IT'S TIME TO CONFESS THAT *BROWN V. ILLINOIS* ISN'T WORKING: PURGING THE TAINT FROM THE SUPREME COURT'S ATTENUATION JURISPRUDENCE

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"[O]urs is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth."[1]

I. INTRODUCTION

A confession can often be the most powerful piece of evidence in a criminal case. As the United States Supreme Court has acknowledged, "the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained."[2] Given the influential role that a confession plays in determining the outcome of a criminal case, the legal system should be especially concerned with the analyses the court employs in deciding whether to admit a confession into evidence.[3] In particular, the court must

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[1] Rogers v. Richmond, 365 U.S. 534, 541 (1961).

[2] Colorado v. Connelly, 479 U.S. 157, 182 (1986) (Brennan, J., dissenting) (quoting MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 148, at 316 (Edward W. Cleary ed., 2d ed. 1972)) (internal quotation marks omitted).

[3] Part of this concern stems from the desire to prevent the admission of false confessions into evidence. *See infra* note 4 and accompanying text. Of course, the best way to protect against the admission of a false confession is to reduce the likelihood of obtaining a false confession in the first place. For recommendations on how to reduce the incidence of false confessions during police interrogations, see Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 25–31 (2010).

Assuming that false confessions cannot and will not be eradicated, the role of the judicial

be concerned about the possibility that a confession may be false, in which case admission of the confession will very likely produce a wrongful conviction.[4] Apart from the false confession concern, the court should also be concerned about the fairness of the way in which the confession was obtained.

The latter concern has been the subject of many Supreme Court cases, the most important of which was *Brown v. Illinois*.[5] *Brown* and its progeny provide the proper framework for an attenuation analysis, which the courts use to decide whether statements obtained subsequent to an illegal arrest should be excluded from trial.[6] In assessing whether a statement made after an illegal arrest has been purged of the taint of that arrest, and is therefore admissible, the court considers whether *Miranda* warnings were issued, the temporal proximity between the arrest and the statement, whether any intervening circumstances occurred during that time, and the flagrancy and purposefulness of the police misconduct.[7]

This note dissects the *Brown* framework and examines how subsequent Supreme Court jurisprudence has modified this framework.[8] Next, the note analyzes how the lower federal courts have applied the attenuation analysis, highlighting the consequences of the Supreme Court's inconsistent language with respect to the *Miranda* factor, which has produced varying results

system is that of gatekeeper—that is, to keep false confessions from being introduced at trial. The quote from *Colorado v. Connelly* illustrates that once a false confession is introduced into evidence, the likelihood of conviction is very high. *See, e.g.*, Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 484 ("When courts fail to dismiss these false confession cases at the pretrial stage, the overwhelming majority of defendants will be wrongfully convicted."); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 923 (2004) ("Confession evidence (regardless of how it was obtained) is so biasing that juries will convict on the basis of confession alone, even when no significant or credible evidence confirms the disputed confession and considerable significant and credible evidence disconfirms it.").

[4] Social science research suggests that false confessions or admissions were involved in fifteen to twenty percent of all DNA-based exonerations of wrongfully convicted defendants. *See* Kassin et al., *supra* note 3, at 3; *see also* Robert J. Norris & Allison D. Redlich, *Seeking Justice, Compromising Truth? Criminal Admissions and the Prisoner's Dilemma*, 77 ALB. L. REV. 1005, 1015–17 (2013/2014) (summarizing the role of false admissions in wrongful convictions).

[5] Brown v. Illinois, 422 U.S. 590 (1975).

[6] *Id.* at 597. While the language in *Brown* indicates that the test applies to statements obtained after an illegal arrest *or* an illegal search, the Supreme Court has only ever applied the analysis in illegal arrest cases. *See* 6 WAYNE R. LAFAVE, SEARCH & SEIZURE § 11.4(c) (5th ed. 2012); *see* discussion *infra* Part III.A.2.

[7] *See Brown*, 422 U.S. at 603–04.

[8] *See infra* Part II.C–G.

among the lower courts. The note also discusses the difficulties of applying the framework in other contexts that do not involve an illegal arrest.[9] Next, the note discusses the divergent interpretations of the police misconduct factor by the federal courts.[10] Finally, the note recommends that courts apply the *Brown* framework as a threshold *Miranda* inquiry and then a three-factor balancing test. The note also recommends that courts adopt a broad view of the police misconduct factor in order to give effect to the policies underlying the attenuation doctrine.[11]

II. SUPREME COURT JURISPRUDENCE

A. Introduction to the Exclusionary Rule

The exclusionary rule is a judicially created doctrine that precludes the government from using at trial evidence obtained as a result of a violation of the defendant's search and seizure rights.[12] Although the Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,"[13] the Amendment does not specify any mechanism to enforce that right.[14] Accordingly, the Supreme Court adopted the exclusionary rule in order to provide a remedy for Fourth Amendment violations.[15]

The exclusionary rule does not apply automatically, however, in every case that involves a Fourth Amendment violation. In order for the exclusionary rule to apply, the evidence at issue must be *the product of* a Fourth Amendment violation.[16] Additionally, there are several exceptions to the exclusionary rule, including the independent source doctrine, the inevitable discovery doctrine, the

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[9] *See infra* Part III.A.2.

[10] *See infra* Part III.B.

[11] *See infra* Part IV.

[12] *See generally* Weeks v. United States, 232 U.S. 383, 398 (1914) (adopting the exclusionary rule for violations of the Fourth Amendment); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying the exclusionary rule to the states via the Due Process Clause of the Fourteenth Amendment).

[13] U.S. CONST. amend. IV.

[14] Heather A. Jackson, Arizona v. Evans*: Expanding Exclusionary Rule Exceptions and Contracting Fourth Amendment Protection*, 86 J. CRIM. L. & CRIMINOLOGY 1201, 1202 (1996).

[15] *Id.* Although the Fourth Amendment is applicable to the states through the Fourteenth Amendment, this note refers to the Fourth Amendment when discussing search and seizure violations.

[16] *See* New York v. Harris, 495 U.S. 14, 19 (1990).

good faith exception, and the attenuation doctrine.[17] The last exception—the attenuation doctrine—is the subject of this note. In the following sections, the history of the attenuation doctrine is discussed, with a specific focus on the seminal case of *Brown v. Illinois*.

B. Underpinnings of the Attenuation Doctrine: Wong Sun

More than a decade before *Brown* was decided, the United States Supreme Court provided key language for the attenuation doctrine in *Wong Sun v. United States*.[18] In *Wong Sun*, petitioners James Wah Toy and Wong Sun confessed to involvement in drug-related crimes after being arrested by federal agents;[19] they were later tried and convicted for narcotics offenses.[20] After agreeing with the Ninth Circuit's finding that the police officers unlawfully entered petitioner Toy's residence and also unlawfully arrested him, the Supreme Court proceeded to determine "what consequences flow from this conclusion."[21] The Court then discussed the fruit-of-the-

[17] *See generally* Jackson, *supra* note 14, at 1204–09 (detailing these exceptions to the exclusionary rule). The Supreme Court has carved out these exceptions over time since making the exclusionary rule applicable to the states in 1961. *See, e.g.*, United States v. Leon, 468 U.S. 897, 913 (1984) (adopting the good faith exception to the exclusionary rule).

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

[19] *See id.* at 473–77. The facts of the case are rather complicated. On June 4, 1959, federal agents went to a laundry looking for "Blackie Toy," who had purportedly sold heroin to another man the previous day. *See id.* at 473–74. When petitioner James Wah Toy answered the door to the laundry, one of the agents misrepresented himself as a potential customer. *See id.* at 474. (It is unclear from the case at what point in the sequence of events the agents learned of Toy's name, but nothing in the record indicated that James Wah Toy and "Blackie Toy" were the same person, at least to the agents' knowledge. *See id.*) After telling the man to come back in a few hours when the laundry would be open, Toy began to close the door on him, at which point the man identified himself as a federal narcotics agent. *Id.* at 474. Toy slammed the door and ran back towards his living quarters, so the agents broke down the door and pursued him. *Id.* Toy was arrested at gunpoint in a bedroom where his wife and child had been sleeping, and no drugs were found in the subsequent search. *Id.* In response to questioning by one of the agents, Toy denied selling drugs, but said he knew someone else who did. *Id.* Based on the description provided by Toy, the police went to the house of Johnny Yee and recovered heroin. *See id.* at 474–75. Yee and Toy were taken to the Office of the Bureau of Narcotics, where they were both questioned. *Id.* at 475. Yee told the agents that he had gotten the heroin from Toy and another man named "Sea Dog" a few days earlier. *Id.* Toy identified "Sea Dog" as Wong Sun, and accompanied the officers to Wong Sun's neighborhood in order to point out where he lived. *Id.* Wong Sun was arrested, and both Wong Sun and Toy later gave additional incriminating statements to the authorities. *See id.* at 475–77.

[20] *See id.* at 472–73. The case also involves additional facts related to Wong Sun's arrest and later interrogation, but those facts are not especially pertinent to the discussion of the case here.

[21] *Id.* at 484.

poisonous-tree doctrine,[22] specifically the rationale behind the exclusionary rule[23] and the scope of this rule.[24] The Court noted that, in the case of petitioner Toy, Toy's statements to the police immediately after being arrested were not "sufficiently an act of free will to purge the primary taint of the unlawful invasion," and thus those statements should have been suppressed at trial.[25] With respect to whether the suppression of Toy's statements also required the suppression of the drugs found on Yee, the Court explained the pertinent inquiry under the attenuation doctrine:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[26]

The Court concluded that "the narcotics were 'come at by the exploitation of that illegality' and hence . . . they may not be used against Toy."[27]

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[22] The fruit-of-the-poisonous-tree doctrine refers to the Supreme Court's extension of the application of the exclusionary rule to the indirect results of a Fourth Amendment violation. 1 MCCORMICK ON EVIDENCE § 176, at 953 (Kenneth S. Brown ed., 7th ed. 2013) ("If a defendant establishes a Fourth Amendment violation—a 'poisonous tree'—and that evidence was obtained as a factual result of that violation—that the evidence is 'fruit' of the poisonous tree—the defendant is entitled to have the evidence excluded unless the prosecution establishes the applicability of an exception to the general requirement of exclusion.").

