

2023

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Recommended Citation

Daniel B. Yeager, *A History of Fruit of the Poisonous Tree (1916-1942)*, 67 How. L.J. 51 (2023).
Available at: <https://scholarlycommons.law.cwsl.edu/fs/438>

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A History of Fruit of the Poisonous Tree (1916–1942)

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Abstract: This is a history of a little-known stage within an otherwise well-known area of criminal procedure. The subject, “fruit of the poisonous tree,” explains the exclusion from trial of evidence (the fruit) derived from unconstitutional police practices (the tree). The Supreme Court first deployed the metaphor in 1939; exclusion of fruits by any other name, however, dates to before the Court began reviewing state convictions. While academic interest in the 1963-to-present phase of fruits is keen, the first quarter of what is now a century of history is taken as given, described in only the most conclusory terms. The 1916–1942 era began with a recently expanded federal criminal law, followed by an expanded review of convictions in the Supreme Court, whose energies Prohibition would divert to other issues of enforcement. As a result, development of fruits doctrine was taken up by the lower federal courts, led by the Second Circuit, which in turn was led by Judge Learned Hand. As the first to articulate the admissibility of so-called derivative evidence (as in copies of illegally seized papers), Hand & Co. were ahead of their time, extending their insights to related matters (harmless error, standing), some of which remain undeveloped to this day (as in evidence derived from coerced confessions). Mostly, the Second Circuit manifested a sensibility toward fruits that is distinct from the wooden, causal, torts-based angle the Supreme Court would come to adopt.

* I thank William Aceves, Hannah Brenner-Johnson, Jessica Fink, and Orin Kerr, plus my writing groups of 2021–22 (Pooja Dadhanian, Pedro Gerson, Richard Oppong) and 2022–23 (Paul Gudel, Erin Sheley).

Introduction

The Supreme Court's exclusionary rule is a restitutionary remedy that prevents prosecutors from deriving adversarial gains from police wrongdoing.¹ Shot-through with exceptions,² the rule—where it still applies—excludes as “fruit of the poisonous tree” any evidence sufficiently traceable to, *inter alia*, illegal searches and seizures.³ In its original form, the rule was a purposely flexible device by which courts were to approach the admissibility of evidence said to have been discovered by way of unconstitutional state action.⁴

In the past half-century, however, the Court has nicked its approach from tort law,⁵ which locates responsible parties through judgments about conditions versus causes, which in turn are characterized as but-for versus proximate, and as dependent versus superseding.⁶ This torts approach to adjudging the relation between police wrongdoing and

1. See, e.g., Rohith V. Srinivas, *The Exclusionary Rule as Fourth Amendment Judicial Review*, 49 AM. CRIM. L. REV. 179, 213 (2012) (“[T]he exclusionary rule . . . functions as a sort of restitution to the extent that it forces the executive to disgorge the benefit that it gained by violating the Constitution.”); William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799, 850 (2000) (“The disgorgement framework does not capture all features of exclusion. It does, however, capture those that are most important.”); Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct*, 2000 B.Y.U. L. REV. 1443, 1443 (2000) (“Apart from its constitutional status, the exclusionary rule is nothing more than an instance of the common law remedy of restitution.”).

2. See generally 1 WAYNE R. LAFAVE, SEARCH & SEIZURE § 1.6(i) (6th ed. Dec. 2021 Update), Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011), Sharon L. Davies & Anna B. Scanlon, *Katz in the Age of Hudson v. Michigan: Some Thoughts on “Suppression as a Last Resort,”* 41 U.C. DAVIS L. REV. 1035, 1042–58 (2008), and Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should It Be?*, 10 OHIO ST. J. CRIM. L. 341, 343–48 (2013) (explaining how the rule became so porous).

3. See *United States v. Crews*, 445 U.S. 463, 471 (1980); Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1099–1100 (2011).

4. Cf. Albert Alschuler, *Regarding Re’s Revisionism: Notes on the Due Process Exclusionary Rule*, 127 HARV. L. REV. F. 302, 308 (2014) (concluding that proximate cause is whatever courts want to treat as a cause); George M. Dery III, *Allowing ‘Lawless Police Conduct’ in order to Forbid ‘Lawless Civilian Conduct’: The Court Further Erodes the Exclusionary Rule in Utah v. Strieff*, 44 HASTINGS CONST. L.Q. 393, 423–24 (2017) (stating the virtues of a flexible notion of proximate cause); Eric A. Johnson, *Dividing Risks: Toward a Determinate Test of Proximate Cause*, 2021 U. ILL. L. REV. 925, 932–34, 942, 945 (2021) (explaining that by focusing on foreseeability, proximate cause is a normative, not descriptive matter); Richard Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1953 (2014) (Fruits “analysis has become like proximate causation in tort law, such that whether a sufficient causal connection is found depends on normative considerations.”).

5. See David Gray, *A Spectacular Non Sequitur: The Supreme Court’s Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AM. CRIM. L. REV. 1, 41–42 (2013); *Utah v. Strieff*, 579 U.S. 232, 257–58 (2016) (Kagan, J., dissenting), citing W. P. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 312 (5th ed. 1984).

6. See generally Mario J. Rizzo & Frank S. Arnold, *Causal Apportionment in the Law of Torts: An Economic Theory*, 80 COLUM. L. REV. 1399 (1980).

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evidence has suffered a “hailstorm of criticism,”⁷ much of it justified.⁸ That criticism calls out the Court not so much for creating the three doctrinal boxes on which its admissibility rulings have come to depend, but for shoving ill-fitting cases into them.⁹ Those three boxes act as “exceptions to the exclusionary rule—the ‘independent source,’ ‘inevitable discovery,’ or ‘attenuation’ doctrines,”¹⁰ which either deny or negate any causal connection between police wrongdoing and evidence. In 2006, the Supreme Court added to those doctrinal boxes a judicial discussion on whether “the interest protected by the constitutional guarantee that has been violated would . . . be served by suppression of the evidence obtained.”¹¹ That went over no better with the legal academy.¹² When in 2016 the Court made clear that its doctrinal boxes remain intact,¹³ their fit to cases remained poor, and the criticism continued.¹⁴

The exclusionary rule’s use-ban on fruit of the poisonous tree comes with a canon dating back to before the Court began reviewing state convictions. While academic interest in the 1963-to-present phase of that canon is keen, the first quarter of what is now a 100-year history is taken as given, described in only the most conclusory terms. By burrowing down into that first quarter-century, this Article takes the position that a better approach to fruit of the poisonous tree can be found in cases of the United States Court of Appeals for the Second Circuit between 1916 and 1942.

Part I decodes the technical vocabulary of exclusion, undertaking the overdue task of identifying what, exactly, the fruit/tree metaphor signifies. Part II examines the evidentiary consequences of police wrongdoing from pre-prohibition to repeal, with an emphasis on decisions that began or ended in the Second Circuit, which made

7. *Crews v. United States*, 389 A.2d 277, 288 (D.C. 1978).

8. See generally Albert W. Alschuler, *The Exclusionary Rule and Causation: Hudson v. Michigan and Its Ancestors*, 93 IOWA L. REV. 1741 (2008).

9. See, e.g., 6 WAYNE R. LAFAVE, SEARCH & SEIZURE § 11.4(d) & n.41 (6th ed. Dec. 2021 Update) (describing *Utah v. Strieff* as “out of touch with reality”); *id.* at § 11.4(a) (*Hudson v. Michigan* “deserves a special niche in the Supreme Court’s pantheon of Fourth Amendment jurisprudence, as one would be hard-pressed to find another case with so many bogus arguments piled atop one another.”).

10. *United States v. Crews*, 445 U.S. 463, 469–70 & n.11 (1980); see also Kerr, *supra* note 3, at 1099 (providing additional doctrinal boxes pertinent to the exclusionary rule).

11. See *Hudson v. Michigan*, 547 U.S. 586, 593 (2006).

12. See 6 WAYNE R. LAFAVE, SEARCH & SEIZURE § 11.4(a) n.43 (6th ed. Sept. 2020 Update); Sharon L. Davies, *Some Reflections on the Implications of Hudson v. Michigan for the Law of Confessions*, 39 TEX. TECH L. REV. 1207, 1215–16 (2007); see generally Eric A. Johnson, *Causal Relevance in the Law of Search and Seizure*, 88 B.U. L. REV. 113 (2008); Laurin, *supra* note 2, at 715–16 nn.234–35.

13. See *Utah v. Strieff*, 579 U.S. 232, 238 (2016) (reciting three exceptions to the exclusionary rule).

14. See LAFAVE, *supra* note 9, at § 11.4(d) n.336.

still-unheralded headway on the scope of exclusion within the war on booze. Part III tracks the path of the exclusionary rule within Frank Carmine Nardone's seven-year wiretapping litigation in which the Second Circuit, on its third remand, read the Supreme Court's take on the rule as entailing judgments that are more moral than causal. Part IV places the Supreme Court's approach—which reverts to causative judgments—in opposition to the more open, less “scientific” approach that the Second Circuit pioneered. In sum, it is the controlling purpose of this Article to develop not a *theory* of fruits doctrine, but the historical background against which theorizing about fruits doctrine can take place.

I. The Basic Concoct of the Rule: What is a Fruit?

In 1939, the Supreme Court came up with “fruit of the poisonous tree”¹⁵ as a “figure of speech”¹⁶ to explain the in-court consequences of unconstitutional police practices. The “poisonous tree” part Justice Frankfurter likely came up with himself (though a credible rumor credits a Frankfurter clerk);¹⁷ the “fruit” part is a play on “fruits of crime,” a term that has long presumed that those who possess them do not do so innocently.¹⁸ Already a “time-worn metaphor” a half-century ago,¹⁹ this “famous,”²⁰ “felicitous,”²¹ “poetic”²² locution now conjures up over 35,000 cites when tapped into Westlaw. Yet apart from a generalized sense that some evidence derived from police wrongdoing is inadmissible at trial, the locution remains so open that it operates more as a folksy idiom than as a precise technical term.²³

15. Nardone v. United States, 308 U.S. 338, 341 (1939).

16. Oregon v. Elstad, 470 U.S. 298, 305–06 (1985).

17. See Orin Kerr (@orinkerr), Twitter (Mar. 3, 2021, 4:10), <https://twitter.com/OrinKerr/status/1367782569404555265>.

18. See State v. Simons, 17 N.H. 83, 88 (1845) (“So the law presumes against him who is in the possession of the fruits of crime recently after its commission, that he is its author.”); see also State v. Laundy, 103 Or. 441, 493–94 (1922) (arguing that “fruits of crime” can be searched for, seized, and admitted at trial). The earliest glimpse of “fruit” as a product of police wrongdoing may be in United States v. Maresca, 266 F. 713, where is the pincite? (S.D.N.Y. 1920) (“Detectives and the like, of course, regard their frauds as pious, and the law has used the fruits thereof time out of mind.”).

19. Harrison v. United States, 392 U.S. 219, 222 (1968).

20. United States v. Desist, 277 F. Supp. 690, 693 (S.D.N.Y. 1967).

21. Mark S. Bransdorfer, Note, *Miranda Right-to-Counsel Violations and the Fruit of the Poisonous Tree Doctrine*, 62 IND. L.J. 1061, 1069 (1987).

22. Sharon L. Davies, *The Penalty of Exclusion—A Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1299 n.118 (2000).

23. Commentators ran with the metaphor, perhaps a bit too far: “The poisonous character of the tree is generally recognized, . . . but our legal chemists are busily at work to perfect formulae which will ascertain whether the fruit is contaminated or fit for judicial consumption.” Nahum A. Bernstein, *Fruit of the Poisonous Tree—A Fresh Appraisal of the Civil Liberties Involved in Wire Tapping and Its Derivative Use*, 37 ILL. L. REV. 99, 100 (1942).

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It is clear enough that the metaphor means to separate tree from fruit. “A confession,” after all, “cannot be ‘fruit of the poisonous tree’ if the tree itself is not poisonous.”²⁴ What is unclear is which is the tree, which is the fruit.²⁵ Is the tree the constitutional wrong itself (as in an illegal search) and the fruit *all* evidence derived from the wrong (as in drugs found in the search plus a confession thereafter from the search victim)? Or is the tree in the example above the drugs found in the search and the fruit the confession, which somehow follows from discovery of the drugs?

In one of his many influential articles on confessions,²⁶ Professor Yale Kamisar gives his student, Professor Robert Pitler, partial credit for decoding the idiom.²⁷ Pitler posits both that “evidence *initially* obtained by virtue of the illicit conduct becomes the ‘poisonous tree,’”²⁸ and that “fruits” refers “to secondary evidence gleaned from illegally obtained primary evidence.”²⁹ On this account, an illegal search or seizure would be *neither* tree nor fruit. Earlier in the article, however, Pitler took the position that the “initially seized evidence . . . of some illicit governmental activity” is *both* “‘poisonous tree’” and “‘first generation fruit.’”³⁰

To clear things up, Kamisar credits only Pitler’s “terminology,” under which there are two types of fruits: “first generation” (as in the drugs

24. *Colorado v. Spring*, 479 U.S. 564, 571–72 (1987).

