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

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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]

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

To effectuate the fourth amendment's[249] 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

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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

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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 proscription 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 arrest[253] 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 weapon[260] 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

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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* Petition'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 Wachtler[266] 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

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[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. Butterly, 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'Neall, 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 conduct[272]—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 exlusionary rule required suppression of the products of the "deliberate and unlawful" police conduct.[276]

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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 Shepardized*, 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]

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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, 309 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.[280] In contrast, the *Boodle* Court implicitly characterized any thought processes of the defendant as intervening circumstances sufficient to purge the primary taint.[281] In so doing, it is suggested that *Boodle* significantly diluted the deterrent effect of the exclusionary rule.[282]

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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. Butterly, 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.

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

[281] *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.

[282] *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 inculpate 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.