[23] *Wong Sun*, 371 U.S. at 486. The Court identified "deterring lawless conduct by . . . officers" and "closing the doors of the federal courts to any use of evidence unconstitutionally obtained" as the purposes behind the exclusionary rule. *Id.* at 486 (citing Elkins v. United States, 364 U.S. 206, 223–24 (1960); Rea v. United States, 350 U.S. 214, 217–18 (1956)). These purposes are usually termed "deterrence of police misconduct" and "judicial integrity." *See* Mapp v. Ohio, 367 U.S. 643, 648, 659 (1961). Later, the Supreme Court seemed to suggest that it no longer considered judicial integrity to be a rationale for the exclusionary rule. *See* United States v. Leon, 468 U.S. 897, 977 n.34 (1984); *see also* Robert M. Bloom, *Judicial Integrity: A Call for Its Re-Emergence in the Adjudication of Criminal Cases*, 84 J. CRIM. L. & CRIMINOLOGY 462, 470–71 (1993) (discussing the Court's shift away from judicial integrity as a justification for the exclusionary rule).

[24] *Wong Sun*, 371 U.S. at 484–85. The Court noted that the exclusionary rule applies to both the direct and the indirect results of unlawful searches. *Id.* (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391–92 (1920)). In addition to physical evidence, the exclusionary rule also applies to verbal statements and testimony. *Wong Sun*, 371 U.S. at 485 (citing Silverman v. United States, 365 U.S. 505, 512 (1961); McGinnis v. United States, 227 F.2d 598, 603 (1st Cir. 1955)).

[25] *Wong Sun*, 371 U.S. at 486.

[26] *Id.* at 487–88 (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

[27] *Wong Sun*, 371 U.S. at 488.

C. The Seminal Case: Brown v. Illinois

Twelve years after *Wong Sun*, the Supreme Court further defined the attenuation doctrine in *Brown v. Illinois*. This time, the Court had to decide whether the issuance of *Miranda* warnings was enough to dissipate the taint of an unlawful arrest and render a subsequent confession admissible.[28] In deciding *Brown*, the Court announced a framework for the lower courts to use in analyzing whether a confession obtained after an unlawful arrest may be used against the defendant at trial.[29]

The facts of *Brown* were seemingly uncontested.[30] Shortly after the murder of Roger Corpus, Chicago Police detectives learned the names of some of Corpus's acquaintances, including that of petitioner Richard Brown.[31] On that basis alone, and without any type of warrant, Detectives Lenz and Nolan, along with a third police officer, went to Brown's apartment in the evening hours—around 5:00 p.m.—on May 13, 1968.[32] Brown was not home.[33] While the third officer stood guard downstairs at the front entrance, the detectives forcibly broke into the apartment and searched it.[34] After searching the apartment, Detective Lenz waited near the rear entrance to the apartment, watching the back porch through a window, while Detective Nolan waited near the front door.[35] At about 7:45 p.m., Detective Lenz observed someone coming up the back stairs, a man he later learned was Richard Brown.[36] As Brown got to the top of the stairs, he looked into the window and saw a stranger—whom he later learned was Detective Lenz—pointing a revolver at him.[37] The stranger (Lenz) told Brown, "Don't move, you are under arrest."[38] Detective Nolan—also a stranger to Brown at that point—came up behind Brown with his gun and also told Brown he was under arrest.[39]

Detectives Lenz and Nolan continued to hold Brown at gunpoint

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[28] *See* Brown v. Illinois, 422 U.S. 590, 591–92 (1975).
[29] *See id.* at 603–04.
[30] *See id.* at 592.
[31] *Id.*
[32] *Id.* at 592–93.
[33] *Id.* at 593.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 592–93.
[37] *Id.*
[38] *Id.*
[39] *Id.*

as they all entered the apartment.[40] The detectives told Brown to stand against the wall and searched him; they did not find a weapon.[41] When the detectives asked Brown his name, he denied being Richard Brown.[42] At this point, Detective Lenz showed him a photograph of Brown that the police had brought with them to the apartment, then told Brown that he was under arrest for Corpus's murder, put him in handcuffs, and brought him to the police car.[43]

After the twenty-minute drive to the police station,[44] the detectives put Brown in an interrogation room, where he was left alone for a short while, until the policemen returned with the Corpus homicide file.[45] The detectives advised Brown of his *Miranda* rights.[46] During the interrogation, Brown inculpated himself in Corpus's murder.[47]

After giving and signing the statement, Brown left the station with the two detectives to go look for Claggett (the man Brown had identified as the shooter) at around 9:30 p.m.[48] When they eventually spotted Claggett, the detectives arrested him and transported both Claggett and Brown back to the station.[49] Brown was placed in the interrogation room, given coffee, and left alone for

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[40] *Id.* at 593.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] On the drive over, Detective Nolan asked the arrestee whether his name was Richard Brown; Nolan also asked Brown whether he owned a 1966 Oldsmobile, to which Brown provided false answers and/or evaded answering. *Id.* at 593–94.

[45] *Id.* at 594.

[46] *Id.*

[47] Brown's inculpatory statements came about as follows: The detectives told Brown that they knew about an incident a week earlier, when Brown had shot a revolver into a ceiling in a poolroom because he was angry over a dice game. *Id.* Brown responded, "Oh, you know about that." *Id.* Detective Lenz told Brown that they had extracted the bullet from the ceiling and sent it to the crime lab for comparison to the bullets in Corpus's body, to which Brown responded, "Oh, you know that, too." *Id.* Detective Lenz asked Brown whether he wanted to talk about the Corpus homicide, to which Brown said he did, and for the next twenty to twenty-five minutes, Detective Nolan asked Brown questions as Detective Lenz typed. *Id.* According to the statement Detective Lenz typed up and which Brown later signed, Brown admitted that he and another man, Jimmy Claggett, had visited the victim on the night of the murder, and the three of them drank and smoked marijuana. *Id.* at 594–95. At some point, Claggett ordered Brown to tie up the victim's hands and feet with a cord, and then, using a pillow as a silencer, Claggett shot the victim three times with a revolver. *Id.* at 595. Brown admitted that he had sold Claggett the revolver. *Id.*

[48] *Id.* The detectives drove around the area of Chicago where Brown indicated Claggett usually hung out, but they were unsuccessful at locating him. *Id.* After stopping at police headquarters to try to find a photograph of Claggett, which they were unable to procure, the detectives and Brown set out again, and at 11:00 p.m., they saw Claggett crossing the street. *Id.*

[49] *Id.* It was about 12:15 a.m. when they all got back to the police station. *Id.*

almost two hours until Assistant State's Attorney (ASA) Crilly got there.[50] ASA Crilly administered *Miranda* warnings to Brown and they spoke for about thirty minutes.[51] A court reporter arrived, and Crilly read Brown his *Miranda* warnings once more.[52] After Crilly told Brown that he would definitely be charged with murder, Brown made a second statement about Corpus's murder.[53] Six hours later, and fourteen hours after he was first arrested, Brown was taken before a magistrate.[54]

After being indicted for murder and prior to trial, Brown moved to suppress his two inculpatory statements, alleging that the statements were taken in violation of his constitutional rights because he had been illegally arrested and detained prior to making them.[55] The trial court denied this motion, and Brown was convicted at trial.[56] On appeal, the Illinois Supreme Court affirmed Brown's conviction.[57] While the court found that Brown's arrest had been unlawful, it held that the issuance of *Miranda* warnings—by the police with respect to the first statement, and by the prosecutor with respect to the second statement—broke the causal connection between the unlawful arrest and the inculpatory statements.[58] The court cited the language from *Wong Sun* in concluding that the *Miranda* warnings had purged the taint of the illegal arrest, thus rendering the defendant's statements admissible.[59] The United States Supreme Court granted certiorari "[b]ecause of our concern about the implication of our holding in *Wong Sun* to the facts of Brown's case."[60]

The Supreme Court explained that *Wong Sun* had announced "the principles to be applied where the issue is whether statements and other evidence obtained after an illegal arrest or search should be excluded."[61] Quoting the key language from *Wong Sun*,[62] the Court

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[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* The second statement was mostly the same as the first statement, but it was factually inaccurate as to parts of Brown's background, such as his employment and education. *Id.* at 595 & n.4. After the court reporter finished typing the statement, however, Brown refused to sign it. *Id.* at 595–96.

[54] *Id.* at 596.

[55] *See id.*

[56] *Id.*

[57] *Id.* (citing People v. Brown, 307 N.E.2d 356 (Ill. 1974)).

[58] *Brown*, 422 U.S. at 596–97.

[59] *Id.* at 597.

[60] *Id.* (citation omitted).

[61] *Id.* For a discussion of how the attenuation analysis has been applied in other contexts besides illegal arrest—such as illegal searches—see *infra* Part III.A.2.

noted that it had applied the exclusionary rule in the earlier case in order to protect Fourth Amendment rights.[63] "Protection of the Fifth Amendment right against self-incrimination was not the Court's paramount concern there."[64] Accordingly, the Illinois Supreme Court had erred when it held that the issuance of *Miranda* warnings—which are designed to vindicate Fifth Amendment rights—could purge the taint of an illegal arrest under the attenuation doctrine and avoid the application of the exclusionary rule, which was designed to vindicate Fourth Amendment rights.[65] The Court explained the relationship between the two Amendments as follows:

> Although, almost 90 years ago, the Court observed that the Fifth Amendment is in "intimate relation" with the Fourth, the *Miranda* warnings thus far have not been regarded as a means either of remedying or deterring violations of Fourth Amendment rights. Frequently, as here, rights under the two Amendments may appear to coalesce since "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." The exclusionary rule, however, when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth. It is directed at all unlawful searches and seizures, and not merely those that happen to produce incriminating material or testimony as fruits. In short, exclusion of a confession made without *Miranda* warnings might be regarded as necessary to effectuate the Fifth Amendment, but it would

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[62] *See supra* text accompanying note 26.

[63] *Brown*, 422 U.S. at 599.