25. Some attempts to decode the locution leave the tree undefined. See, e.g., Lynn Adelman & Shelley Fite, *Exercising Judicial Power: A Response to the Wisconsin Supreme Court’s Critics*, 91 MARQ. L. REV. 425, 431 n.44 (2007) (“‘Fruit of the poisonous tree’ refers to evidence gathered with the aid of information obtained illegally.”); Joseph G. Casaccio, Note, *Illegally Acquired Information, Consent Search, and Tainted Fruit*, 87 COLUM. L. REV. 842, 844 n.20 (1987) (“The term ‘fruit of the poisonous tree’ refers to evidence obtained indirectly through the use of illegally acquired evidence or information.”); Michael A. Cantrell, *Constitutional Penumbras and Prophylactic Rights: The Right to Counsel and the “Fruit of the Poisonous Tree,”* 40 AM. J. CRIM. L. 111, 113 (2013) (“[A] compelled confession is inadmissible in evidence . . . and any evidential ‘fruit’ subsequently obtained from that confession is likewise suppressed.”). Some designate neither tree nor fruit. See, e.g., Quentin Burrows, Note, *Scowl Because You’re on Candid Camera: Privacy and Video Surveillance*, 31 VAL. U. L. REV. 1079, 1119 n.321 (1997) (“Fruit of the poisonous tree means that evidence which is spawned by or directly derived from an illegal search is generally inadmissible against the defendant because of its original taint.”).

26. See Yale Kamisar, *On the “Fruits” of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 942 & n.51 (1995).

27. *Id.*

28. Robert M. Pitler, *The Fruit of the Poisonous Tree Revisited and Shepardized*, 56 CAL. L. REV. 579, 581 (1968) (emphasis added); see also John Brunetti, *Criminal Procedure*, 48 SYRACUSE L. REV. 517, 520 n.10 (1998) (“The very use of the phrase ‘fruit of the poisonous tree’ denotes two typical types of evidence, the tree as primary evidence and the fruit as secondary evidence.”).

29. Pitler, *supra* note 28, at 581.

30. *Id.* at 579, 581, 588–89, 629. From then on, Pitler never uses the term “first generation fruit” or its synonym, “primary fruit.” Instead, he refers to “primary evidence,” and “first generation evidence,” usages that would make sense if for Pitler no item of evidence could be at once both primary and fruit. But for Pitler it can.

found in the illegal search) and “second generation” (as in the confession that follows discovery of the drugs).³¹ From there, Kamisar turns to Professors Wayne LaFave and Jerold Israel, who substitute for “first generation” fruits the words “direct or primary,” and for “second generation” fruits the words “secondary or derivative.”³² Joined on the hornbook by Professors Nancy King and Orin Kerr, LaFave and Israel continue to insist that the poisonous tree is the unconstitutional action itself and the fruit its byproducts, whatever their type.³³ Absent in their sensible reading is Pitler’s peculiar notion that evidentiary items could be both fruit and tree at once.

The Court has expended minimal effort on the grammar of its fruits metaphor. And whatever the Court has expended to that end is contradictory. At times, the Court takes the position that primary evidence is every bit a fruit as much as secondary evidence.³⁴ At other times, the Court takes the position that only secondary, not primary, evidence can be labeled a fruit.³⁵ Truest to the origins of the metaphor is that primary

31. Kamisar, *supra* note 26, at 942 n.51.

32. *Id.* (quoting 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 9.3(a), at 734 (1984)).

33. 3 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, ORIN S. KERR, CRIMINAL PROCEDURE § 9.3(a) (4th ed.) (Nov. 2021 Update) (“[T]he ‘poisonous tree’ can be an illegal arrest or search, illegal interrogation procedures or illegal identification practices.”). For a discussion of fruits of confessions taken contrary to the protocol of *Miranda*’s protection of the Fifth Amendment (which cannot exclude secondary fruits) and *Massiah*’s protection of the Sixth Amendment (which theoretically can), see generally Eve Brensike Primus, *Disentangling Miranda and Massiah: How To Revive the Sixth Amendment Right to Counsel as a Tool for Regulating Confession Law*, 97 BOSTON U.L. REV. 1085 (2017).

34. See, e.g., *Hemphill v. New York*, 142 S. Ct. 681, 692 (2022) (“Because the prophylactic exclusionary rule is a ‘deterrent sanction’ rather than a ‘substantive guarantee,’ the Court applied a balancing test to allow States to impeach defendants with the fruits of prior Fourth Amendment violations, even though the rule barred the admission of such fruits in the State’s case-in-chief.”); *Kansas v. Ventris*, 556 U.S. 586, 590–91 (2009) (“The Fourth Amendment . . . guarantees that no person shall be subjected to unreasonable searches or seizures, and says nothing about excluding their fruits from evidence”); *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) (“The purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits.”); *New Jersey v. T.L.O.*, 469 U.S. 325, 333 n.3 (1985) (“In holding that the search of T.L.O.’s purse did not violate the Fourth Amendment, we do not implicitly determine that the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities.”); *Williams v. United States*, 401 U.S. 646, 661 (1971) (Brennan, J., concurring) (“[W]e are presented in these cases with the question whether *Chimel* should be applied to require the exclusion at trial of evidence which is the fruit of a search”); *Kaiser v. New York*, 394 U.S. 280, 282–83 (1969) (“Since the wiretapping in this case occurred before *Katz* was decided and was accomplished without any intrusion into a constitutionally protected area of the petitioner, its fruits were not inadmissible under the exclusionary rule”); *Costello v. United States*, 365 U.S. 265, 280 (1961) (“[T]he ‘fruit of the poisonous tree’ doctrine excludes evidence obtained from or as a consequence of lawless official acts”).

35. See, e.g., *Utah v. Strieff*, 579 U.S. 232, 237 (2016) (“Under the Court’s precedents, the exclusionary rule encompasses both the ‘primary evidence obtained as a direct result of an illegal search or seizure’ and, relevant here, ‘evidence later discovered and found to be derivative of an illegality,’ the so-called ‘fruit of the poisonous tree.’”); *Hudson v. Michigan*, 547 U.S. 586, 607 (2006) (Breyer, J., dissenting) (“*Silverthorne* thus stands for the proposition that the exclusionary rule

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evidence *can* be a fruit. When Justice Frankfurter first introduced the term, he said only that once an accused “proves that a substantial portion of the case against him was a fruit of the poisonous tree,” it is up “to the Government to convince the trial court that its proof had an independent origin.”³⁶ Reference to “the case” is broad, drawing no distinction between primary and secondary evidence, thereby revealing both as classes of fruits, rendering the constitutional wrong the tree.³⁷ If we assume that Frankfurter’s subsequent reading of his own term is instructive, two decades later he reiterated that broad sense that *all* evidence traceable to the constitutional wrong is fruit, whether the evidence is primary or secondary, direct or indirect.³⁸

Even once we have reached agreement on the fruits vocabulary, the doctrine remains “complex and elusive.”³⁹ In structuring an approach to fruits, the Court has rejected two opposing theories: first, that exclusion is justified any time the evidence would not have been discovered “but for” the wrong; second, that the implications of police wrongdoing can be neutralized after-the-fact through, for example, promptly Mirandizing the suspect, who then provides an admissible oral version of the inadmissible tangible evidence.⁴⁰ In between those two rejected theories is the Court’s proximate-cause approach, which holds that but-for causation is a necessary but not sufficient condition of police responsibility for the discovery of evidence.⁴¹ Though the causal language within fruits may be

does not apply if the evidence in question (or the ‘fruits’ of that evidence) was obtained through a process unconnected with, and untainted by, the illegal search.”); *United States v. Patane*, 542 U.S. 630, 644 (2004) (“[I]t is true that the Court requires the exclusion of the physical fruit of actually coerced statements . . .”); *Segura v. United States*, 468 U.S. 796, 804 (1984) (“Under this Court’s holdings, the exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or ‘fruit of the poisonous tree.’”); *Nix v. Williams*, 467 U.S. 431, 441 (1984) (*Wong Sun* “extended the exclusionary rule to evidence that was the indirect product or ‘fruit’ of unlawful police conduct . . .”); *Alderman v. United States*, 394 U.S. 165, 201 (1969) (Fortas, J., concurring in part & dissenting in part) (“The defendant is entitled to suppression or exclusion from his trial of such illegally obtained information and its fruits.”).

36. *Nardone v. United States*, 308 U.S. 338, 341 (1939).

37. *But cf.* Francis A. Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213, 240 n.143 (1959) (noting that “fruits” originated in a case about derivative evidence).

38. *See Rios v. United States*, 364 U.S. 233, 237 (1960) (Frankfurter, J., dissenting) (“The Court asserts that there is no longer any logic in restricting . . . *Weeks* . . . to the fruits of federal seizures, for *Wolf* recognizes that state seizures may also encroach on . . . the Federal Constitution.”).

39. *Harrison v. United States*, 392 U.S. 219, 230 (1968) (White, J., dissenting).

40. *Brown v. Illinois*, 422 U.S. 590, 600–04 (1975). As late as 1966, but-for causation still had some support as a basis of exclusion. *See, e.g., Developments in the Law—Confessions: The “Fruit of the Poisonous Tree,”* 79 HARV. L. REV. 1024, 1025 (1966).

41. *See Hudson v. Michigan*, 547 U.S. 586, 592 (2006); *Powell v. Nevada*, 511 U.S. 79, 89 (1994) (Thomas, J., dissenting); *see also* Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 319–20 (2012); Merry C. Johnson, *Discovering Arrest Warrants During Illegal*

more metaphorical than within its torts origins,⁴² the idea is the same or at least “akin”:⁴³ of all operative variables that might have contributed to a consequence, some are less significant, less “proximate,” than others.⁴⁴ Those peripheral variables are *not* the proximate cause of the injury—here, the discovery of evidence—whereas the more significant variables *are* the proximate cause of the discovery of the evidence.⁴⁵ It makes good sense that all but one of the Court’s canonical fruits cases involve secondary fruits,⁴⁶ given that the causal relation of primary fruits to police wrongdoing is predictably easier to make out.⁴⁷

II. Evidentiary Consequences of Police Wrongdoing from Pre-Prohibition to Repeal

A. The Pre-Prohibition Era

The Supreme Court reviewed few criminal convictions until the 1920s.⁴⁸ As early as 1821, the Court reviewed *state* convictions,⁴⁹ but until after the Civil War, “only those objected to as *ex post facto* and bills of attainder.”⁵⁰ Even after the Civil War amendments, application of the Fourteenth Amendment produced little activity in the Supreme Court until 1932, when a stream of Due Process cases began to supplement

Traffic Stops: The Lower Courts’ Wrong Turn in the Exclusionary Rule Attenuation Analysis, 85 Miss. L.J. 225, 234–35 (2016).

42. See Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 478 n.75 (2009) (The Court’s “use of these metaphors apparently has led it to no different results than it would have reached if it had used more conventional causal language.”); Albert W. Alschuler, *The Exclusionary Rule and Causation: Hudson v. Michigan and Its Ancestors*, 93 IOWA L. REV. 1741, 1743 (2008) (exclusion’s emphasis on cause is “examined at length in classes on torts and substantive criminal law,” yet “[f]or no apparent reason, . . . the vocabulary is different”).

43. Johnson, *supra* note 12, at 115.

44. *E.g.*, *Kinderavich v. Palmer*, 15 A.2d 83, 86–89 (Conn. 1940) (distinguishing, *inter alia*, causes from conditions).

45. See *Utah v. Strieff*, 579 U.S. 232, 257–58 (2016) (Kagan, J., dissenting); *Oregon v. Elstad*, 470 U.S. 298, 333 (1985) (Brennan, J., dissenting).

46. *Hudson*, 547 U.S. at 588 (where Detroit police officers found rock cocaine in a residence that had been entered on the authority of a search warrant that had been executed with insufficient notice to the occupant).

47. *E.g.*, *Payton v. New York*, 445 U.S. 573, 576–77 (1980) (suppressing a shell casing found on top of stereo as primary fruit of warrantless, non-emergency, non-consensual search of Bronx apartment).

48. *But cf.* Shirley M. Hufstедler, *Invisible Searches for Intangible Things: Regulation of Governmental Information Gathering*, 127 U. PA. L. REV. 1483, 1490 (1979) (“Until the late nineteenth century, the Supreme Court was called upon only rarely to interpret the fourth amendment.”).

49. See *Cohens v. Virginia*, 19 U.S. 264, 264 (1821).

50. See Henry P. Weihofen, *Supreme Court Review of State Criminal Procedure*, 10 AM. J. LEG. HIST. 189, 189 (1966); Allen, *supra* note 37, at 216–17 (“Cases involving extradition and interstate rendition were numerous.”).

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a small number of Equal Protection cases.⁵¹ With rare exceptions,⁵² Due Process challenges before then were rejected in criminal cases, even when the Court was “vigorously applying the Due Process clause to supervise state experiments in economic and social legislation.”⁵³ It was reform of the Court’s jurisdiction in 1925, “giving it discretion under certiorari jurisdiction to control its own docket,” which opened the Court to complaints about police practices,⁵⁴ but this time without the court-clogging associated with the old writ of error’s review as-of-right.⁵⁵ Yet because the states were not bound by the Fourth Amendment until 1949,⁵⁶ nor by the federal exclusionary remedy until 1961,⁵⁷ the high court’s state criminal docket was in the meantime quiet.

