. 569 (1977).

²⁸⁴ See notes 278-279 and accompanying text *supra*.

²⁸⁵ See notes 1 & 282 and accompanying text *supra*.

²⁸⁶ *Brown v. Illinois*, 422 U.S. 590, 604 (1975) discussed in notes 251 & 281 *supra*. It is suggested that the tripartite attenuation test enunciated in *Brown*, 422 U.S. at 603-04; see note 251 *supra*, also would require an evaluation of the nature of the defendant's conduct. Although *Brown* involved the admissibility of a voluntary confession made subsequent to an unlawful arrest, 422 U.S. at 591, see note 251 *supra*, the facts in *Boodle* create an obvious parallel, because, in both cases, the challenged evidence was revealed by voluntary acts of the defendants. *Brown*, however, mandates that "voluntariness" be viewed in the context of the surrounding circumstances. *Id.* at 603-04.