[64] *Id.* The Court further noted that "[t]o the extent that the question whether Toy's statement was voluntary was considered, it was only to judge whether it 'was sufficiently an act of free will to purge the primary taint of the unlawful invasion.'" *Id.* (quoting Wong Sun v. United States, 371 U.S. 471, 486 (1963)). However, this is misleading to the reader, because the Court in *Wong Sun* did not consider voluntariness in the way that concept came to be understood after *Miranda v. Arizona*, 384 U.S. 436 (1966). Indeed, the Court noted that *Wong Sun* was decided before *Miranda*. *Brown*, 422 U.S. at 600. Accordingly, it would be more accurate to say that while *Wong Sun* contained language that would later come to be associated with a voluntariness analysis, the Court was not actually analyzing the voluntariness of the statement from a Fifth Amendment perspective; it was instead analyzing the admissibility of the statement based on the attenuation doctrine, which is based on the exclusionary rule to the Fourth Amendment.

[65] *See Brown*, 422 U.S. at 600, 603.

> not be sufficient fully to protect the Fourth. *Miranda* warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation.
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> Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, *Wong Sun* requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be "sufficiently an act of free will to purge the primary taint." *Wong Sun* thus mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment.[66]

Accordingly, the Supreme Court concluded that *Miranda* warnings, by themselves, cannot purge the taint of an illegal arrest.[67] To hold otherwise would "substantially dilute[]" the effect of the exclusionary rule, because the police could remedy the effect of any unlawful arrest by administering *Miranda* warnings, thus rendering the subsequent confession admissible.[68] This would encourage the police to make unconstitutional arrests, based on hunches and suspicion less than probable cause, by undermining the deterrent effect of the exclusionary rule.[69]

Instead, the court must engage in an ad hoc analysis[70] to determine whether the confession was sufficiently attenuated from the taint of the illegal arrest so as to render it the product of free will, and therefore admissible under the attenuation doctrine, as opposed to the product of the exploitation of the illegal arrest, in

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[66] *Id.* at 601–02 (footnote omitted) (citations omitted) (quoting *Wong Sun*, 371 U.S. at 486; Boyd v. United States, 116 U.S. 616, 633 (1886)).

[67] *Brown*, 422 U.S. at 603.

[68] *Id.* at 602–03.

[69] *See id.*

[70] Specifically, the Court said: "The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive." *Id.* at 603. The Court then went on to list the factors to be considered in the analysis. *See infra* text accompanying note 72. At no point did the Court say that no *factor* was dispositive, aside from its prior conclusion that *Miranda* warnings alone were not enough. Accordingly, this leaves open the possibility that one of the three factors—temporal proximity, intervening circumstances, and police misconduct—may be determinative in a given case. However, based on the Court's treatment of these factors in later cases, it is unlikely that temporal proximity would ever be dispositive. *See infra* notes 162–63 and accompanying text. The absence of intervening circumstances is most likely to be determinative in any given case. *See infra* text accompanying note 90.

which case it would be inadmissible under the exclusionary rule.[71] The Court identified the following factors that should be considered in this analysis:

> The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant.[72]

Furthermore, the court noted that "[t]he voluntariness of the statement is a threshold requirement."[73] The prosecution bears the burden of demonstrating that the statement is admissible.[74]

In applying the newly articulated factors to the facts of the case, the Court expounded upon the police misconduct factor, using language that lower courts would later interpret as guidelines for assessing varying levels of police misconduct.[75] With respect to the police behavior in *Brown*, the Court noted:

> The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for "questioning." The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion.[76]

By effecting a warrantless arrest, without probable cause, in

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[71] *See Brown*, 422 U.S. at 603.

[72] *Id.* at 603–04 (footnotes omitted) (citations omitted).

[73] *Id.* at 604.

[74] *Id.* The Ninth Circuit has expounded upon the burdens each side bears in an attenuation analysis: "[O]nce the defendant has gone forward with some 'specific evidence demonstrating taint,' the burden of proof that the taint was attenuated enough to allow admitting the tainted evidence belongs to the government." United States v. Perez-Esparza, 609 F.2d 1284, 1290 (9th Cir. 1979) (quoting United States v. Cella, 568 F.2d 1266, 1284 (9th Cir. 1977)); *see also* United States v. Riesselman, 646 F.3d 1072, 1080 (8th Cir. 2011) ("[O]nce the defendant comes forward with specific evidence demonstrating taint, the government has the ultimate burden of persuasion to show the evidence is not tainted." (citing Alderman v. United States, 394 U.S. 165, 183 (1969))).

[75] *See, e.g.*, United States v. Reed, 349 F.3d 457, 464–66 (9th Cir. 2003).

[76] *Brown*, 422 U.S. at 605 (footnote omitted) (citations omitted).

order to question the defendant about a murder, despite knowing they had no legal basis to do so, the detectives engaged in the type of purposeful and flagrant police misconduct that the Fourth Amendment was designed to protect against. This factor, in conjunction with the short temporal proximity between the illegal arrest and the confession,[77] and the lack of any intervening circumstances in the interim, persuaded the Court to conclude that the state had failed to meet its burden under *Wong Sun*, and that the taint of the illegal arrest had not been purged from the defendant's confession.[78] Accordingly, Brown's statements should not have been admitted at trial.[79]

D. Reaffirming Brown: Dunaway v. New York

In *Dunaway v. New York*,[80] the Supreme Court reaffirmed *Brown*'s requirement that the prosecution demonstrate that the taint of an illegal arrest had been purged from the defendant's subsequent statements in order for those statements to be admissible at trial.[81] While the language in *Brown* had presented the *Miranda* factor together with the other three factors, the *Dunaway* Court made clear the proper order of the inquiry: "[A]lthough a confession after proper *Miranda* warnings may be found 'voluntary' for purposes of the Fifth Amendment, this type of 'voluntariness' is merely a 'threshold requirement' for Fourth Amendment analysis. Indeed, if the Fifth Amendment has been violated, the Fourth Amendment issue would not have to be reached."[82] The Court reiterated that "the relevant inquiry [is] 'whether [the defendant's] statements were obtained by exploitation of the illegality of his arrest.'"[83] The focal point of the analysis is "the causal connection between the illegality and the confession."[84]

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[77] The defendant confessed within two hours of his unlawful arrest. *Id.* at 604.

[78] *Id.* at 604–05. The Court also concluded that the defendant's second inculpatory statement "was clearly the result and the fruit of the first," and therefore was also inadmissible. *Id.* at 605.

[79] *See id.* at 605.

[80] Dunaway v. New York, 442 U.S. 200 (1979).

[81] *See id.* at 216.

[82] *Id.* (citations omitted) (quoting Brown v. Illinois, 422 U.S. 590, 604 (1975)).

[83] *Dunaway*, 422 U.S. at 217 (quoting *Brown*, 422 U.S. at 600).

[84] *Dunaway*, 422 U.S. at 217 (quoting *Brown*, 422 U.S. at 603) (internal quotation marks omitted). This inquiry is meant to vindicate the policies behind the Fourth Amendment. "When there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts." *Id.* at 218. *See also supra* note 23 (discussing the rationales behind the exclusionary rule).

In order to determine whether the statements were obtained by exploitation of the illegal arrest, or instead whether the taint of the illegality had been purged, the deciding court must consider the three *Brown* factors: "[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 . . . ."[85]

Noting that the facts of *Dunaway* were very similar to those in *Brown*,[86] the Supreme Court held that the taint of the defendant's illegal arrest had not been purged, and thus his statements to police were inadmissible.[87] Specifically, the Court highlighted the fact that the defendant was "seized without probable cause in the hope that something might turn up, and confessed without any intervening event of significance."[88] The Court rejected the lower court's reasoning that the case was distinguishable from *Brown* because the police had not threatened or abused the defendant,[89] and again reiterated that no intervening circumstances had occurred which would break the causal connection between the illegal arrest and the confession.[90]

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[85] *Dunaway*, 442 U.S. at 218 (alteration in original) (quoting *Brown*, 422 U.S. at 603–04) (internal quotation marks omitted).

[86] In *Dunaway*, the police got a tip that the defendant may have been involved in an attempted robbery that resulted in a murder, but there was not enough information to secure an arrest warrant. *Dunaway*, 442 U.S. at 202–03. Nevertheless, the investigating detective ordered other police officers to "pick up" the defendant and "bring him in." *Id.* at 203. After being picked up at his house and driven to the police station, the defendant was interrogated; he made incriminating statements and also drew incriminating sketches. *Id.*

[87] *Id.* at 218–19.

[88] *Id.* at 218.

[89] The Court claimed that the lower court's reasoning demonstrated "a lingering confusion" between the voluntariness requirement, based on the Fifth Amendment, and the causal connection requirement, based on the Fourth Amendment, and blamed this confusion for the lower court's distinction between the police misconduct in *Brown* and that in the instant case. *Id.* at 218–19. However, in rejecting the lower court's reasoning, the Supreme Court was also implicitly rejecting a distinction between the degree of police misconduct in the two cases as a basis for reaching opposite conclusions in the attenuation analysis. In other words, the Court rejected the opportunity to conclude that because the police misconduct in *Dunaway* was somehow less egregious than the misconduct in *Brown*, that factor should weigh in favor of attenuation. The Court may have disagreed with the contention that the misconduct in *Dunaway* was less egregious—indeed, it appears to equate them by noting that, like Brown, Dunaway was also seized without probable cause, for the purpose of furthering the investigation. *Id.* at 218. Nevertheless, lower federal courts have interpreted *Dunaway* as standing for the proposition that the lack of intervening circumstances is most determinative, and the absence of flagrant police misconduct is of relatively little importance. *See, e.g.*, United States v. Ricardo D., 912 F.2d 337, 343 (9th Cir. 1990). *See also infra* Part III.B.2 (discussing the Ninth Circuit's interpretation of *Dunaway*).

[90] *Dunaway*, 442 U.S. at 218–19.

*E. Post-*Dunaway *Confusion:* Rawlings*,* Taylor*, and the Proper Role of* Miranda

In the three cases decided since *Dunaway*, the Supreme Court has been inconsistent in its formulation of the *Brown* framework.[91] Specifically, the role of *Miranda* warnings in the analysis—as a threshold requirement versus as one of four factors to be weighed in the analysis—has changed from case to case. This section summarizes two of those cases and explores their contrasting articulations of the attenuation framework.