Likewise, there was no review of *federal* convictions in the Supreme Court for its first 100 years, “an omission that Congress did not remedy until 1889”⁵⁸ Nor were there many federal crimes to enforce.⁵⁹ Because protecting persons and their property was an almost uniquely state prerogative, the daily fare of federal trial courts “had practically nothing to do with the Fourth Amendment.”⁶⁰

The late nineteenth century, however, was a “culture of mobility,” which necessitated federal regulatory crimes to protect local economies from interstate difficulties.⁶¹ For example, in 1884, Congress forbade railroads and boat lines from moving diseased livestock once it was discovered that Texas cattle with contagious fever were being brought to Iowa,

51. Weihofen, *supra* note 50, at 190–91. Compare, for example, *Ex parte Virginia*, 100 U.S. 339, 340 (1880) (Equal Protection), with *Powell v. Alabama*, 287 U.S. 45, 50 (1932) (Due Process).

52. *But see Moore v. Dempsey*, 261 U.S. 86 (1923) (trial by lynch mob violates Due Process). For a deep dive into *Moore*, see Thomas D. Holland & Michael R. Dolski, Symposium, “A Solemn Promise Kept”: The 1919 Elaine Race Riot and the Broadening of Habeas Corpus 100 Years Later, 57 *TULSA L. REV.* 65, 84–108 (2021).

53. Allen, *supra* note 37, at 21759.

54. Weihofen, *supra* note 50, at 192.

55. See Note, 23 *J. CRIM. L. & CRIMINOLOGY* 841, 843 (1933).

56. *Wolf v. Colorado*, 338 U.S. 25 (1949).

57. *Mapp v. Ohio*, 367 U.S. 643 (1961).

58. *Kansas v. Marsh*, 548 U.S. 163, 183 n.1 (2006) (Scalia, J., concurring) (citation omitted).

59. See George C. Thomas III, *Stumbling Toward History: The Framers’ Search and Seizure World*, 43 *TEX. TECH L. REV.* 199, 208 (2010) (“The Constitution gave Congress power to create federal crimes of counterfeiting, piracy, felonies on the high seas, offenses against the law of nations, and treason,” to which “the first federal criminal code . . . added a few common-law crimes, like larceny and murder, if committed on a federal enclave.”); Allen, *supra* note 37, at 213 n.1 (summarizing that more than half of Chicago arrests in 1912 were for crimes that had been created in the preceding 25 years).

60. Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 *WM. & MARY L. REV.* 1, 117 n.396 (2006) (citation omitted).

61. Kathleen F. Brickley, *Criminal Mischief: The Federalization of American Criminal Law*, 46 *HASTINGS L.J.* 1135, 1141 (1995).

which could not guard itself against “every conceivable infection.”⁶² To minimize other far-flung harms, Congress enacted the Comstock Act (1873),⁶³ Interstate Commerce Act (1887),⁶⁴ Sherman Act (1890),⁶⁵ Federal Lottery Act (1895),⁶⁶ Mann Act (1910),⁶⁷ and Dyer Act (1919).⁶⁸ As state borders were made “increasingly porous” by planes, trains, and automobiles, Congress enlarged its federal criminal jurisdiction.⁶⁹ Despite this enlargement, federal law enforcement remained peripheral for the first two decades of the twentieth century.⁷⁰

Limited federal law enforcement meant limited Supreme Court regulation of police. In fact, “the Supreme Court mentioned the Fourth Amendment in only about two dozen cases in the first 130 years of the Amendment’s existence, and . . . interpreted the Amendment only a handful of times in that period.”⁷¹ One of those times was the October Term 1913 when the Court heard the case of *Fremont Weeks*,⁷² whose house was “searched by local police, who turned certain evidence over to the U.S. marshal,” who “later that day participated in a second warrantless search of the house,” also by the local police.⁷³ Kept by the prosecution for use at trial were papers, letters, and envelopes found in Weeks’s room.⁷⁴ Reversing Weeks’s conviction for running an illegal mail lottery, the Supreme Court ordered a new trial, this time without the documentary evidence that the feds had discovered in violation of the Fourth Amendment.⁷⁵

62. See *id.* at 1142.

63. See *Manual Enters., Inc. v. Day*, 370 U.S. 478, 500–11 (1962) (Brennan, J., concurring) (reviewing the history of the law’s ban on obscene materials, including those relating to abortion).

64. See *Interstate Com. Comm’n v. Balt. & O.R. Co.*, 145 U.S. 263, 276 (1892) (“[P]rincipal objects of the interstate commerce act were to secure just and reasonable charges for transportation.”).

65. See *Allen Bradley Co. v. Loc. Union No. 3, Int’l Bhd. of Elec. Workers*, 325 U.S. 797, 802 n.3 (1945) (Sherman Act was enacted to meet the “dominant concern of Congress to protect consumers from business combinations”).

66. See *Champion v. Ames*, 188 U.S. 321, 353–54 (1903) (ruling that Congress could “regulate” commerce by prohibiting altogether the transportation of lottery tickets from state to state).

67. See *Caminetti v. United States*, 242 U.S. 470, 488 n.1 (1917) (statute prohibiting transportation of women in interstate commerce for prostitution “or any other immoral purpose”).

68. See *United States v. Turley*, 352 U.S. 407, 410 (1957) (observing that the National Motor Vehicle Theft Act criminalized knowingly transporting a stolen vehicle or aircraft in interstate commerce).

69. Brickey, *supra* note 61, at 1142.

70. See Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 504 (2011).

71. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 842 (2004).

72. *Weeks v. United States*, 232 U.S. 383, 386 (1914).

73. 1 WAYNE R. LAFAVE, SEARCH & SEIZURE § 1.1(c) (6th ed. Dec. 2021 Update).

74. *Weeks*, 232 U.S. at 386.

75. *Id.* at 398–99. For a discussion of precursor cases that made *Weeks* “inevitable,” see Osmond K. Frankel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 370–72 (1921), *citing*,

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Weeks established exclusion of illegally discovered evidence in federal criminal cases;⁷⁶ what it did *not* establish was the doctrine of fruit of the poisonous tree. The reason? In *Weeks*, the connection between the warrantless searches and the documentary evidence was obvious, thus presenting no issue as to the causal scope of the exclusionary remedy, which is the office of fruits doctrine/analysis.

The first four federal cases to cite *Weeks* were all from the Second Circuit,⁷⁷ the last of those being *Flagg v. United States*,⁷⁸ which was the first to exclude evidence where causation was *non-obvious*. In *Flagg*, a haughty U.S. Post Office Inspector named Elmer Kincaid, aided by New York City police, led a warrantless raid of the Manhattan offices of Jared Flagg, a stockbroker whose short-sale, pre-Ponzi scheme, fueled by kickbacks from brokers, got him convicted on six counts of violating the federal mail-fraud statute.⁷⁹ In the September 23, 1911 raid, “all his books and papers, including securities and cash, were seized . . . and . . . carted away to the post office building, in which is the office of the United States attorney”⁸⁰ The raid was so indiscriminate in scope that while Flagg’s office was being tossed, a picture of his mother “was torn from its frame and destroyed in his presence.” Even his cigars were confiscated.⁸¹

inter alia, *Wise v. Mills*, 220 U.S. 549 (1911) (dismissing for want of jurisdiction prosecutor’s challenge to contempt citation issued by trial court for prosecutor’s failure to obey order to return books and papers improperly seized in search by warrant of business owners suspected of tax evasion). For a related argument that the historical presumption against exclusion, attributed to evidence guru John Henry Wigmore, was never really all that strong, see Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZAGA L. REV. 1, 54–65 (2010).

76. See *Hudson v. Michigan*, 547 U.S. 586, 590 (2006) (“In *Weeks*, we adopted the federal exclusionary rule for evidence that was unlawfully seized from a home without a warrant in violation of the Fourth Amendment.”) (citation omitted); cf. Morgan Cloud, Symposium, *A Conservative House United: How the Post-Warren Court Dismantled the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 477, 477 (2013) (“The Supreme Court first suppressed evidence obtained in violation of the Fourth Amendment more than 125 years ago.”) (citing *Boyd v. United States*, 116 U.S. 616 (1886)).

77. See *United States v. Hart*, 214 F. 655 (N.D.N.Y. June 16, 1914) (making no ruling on admissibility, papers voluntarily surrendered to prosecutor may be retained during trial, copies having been made for defendant’s benefit); *United States v. Abrams*, 230 F. 313, 315 (D. Vt. Feb. 23, 1916) (Fourth and Fifth Amendments require suppression of evidence, oral or tangible, obtained by official coercion); *United States v. Jones*, 230 F. 262 (N.D.N.Y. Mar. 2, 1916) (Congress had not vested commissioners with authority to issue search warrants to investigate federal mail fraud); *Flagg v. United States*, 233 F. 481, 486 (2d Cir. May 9, 1916).

78. See generally *Flagg*, 233 F. 481.

79. See Supreme Court of the U.S., Original Term 1914, In the Matter of the Application of Jared Flagg for a Writ of Prohibition against the U.S. Dist. Ct. for the Southern Dist. of N.Y. or in the alternative a Writ of Mandamus directed to U.S. Dist. Ct. for the Southern Dist. of N.Y., or one of the judges thereof.

80. *Flagg*, 233 F. 481 at 482.

81. In the Matter of the Application of Jared Flagg, p. 4, para. 10.

Because the Second Circuit flicked off the United States' excuse that the raid was the doing of local police,⁸² *Flagg* has come to stand for the proposition that the feds cannot avoid responsibility for illegal searches and seizures by hiding behind lawless municipal agents with whom they have colluded.⁸³ Much rarer is the acknowledgment of *Flagg* as an early take on secondary evidence,⁸⁴ which Judge Coxe's opinion there ruled inadmissible:

The return of the defendant's books and papers, after all the information contained therein had been obtained by the prosecuting officers, did not cure the original trespass. The wrong had then been done. The *information* illegally obtained was in the possession of the United States attorney whose agents had been working over the papers 'for three long years.' Their return at that time was an idle ceremony. The government officials possessed the 'secondary evidence' [the information] and were not concerned about the disposition of the 'primary evidence' [the physical papers].⁸⁵

While the specific items of inadmissible secondary evidence were not delineated in *Flagg*, Judge Coxe was likely referencing either the feds' testimony about the searches or other gains from the searches, perhaps even leads, which the feds got from reading the papers. In other words, the physical papers were the primary evidence, and their content (not just as marks on paper) the secondary evidence. As a Fourth Amendment case in federal court, *Flagg* is exceptional for that fact alone, but *Flagg* is made even more exceptional as the sort of early foray into the causal scope of exclusion that would occupy the Second Circuit.

82. *Flagg*, 233 F. 481 at 483 ("To attribute such an elaborate and carefully prepared proceeding as was planned to convict the defendant, to a few local patrolmen . . . makes too severe a demand upon the imagination.").

83. Crucial to *Flagg* is that local authorities were acting at the instigation of federal authorities. On the responsibility of one entity for the actions of agents of another, see Roy R. Ray, *The Law of Privilege in Texas*, 12 TEX. L. REV. 143, 144 & n.34 (1934); J.B., Recent Case, *Evidence—Admissibility of Evidence Obtained by Illegal Search and Seizure by State Officers under National Prohibition Act*, 6 TEX. L. REV. 390, 390 (1928); R.J.S., Comment, *Prohibition Searches by New York State Police*, 37 YALE L.J. 784, 777–88 (1928); *The Use of State-Compelled, Self-Incriminating Testimony in Federal Court*, 68 YALE L.J. 322, 327 & n.30 (1958).

84. See, e.g., Donald Dripps, Akhil Amar on *Constitutional Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again,"* 74 N.C. L. REV. 1559, 1596 n.167 (1996); Notes and Legislation, *Wiretapping and Law Enforcement*, 53 HARV. L. REV. 863, 866–67 & n.27 (1940).

85. *Flagg*, 233 F. 481 at 486 (emphasis added). The reference to "three long years" is to the fact that the prosecutor sat on the indictments of 1911 and 1912 until 1914 before trying *Flagg*, a path the prosecution preferred to "interfering with the action of the Grand Jury" by post-indictment non-prosecution. See In re Application of Jared Flagg, Exh. E.

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Repeatedly, the Second Circuit would ask in different contexts: *Which* evidence, exactly, is subject to exclusion?

Three years after *Flagg*, the Second Circuit took a position on whether secondary evidence in the form of an in-court reference to illegally seized documentary evidence could be harmless error, that is, error that did not proximately cause the conviction.⁸⁶ Specifically, at John Fitter’s trial for conspiring to defraud the U.S. Navy of dairy, meat, and poultry, the prosecutor asked whether defense counsel was in possession of any delivery slips (which happened to have been illegally seized) to which a government witness had just referred.⁸⁷ Defense counsel took exception to the question, which the judge not only did not hear but doubted that any jurors heard, either.⁸⁸ The prosecutor withdrew the question, which the judge then instructed jurors to ignore.⁸⁹ Finding the prosecutor’s reference to tainted evidence to have had no influence on the verdict of the “clearly guilty” Fitter, the Second Circuit identified a novel fruits issue: not just whether a Fourth Amendment violation proximately caused the discovery of evidence, but whether that violation, as a result, brought about the defendant’s *conviction* as well. Remarkably, that recurring fruits issue within criminal litigation would lurk around for decades without being engaged by the Supreme Court.⁹⁰

Over the next three decades, the Supreme Court twice “adverted to the possibility” that constitutional trial errors are never harmless.⁹¹ The Court eventually got around to resolving the issue only by implication,⁹²

86. See *Fitter v. United States*, 258 F. 567, 573–75 (2d Cir. 1919) (Rogers, Hough, & Manton, JJ.), *cited in* Recent Development, *Admission of Illegally Seized Evidence in State Prosecution Held Harmless Error Not Requiring Reversal of Conviction*, 64 COLUM. L. REV. 367, 370 & n.28 (1964).