Despite the clear language of the *Brown* framework repeated in *Dunaway*, the Supreme Court muddied the waters only a year later in *Rawlings v. Kentucky*.[92] In that case, the Court had to analyze whether, assuming the defendant was illegally detained while the police obtained a search warrant, his inculpatory statements were the fruit of his illegal detention, or whether the taint had been purged.[93] Before beginning the analysis, the Court quoted the relevant language of the test from *Brown*,[94] with an additional

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[91] The three cases are *Rawlings v. Kentucky*, 448 U.S. 98 (1980), *Taylor v. Alabama*, 457 U.S. 687 (1982), and *Kaupp v. Texas*, 538 U.S. 626 (2003) (per curiam). The Supreme Court also decided another case, *New York v. Harris*, 495 U.S. 14 (1990), pertaining to the *Brown* analysis during this post-*Dunaway* time period. In that case, however, the Court held that an attenuation analysis under *Brown* was *not* appropriate where the defendant was arrested without a warrant in his home, in violation of *Payton v. New York*, 445 U.S. 573 (1980), then later made inculpatory statements at the police station. *See Harris*, 495 U.S. at 20–21 ("We hold that, where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*.").

[92] The membership of the Court was the same for *Dunaway* and *Rawlings*, except Justice Powell did not take part in *Dunaway*. *Dunaway*, 442 U.S. at 219. See *infra* Part II.F for a discussion of how the Justices voted in three of the post-*Brown* cases.

[93] *Rawlings*, 448 U.S. at 106. In *Rawlings*, the police went to the home of Lawrence Marquess in order to take him into custody pursuant to an arrest warrant. *Id.* at 100. Marquess's housemate and four other guests (including Rawlings) were in the home at the time, although Marquess was not present. *Id.* While searching the house for Marquess, the officers smelled marijuana smoke and observed marijuana seeds, so they decided to get a search warrant. *Id.* Four officers remained at the house while awaiting the approval of the search warrant; these officers did not allow any of the occupants to leave unless they consented to a body search, which two of the occupants did. *Id.* When the other officers returned with the search warrant, one of them read it aloud and also administered *Miranda* warnings to the remaining three occupants. *Id.* An officer ordered one of the occupants, Cox, to empty her purse on the table; when she did, the contents included LSD and other illicit drugs. *Id.* at 101. Cox turned to Rawlings and told him "to take what was his," at which point Rawlings claimed ownership of the drugs to the officers. *Id.* Rawlings was then searched—revealing $4500 in cash and a sheathed knife—and formally placed under arrest. *Id.*

[94] *Id.* at 106–07 (quoting Brown v. Illinois, 422 U.S. 590, 603–04 (1975)); *see also supra* text accompanying note 72 (quoting the relevant language from *Brown*).

citation to *Dunaway*.[95] When the Court engaged in the application of the test to the facts of the case, however, it treated the issuance of *Miranda* warnings as the first of several factors to be considered, as opposed to a threshold question.[96] The Court reinforced this formulation by referring to temporal proximity,[97] intervening circumstances, and police misconduct as the second, third, and fourth factors, respectively.[98] At the end of its analysis, the Court finally acknowledged that voluntariness was a threshold requirement under *Brown*.[99] Yet by discussing this requirement at the end—after it had already considered the issuance of *Miranda* warnings as a separate factor in the analysis—the Court made it appear as though voluntariness and *Miranda* were two separate inquiries, with *Miranda* warnings being a factor to consider in the balancing test, and voluntariness as a separate threshold requirement.[100]

In *Taylor v. Alabama*, a mere two years after *Rawlings*, the Supreme Court reverted to the formulation of the test used in

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[95] *Rawlings*, 448 U.S. at 107 (citing *Dunaway*, 442 U.S. at 218).

[96] *Rawlings*, 448 U.S. at 107 ("First, we observe that petitioner received *Miranda* warnings only moments before he made his incriminating statements, a consideration *Brown* treated as important, although not dispositive, in determining whether the statements at issue were obtained by exploitation of an illegal detention.").

[97] In considering temporal proximity, the Court also analyzed the conditions of the detention in conjunction with this factor, which it had not done in *Brown* or *Dunaway*. *Id.* at 107–08. The Court explained that a short period of time, such as the forty-five minutes in this case, might not be enough to purge the taint "under the strictest of custodial conditions," but, presumably because this case did *not* involve strict custodial conditions, it was "necessary to examine the precise conditions under which the occupants of this house were detained." *Id.* at 107. Accordingly, it seems that the majority felt it necessary to give the temporal proximity factor some context because the defendant was not in full-blown custody; without this context, the short temporal proximity would have weighed against attenuation. In doing so, the Court did not explain whether it was adding a new layer to the *Brown* framework. Therefore, after *Rawlings*, it is unclear whether the deciding court should consider the context of the temporal proximity when the illegal police conduct in question is something less than a full custodial arrest. The Court seemed so eager to find attenuation in *Rawlings* that it muddled the already-clear *Brown* framework.

In applying this new contextual aspect to the temporal proximity factor, the Court observed that there was a "congenial atmosphere" in the house for the forty-five minute time period, during which the occupants "sat quietly in the living room, or at least initially, moved freely about the first floor of the house." *Id.* at 108. Accordingly, the Court concluded that "these circumstances outweigh the relatively short period of time that elapsed between the initiation of the detention and [the defendant's] admissions." *Id.*

[98] *Id.* at 107–10 ("Second, *Brown* calls our attention to the 'temporal proximity of the arrest and the confession.' . . . Third, *Brown* suggests that we inquire whether any circumstances intervened between the initial detention and the challenged statements. . . . Fourth, *Brown* mandates consideration of 'the purpose and flagrancy of the official misconduct.'" (quoting *Brown*, 422 U.S. at 603–04) (ellipsis omitted).

[99] *Id.* at 110.

[100] No case or commentator has discussed or even noted this seeming contradiction.

Dunaway, describing voluntariness as a threshold requirement[101] and enumerating the other three factors as those to be considered in evaluating whether the taint of the illegal arrest had been purged.[102] Moreover, the Court seemed to emphasize the intervening circumstances factor as the most important consideration in the analysis.[103] Consistent with its formulation of the *Miranda* warnings as a threshold issue, as opposed to part of the attenuation balancing test, the Court rejected the state's contention that the issuance of *Miranda* warnings to the defendant on multiple occasions constituted intervening circumstances.[104]

In fact, the Court found that no intervening events had occurred for attenuation purposes.[105] Even though the defendant was allowed to meet with his girlfriend and another friend for a few minutes after waiving his *Miranda* rights, after which he made his confession to the police, the Court did not consider this to be an intervening circumstance.[106] The Court noted that the defendant's girlfriend was upset at the time, after hearing the officer urge the defendant to cooperate.[107] Accordingly, it was hard for the Court to fathom how such a visit "could possibly have contributed to [the defendant's] ability to consider carefully and objectively his options and to exercise his free will. . . . If any inference could be drawn, it

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[101] Taylor v. Alabama, 457 U.S. 687, 690 (1982) ("[A] finding of 'voluntariness' for purposes of the Fifth Amendment is merely a threshold requirement for Fourth Amendment analysis." (citing Dunaway v. New York, 442 U.S. 200, 217 (1979))).

[102] *Taylor*, 457 U.S. at 690 ("This Court identified several factors that should be considered in determining whether a confession has been purged of the taint of the illegal arrest: '[the] temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct.'" (quoting *Brown*, 422 U.S. at 603–04)).

[103] *See Taylor*, 457 U.S. at 690 ("[A] confession obtained through custodial interrogation after an illegal arrest should be excluded *unless intervening events break the causal connection* between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint.'" (emphasis added) (citations omitted) (quoting *Brown*, 422 U.S. at 602)).

[104] *Taylor*, 457 U.S. at 693. The facts of *Taylor* are similar to those of *Dunaway*. *Id.*Based on an unsubstantiated tip that Taylor was involved in a robbery, and which did not amount to probable cause, the police arrested Taylor without a warrant, brought him to the station, and read him his *Miranda* warnings. *Id.* at 688–89. The defendant was then fingerprinted, given the *Miranda* warnings a second time, questioned, and subjected to a line-up. *Id.* at 689. Although the victims could not identify Taylor as the robber, the police were able to match his fingerprints to those left at the crime scene, after which the police confronted Taylor with this development. *Id.* After briefly visiting with his girlfriend and another friend, the defendant signed a form waiving his *Miranda* rights and made a written confession, occurring approximately six hours after he was illegally arrested. *Id.* at 689, 691.

[105] *See id.* at 691–93.

[106] *See id.* at 691–92.

[107] *Id.* at 691–92 & n.1.

would be that this visit had just the opposite effect."[108]

In addition, the Court rejected the narrow view of "flagrant and purposeful police misconduct" advocated by the state. "The fact that the police did not physically abuse petitioner, or that the confession they obtained may have been 'voluntary' for purposes of the Fifth Amendment, does not cure the illegality of the initial arrest."[109] The police arrested the defendant, without probable cause, "in the hope that something would turn up."[110] Accordingly, the police misconduct was similar to that in *Brown* and *Dunaway*, in which the Court refused to find attenuation.[111] Similarly, the Court concluded that the taint of Taylor's illegal arrest was not purged when he confessed six hours later, without any significant intervening events.[112]

F. A Court Divided: Attempting to Reconcile Dunaway*,* Rawlings*, and* Taylor

The *Taylor* Court made no reference to *Rawlings* or the seemingly contradictory formulation of the *Brown* framework contained in that decision. However, parts of Justice O'Connor's dissenting opinion in *Taylor* suggest that there was disagreement among the members of the Court as to the proper formulation of the attenuation analysis.[113] Thus, the inconsistencies in the language of the framework between *Dunaway*, *Rawlings*, and *Taylor* can be explained by the make-up of the majority opinions in those cases. Furthermore, the different formulations of the *Brown* framework in these cases reveal the contrasting viewpoints among the Justices as to the importance of *Miranda* warnings in the attenuation analysis, as well as the importance that should be assigned to the degree of police misconduct present.