87. See *Fitter*, 258 F. 567 at 575–76.

88. *Id.* at 576.

89. *Id.*

90. For opposing positions on the scope of the harmless-error rule within the Second Circuit, compare *United States v. Warren*, 120 F.2d 211, 212 (2d Cir. 1941) (L. Hand, Chase, & Frank, JJ.) (“Indeed, the disposition of courts to reverse judgments because of minor excesses in the exercise of the judge’s authority at the trial has much abated.”) with *United States v. Liss*, 137 F.2d 995, 1005 (2d Cir. 1943) (Frank, J., dissenting in part) (“My colleagues, in stating that there is a ‘modern disposition to assume that an error has been harmless,’ have failed to note what five circuit courts have observed: . . . that, if error is shown, there must be reversal unless it affirmatively appears from the whole record that it was not prejudicial.”).

91. See Daniel Epps, *Harmless Errors and Substantial Rights*, 131 HARV. L. REV. 2117, 2131–32 (2018), *citing* *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (“No matter what the evidence was against him, he had the right to have an impartial judge.”), and *Kotteakos v. United States*, 328 U.S. 750, 764–65 (1946) (“If . . . the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress.”).

92. Cf. 7 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 27.6(a) (4th ed.) (Nov. 2021 Update) (“In the 1960s, with the expansion of the constitutional regulation of the criminal process, appellate courts extended harmless error analysis to constitutional violations.”).

indicating on three occasions that the introduction at trial of evidence obtained in violation of the Fourth Amendment is potentially harmless.⁹³ By ruling in *Fitter* that reversal does not necessarily follow when evidence traceable to police wrongdoing finds its way in at trial—that some evidence, no matter how it was discovered, has no influence on a conviction based on an otherwise strong case—the Second Circuit again demonstrated what would become an enduring knack for discovering causal issues in police investigation and proof.

In sum, because of limited bases for reviewing police practices, the Supreme Court made negligible progress toward elaborating fruits doctrine in the pre-prohibition era. Whatever progress was made within fruits doctrine can be credited to the Second Circuit, which would habitually stay ahead of the curve both by identifying fruits issues not yet identified by the Supreme Court and by making rulings that were comparatively flexible, open, and unscientific.

B. The Prohibition Era: *Silverthorne* and Its Progeny

In and out of the Second Circuit, Prohibition would shine a light on the Fourth Amendment. The origins of Prohibition go back at least to the Massachusetts Society for the Suppression of Intemperance, founded in 1813.⁹⁴ By 1835, offshoots of the American Society for the Promotion of Temperance, founded in 1826, had 20% of American adults as members. After being put on hold to eradicate a graver form of human sin⁹⁵—slavery⁹⁶—the war on booze would revive. President

93. See *Chambers v. Maroney*, 399 U.S. 42, 53–54 (1970); *id.* at 65 (Harlan, J., concurring in part); *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968); *id.* at 553–54 (Harlan, J., concurring); *id.* at 557–61 (Black, J., dissenting); *id.* at 562 (White, J., dissenting). In a third case, the issue was dodged, 5–4. See *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963) (“On the facts of this case, it is not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to . . . ‘harmless error.’”).

94. JACK S. BLOCKER, JR., *AMERICAN TEMPERANCE MOVEMENTS: CYCLES OF REFORM* 11–12 (1989).

95. Cf. Michael deHaven Newsom, *Some Kind of Religious Freedom: National Prohibition and the Volstead Act’s Exemption for the Religious Use of Wine*, 70 BROOKLYN L. REV. 739, 787 (2005) (remedy for intemperance was “banishment of ardent spirits from the list of lawful articles of commerce, by a correct and efficient public sentiment such as has turned slavery out in half our land, and will yet expel it from the world”) (citation omitted).

96. See, e.g., NORMAN H. CLARK, *DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION* 48–49 (1976); Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1455 n.70 (2000) (“This initial push for prohibition ran its course in the 1860s, which most historians attribute to the rising sectional conflict over slavery”); Kevin Wendell Swain, *Liquor by the Book in Kansas: The Ghost of Temperance Past*, 35 WASHBURN L.J. 322, 325 n.17 (1996) (“Significantly, 8 of the 12 temperance states from which Kansas had drawn its prohibitory strength saw their liquor control laws struck or repealed during the pre-war period, reportedly because the slavery issue diverted public attention away from temperance concerns.”); Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 237

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Lincoln predicted in 1865 that after Reconstruction, suppression of legalized liquor would be the country's next major question.⁹⁷ Sure enough, the National Prohibition Party was organized in 1869, the Women's Christian Temperance Union in 1874, and the influential Anti-Saloon League in 1893.⁹⁸ The revived temperance movement, along with 1) anti-immigrant (particularly anti-German) urges,⁹⁹ 2) the passage of the Sixteenth Amendment (by which an income tax would replace liquor taxes),¹⁰⁰ and 3) an aim to reverse the drag that drunk male workers were placing on productivity and on their dependents,¹⁰¹ all led to Prohibition.¹⁰²

The Eighteenth Amendment's "prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors" was ratified on January 16, 1919.¹⁰³ To give it teeth, Congress passed the Volstead Prohibition Enforcement Code (Volstead Act), which became effective January 17, 1920, over President Wilson's veto.¹⁰⁴ Nine days later, the Supreme Court would decide *Silverthorne v. United States*,¹⁰⁵ which, though not a liquor case, is known as the Supreme Court's earliest articulation of what would become fruit of the poisonous tree.¹⁰⁶

(2000) ("The intervention of the slavery question, which precipitated a shift in the moral fervor of the people from temperance, ended the first crusade."). To keep agricultural productivity up and revolt down, slaves themselves were denied alcohol by law, even in some northern states post-emancipation. See Jayesh M. Rathod, *Distilling Americans: The Legacy of Prohibition on U.S. Immigration Law*, 51 HOUSTON L. REV. 781, 800–01 (2014). But cf. FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 251–55 (1855) (slaveholders, for a range of perverse motives, would purposely render their slaves drunk each December from Christmas until New Year's).

97. See Sidney J. Spaeth, *The Twenty-First Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CALIF. L. REV. 161, 169 (1991).

98. *Id.* at 169–70.

99. Douglas A. Berman & Alex Kreit, *Ensuring Marijuana Reform Is Effective Criminal Justice Reform*, 52 ARIZ. ST. L. REV. 741, 749–50 (2020).

100. See Mark Norris, Note, *From Craft Brews to Craft Booze: It's Time for Home Distillation*, 64 CASE W. RES. L. REV. 1341, 1352 (2014); cf. Robert Miller, *Taxation – Are Bootlegger's Profits Subject to Income Tax?*, 5 TEX. L. REV. 207, 208 (1927) ("That Congress has the power to declare gains derived from criminal sources income for the purpose of taxation is without question.").

101. See EDWARD BEHR, PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA 149–50 (2011) (Henry Ford warned that with male workers drunk two to three days a week, a 40-hour week would need double that for his factories to be productive); cf. Rathod, *supra* note 96, at 790 (apart from the negative economic effects of alcohol, the saloon was seen "as a breeding place for crime, immorality, labor unrest and corrupt politics").

102. See Bryce Pfalzgraf, Note, *Taking the Keg: An Analysis on the Potential Effects of Changing the Federal Excise Tax on Beer*, 2015 U. ILL. L. REV. 2141, 2147–48 (2015).

103. ERNEST H. CHERRINGTON, THE EVOLUTION OF PROHIBITION IN THE UNITED STATES 374 (1969).

104. *Id.* at 381–82.

105. *Silverthorne v. United States*, 251 U.S. 385 (1920).

106. See, e.g., *Nix v. Williams*, 467 U.S. 431, 441 (1984) ("The doctrine requiring courts to suppress evidence as the tainted 'fruit' of unlawful governmental conduct had its genesis in *Silverthorne*; there, the Court held that the exclusionary rule applies not only to the illegally

After federal agents ransacked their Tonawanda Island, New York lumberyard on February 25, 1919 “without a shadow of authority,”¹⁰⁷ father-and-son owners Asa and Frederick Silverthorne successfully moved the district court to return their seized documents.¹⁰⁸ The documents were returned, or at least those not handed over to the U.S. Railroad Administration, while copies U.S. Attorneys had made were impounded by the district court clerk.¹⁰⁹ Based on the copies, the Silverthornes were indicted for defrauding the U.S. by billing for “grain door boards” not received by the government-controlled Lehigh Valley Railroad Company.¹¹⁰ When subpoenaed for the originals for the prosecution’s use at trial, Frederick’s refusal resulted in his purgeable contempt citation, from which he appealed.¹¹¹ In a ruling authored by Justice Holmes, the Supreme Court granted the contemnor the relief sought, thereby extending *Weeks* (which had excluded tainted primary evidence),¹¹² to bar the U.S. from using the originals in “two steps instead of one” to prove the owners’ fraud.¹¹³

obtained evidence itself, but also to other incriminating evidence derived from the primary evidence.”); *Michigan v. Tucker*, 417 U.S. 433, 463 (1974) (Douglas, J., dissenting) (“Mr. Justice Holmes first articulated the ‘fruits’ doctrine in *Silverthorne*.”); Keith A. Fabi, Comment, *The Exclusionary Rule: Not the “Expressed Juice of the Wolly-Headed Thistle,”* 35 *BUFF. L. REV.* 937, 945 (1986) (“The general rule against using illegally obtained evidence for the purpose of gaining other evidence was first elicited in *Silverthorne* . . .”).

107. *Silverthorne*, 251 U.S. at 390.

108. It made no constitutional difference that the Silverthornes’ searched premises were a business, not a house. See *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) (corporations are protected by the Fourth Amendment), citing *Hale v. Henkel*, 201 U.S. 43, 75–76 (1906) (same).

109. *United States v. Silverthorne*, 265 F. 859, 860–61 (W.D.N.Y. 1920) (granting motion to dismiss fraud indictment).

110. *United States v. Silverthorne*, 265 F. 853, 856 (W.D.N.Y. 1920) (denying motion to dismiss fraud indictment). Congress took World War I as an exigency that justified federal operation of private railroads. See Act to Provide for the Operation of the Transportation System While Under Federal Control, 40 *STAT.* 451 (1918). “On May 20, 1919, President Wilson announced that the railroads would be returned to their owners at the end of that year.” Nathan L. Jacobs, *The Interstate Commerce Commission and Interstate Railroad Reorganizations*, 45 *HARV. L. REV.* 855, 862 (1932). “The date of relinquishment was subsequently extended to March 1, 1920.” *Id.* at 862 n.35.

111. No account of the dispute is clear as to the corporation’s contempt, which is referred to as a \$250 fine. See *Silverthorne*, 251 U.S. at 390; see also *Carroll v. United States*, 267 U.S. 132, 148 (1925) (In *Silverthorne*, “a writ of error was brought to reverse a judgment of contempt . . . fining the company and imprisoning one Silverthorne, its president, until he should purge himself of contempt in not producing books and documents of the company before the grand jury to prove violation of the statutes of the United States by the company and Silverthorne.”). One court has read the corporation’s contempt as civil, that is, purgeable through compliance, rather than criminal, that is, punitive. See *In re Grand Jury Proceedings*, 450 F.2d 199, 211 (3d Cir. 1971). Frederick’s contempt has at times been lumped in with the judgment against the corporation, both as “contempt convictions,” not citations. See *United States v. Calandra*, 414 U.S. 338, 361–62 (1974) (Brennan, J., dissenting); *Gelbard v. United States*, 408 U.S. 41, 62–63 (1972) (Douglas, J., concurring).

112. *Silverthorne*, 251 U.S. at 391–92, citing *Weeks v. United States*, 232 U.S. 383, 398 (1914); see Margaret L. Rosenzweig, *The Law of Wire Tapping*, 32 *CORNELL L.Q.* 514, 521 (1947) (*Silverthorne* “reiterated and expanded” *Weeks*.) [hereinafter *Wire Tapping I*].

113. *Silverthorne*, 251 U.S. at 390–92.

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Step one was when the feds illegally seized the papers that the trial court later ordered returned to the Silverthornes; step two was the feds using information gained from step one to draft a subpoena for the originals. *Silverthorne*'s ruling—that “knowledge gained by the Government’s own wrong cannot be used”¹¹⁴—“even as a means for drafting subpoenas describing the papers sought to be produced”¹¹⁵—did place what Professor John Maguire called “a natural limitation”¹¹⁶ on the scope of the exclusionary rule. After suppressing the originals from the lumberyard raid, the Court clarified, albeit in dictum:¹¹⁷ “this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an *independent source* they may be proved like any others”¹¹⁸ In other words, *Silverthorne* acknowledged that evidence causally independent of the wrong would be *admissible* non-fruits.