In *Dunaway*, Justices Marshall, Blackmun, Stewart, White, and Stevens joined in Justice Brennan's majority opinion, in which the Court articulated the attenuation analysis as a three-factor test with a threshold requirement of voluntariness.[114] Using this framework, the majority held that the taint of Dunaway's illegal

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[108] *Id.* at 691–92.

[109] *Id.* at 693.

[110] *Id.*

[111] *See supra* text accompanying notes 76, 88 (discussing *Brown* and *Dunaway*, respectively).

[112] *See Taylor*, 457 U.S. at 691, 694.

[113] *See infra* note 123 and accompanying text.

[114] *See* Dunaway v. New York, 442 U.S. 200, 217 (1979).

arrest had not been purged from his confession, therefore making it inadmissible at trial.[115] Chief Justice Burger joined in the dissenting opinion authored by Justice Rehnquist, which argued that even if Dunaway had been "seized" by the police for Fourth Amendment purposes, his confession was sufficiently attenuated from this seizure.[116] While the dissent acknowledged that voluntariness was a threshold requirement, it also characterized the issuance of *Miranda* warnings as an "important factor."[117]

> Moreover, Justice Rehnquist's dissenting opinion contended that the [*Brown*] Court did not assign equal weight to each of these factors. Given the deterrent purposes of the exclusionary rule, the "purpose and flagrancy" of the police conduct is, in my view, the most important factor. Where police have acted in good faith and not in a flagrant manner, I would require no more than that proper *Miranda* warnings be given and that the statement be voluntary within the meaning of the Fifth Amendment.[118]

In the dissent's view, the attenuation analysis should focus on the police misconduct at issue, since the exclusionary rule was designed to deter police misconduct.[119]

In *Taylor*, which characterized the attenuation analysis using the same framework as *Dunaway*, five of the Justices who formed the majority opinion in *Dunaway* similarly comprised the majority opinion in *Taylor*.[120] Likewise, Chief Justice Burger and Justice Rehnquist, the dissenters in *Dunaway*, joined Justices O'Connor and Powell in *Taylor*'s dissenting opinion, authored by Justice

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[115] *Id.* at 218–19.

[116] *Id.* at 225 (Rehnquist, J., dissenting). The dissent also argued that Dunaway was not illegally seized in the first place. *Id.*

[117] *Id.* at 226 (quoting Brown v. Illinois, 422 U.S. 590, 603 (1975)) (internal quotation marks omitted).

[118] *Dunaway*, 442 U.S. at 226 (Rehnquist, J., dissenting) (citing *Brown*, 422 U.S. at 612 (Powell, J., concurring in part)). Justice Powell did not take part in deciding *Dunaway*. However, his concurrence in *Brown* suggests that he likely would have agreed with Justice Rehnquist's dissent. *See* Alan C. Yarcusko, Note, Brown *to* Payton *to* Harris*: A Fourth Amendment Double Play by the Supreme Court*, 43 CASE W. RES. L. REV. 253, 272 (1992) ("In Powell's view, therefore, the 'flagrancy' prong of the majority's three-part test was the determinative factor in an attenuation analysis.").

[119] This viewpoint ignores the overall purpose of the attenuation analysis: to ensure that the statement was "sufficiently an act of free will." *Brown*, 422 U.S. at 602 (quoting Wong Sun v. United States, 371 U.S. 471, 486 (1963)) (internal quotation marks omitted). The nature of the police misconduct is merely one factor in that analysis.

[120] Those five Justices were Brennan, Marshall, Blackmun, White, and Stevens. In the time between *Dunaway* and *Taylor*, the sixth vote on *Dunaway*, Justice Stewart, was replaced by Justice O'Connor, who wrote the dissent in *Taylor*.

O'Connor.[121] Like the dissent in *Dunaway*, the *Taylor* dissent noted that the *Brown* Court had described the issuance of *Miranda* warnings as an "important factor."[122] Accordingly, the dissent argued that the Court should not only consider the issuance of *Miranda* warnings *in conjunction with* the other three factors, as opposed to as just a threshold issue, but it also implied that the Court should give the *Miranda* factor substantial weight in the analysis.[123]

Chief Justice Burger and Justice Rehnquist, who had dissented in *Dunaway* and *Taylor*, joined Justice Powell, who had dissented in *Taylor* and had not taken part in *Dunaway*, along with Justices Stevens and Blackmun to form the majority in *Rawlings*.[124] The majority opinion presented the attenuation analysis as a four-factor test, noting that the issuance of *Miranda* warnings was an important factor.[125] The majority also minimized the impact of the short temporal proximity between the detention[126] and the confession by considering the context of the detention and concluding that the "congenial atmosphere" outweighed the short time period.[127] In addition, the majority noted that "the conduct of

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[121] *See* Taylor v. Alabama, 457 U.S. 687, 694 (1982).

[122] *Id.* at 697, 699 (O'Connor, J., dissenting) (quoting *Brown*, 422 U.S. at 603) (internal quotation marks omitted).

[123] *See Taylor*, 457 U.S. at 698–99 (O'Connor, J., dissenting) (noting that the defendant was given his *Miranda* warnings on three separate occasions before he confessed). Based on the issuance of *Miranda* warnings three separate times, the intervening events noted by the trial court, and the lack of flagrant police misconduct, the dissent concluded that the state had met its burden in demonstrating that the taint of the illegal arrest had been purged. *Id.* at 699–701.

[124] Justice Rehnquist authored the majority opinion. *See* Rawlings v. Kentucky, 448 U.S. 98, 100 (1980). Justices Brennan and Marshall, who authored the majority opinions in *Dunaway* and *Taylor*, respectively, both dissented in *Rawlings*, with Justice Marshall authoring the dissenting opinion. *See id.* at 114. Justice Marshall's dissent argued that the proper disposition was to remand the case back to the trial court to develop the factual record and conduct the attenuation analysis. *See id.* at 120 (Marshall, J., dissenting). The dissenters also disagreed with the majority's conclusion that the taint of the detention had been purged from the defendant's confession:

> [Rawlings's] admissions, far from being "spontaneous," were made in response to Vanessa Cox's demand that [Rawlings] "take what was his." In turn, it is plain that her statement was the direct product of the illegal search of her purse. And that search was made possible only because the police refused to let anyone in the house depart unless they "consented" to a body search; that detention the Court has assumed was illegal. Under these circumstances [Rawlings's] admissions were obviously the fruit of the illegal detention and should have been suppressed.

Id. (citations omitted).

[125] *Id.* at 107 (majority opinion) (citing *Brown*, 422 U.S. at 603–04).

[126] The majority assumed, without deciding, that the defendant's detention in the house, while the police waited for a search warrant, was unconstitutional. *Rawlings*, 448 U.S. at 106.

[127] *Id.* at 108; *see also supra* note 97 (discussing the Court's analysis of the temporal

the police here does not rise to the level of conscious or flagrant misconduct requiring prophylactic exclusion of [the defendant]'s statements."[128] After weighing the four factors, the majority concluded that the defendant's inculpatory statements "were acts of free will unaffected by any illegality in the initial detention."[129]

Clearly, the contrasting articulations of the *Brown* framework in *Rawlings* compared to *Dunaway* and *Taylor* can best be explained by the make-up of the majority and dissenting factions on the Court. One segment of the Court, comprised of Chief Justice Burger and Justices Rehnquist and Powell, viewed the issuance of *Miranda* warnings as an important factor that should be weighed alongside the other factors in the attenuation analysis, as opposed to merely a threshold inquiry. Moreover, these Justices viewed police misconduct as the most decisive factor in the analysis. When the misconduct at issue is not egregious, the deterrent value of the exclusionary rule is low, and thus the exclusionary rule should not be applied. Accordingly, these Justices almost appear to adopt a presumption of attenuation in cases that lack flagrant police misconduct.

The other viewpoint, represented by Justices Brennan and Marshall, conceives of the *Brown* framework as a threshold voluntariness inquiry, followed by a three-factor balancing test. Neither the issuance of *Miranda* warnings nor a lack of flagrant police misconduct shifts the burden from the prosecution to demonstrate attenuation. Unless the prosecution can adequately demonstrate attenuation, the evidence will be excluded. Intervening circumstances are those that make a defendant's confession more likely to be the result of his own free will, and whether those types of circumstances exist is closely scrutinized.

In *Dunaway* and *Taylor*, the majority opinions represented the viewpoint of Justices Marshall and Brennan, while the majority opinion in *Rawlings* represented the viewpoint of Chief Justice Burger and Justices Rehnquist and Powell. Consistent with these differing formulations, the majority of the Court found attenuation in *Rawlings*, but did not find attenuation in either *Dunaway* or

proximity factor in *Rawlings*).

[128] *Rawlings*, 448 U.S. at 110. This observation is consistent with Justice Rehnquist's dissent in *Dunaway*, which focused on the deterrent purpose of the exclusionary rule. Dunaway v. New York, 442 U.S. 200, 226 (1979) (Rehnquist, J., dissenting).

[129] *Rawlings*, 448 U.S. at 110. *Compare id.* (finding attenuation), *with Dunaway*, 442 U.S. at 219 (finding no attenuation), *and* Taylor v. Alabama, 457 U.S. 687, 694 (1982) (finding no attenuation).

Taylor. This illustrates the key role that the articulation of the *Brown* framework played in the outcomes of these cases.

G. Kaupp v. Texas

The most recent Supreme Court decision on attenuation, *Kaupp v. Texas*, does little to clear up the existing confusion as to the proper formulation of the *Brown* framework. The decision was surprisingly unanimous,[130] likely because of the extremely egregious nature of the facts, especially the police misconduct involved.[131] After disagreeing with the Texas State Court of Appeals and finding that Kaupp had indeed been arrested before he was taken to the police station,[132] the Court seemed to have little difficulty concluding that his subsequent confession was inadmissible because the taint of the unlawful arrest had not been purged.[133]

In delineating the attenuation framework, the Court did not mention the threshold voluntariness requirement, and instead presented the test as a four-factor inquiry.[134] The Court found that only one of the factors, the issuance of *Miranda* warnings, weighed in favor of attenuation, and then recognized its prior jurisprudence that *Miranda* warnings alone are not enough.[135] Since the remaining factors of temporal proximity,[136] intervening circumstances,[137] and police misconduct[138] all weighed against attenuation, the Court held that the taint of the illegal arrest had not been purged from Kaupp's confession and thus the confession

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[130] Kaupp v. Texas, 538 U.S. 626, 627 (2003) (per curiam). Only three of the Justices who had decided *Taylor*—now-Chief Justice Rehnquist and Justices Stevens and O'Connor—were still on the Court when *Kaupp* was decided in 2003.

[131] *See id.* at 627–29.

[132] *See id.* at 629–32.

[133] *See id.* at 633.

[134] *Id.* ("Relevant considerations include observance of *Miranda*, 'the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct.'" (quoting Brown v. Illinois, 422 U.S. 590, 603–04 (1975))).

[135] *Kaupp*, 538 U.S. at 633 (citing Taylor v. Alabama, 457 U.S. 687, 699 (1982) (O'Connor, J., dissenting); *Brown*, 422 U.S. at 603).

[136] The Court found that "[no] substantial time passed" between the defendant's illegal arrest at his house and his confession ten to fifteen minutes into his interrogation at the police station. *Kaupp*, 538 U.S. at 633.

[137] The Court also found that no intervening event had occurred between the illegal arrest and the confession, and also noted that the defendant had "remained in his partially clothed state in the physical custody of a number of officers" during this time period. *Id.*

[138] While the Court did not explicitly state that the police conduct was flagrant or purposeful, it noted that at least some of the officers involved in the arrest knew that they did not have probable cause to arrest the defendant. *Id.*

should have been suppressed.[139]

III. THE APPLICATION OF *BROWN* IN LOWER FEDERAL COURTS

A. Articulations of the Attenuation Framework

Despite the Supreme Court's contradictory explication of the attenuation framework in the decades since *Brown*, the lower federal courts have been relatively consistent in applying the *Dunaway* formulation of the framework—that is, the voluntariness threshold requirement and the three-part causal connection test—to cases involving illegal arrests.[140] However, the federal courts have often reverted to the four-factor framework in deciding cases that involve unconstitutional police conduct other than an arrest.[141] Before delving into the differing articulations of the attenuation analysis among the lower courts in the next section, this section explains how the way in which the deciding court situates the *Miranda* inquiry in the overall analysis significantly affects the conclusion the court reaches with respect to attenuation.

1. The Role of the *Miranda* Warnings

The way the lower court articulates the *Brown* framework is critical because it determines what weight the *Miranda* warnings are given in the analysis. For example, if the court follows the framework described in *Dunaway* and reaffirmed in *Taylor*, the *Miranda* warnings are only relevant to the threshold inquiry of whether the statement was made voluntarily for Fifth Amendment purposes. After the threshold requirement has been met, the court then analyzes the three *Brown* factors—temporal proximity, intervening circumstances, and police misconduct—to determine whether the taint of the initial illegality had been purged. Importantly, whether *Miranda* warnings were issued should not play any part in this analysis, having already been addressed in the

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[139] Technically, the Court remanded the case back to the Texas State Court of Appeals with orders to suppress the confession "[u]nless, on remand, the state can point to testimony undisclosed on the record before us, and weighty enough to carry the state's burden despite the clear force of the evidence shown," that the confession should not be suppressed under the attenuation doctrine. *Id.*

[140] *See, e.g.*, United States v. Reed, 349 F.3d 457, 464 (7th Cir. 2003); United States v. Ricardo D., 912 F.2d 337, 343 (9th Cir. 1990); United States v. Butts, 704 F.2d 701, 705 (3d Cir. 1983); United States v. Johnson, 626 F.2d 753, 758–59 (9th Cir. 1980); United States v. Perez-Esparza, 609 F.2d 1284, 1289 (9th Cir. 1979).

[141] *See, e.g.*, United States v. Riesselman, 646 F.3d 1072, 1080–81 (8th Cir. 2011).

threshold inquiry.

If the lower court articulates the *Brown* framework as a four-factor test—considering the *Miranda* warnings in conjunction with temporal proximity, intervening circumstances, and police misconduct—the court will in effect be giving more weight to the *Miranda* factor in the attenuation analysis. For example, in a case where there were no intervening circumstances and the temporal proximity was short, but the police misconduct was not flagrant or purposeful, including the *Miranda* factor as part of the balancing test is more likely to result in a finding of attenuation because two out of the four factors weigh in favor of such a conclusion.[142] Using the same factual scenario, if the *Miranda* warnings were limited to the threshold voluntariness inquiry, a court would likely find that the taint of the illegality had not been purged because two of the three factors—short temporal proximity and lack of intervening circumstances—weigh against attenuation.[143]

2. The Application of *Brown* Beyond Illegal Arrests

While the facts of *Brown* involved an illegal arrest and a subsequent confession,[144] the Supreme Court announced a framework for analysis that was rather broad. Consequently, the framework has been applied by the lower federal courts in analyzing attenuation where the unlawful police conduct was not an illegal arrest. For example, the courts have applied the *Brown* factors, in some form or other, in cases involving unlawful investigatory stops,[145] illegal searches,[146] and unlawful entries onto property.[147] Furthermore, courts have applied the *Brown* factors to cases in which the unlawful police conduct results in the defendant giving consent to search, as opposed to or in addition to an inculpatory statement.[148] The analysis becomes even more complicated when the police commit more than one unlawful act—such as an illegal search and then an illegal arrest—after which the

[142] The conclusion would also be influenced by the weight the court gives to the police misconduct factor. *See* discussion *infra* Part III.B.

[143] *See, e.g.*, *Ricardo*, 912 F.2d at 343; *Johnson*, 626 F.2d at 758–59; *Perez-Esparza*, 609 F.2d at 1289.

[144] Brown actually made two separate inculpatory statements. *See supra* notes 47, 53.

[145] *See, e.g.*, United States v. Peters, 10 F.3d 1517 (10th Cir. 1993).

[146] *See, e.g.*, United States v. Shetler, 665 F.3d 1150 (9th Cir. 2011); *Riesselman*, 646 F.3d at 1080–81; United States v. Fazio, 914 F.2d 950 (7th Cir. 1990).

[147] *See, e.g.*, United States v. Conrad, 673 F.3d 728 (7th Cir. 2012).

[148] *See, e.g.*, United States v. Maez, 872 F.2d 1444 (10th Cir. 1989).

suspect makes inculpatory statements.[149] Additional complications arise when there is unlawful police conduct followed by multiple confessions.[150]

The application of the *Brown* framework to multiple factual scenarios—beyond a confession made subsequent to an illegal arrest—can present problems with respect to the fit of the analysis. Because *Brown* involved a confession made subsequent to an illegal arrest, the Court included the *Miranda* warnings as part of the analysis.[151] However, suspects who are not subjected to custodial interrogation—that is, they are not in custody and/or they are not interrogated—do not have to be read their *Miranda* warnings.[152] Therefore, in cases involving illegal searches, where the defendant was not taken into custody, applying the threshold *Miranda* requirement would seem inappropriate. Accordingly, the lower federal courts usually frame the analysis differently depending on what type of unlawful police conduct is involved. Generally speaking, the courts usually present the attenuation analysis as a three-factor test with a threshold requirement for illegal arrest cases.[153] In contrast, the courts are split over how to frame the attenuation analysis in illegal search cases: some use the three-factor test with the threshold requirement, whereas others use a four-factor test with no threshold inquiry.[154]

The different conceptualizations of the attenuation framework across the lower federal courts mean that the issuance of *Miranda*

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[149] *See, e.g.*, United States v. Gillespie, 650 F.2d 127 (7th Cir. 1981).

[150] *See, e.g.*, United States v. Patino, 862 F.2d 128 (7th Cir. 1988); United States v. Johnson, 626 F.2d 753 (9th Cir. 1980).

[151] *Miranda v. Arizona* held that statements made during custodial interrogation are not admissible unless the suspect is made aware of his rights under the Fifth Amendment, which is accomplished through the issuance of *Miranda* warnings. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[152] *See id.*

[153] *See, e.g.*, United States v. Reed, 349 F.3d 457, 464 (7th Cir. 2003); United States v. Ricardo D., 912 F.2d 337, 343 (9th Cir. 1990); United States v. Butts, 704 F.2d 701, 705 (3d Cir. 1983); *Johnson*, 626 F.2d at 758–59; United States v. Perez-Esparza, 609 F.2d 1284, 1289 (9th Cir. 1979).

[154] *Compare Patino*, 862 F.2d at 132 (applying threshold requirement and three-factor test to illegal search case), *with* United States v. Riesselman, 646 F.3d 1072, 1080–81 (8th Cir. 2011) (applying four-factor test to illegal search case). With one exception, the cases are silent as to any recognized difference between the framework for an illegal arrest case and an illegal search case. The exception is *United States v. Shetler*, in which the Ninth Circuit acknowledged that "'[t]he analysis that applies to illegal detentions differs from that applied to illegal searches.' . . . [T]here are at least two additional relevant considerations when a confession follows an illegal search rather than an illegal detention." United States v. Shetler, 665 F.3d 1150, 1157 (9th Cir. 2011) (citations omitted) (quoting United States v. Crawford, 372 F.3d 1048, 1054 (9th Cir. 2004)).

warnings carries different weight depending on how the court applies it in the analysis.[155] For example, in *United States v. Riesselman*, the court considered all four attenuation factors together and found that the taint of the illegal search had been purged.[156] The Eighth Circuit found that the defendant had received *Miranda* warnings two separate times between the illegal search and his subsequent confession, which "tend[ed] to indicate the voluntariness of Riesselman's statements."[157] In contradistinction, the Third Circuit held that the taint of the defendant's illegal arrest had not been purged, despite the issuance of *Miranda* warnings, because none of the three factors weighed in favor of attenuation: the defendant confessed less than four hours after being arrested, without probable cause, and no intervening events took place.[158] The fact that the defendant had been read his *Miranda* warnings was only relevant insofar as the threshold voluntariness requirement had been met.[159]

The differing formulations of the attenuation framework are also problematic because the lower federal courts often cite to other cases in support of their conclusions without identifying whether the cited cases involved an illegal search or an illegal arrest. In other words, the courts use prior cases interchangeably, without regard to whether the previous case concerned the same type of unconstitutional police conduct.[160]

B. The Role of the Police Misconduct Factor in Attenuation Analyses

Because of the inconsistencies regarding how *Miranda* warnings should be used as a factor in the analysis,[161] the minimal utility of the temporal proximity factor,[162] and the tendency of courts to

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[155] *See supra* Part III.A.1.