From there, the Silverthornes twice moved the district court to dismiss their fraud charges. On the second try, Judge Hazel acknowledged that 1) the agents who raided the business did not testify before the grand jury, 2) no secondary evidence was used before the grand jury, and 3) the Silverthornes made no “definite allegation” as to “clues or leads” benefitting the U.S. from the illegally seized documents.¹¹⁹ Judge Hazel also nodded to “evidence showing that the basis for the indictment was procured from *independent sources*, and not from any wrongful act.”¹²⁰ Nonetheless, the fact that prosecutors “worked over” the documents rendered it “manifestly impossible” for the Silverthornes to demonstrate where that work led,¹²¹ which Hazel deduced must have been, “directly or indirectly,” to the fraud indictments.¹²² Quoting both the ruling above and *Flagg* (which was circuit precedent),¹²³ Judge Hazel granted the Silverthornes’ motions to dismiss.¹²⁴

Silverthorne has consistently been read to exclude not just primary evidence (the documents seized in the lumberyard raid) but

114. *Id.* at 392.

115. *Rogers v. United States*, 97 F.2d 691, 692 (1st Cir. 1938).

116. JOHN M. MAGUIRE, *EVIDENCE OF GUILT* § 5.07, at 219 n.7 (1959).

117. *See Harrison v. United States*, 392 U.S. 219, 230 (1968) (White, J., dissenting).

118. *Silverthorne*, 251 U.S. at 392.

119. *United States v. Silverthorne*, 265 F. 859, 862 (W.D.N.Y. 1920).

120. *Id.* at 863 (emphasis added) (cryptic reference to the untainted testimony of one Woodworth).

121. *Id.* at 862.

122. *Id.* at 863.

123. *See Flagg v. United States*, 233 F. 481, 483 (2d Cir. 1916).

124. *Silverthorne*, 265 F. 859 at 863.

also one item of putatively derivative/secondary evidence (the subpoenaed originals).¹²⁵ Despite the perception that *Silverthorne* posed a secondary fruits issue,¹²⁶ only the subpoenaed originals were at issue.¹²⁷ Notably, whether *Silverthorne* rendered inadmissible a real item of derivative evidence—the “improperly made copies”¹²⁸—was not before the Court.

On that issue, there was already, apart from *Flagg*,¹²⁹ some lower-court support for suppressing the copies, not just the subpoenaed originals.¹³⁰ And a year after *Silverthorne*, Judge Learned Hand, still a district court judge,¹³¹ ruled on the admissibility of derivative evidence in *United States v. Kraus*.¹³² Though the facts are thin, Hand wrote that as

125. The following state-court rulings say as much. *State v. Miles*, 244 P.3d 1030, 1035 (Wash. Ct. App. 2011); *People v. Williams*, 756 P.2d 221, 237–38 (Cal. 1988) (en banc); *State v. Griffith*, 500 So.2d 240, 243 (Fla. Ct. App. 1986); *In re Special Investigation No. 228*, 458 A.2d 820, 832 (Md. Ct. Spec. App. 1983); *People v. Fuentes*, 414 N.E.2d 876, 880 (Ill. Ct. App. 1980); *People v. Jones*, 238 N.W.2d 813, 821–22 (Mich. Ct. App. 1975) (Bronson, J., concurring in part & dissenting in part); *Carter v. State*, 337 A.2d 415, 438–39 (Md. Ct. App. 1975). As do the following commentators. See, e.g., James Boyd White, *Forgotten Claims in the “Exclusionary Rule” Debate*, 81 MICH. L. REV. 1273, 1278–79 (1983) (“The rule was extended in *Silverthorne* . . . to include the derivative use of improperly seized property—in this case improperly seized papers were copied”) (citation omitted); Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 143 (1984) (Subsequent cases meant “to supplement *Silverthorne*’s argument for expanding the rule to reach ‘derivative fruits.’”); J.R.H., *Recent Case, Criminal Law—Evidence Obtained as an Indirect Consequence of Unlawful Wire-Tapping*, 18 TEX. L. REV. 504, 504–05 (1940) (“Consequently, the rule now seems settled in the federal courts that information, inadmissible in evidence because of its having been wrongfully obtained, cannot be used to secure other relevant evidence . . . , as expressed in *Silverthorne*”).

126. See, e.g., Kenneth Melilli, *Act-of-Production Immunity*, 52 OHIO ST. L.J. 223, 229 (1991) (“If the exclusionary rule were to apply only to the ‘poisonous tree’ and not also to the ‘fruits,’ then the deterrent value of suppression would be substantially compromised.”), citing *Silverthorne*, 251 U.S. at 392; *id.* at 229 n.45 (“Without the suppression of the ‘fruits’ (in *Silverthorne Lumber* the evidence to be produced in response to the subpoenas), a calculating police officer would still have had a significant incentive to engage in the illegal search of the office and seizure of the documents.”).

127. This distinction apparently evaded Justice White. See *Harrison v. United States*, 392 U.S. 219, 230 (1968) (White, J., dissenting) (“In *Silverthorne*, . . . the ‘fruits’ were copies and photographs of original documents illegally seized; it would be difficult to imagine a case where the fruits hung closer to the trunk of the poison tree.”).

128. *State v. Keeler*, 236 N.W. 561, 563 (Wis. 1931).

129. *Flagg v. United States*, 233 F. 481, 486 (2d Cir. 1916).

130. See Osmond K. Frankel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 384–85 & nn.150–51 (1921), citing, *inter alia*, *United States v. Brasley*, 268 F. 59, 65 (W.D. Pa. 1920) (decided 25 days before *Silverthorne*, quashing subpoena, court returned not just the seized books and papers, “but . . . every memorandum taken therefrom, every photographic or other copy made thereof”), and *In re Tri-State Coal & Coke Co.*, 253 F. 605, 608 (W.D. Pa. 1918) (quashing search warrants, court returned “all books, papers, writings, and other property, . . . together with all copies, photographs, or memoranda thereof made since the same were taken”).

131. President Taft appointed Judge Hand to the United States District Court for the Southern District of New York in 1909, where he sat 15 years. See Nadine J. Wichern, Comment, *A Court of Clerks, Not of Men: Serving Justice in the Media Age*, 49 DEPAUL L. REV. 621, 634 & n.75 (1999).

132. *United States v. Kraus*, 270 F. 578 (S.D.N.Y. 1921) (L. Hand, J.).

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he understood *Silverthorne*, an illegal forcible entry by revenue agents to search for and seize evidence of Kraus's liquor enterprise "is enough to require a return of the papers, though *not* of any copies taken or of any other information obtained from their custody."¹³³

Hand characterized "this right to retain copies," in his view a matter unsettled by *Silverthorne*, as "the nub" of *Kraus*.¹³⁴ (*Silverthorne* had held only that the feds could not subpoena the primary fruits/papers returned by the trial court to the Silverthornes). Because "the Fourth Amendment does not touch the competency of proof, but the means used to get it," Hand concluded "that not only must the papers be returned, but any copies now in the possession of the [U.S.]."¹³⁵ His riff in *Kraus* on *Silverthorne*'s "natural limitation"¹³⁶—that evidence causally independent of the wrong would be admissible non-fruits—is worth quoting at length:

A more difficult question arises to prevent any use of the information derived from their possession, a question which must not be interjected into the trial. The officials made the first unlawful move, and any confusion resulting from it they must undertake to clear up. The order must therefore provide that no testimony or other evidence of any transaction recorded in any of the papers seized shall be offered upon the trial unless the [U.S.] can show that they got it independently of their wrongful possession. To settle this before trial some reference will be necessary to a master, who will make a record of all purchases and sales of liquor recorded in any of the papers surrendered, so that they may be identified if evidence is offered of them at the trial. No such transactions may be proved unless the [U.S.] show before the master that they have independent proof not derived from information contained in the papers. The expenses of that reference will be borne by the prosecution, through whose wrong the difficulty arose.¹³⁷

Kraus, which posited the exclusion of derivative evidence and was the first to allocate the burden of proof on the exclusionary rule,¹³⁸

133. *Id.* at 581 (emphasis added). *Kraus* involved enforcement of Prohibition, which Judge Hand personally "abhorred" yet obeyed, having given up "social drinking unless he could be assured that the libation came from a private stock purchased before passage of the act." Barbara Allen Babcock, Commentary, "Contracted" Biographies and Other Obstacles to "Truth," 70 N.Y.U. L. REV. 707, 708 & n.6 (1995); see George W. Pepper, *The Literary Style of Learned Hand*, 60 HARV. L. REV. 333, 338 (1947) ("I suspect that his duty to enforce the National Prohibition Act was not a welcome responsibility:").

134. *Kraus*, 270 F. 578 at 581.

135. *Id.*

136. JOHN M. MAGUIRE, EVIDENCE OF GUILT § 5.07, at 219 n.7 (1959).

137. *Kraus*, 270 F. 578 at 581–82.

138. Allocating burdens of proof on the exclusionary rule became a recurring burden for the Court. See, e.g., *Murray v. United States*, 487 U.S. 533, 540 (1988); *Nix v. Williams*, 467 U.S. 431, 444 & n.5 (1984); *Brown v. Illinois*, 422 U.S. 590, 604 & n.10 (1975); *Balistieri v. United States*, 394

would stay both ahead of its time and in obscurity. The Supreme Court would cite it just once, a decade later in a string cite for an unrelated proposition,¹³⁹ nor did commentators take notice,¹⁴⁰ perhaps because Judge Hand himself would come to abandon (or at least severely qualify) his position.¹⁴¹ And when the essence of *Kraus* did become the law of the land the next Term, it was without attribution.¹⁴²

Kraus was decided on February 1, 1921. On February 28, the Supreme Court excluded copies of illegally seized documents in *Gouled v. United States*,¹⁴³ which also originated in the Second Circuit, where Felix Gouled unsuccessfully moved the district court both for the return of those documents¹⁴⁴ and later, to quash an indictment based on the same.¹⁴⁵ The documents implicated Gouled in a mail fraud against the U.S. through a bribery scheme with Vaughan (“a captain in the Quartermaster’s Department of the United States army”)¹⁴⁶ and Podell (a lawyer).¹⁴⁷ On Gouled’s appeal from his conviction at a trial that allowed in the documents in question, the Second Circuit certified six questions to the Supreme Court,¹⁴⁸ whose ruling is today primarily known for three propositions,¹⁴⁹ none of them pertinent here.

U.S. 985, 986–87 (1969) (Fortas, J., dissenting from denial of certiorari); *United States v. Wade*, 388 U.S. 218, 239–40 & n.31 (1967), quoting *Murphy v. Waterfront Comm’n of New York Harbor*, 378 U.S. 52, 79 n.18 (1964), quoting *Goldstein v. United States*, 316 U.S. 114, 123–24 n.1 (1942) (Murphy, J., dissenting); cf. Carla Rhoden, *Challenging Searches and Seizures of Computers at Home or in the Office: From a Reasonable Expectation of Privacy to Fruit of the Poisonous Tree and Beyond*, 30 AM. J. CRIM. L. 107, 128–31 (2002) (analyzing lower-court interpretations of exclusionary-rule burdens as set forth in *Alderman v. United States*, 394 U.S. 165, 180–85 (1969)).

139. See *Go-Bart Import. Co. v. United States*, 282 U.S. 344, 355 (1931) (citing *Kraus* for the proposition that district courts have jurisdiction to rule on motions to suppress evidence/return property).

140. But see Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 563 (2005) (identifying *Kraus* and *Silverthorne* as “antecedents” to the “modern” fruits doctrine).

141. See *United States v. Nardone*, 106 F.2d 41, 43–44 (2d Cir. 1939) (L. Hand, J.).

142. See *Nardone v. United States*, 308 U.S. 338, 341 (1939).

143. *Gouled v. United States*, 255 U.S. 298, 313 (1921).

144. *United States v. Gouled*, 253 F. 770, 770–72 (S.D.N.Y. 1918) (Manton, J.).

145. *United States v. Gouled*, 253 F. 242, 243 (S.D.N.Y. 1918) (Hutcheson, J.).

146. Aubrey Vaughan pleaded guilty. See *Gouled v. United States*, 264 F. 839, 841 (2d Cir. 1920) (Ward, Rogers, Hough, JJ.).

147. *Gouled v. United States*, 273 F. 506, 507–08 (2d Cir. 1921) (Ward, Rogers, Hough, JJ.). David Podell was acquitted. See *Gouled*, 264 F. at 841.

148. *Gouled*, 264 F. 839 at 839.