[156] *See Riesselman*, 646 F.3d at 1080–81.

[157] *Id.* at 1080.

[158] *See Butts*, 704 F.2d at 705.

[159] *See id.*

[160] For example, in *United States v. Fazio*, the Seventh Circuit analyzed whether the defendant's confession was sufficiently attenuated from the illegal search of his restaurant; the defendant was not taken into custody until after he confessed. United States v. Fazio, 914 F.2d 950, 956–57 (7th Cir. 1990). Later, in *United States v. Reed*, the Ninth Circuit cited an example of an intervening circumstance from *Fazio* while considering whether the taint of Reed's illegal *arrest* was sufficiently purged from his confession. United States v. Reed, 349 F.3d 457, 464 (7th Cir. 2003). Notably, the *Reed* court incorrectly characterized *Fazio* as an illegal arrest case. *Id.*

[161] *See supra* Part III.A.1.

[162] *See* LAFAVE ET AL., supra note 6, at § 11.4(b) (noting the "nonutility" of the temporal proximity factor); *see also* Dunaway v. New York, 442 U.S. 200, 220 (1979) (Stevens, J.,

consider temporal proximity and intervening circumstances together,[163] the final factor—the purpose and flagrancy of the police misconduct—can have a significant impact on the outcome of the court's attenuation analysis. There are essentially two ways the lower federal courts have come to view the police misconduct factor: broadly or narrowly. Courts that interpret the police misconduct factor narrowly tend to emphasize that it is the most important consideration in the analysis, reasoning that the purpose behind the exclusionary rule is to deter police misconduct.[164] Courts that interpret the police misconduct factor narrowly are more likely to find attenuation.[165] Conversely, courts that take a broader view of police misconduct are more likely to hold that the taint of the illegality has not been purged.[166] Courts that take this broader view tend to minimize the importance of the police misconduct factor in the analysis, instead focusing on whether there were intervening circumstances between the unlawful police conduct and the confession.[167] The next section explains and illustrates the contrasting approaches of the various lower federal courts.

1. Narrow View of Police Misconduct

The narrow interpretation of the police misconduct factor is embodied in Justice Rehnquist's dissent in *Dunaway*.[168] Courts that subscribe to this interpretation, including the Seventh Circuit, emphasize that the flagrancy and purposefulness of the police misconduct is the most important factor in the analysis, and cite to the *Brown* Court's inclusion of the word "particularly" before enumerating that factor.[169] In the words of the Seventh Circuit:

> This factor is "particularly" important because it is tied to the rationale of the exclusionary rule itself. Because the primary purpose of the exclusionary rule is to discourage police misconduct, application of the rule does not serve this deterrent function when the police action, although erroneous, was not undertaken in an effort to benefit the

concurring) ("The temporal relationship between the arrest and the confession may be an ambiguous factor.").

163 *See, e.g.*, *Reed*, 349 F.3d at 464.

164 *See* discussion *infra* Part III.B.1.

165 *See* discussion *infra* Part III.B.1.

166 *See* discussion *infra* Part III.B.2.

167 *See* discussion *infra* Part III.B.2.

168 *See* Dunaway v. New York, 442 U.S. 200, 226 (1979) (Rehnquist, J., dissenting).

169 *See, e.g.*, United States v. Fazio, 914 F.2d 950, 958 (7th Cir. 1990).

police at the expense of the suspect's protected rights.[170]

The Eighth Circuit has adopted a similar view of the police misconduct factor: "The purpose and flagrancy of the official misconduct is considered the most important factor because it is directly tied to the purpose of the exclusionary rule—deterring police misconduct."[171] Accordingly, the Eighth Circuit's conception of what constitutes flagrant or purposeful police misconduct is rather narrow:

> Courts have found purposeful and flagrant conduct where: (1) the impropriety of the official's misconduct was obvious or the official knew, at the time, that his conduct was likely unconstitutional but engaged in it nevertheless; and (2) the misconduct was investigatory in design and purpose and executed "in the hope that something might turn up."[172]

Courts that emphasize the importance of the police misconduct factor are less likely to find attenuation when the police misconduct is not particularly flagrant or purposeful, because the deterrent value of the exclusionary rule is not served in these situations.[173] Consistent with the viewpoint represented by Chief Justice Burger and Justices Rehnquist and Powell, these courts ignore the true purpose of an attenuation analysis, which is to ensure that the defendant's decision to confess was an act of free will, and instead reframe the analysis in terms of whether the police deterrent purpose of the exclusionary rule is served by finding a lack of attenuation.[174]

2. Broad View of Police Misconduct

The broad interpretation of the police misconduct factor is well represented in cases from the Ninth Circuit that analyze attenuation after an illegal arrest. In general, the Ninth Circuit has examined the purpose behind each of the *Brown* factors in order to determine how the factors should be applied.[175] The court uses the three factors to analyze "the degree of causal remoteness between the illegal detention and the evidence obtained from the

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[170] *Id.* (footnote omitted).

[171] United States v. Simpson, 439 F.3d 490, 496 (8th Cir. 2006).

[172] *Id.* (quoting Brown v. Illinois, 422 U.S. 590, 605 (1975)).

[173] United States v. Faulkner, 636 F.3d 1009, 1016–17 (2011); *Simpson*, 439 U.S. at 496–97.

[174] *See Simpson*, 439 U.S. at 496; *Fazio*, 914 F.2d at 958.

[175] *See* United States v. Johnson, 626 F.2d 753, 758 (9th Cir. 1980); *see also* United States v. Perez-Esparza, 609 F.2d 1284, 1289–90 (9th Cir. 1979) (exploring each factor in depth).

defendant."[176] With respect to the police misconduct factor, the Ninth Circuit noted one possible interpretation, which was advanced by Justice Rehnquist in his dissenting opinion in *Dunaway*: "[The factor] could arguably be viewed as a broad general factor utilized to assess whether the flagrancy of police misconduct justifies the exclusion of the evidence in light of the deterrence rationale of the exclusionary rule."[177] However, the Ninth Circuit emphasized that the Supreme Court has rejected such an interpretation and instead appears to apply the police misconduct factor in the same manner as it does the other two factors—to assess the causal connection between the illegal arrest and the confession.[178]

Because the Ninth Circuit looks at the causal connection between the police misconduct and the suspect's confession—as opposed to analyzing whether excluding the confession would vindicate the purpose of the exclusionary rule by deterring future police misconduct—this factor becomes less important in the overall analysis if the other two factors indicate a lack of attenuation. In support of this view, the Ninth Circuit has held that when the temporal proximity and intervening circumstances factors establish "a close causal connection" between the illegal arrest and the defendant's statements,[179] this "requires the conclusion that the statements were obtained by exploitation of the arrest."[180] The flagrancy of the Fourth Amendment violation—or lack thereof—is not particularly important to the analysis under those circumstances.[181] For example, in *United States v. Johnson*, the Ninth Circuit concluded that the police misconduct at issue, although not especially flagrant, was not an important consideration in the attenuation analysis because the very close temporal proximity—ten minutes—between the illegal arrest and the statements, coupled with the lack of any intervening events, mandated the conclusion that the taint of the illegal arrest had not been purged.[182]

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[176] *Johnson*, 626 F.2d at 758.

[177] *Id.* (citations omitted).

[178] *Id.* ("*Dunaway* repeatedly emphasize[d] that it is the 'causal connection' that is the relevant inquiry in making the attenuation determination.").

[179] United States v. Ricardo D., 912 F.2d 337, 343 (9th Cir. 1990). Obviously, a short temporal proximity and a lack of any intervening circumstances between the illegal arrest and the statements would most strongly support a close causal connection.

[180] *Id.*

[181] *See id.*

[182] *Johnson*, 626 F.2d at 758–59. The court further concluded that a second statement,

The Ninth Circuit cites to the Supreme Court's decision in *Dunaway* in support of its position that the nature of the police misconduct is not particularly important when there is a close temporal proximity and a lack of intervening circumstances between a defendant's illegal arrest and his confession.[183] While acknowledging that the original language in *Brown* suggested that the police misconduct factor was "'particularly' important,"[184] the Ninth Circuit has highlighted that "[t]he Court in *Dunaway* gave short shrift to the 'purpose and flagrancy' factor emphasized in *Brown*."[185] This is in contrast to the Seventh Circuit, which focuses on the description of the police misconduct factor in *Brown* to support the view that this factor is the most important consideration in the analysis.[186]

IV. RECOMMENDATIONS

At its core, the attenuation doctrine—as introduced in *Wong Sun v. United States* and developed in *Brown v. Illinois*—is about making sure that any confession the police obtain from a suspect is "sufficiently an act of free will to purge the primary taint" of the unconstitutional conduct that enabled the police to question the suspect in the first place.[187] When the courts minimize the importance of the police misconduct factor or overemphasize the importance that *Miranda* warnings have on voluntariness, they

given at the police station an hour or so later, was also not attenuated from the illegal arrest and must therefore be suppressed. *Id.* However, this holding is called into question by the subsequent Supreme Court decision in *New York v. Harris*, since the reason the defendant's arrest was illegal in *Johnson* was because the police arrested him without a warrant in his home, in violation of *Payton v. New York*, 445 U.S. 573 (1980). In accordance with *Harris*, the court would have to decide whether the defendant's arrest was also unlawful because it was not based on probable cause, in which case the attenuation analysis was correctly applied. *See* New York v. Harris, 495 U.S. 14, 17 (1990). If there was probable cause for the defendant's arrest, then his first statement, which was made at his home, would still be excluded under *Harris*, but his later statement, at the police station, would likely be admissible unless the court concluded that it was a result of the defendant's earlier, inadmissible statement. *See id.*

[183] *Johnson*, 626 F.2d at 759. Of course, if the police misconduct was particularly flagrant or purposeful, the court would use this in support of its conclusion that the taint of the illegal arrest had not been purged. *See* United States v. Perez-Esparza, 609 F.2d 1284, 1289 (9th Cir. 1979). It is only when the misconduct is not particularly egregious or offensive that the court must characterize the factor as "not important" in order to justify its conclusion that attenuation has not occurred. *See Johnson*, 626 F.2d at 759.

[184] *Perez-Esparza*, 609 F.2d at 1289 (quoting Brown v. Illinois, 422 U.S. 590, 604 (1975)).

[185] *Perez-Esparza*, 609 F.2d at 1291.

[186] *See* discussion *supra* Part III.B.1.

[187] *Brown*, 422 U.S. at 602 (quoting Wong Sun v. United States, 371 U.S. 471, 486 (1963)) (internal quotation marks omitted).

undermine a legal doctrine that should be used to accomplish two goals: discouraging police misconduct in obtaining confessions and keeping false confessions from being admitted at trial.[188] The following section suggests modifications to the attenuation analysis in order to maximize the achievement of those goals.

A. The Appropriate Framework

The courts should use the framework originally conceived by the Supreme Court in *Brown* and reaffirmed in *Dunaway*: a voluntariness threshold requirement and a three-factor balancing test. The *Miranda* warnings should only be considered in the threshold inquiry; they should play no part in the assessment of temporal proximity, intervening circumstances, or police misconduct. Limiting this consideration to the threshold inquiry ensures that the importance of a suspect receiving *Miranda* warnings is not overblown: *Miranda* warnings are a necessary precondition for finding voluntariness, but they are certainly not *sufficient* for finding that a confession was sufficiently an act of the defendant's free will. Indeed, social science research has found that eighty percent of suspects waive their rights, which suggests that the compulsion to "cooperate" cannot be dispelled by *Miranda* warnings alone.[189] Coupled with the additional coercion present when the defendant is unlawfully detained, *Miranda* warnings are particularly unhelpful at purging the taint of an illegal arrest.

Limiting the consideration of the *Miranda* warnings factor to the threshold voluntariness inquiry will also ensure that the Supreme Court's message in *Brown* is specifically adhered to: the issuance of *Miranda* warnings, by themselves, cannot be enough to purge the

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[188] *See supra* notes 2–4 and accompanying text (noting that a confession is the most powerful type of evidence). Preventing the admission of false confessions will reduce the incidence of wrongful convictions, and thus this goal can be seen as an offshoot of the judicial integrity rationale for the exclusionary rule. False confessions and wrongful convictions also have broader societal consequences beyond those for the innocent defendants. *See* James R. Acker, *The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free*, 76 ALB. L. REV. 1629, 1631 (2012/2013) ("Wrongful convictions entail profound social costs in addition to the hardships borne by the unfortunate individuals who are erroneously adjudged guilty. When innocents are convicted, the guilty go free. Offenders thus remain capable of committing new crimes and exposing untold numbers of additional citizens to continuing risk of victimization. Public confidence in the administration of the criminal law suffers when justice miscarries. At some point, as cases mount and the attendant glare of publicity intensifies, the perceived legitimacy of the justice system and the involved actors is jeopardized. Associated monetary costs, paid from public coffers, represent yet another tangible social consequence of wrongful convictions." (footnotes omitted)).

[189] *See* Kassin et al., *supra* note 3, at 7.

taint of an illegal arrest. Once the *Miranda* warnings are excluded from the calculus, at least one of the other three factors must weigh in favor of attenuation in order for the confession to be admissible.

B. Broad View of Police Misconduct

Adopting a broad view of police misconduct is the best way to achieve the twin goals of deterring police misconduct and preventing wrongful convictions based on false confessions. Accordingly, the Ninth Circuit's conceptualization of police misconduct should be employed by other courts in conducting an attenuation analysis.[190] When the police misconduct is not particularly egregious, this factor should not be determinative, nor even particularly important, to the analysis. Even if the police do not act with the level of flagrancy or purposefulness as was present in *Brown*, the defendant has still been illegally arrested and subjected to interrogation; therefore, the absence of flagrant police misconduct does not necessarily lessen the compulsion to submit to interrogation in any meaningful way.[191] Instead, the court should consider the situation from the defendant's perspective by focusing on whether there were any intervening circumstances between the unlawful arrest and the confession that would purge the taint of the illegality and make the confession more likely to be the product of free will.

While the absence of flagrant or purposeful police misconduct should not weigh very heavily in favor of attenuation, the corollary proposition *should* hold true: flagrant, egregious, or purposeful police misconduct should create a presumption against attenuation. This is when the deterrent function of the exclusionary rule is most important. In addition, this type of police misconduct can be particularly coercive and thus is most likely to cause false confessions,[192] or at least confessions that were not sufficiently an act of free will.

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[190] *See* discussion *supra* Part III.B.2.

[191] *Cf.* Dunaway v. New York, 442 U.S. 200, 220 (1979) (Stevens, J., concurring) ("The flagrancy of the official misconduct is relevant, in my judgment, only insofar as it has a tendency to motivate the defendant.").

[192] *See* Leo et al., *supra* note 3, at 517 ("The primary cause of false confession is the interrogator's use of psychologically coercive interrogation techniques such as implicit or explicit promises of leniency in exchange for confession and threats of differential punishment in the absence of confession. Other coercive techniques include lengthy or incommunicado interrogation; depriving essential necessities such as food, sleep, water, or access to bathroom facilities; refusing to honor a suspect's request to terminate interrogation; and inducing extreme exhaustion and fatigue.").

In addition to a presumption against attenuation when the police misconduct is flagrant, egregious, or purposeful, the courts should expand their interpretation of what constitutes police misconduct in order to better represent the causal effect of police action on inducing confessions. Beyond the recognized examples of flagrant or purposeful police misconduct—investigatory arrests for questioning, without probable cause;[193] arrests conducted in a manner "calculated to cause surprise, fright, and confusion;"[194] and physical coercion[195]—the courts should also consider other types of police action as misconduct that weighs against attenuation. This type of "misconduct" should encompass deceptive police tactics that are most likely to produce false confessions, such as presenting the suspect with false evidence or telling the suspect he can go home if he confesses.[196] Although the Supreme Court has held that police deception does not automatically render a confession involuntary,[197] courts are starting to recognize the relationship between police deception and coercion.[198] While they may be constitutional, deceptive police tactics are specifically designed to overcome a suspect's denials by manipulating him psychologically.[199] It is in

[193] *See, e.g.*, Kaupp v. Texas, 538 U.S. 626, 630 (2003) (per curiam); Dunaway v. New York, 442 U.S. 200, 202 (1979); Brown v. Illinois, 422 U.S. 590, 605 (1975).

[194] *See, e.g.*, *Brown*, 422 U.S. at 605; United States v. Maez, 872 F.2d 1444, 1446–47 (10th Cir. 1989).

[195] *See, e.g.*, United States v. Jenkins, 938 F.2d 934, 942 (9th Cir. 1991) (holding confession was involuntary after defendant was beaten and threatened with death).

[196] *See* Kassin et al., *supra* note 3, at 14, 28. The Central Park Jogger case is a paradigmatic example of how these two tactics produce false confessions. *See generally* SARAH BURNS, THE CENTRAL PARK FIVE: A CHRONICLE OF A CITY WILDING 37–48, 51–56 (2011) (describing the interrogation techniques used on the suspects and explaining how these techniques can produce false confessions). In that case, five minority teenagers were convicted of raping and assaulting a young woman in Central Park, almost exclusively on the basis of their inculpatory statements. Bennett L. Gershman, *Misuse of Scientific Evidence by Prosecutors*, 28 OKLA. CITY U. L. REV. 17, 36 (2003). The five young men were later exonerated, and after a protracted legal battle, the City of New York recently agreed to pay them a total of $41 million in compensation. *See* People v. Wise, 752 N.Y.S.2d 837, 850 (Sup. Ct. 2002); Benjamin Weiser, *Settlement Approved in '89 Jogger Case; City Deflects Blame*, N.Y. TIMES, Sept. 6, 2014, at A17. Unfortunately, there are still those who believe that the five men were at least partly responsible for the attack on the jogger, which illustrates the enduring effects of (false) confessions on public perceptions of guilt. *See* Margaret A. Berger, *False Confessions—Three Tales from New York*, 37 SW. L. REV. 1065, 1071 (2008).

[197] *See* Frazier v. Cupp, 394 U.S. 731, 739 (1969). *See also* Kassin et al., *supra* note 3, at 13 ("[*Frazier*] has been interpreted by police and the courts as a green light to deception.").

[198] *See, e.g.*, People v. Thomas, 8 N.E.3d 308, 313–14 (N.Y. 2014). *See generally* Dorothy Heyl, *The Limits of Deception: An End to the Use of Lies and Trickery in Custodial Interrogations to Elicit the "Truth"?*, 77 ALB. L. REV. 931 (2013/2014) (discussing the *Thomas* case and summarizing the United States Supreme Court's jurisprudence on the constitutionality of confessions with respect to voluntariness and deception).

[199] *See* Kassin et al., *supra* note 3, at 16–17.

these scenarios that the confession is undeniably obtained by exploiting the illegal arrest of the defendant. Accordingly, police tactics that undermine free will should be viewed as a type of police misconduct that weighs against attenuation.

V. CONCLUSION

In order to give full effect to the attenuation doctrine articulated in *Brown v. Illinois*, the lower federal courts must analyze cases using the proper framework from *Dunaway*, considering the issuance of *Miranda* warnings only as a threshold matter, and then moving on to the three-factor balancing test. The courts should adopt a broad view of police misconduct, including tactics that are likely to produce false confessions. A presumption against attenuation should be triggered when flagrant or purposeful police misconduct is involved, and in the absence of this kind of misconduct, the deciding court should focus on whether there were any intervening circumstances to purge the taint of the illegal arrest. Only by adopting all of these recommendations can the judicial system properly protect against the admission of false and improperly obtained confessions into evidence in criminal trials.