149. First, *Gouled* “held that a warrant could not be used solely for the purpose of gaining access to a house to search for incriminating evidence unless the public or the complainant had a ‘primary right’ in the property seized.” Charles T. Newton, Jr., Comment, *The Mere Evidence Rule: Doctrine or Dogma?*, 45 TEX. L. REV. 526, 527 (1967). Second, because “defendant had no knowledge of the adverse possession of the evidence until its production in court,” *Gouled* relaxed the requirement that motions for return of papers be made “by seasonable demand” pre-trial. Comment, *Search, Seizure, and the Fourth and Fifth Amendments*, 31 YALE L.J. 518, 521–22 (1922). Third, *Gouled* “had no difficulty concluding that the Fourth Amendment had been violated by the secret and general ransacking, notwithstanding that the initial intrusion was occasioned by a fraudulently

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Common knowledge is that the government's fraud case against Gouled, who held a contract to make raincoats for soldiers in World War I,¹⁵⁰ was thwarted by a surreptitious search of his office at 1 Madison Avenue¹⁵¹ by acquaintance Private Cohen, who was "under direction of officers of the Intelligence Department of the Army."¹⁵² That unjustified search of Gouled's office tainted two subsequent searches there by warrant,¹⁵³ the second of which uncovered an inculpatory "written contract, signed by the defendant and one Steinthal."¹⁵⁴ What is not common knowledge is that the contract "was not offered in evidence but a duplicate original, obtained from Steinthal, was admitted over the objection that the possession of the seized original must have suggested the existence and the obtaining of the counterpart . . ."¹⁵⁵ Citing *Silverthorne*, the Court prohibited use of the duplicate original/copy of the contract at trial.¹⁵⁶

The same day, the Court made a like ruling in *Amos v. United States*,¹⁵⁷ an early example of its many Prohibition cases, the only in that line that addressed the admissibility of derivative evidence. In *Amos*, two federal revenue agents went to Amos's home, where they encountered his wife,¹⁵⁸ whom they coerced into consenting to a search of the couple's adjacent store,¹⁵⁹ where agents found a bottle containing a half pint of illicitly distilled "blockade whisky." Two more bottles of whiskey were found under the quilt on the bed of the Amos home.¹⁶⁰ After the federal district court denied Amos's motion for return of property,¹⁶¹ the agents conceded at trial that they had no search or arrest warrant and that Amos showed up only after the search concluded.¹⁶² Amos's

obtained invitation rather than by force or stealth." *Lewis v. United States*, 385 U.S. 206, 210 (1966). The Court would come to call this third *Gouled* proposition "extreme." See *Olmstead v. United States*, 277 U.S. 438, 463 (1928); see also Donald A. Dripps, Symposium, *Justice Harlan on Criminal Procedure: Two Cheers for the Legal Process School*, 3 OHIO ST. J. CRIM. L. 125, 163 n.202 (2005) ("Gouled v. United States carried the inhibition against unreasonable searches and seizures to the extreme limit.").

150. *Name Army Officers in Raincoat Scandal*, N.Y. TIMES, Sept. 25, 1918, at 3; *Captain Indicted in Raincoat Fraud*, N.Y. TIMES, July 31, 1918, at 7.

151. *Gouled*, 253 F. 770 at 771.

152. *Gouled v. United States*, 255 U.S. 298, 303 (1921).

153. The Steinthal contract was discovered in an envelope in Gouled's office on July 22, 1918, the first warrant having been executed on June 17, 1918. See *Gouled*, 264 F. 839 at 841.

154. *Id.*; see also *Gouled*, 255 U.S. at 306–07.

155. *Gouled*, 255 U.S. at 307.

156. *Id.*

157. *Amos v. United States*, 255 U.S. 313 (1921).

158. *Id.* at 315.

159. *Id.* at 315, 317.

160. *Id.* at 315.

161. *Id.* at 314–15.

162. *Id.* at 315.

conviction of selling untaxed whiskey followed his unsuccessful motion to strike the agents' testimony.¹⁶³ Again citing *Silverthorne*, the Supreme Court reversed, ruling that both the pre-trial petition for return of property (as primary fruit of the illegal search) and motion to strike the agents' testimony (as secondary fruit of the illegal search) should have been granted.¹⁶⁴

1. The Supreme Court's Hiatus from Fruits

Silverthorne, *Gouled*, *Amos*, and the Second Circuit's ruling in *Kraus* all were decided within a year after the Volstead Act became law. For nearly two decades thereafter, however, the Supreme Court offered no guidance either on *Silverthorne*'s exclusion of derivative evidence or on its "natural limitation"¹⁶⁵ that allows in evidence causally independent from the wrong. This is not to say that the lack of guidance affected the outcome of suppression hearings; it is, however, to say that the lack of guidance delayed the refinement of fruits doctrine. That hiatus from delineating the scope of the exclusionary remedy is hard to trace back to anything but the demands that Prohibition placed on the Court's energies.

During that hiatus (1922–1939) the Court had three preoccupations: 1) rejecting attacks on the Eighteenth Amendment and the laws implementing it;¹⁶⁶ 2) resolving dual-sovereignty tensions posed by what Professor Orin Kerr calls "cross-enforcement up," that is, when local police enforce federal Prohibition law;¹⁶⁷ and 3) ratifying Prohibition investigations, which the "bone dry"¹⁶⁸ Taft Court (1921–1930) would find involved a) no search and seizure at all,¹⁶⁹ b) justifiable search and seizure,¹⁷⁰ or c) both a and b,¹⁷¹ thus precluding any talk of

163. *Amos v. United States*, 255 U.S. 313, 315 (1921).

164. *Id.* at 315–17.

165. JOHN M. MAGUIRE, EVIDENCE OF GUILT § 5.07, at 219 n.7 (1959).

166. Kenneth M. Murchison, *Prohibition and the Fourth Amendment: A New Look at Some Old Cases*, 73 J. CRIM. L. & CRIMINOLOGY 471, 476 n.35 (1982).

167. See Orin S. Kerr, *Cross-Enforcement of the Fourth Amendment*, 132 HARV. L. REV. 471, 495–506 (2018) (discussing, *inter alia*, *Marsh v. United States*, 29 F.2d 172 (2d Cir. 1928), *Gambino v. United States*, 275 U.S. 310 (1927), and *Byars v. United States*, 273 U.S. 28 (1927)).

168. Post, *supra* note 60, at 42.

169. *E.g.*, *Olmstead v. United States*, 277 U.S. 438 (1928); *Hester v. United States*, 265 U.S. 57 (1924).

170. *E.g.*, *Marron v. United States*, 275 U.S. 192 (1927); *Dumbra v. United States*, 268 U.S. 435 (1925); *Steele v. United States*, 267 U.S. 498 (1925); *Carroll v. United States*, 267 U.S. 132 (1925).

171. *E.g.*, *United States v. Lee*, 274 U.S. 559 (1927) (Coast Guard boatswain's preboarding examination with a searchlight did *not* search vessel suspected of violating revenue laws despite the descriptive name of the tool used, but subsequent boarding of vessel was justified as a search incident to lawful arrest of occupants).

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exclusion of evidence except in the most obvious cases.¹⁷² Consequently, the Court's progress in deciphering the causal reach of the exclusionary rule was impeded by a sense that the "Eighteenth Amendment must be considered in determining the question of what is an unreasonable search and seizure as prescribed by the Fourth Amendment."¹⁷³ Even more radically, the two amendments were at times considered reconcilable only by implicit repeal of the Fourth, strict adherence to which severely hampered Prohibition enforcement, since alcohol production, distribution, and consumption were on the sly.¹⁷⁴ Although the Court's "antilibertarian decisions"¹⁷⁵ in support of Prohibition steadily diminished as the 1933 repeal approached¹⁷⁶—hastened by the Wickersham Report¹⁷⁷ and the Great Depression¹⁷⁸—the shift did nothing to generate

172. *E.g.*, *Agnello v. United States*, 269 U.S. 20 (1925); *Amos v. United States*, 255 U.S. 313 (1921).

173. *United States v. Bateman*, 278 F. 231, 233 (S.D. Cal. 1922). The Fourth Circuit soon after elaborated:

The obligation to enforce the Eighteenth Amendment is no less solemn than that to give effect to the Fourth and Fifth Amendments. The Courts are therefore under the duty of deciding what is an unreasonable search of motor cars, in light of the mandate of the Constitution that intoxicating liquors shall not be manufactured, sold, or transported for beverage purposes.

Milam v. United States, 296 F. 629, 631 (4th Cir. 1924). The very next year the Supreme Court upheld a warrantless search of a car in which sixty-nine bottles of moonshine were found in the upholstery, which federal revenue agents tore open to facilitate the discovery. *See Carroll v. United States*, 267 U.S. 132, 172–74 (1925) (McReynolds, J., dissenting); *cf.* Alice Ristroph, Book Review, *What Is Remembered*, 118 MICH. L. REV. 1157, 1173 (2020) (positing that either sixty-eight or seventy-three bottles were found in Carroll's car, not sixty-nine).

174. *See* Frederic A. Johnson, *Some Constitutional Aspects of Prohibition Enforcement*, 97 CENTRAL L. REV. 113, 122–23 (1924); John P. Bullington, Comment, *Constitutional Law—Searches & Seizures—A New Interpretation of the Fourth Amendment*, 3 TEX. L. REV. 460, 471 (1925) ("A very respectable argument might be advanced that the Eighteenth Amendment qualified the Fourth Amendment in so far as necessary for the complete realization of the former."). This view that the Eighteenth Amendment repudiated the Fourth "did not go unchallenged." Tracy Maclin, *Cops and Cars: How the Automobile Drove Fourth Amendment Law*, 99 B.U. L. REV. 2317, 2322 n.7 (2019).

175. Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383, 426 (1986).

176. *See generally* Kenneth M. Murchison, *Prohibition and the Fourth Amendment: A New Look at Some Old Cases*, 73 J. CRIM. L. & CRIMINOLOGY 471 (1982).

177. *See, e.g.*, Franklin E. Zimring, *The Accidental Crime Commission: Its Legacies and Lessons*, 96 MARQ. L. REV. 995, 1006 (2013) (A "generous reading of Wickersham's work on Prohibition is that its extensive documentation of cost and ineffectiveness provided a foundation for many supporters of Prohibition to accept the inevitable repeal of Prohibition two years later when it came.").

178. *See, e.g.*, Robert W. Sweet, *Will Money Talk?: The Case for a Comprehensive Cost-Benefit Analysis of the War on Drugs*, 20 STAN. L. & POL'Y REV. 229, 237 & nn.48–49 (2009) ("Of course, the Wickersham Commission report was only one among a variety of factors leading to the repeal of Prohibition, the most significant of which was the onset of the Great Depression.").

any high-court rulings that would shed light on what might count as fruit of the poisonous tree.¹⁷⁹

Nonetheless, Fourth Amendment litigation was all over the lower federal courts, which were “flooded . . . with criminal defendants,” many of them “wealthy enough to afford lawyers,” who were engaged in challenging the admissibility of liquor seized by Prohibition agents.¹⁸⁰ Enforcement was handled by underpaid, corrupt appointees within a party-spoils system so far gone that H.L. Mencken predicted that “the chief victims of Prohibition . . . will . . . be the Federal judges,” whose “typical job today . . . is simply to punish men who have refused or been unable to pay the bribes demanded by Prohibition enforcement officers.”¹⁸¹ Consigned “to perform the function of petty police courts,” federal judges pushed back by subverting the Prohibition apparatus through exclusion of the evidence it uncovered.¹⁸²

Without any help from the Supreme Court, a handful of Prohibition-era rulings from the lower federal courts did begin to flesh out the scope of *Silverthorne*, confronting causal difficulties more challenging than those posed by copies of illegally seized documents and testimony from offending state actors.¹⁸³ This is not to say the lower federal courts agreed about the scope of *Silverthorne*. In actuality, “the Eighteenth Amendment presented the lower federal courts with problems which . . . resulted in considerable diversity of opinion”¹⁸⁴ that until then was absent.¹⁸⁵ That diversity of opinion makes good sense, given that due to *Silverthorne*’s “natural limitation” on its causal scope, fruits doctrine is as susceptible to admitting as excluding evidence, and thus “can act as either sword or shield.”¹⁸⁶

179. See, e.g., *Nathanson v. United States*, 290 U.S. 41 (1933); *Sgro v. United States*, 287 U.S. 206 (1932); *Grau v. United States*, 287 U.S. 124 (1932); *Taylor v. United States*, 286 U.S. 1 (1932); *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931).

180. Post, *supra* note 60, at 116–17.

181. *Id.* at 27–28, quoting H.L. Mencken, *Editorial*, 1 AM. MERCURY 161, 161 (1924).

182. *Id.* at 28.

183. See, e.g., *Wiggins v. United States*, 64 F.2d 950 (9th Cir.) (ruling admissible the confession of an oral surgeon, who offices were unjustifiably searched by IRS agents, who had already obtained same information voluntarily from secretary/nurse and other office staff), *cert. den.* 290 U.S. 657 (1933); *Watson v. United States*, 6 F.2d 870 (3d Cir. 1925) (suppression of judge’s testimony about illegally seized receipt and confession); *Legman v. United States*, 295 F. 474 (3d Cir. 1924) (cross-enforcement between federal Prohibition agents and Newark police required suppression of federal agent’s testimony about discoveries in unlawful search and seizure of kitchen/still).

184. Bullington, *supra* note 174, at 461.

185. *Id.* at 464.

186. See David Gray, *A Spectacular Non Sequitur: The Supreme Court’s Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AM. CRIM. L. REV. 1, 42 (2013).

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2. The Second Circuit's Contribution to Fruits

The Second Circuit, too, was encumbered during Prohibition with cases unrelated to the exclusionary rule.¹⁸⁷ And on those occasions when the rule was litigated, the question of *which* evidence would be subject to exclusion rarely was at issue.¹⁸⁸ At issue instead was whether the rule applied *at all*, such as in deportation proceedings.¹⁸⁹ In those rare cases in the Second Circuit where clarifying the causal scope of exclusion was at issue, progress was at least intimated, if not always made.

For instance, in *United States v. Lydecker*,¹⁹⁰ District Judge Hazel (who a year before dismissed the Silverthornes' fraud charges) reasoned that it does not follow from the fact that we return illegally seized property that an extorted confession "must be returned."¹⁹¹ The analogy to *Silverthorne* fails, Hazel continued, because "seizing one's books and papers and extorting a confession of crime to be used on the trial are both violations of fundamental rights, yet . . . are not controlled by the same evidentiary rule."¹⁹² Hazel was not addressing the so-called convergence theory, which holds that the Fourth and Fifth Amendments both enjoin police from coercing divulgences.¹⁹³ Instead, Hazel was pointing to a rule of admissibility that adjudges coerced confessions on a different plane from the coerced surrender of papers; jurors can make up their own minds about the value of a confession, the argument runs, but they risk being bewitched by all other evidence, the truth-value of which seems to speak for itself.

187. For example, that 1) a federal commissioner (unlike a federal district court judge) cannot order the destruction of liquor, *see United States v. Casino*, 286 F. 976, 981 (SDNY 1923) (L. Hand, J.), 2) evidence voluntarily surrendered cannot be excluded as compelled, *see In re E. Dier & Co.*, 279 F. 274, 275 (S.D.N.Y. 1922) (L. Hand, J.), and 3) consecutive sentences are improper "where the counts are for merely alternative forms of the same offense, and where a conspiracy count is added to a count for the substantive crime," *see Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (L. Hand, Rogers, & Hough, JJ.).

188. *E.g.*, *United States v. Kirschenblatt*, 16 F.2d 202 (2d Cir. 1926) (L. Hand, Hough, & Manton, JJ.) (affirming order for return/suppression of papers, the seizure of which exceeded scope of Prohibition agents' warrant to search defendant's offices).

189. *Compare Ex parte Caminita*, 291 F. 913, 914 (S.D.N.Y. 1922) (L. Hand, J.) (exclusionary rule applies in deportation proceedings) *with In re Weinstein*, 271 F. 5, 6 (S.D.N.Y. 1920) (L. Hand, J.) ("This court may not attempt any regulation of those proceedings while they last, unless perhaps it appears that the relator is not being restrained for purpose of deportation at all.").

190. *United States v. Lydecker*, 275 F. 976 (W.D.N.Y. 1921) (Hazel, J.).

191. *Id.* at 978.

192. *Id.*

193. *See Andresen v. Maryland*, 427 U.S. 463, 472 n.6 (1976); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 955 n.61 (1977).

Although the rule *Hazel* was reciting was abandoned in 1936,¹⁹⁴ a decade later in a related context the Second Circuit would revive the analogy that he had rejected in *Lydecker*. Relying on *Silverthorne*, *United States v. Bayer* ruled that a second confession taken from a suspect was “patently the fruit of the earlier one,” which had been taken under more coercive circumstances, though never proffered by the prosecution.¹⁹⁵ On the government’s appeal, the Supreme Court reversed, pronouncing that *Silverthorne* is inapposite in confessions cases.¹⁹⁶ Both before *Bayer* in *Lyons v. Oklahoma*,¹⁹⁷ and after in *Leyra v. Denno*,¹⁹⁸ the Court would analyze cases involving multiple confessions for their voluntariness in Due Process terms rather than in terms of whether, once “the cat is out of the bag,”¹⁹⁹ the second confession is a suppressible upshot of the prior involuntary confession.²⁰⁰ Yet for reasons that remain opaque, the relation between coerced confessions and fruit of the poisonous tree remains up in the air to this day.²⁰¹

Another prescient Prohibition-era move by the Second Circuit in defining the causal scope of the exclusionary rule came within the law of standing,²⁰² which has been read into American constitutional

194. See *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (*Brown v. Mississippi*, decided in 1936, “was the first case in which the Court held that the Due Process Clause prohibited the States from using the accused’s coerced confession against him.”) (citation omitted).

195. *United States v. Bayer*, 156 F.2d 964, 970 (2d Cir. 1946) (Clark, L. Hand, & A. Hand, JJ.).

196. *United States v. Bayer*, 331 U.S. 532, 540–41 (1947). *Bayer* featured two confessions taken six months apart under quite different conditions from Army Major Walter Radovich, who had taken \$7,000 in bribes from the Bayer brothers, who were desperate to keep a son to one brother and a nephew to both out of combat in World War II. *Silverthorne* and its progeny, the Court summarized, “did not deal with confessions but with evidence of a quite different category and do not control this question.” *Id.*; cf. Robert Hobbs, *Evidence—Confessions—Admissibility of Subsequent Confessions Where Prior Confession Inadmissible*, 26 TEX. L. REV. 536, 536 (1948) (calling Radovich’s second confession admissible “even though it was psychologically the fruit of the first”). But different how? The Court’s idea that fruits analysis has no application to confession cases would become hornbook law. See George H. Dession, Richard C. Donnelly, Lawrence Z. Freedman & Frederick G. Redlich, *Drug-Induced Revelation and Criminal Investigation*, 62 YALE L. J. 315, 334–35 & nn.66–67 (1953) (After *Bayer*, “most state courts permit the prosecution to use evidence discovered through the involuntary confession of an accused even though the confession itself is inadmissible.”).

197. *Lyons v. Oklahoma*, 322 U.S. 596, 603 (1944).

198. *Leyra v. Denno*, 347 U.S. 556, 561 (1954).

199. *Bayer*, 331 U.S. at 540–41.

200. See 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 9.5(c) (4th ed.) (Nov. 2021 Update) (citation omitted); see also *United States v. Ellwein*, 6 U.S.C.M.A. 25, 29–31 (Ct. Mil. App. 1955) (expressing “uncertainty” over the “peremptory dismissal in *Bayer* of the applicability of . . . *Silverthorne*”).

201. Cf. Akhil R. Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 917 n.265 (1995) (authors “aware of no U.S. Supreme Court case . . . that actually excludes physical fruits of a coerced confession”).

202. For an acknowledgment of standing as a causal doctrine, see Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 320 (2012).

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law through Article III, Section 2, “for want of a better vehicle.”²⁰³ That constitutional provision extends the judicial power to “cases and controversies,”²⁰⁴ not to meddling in the grievances of others.²⁰⁵ As the Supreme Court’s operative term of art, “standing” dates to 1939,²⁰⁶ while by any other name, at least back to 1923,²⁰⁷ if not earlier.²⁰⁸ Based on the idea that “rights are personal,”²⁰⁹ one does not get standing to challenge a search or seizure simply by being the person prosecuted; instead, one must be the person actually searched or seized.²¹⁰ Another way of saying this is that the search or seizure must cause harm to the plaintiff, not to someone else, whose rights the plaintiff may not assert vicariously. When first registering this causal limitation on suppression in 1942 (albeit in a statutory, not constitutional context), the Supreme Court acknowledged that lower federal courts were already denying the suppression remedy to third parties.²¹¹ Among those courts is the Second Circuit.

Limited credit for the development of the standing limitation has been given to *Rouda v. United States*,²¹² a Volstead-Act case where Prohibition agents entered Rouda’s liquor “plant” trespassorily by an adjoining hosiery shop through which Rouda “had a right of passage.”²¹³ Judge

203. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983).

204. See *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring) (first opinion to link “standing” to Article III’s “cases and controversies”).

205. See Craig A. Stern, *Another Sign from Hein: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing To Sue?*, 12 LEWIS & CLARK L. REV. 1169, 1192 (2008).

206. See *United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533, 560 (1939).

207. See *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923) (taxpayers lacked standing under the Tenth Amendment to challenge federal funding of health programs for mothers and children where no “direct injury suffered or threatened”), cited in *Flast v. Cohen* 392 U.S. 83, 91 (1968) (“This Court first faced squarely the question whether a litigant asserting only his status as a taxpayer has standing to maintain a suit in a federal court in *Frothingham* . . .”) (citation omitted).

208. See Linda S. Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303, 309 & n.35 (1996), citing *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922) (“The alleged wrongful act of the Attorney General, said to be threatening, is the enforcement, as against election officers, of the penalties to be imposed by a contemplated act of Congress which plaintiff asserts would be unconstitutional. But plaintiff is not an election officer.”).

209. *Simmons v. United States*, 390 U.S. 377, 389 (1968).

210. *Alderman v. United States*, 394 U.S. 165, 171–72 (1969).

211. See Elwood E. Sanders, Jr., *Fourth Amendment Standing: A New Paradigm Based on Article III Rules and Right to Privacy*, 34 CAP. U. L. REV. 669, 672 n.17 (2006), quoting *Goldstein v. United States*, 316 U.S. 114, 121 (“While this court has never been called upon to decide the point, the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized.”).

212. *Rouda v. United States*, 10 F.2d 916 (2d Cir. 1926) (L. Hand, Hough, & Manton, JJ.).

213. Recent Case, *Constitutional Law—Searches and Seizures—Evidence Held Admissible against Roomer when Obtained at His Arrest for Crime Observed through Transom Window by Officers Who Illegally Entered Rooming House*, 61 HARV. L. REV. 1249, 1251 (1948).

Hand's use of standing as a bar to Rouda's relief is straightforward: "If a trespass, it was not upon the premises occupied by the defendants, and they may not escape through a wrong of which they were not the victims."²¹⁴ With no interest in the hosiery shop, its unlawful entry inflicted no injury on Rouda to litigate, apart from the unactionable fact that it landed him in court.²¹⁵ In his slim tribute to Judge Hand's criminal-law rulings, Orrin Judd credits Hand for his early nod in *Rouda* to the relevance of standing.²¹⁶

But Hand's acknowledgment of standing had come even earlier in *Ex Parte Caminita*,²¹⁷ a district-court case so obscure to have been cited by another court just once in 100 years.²¹⁸ There, after Ludovico Caminita was discovered distributing "an avowed anarchistic publication,"²¹⁹ he sought to suppress the papers in his deportation trial (which was just a pretext for J. Edgar Hoover to shake Caminita down for information about the June 2, 1919 bombings that almost killed Attorney General Palmer).²²⁰ Judge Hand was willing to concede the illegality of the search because while Caminita was implicated, the search violated only the rights of Mazzotta, in whose "composing room" the papers were found. "The most that can be said," Hand reasoned, "is that by a wrong against Mazzotta the officials learned of the existence of competent evidence against [Caminita], which otherwise they would not have got."

214. *Rouda*, 10 F.2d at 918.

215. In elaborating, Hand, just five years after *Kraus*, was cynical about the exclusionary rule:

The imputed incompetency of evidence procured by an unlawful search is remedial, and no remedy can extend to wrongs done another. True, it is argued, and has indeed been held, that the remedy has in no case any relation to the wrong, taking form, as in application it does, in the victim's exoneration of a crime. But with that we have nothing to do; our only question is whether the doctrine extends to a case where the criminal has not been wronged at all. No tenable theory could support his escape, merely as punishment for the official's trespass.

Id.

216. See Orrin G. Judd, *Judge Learned Hand and the Criminal Law*, 60 HARV. L. REV. 405, 412 & n.29 (1947) ("He has confined the protection of the Constitution to the persons who came directly within its purview, however, and held that a defendant who was not lawfully in occupation of premises could not object to the seizure of property thereon.").

217. *Ex parte Caminita*, 291 F. 913 (S.D.N.Y. 1922). "The first case involving an illegal search in which the limitation was applied apparently was *Moy Wing Sun v. Prentis*, 234 Fed. 24 (7th Cir. 1916), although the limitation had previously arisen in cases involving subpoenas duces tecum. *Hale v. Henkel*, 201 U.S. 43 (1906)." Comment, *Judicial Control of Illegal Search and Seizure*, 58 YALE L.J. 144, 154 n.43 (1948).

218. See *Schenk ex rel. Chow Fook Hong v. Ward*, 24 F. Supp. 776, 778 (D. Mass. 1938).

219. *La Jacquerie* was the publication's name. *Caminita*, 291 F. 913 at 914.

220. See KENYON ZIMMER, *IMMIGRANTS AGAINST THE STATE: YIDDISH AND ITALIAN ANARCHISM IN AMERICA* 150–56 (Univ. of Ill. 2015).

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But *Silverthorne*, Hand concluded, does not “invest” Caminita “with the wrongs done to another.”²²¹

While the Supreme Court’s ruling in *Silverthorne* makes no reference to the limits of standing, Judge Hazel had stated those limits in dictum in dismissing the Silverthornes’ fraud indictment *after* the Supreme Court’s ruling:

It is argued . . . that the Fourth Amendment implies a right in which all the people are concerned, and any person aggrieved may complain of the violation. But this construction is deemed fallacious The rights guaranteed by both the Fourth and Fifth Amendments are expressly for the benefit of the person or individual whose rights have been invaded, and to transfer such rights to a person who may believe himself injured by a violation of the rights of another would give such scope to the Fourth Amendment as was never contemplated.²²²

Ironically, Hazel deploys “aggrieved” in a way that would nullify the limitation that standing places on the right to sue. Such an extended sense of “aggrieved” would confer standing on anyone prosecuted (i.e., someone who *feels* aggrieved) rather than only on those unlawfully searched or seized. But that extended sense of “aggrieved” did not become law. Instead, *Caminita*, subsequent Second Circuit cases,²²³ the Supreme Court,²²⁴ and the Federal Rules of Criminal Procedure (to which Judge Hand contributed as a member of the Advisory Committee)²²⁵ all

221. *Caminita*, 291 F.913 at 914.

222. *United States v. Silverthorne*, 265 F.853, 857 (W.D.N.Y. 1920) (Hazel, J.).

223. In a post-Prohibition liquor prosecution, Judge Hand denied a motion to suppress on the ground that “none of the accused were *aggrieved* by the search, not being in possession of the premises.” *United States v. Dellaro*, 99 F.2d 781, 782 (2d Cir. 1938) (L. Hand, Swan, & A. Hand, JJ.) (emphasis added).

224. See *Alderman v. United States*, 394 U.S. 165, 171–72 (1969); *Jones v. United States*, 362 U.S. 257, 260–61, 264–65 (1960); cf. *Flast v. Cohen*, 392 U.S. 83, 108–09 (1968) (Douglas, J., concurring) (“Congress can . . . define broad categories of ‘aggrieved’ persons who have standing to litigate cases and controversies. But . . . the failure of Congress to act has not barred this Court from allowing standing to sue and from providing remedies. The multitude of cases under the Fourth, as well as the Fourteenth Amendment, are witness enough.”).

225. Judge Hand was absent from the Advisory Committee’s first morning session where the pertinent rule was briefly discussed. That first iteration of the Federal Rules stated that “A person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property and to suppress for use as evidence anything so obtained” FRCP Rule 41(e), at 68–69 (N.Y.U. 1946). In four sessions over two days, the Committee steered clear of Rule 41(e), a “delicate subject” of a “controversial nature.” *Id.* at 130. When Nathan April brought it up anyway by asking whether illegally seized papers and their copies would be subject to suppression, *id.* at 146–47, Judge Alexander Holtzoff, backed up by Fred Strine, insisted that their Advisory Committee was tasked with devising a system of “procedural matters,” *id.* at 147, not with taking positions on “the constitutional rights of the defendant” (though Strine admitted *Silverthorne* would exclude the papers and their copies). *Id.* at 148. Judge Hand would not join the session until after lunch.

would limit standing to move to suppress evidence to parties who were actually searched or seized: no one else qualifies as aggrieved.²²⁶

While the Supreme Court was on hiatus from fruits, the Second Circuit was less so. Working out the relation of fruits to coerced confessions (to this day an undeveloped aspect of Supreme Court jurisprudence), not to mention the related matter of standing, the Second Circuit's preoccupation with the causal implications of *Silverthorne* was, in a word, unique. And it is not that other courts were taking different approaches to understanding the scope of the exclusionary rule; they were taking no approach at all, as though somehow the issue was not yet live.

3. The State Courts' Contribution to Fruits

As for the states' contribution to the development of fruits doctrine during Prohibition, though not yet bound by the federal exclusionary remedy,²²⁷ a number of them nonetheless adopted the exclusionary remedy into their constitutions on their own accord.²²⁸ In fact, a few states had done so even before *Weeks* pronounced the federal standard in 1914.²²⁹

"Aggrieved" was here to stay, appearing six times in the 1989 amendments to Rule 41 and appearing as well in Rule 41(e)'s successor, 41(g)-(h).

226. The first case to deploy "aggrieved" in what would become hornbook fashion is *Kelley v. United States*, 61 F.2d 843, 845 (8th Cir. 1932), where the Eighth Circuit ruled that as a mere employee of the still operation on the Nebraska farm, "[i]t is not understandable how Kelley was aggrieved by the seizure of someone else's property in which he had absolutely no interest. The most that can be claimed here is that Kelley as an employee had a certain physical custody and control of the illegal business and of the incriminatory evidence. That is not sufficient." See Comment, *Judicial Control of Illegal Search and Seizure*, 58 YALE L.J. 144, 154 n.43 (1948).

227. *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating federal exclusionary remedy).

228. See Bullington, *supra* note 174, at 460-61 n.1 ("approximately half the state courts"); Comment, *Judicial Control of Illegal Search and Seizure*, 58 YALE L.J. 144, 150 (1948) ("With the advent of prohibition, . . . nearly half the states adopted it."); Francis A. Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 246, 250 (1961) ("[M]ost of the states that accepted the 'Weeks Rule' did so during the period of national prohibition."); Francis A. Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213, 240-41 (1959) ("Exclusion . . . has been rejected by two-thirds of the American states."); cf. Wesley M. Oliver, *America's First Wiretapping Controversy in Context and As Context*, 34 HAMLIN L. REV. 205, 209 (2011) (a majority of states adopted the exclusionary remedy before 1961); Wesley M. Oliver, *Prohibition's Anachronistic Exclusionary Rule*, 67 DEPAUL L. REV. 473, 496 (2018) ("By 1930, eighteen states had adopted a generic version of the exclusionary rule.")

229. See, e.g., John E. Fennelly, *Inevitable Discovery, the Exclusionary Rule, and Military Due Process*, 131 MILITARY L. REV. 109, 111 (1991) ("In *State v. Height*, a pre-*Weeks* case, the Iowa Supreme Court fashioned an exclusionary remedy on state constitutional grounds."); Kenneth Katkin, "Incorporation" of the *Criminal Procedure Amendments: The View from the States*, 84 NEB. L. REV. 397, 415 (2005) ("Though the holding in *Weeks* applied only to federal courts, a few states had already adopted similar rules."); Jack L. Landau, Symposium, *Should State Courts Depart from the Fourth Amendment? Seizure, State Constitutions, and the Oregon Experience*, 77 MISS. L.J. 369, 377 (2007) ("[B]efore the . . . Supreme Court decided *Weeks*, . . . courts in several states recognized

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That state courts began adopting the exclusionary rule more widely in the 1920s is chalked up to “the personal reaction of judges to the prohibition law,”²³⁰ particularly the “indiscriminate raids of the Prohibition agents and the fact that many defendants were erstwhile law-abiding citizens rather than hardened criminals”²³¹ Indeed, the spectacle of gonzo temperance advocate Carrie Nation “hatchetizing” Kansas saloons may be more memorable,²³² but “saloons were smashed up”²³³ at the hand of Prohibition agents, too, with no more legal authority than the moralizing temperance crusaders who came before.

States have always lacked authority to prosecute federal crimes.²³⁴ Yet the Eighteenth Amendment gave “Congress and the several States” the “concurrent power to enforce . . . by appropriate legislation” the nationwide ban on the manufacture and distribution of liquor.²³⁵ In exercise of that power, Congress’s Volstead Act empowered state judges to issue warrants for Volstead-Act violations and state prosecutors to bring nuisance actions to enjoin the same.²³⁶ Only five states at the turn of the century had “laws prohibiting the manufacture and sale of intoxicating beverages,” but by April 1917, there were twenty-six.²³⁷ Of these, only thirteen—all in the southern and western regions—“had sought . . . the

an exclusionary rule.”); Osmond K. Frankel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 368 & n.43 (1921) (citing pre-*Weeks* cases from Iowa, Maryland, and Vermont); cf. *Elkins v. United States*, 80 S. Ct. 1437, 1448–49 (1960) (detailing a half-century of states’ positions on exclusion).

230. John Baker White, Note, *Search and Seizure—Wire Tapping—Judicial Method*, 27 MICH. L. REV. 78, 81 (1928); see Rosenzweig, *Wire Tapping I*, *supra* note 112, at 525 (states adopting the exclusionary remedy went from nine in 1923 to eighteen in 1934).

231. Rosenzweig, *Wire Tapping I*, *supra* note 112, at 525.

232. See Karl S. Coplan, *Fossil Fuel Abolition: Legal and Social Issues*, 41 COLUM. J. ENVTL. L. 223, 289 (2016); Susan Cagnan & Rick Van Duzer, *75 Years after Prohibition*, 18 BUSINESS LAW TODAY 45, 45 (May/June 2009) (“In the days when Carrie Nation took an axe to barrels in Kansas saloons, alcohol was blamed by the burgeoning temperance movement as the source of virtually all societal ills . . .”).

233. Wesley M. Oliver, *Prohibition’s Anachronistic Exclusionary Rule*, 67 DEPAUL L. REV. 473, 474 (2018).

234. See *Martin v. Hunter’s Lessee*, 14 U.S. 304, 337 (1916) (“No part of the criminal jurisdiction of the United States can consistently with the constitution be delegated to state tribunals.”).

235. U.S. CONST. amend. XVIII, §§ 1 & 2 (repealed 1933); see Elizabeth Norton, Note, *The Twenty-First Amendment in the Twenty-First Century: Reconsidering State Liquor Controls in Light of Granholm v. Heald*, 67 OHIO ST. L.J. 1465, 1466 n.8 (2006) (“The Twenty-First Amendment, ratified in 1933, repealed the Eighteenth Amendment, and with it Prohibition, but left the states with the ability to regulate alcoholic beverages, via its Section 2 powers.”).

236. Orin S. Kerr, *Cross-Enforcement of the Fourth Amendment*, 132 HARV. L. REV. 471, 497 (2018); J.P. Chamberlain, *Enforcement of the Volstead Act through State Agencies*, 10:6 A.B.A. J. 391, 391 (1924).

237. Post, *supra* note 60, at 5–6 & n.6, citing JAMES H. TIMBERLAKE, PROHIBITION AND THE PROGRESSIVE MOVEMENT (1900–1920) 149–66 (1966).

drastic bone-dry legislation of the Eighteenth Amendment.”²³⁸ Even though enforcement would seem almost an impossibility without the “state enforcement authorities and the state courts,”²³⁹ such cooperation was withheld, even though virtually every state eventually passed its own Prohibition statute.²⁴⁰ For example, for fear of reputational harm “the New York Police Department wanted no part of Prohibition enforcement.”²⁴¹ Regrettably, caving in soon after under pressure from the Governor to enforce the state’s version of the federal booze ban “debauched the police force of this city and caused an orgy of graft, perjury, and corruption.”²⁴²

Like the lower federal courts, state courts of last resort began to work out the scope of the exclusionary rule in the 1920s through cases involving illegal searches and seizures in enforcement of state prohibition laws, though comparatively infrequently. The primary evidence chronically at issue was stills, mash, barrels, and whiskey, whereas the secondary evidence was agents’ testimony about the primary evidence.²⁴³ For example, when nine bottles of liquid were surrendered to local police in an illegal search of the restaurant where the defendant boarded, the Florida Supreme Court found error not just in the prosecution’s introduction of the bottles, but in their derivative use as well.²⁴⁴ Specifically, the sheriff had vouched at trial for the intoxicating contents of the “two or three bottles” he had tasted (“It would make me drunk”).²⁴⁵ Likewise, on the county attorney’s invitation, jurors tasted the liquid as well, the error there being none were experts, and the whole experiment might

238. *Id.* at 4–6 & 5 n.6, citing CHARLES MERZ, *THE DRY DECADE* 22 (1931). The remaining dry states allowed importation and/or manufacture of alcohol for personal use, although some restricted the type of alcohol permitted and others the amount that could be imported during a given period. *See id.* at 5 n.62.

239. J.P. Chamberlain, *Enforcement of the Volstead Act through State Agencies*, 10:6 A.B.A. J. 391, 391 (1924).

240. *Post, supra* note 60, at 24–25.

241. Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850–1940*, 62 RUTGERS L. REV. 447, 496 (2010).

242. *Id.* at 497.

243. *See, e.g.*, *State v. McDaniel*, 231 P. 965, 967, 973 (Or. 1925) (While the “bottle of whiskey was not offered or admitted in evidence,” county sheriffs’ testimony that “the bottle was three-fourths full of whiskey,” and chemist’s testimony that seized liquor “contained 34 per cent. of alcohol” ruled inadmissible); *Flum v. State*, 141 N.E. 353, 353, 356 (Ind. 1923) (ruling inadmissible testimony as to stills, mash, and “white mule whiskey” found by local police, sheriff, and federal agent in execution of defective search warrant); *Tucker v. State*, 90 So. 845, 845, 848 (Miss. 1922) (after local constables’ warrantless search revealed still and whiskey, constables’ testimony, not just the tangible items, excluded); *State v. Andrews*, 114 S.E. 257, 260 (W. Va. 1922) (ordering suppression not only of liquor seized during an illegal search, but also “any information acquired by the officers in making such search and seizure”) (emphasis added).

244. *Atz v. Andrews*, 94 So. 329, 334–35 (Fla. 1922).

245. *Id.* at 334.

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have violated the Volstead Act to boot.²⁴⁶ Not every state-court ruling involving secondary evidence involved the enforcement of Prohibition laws,²⁴⁷ but the lesson about derivative evidence was always the same: that *Silverthorne* provided for the exclusion of secondary evidence *not* stemming from a source independent from the wrong.

To recap, once the Supreme Court made exclusion a remedy for violations of the Fourth Amendment, the first judicial adventure into fruits (*Flagg*) was decided in the Second Circuit before Prohibition. Once Prohibition commenced, the Supreme Court's seminal ruling in *Silverthorne* also originated in the Second Circuit, as did *Gouled*, one of the high court's same-day decisions that constituted its first explicit rulings on secondary evidence. The Second Circuit also got there first, however, having decided *Kraus* a month before.

III. The Influence of Wiretapping on Fruits in the Post-Prohibition Era

Development of the causal scope of the exclusionary remedy no doubt owes a debt to wiretapping. Statutes regulating the interception of telegraphic communications arose at the end of the nineteenth century to protect the telegraph companies' property and their customers' uninterrupted service.²⁴⁸ But those statutes were rarely enforced until “the lawless twenties when the rise of organized crime, the difficulty of enforcing the Prohibition Law, and the perfecting of wiretapping devices brought about [its] widespread use . . . in crime detection.”²⁴⁹ There was no federal regulation of wiretapping until 1934²⁵⁰ when Congress sought to protect telephonic communications, which “proved to be a dramatic

246. *Id.*

247. See, e.g., *Gorman v. State*, 158 A. 903, 906 (Md. Ct. App. 1932) (excluding not only tangible evidence seized by Baltimore police sergeant who entered house without justification, but also testimony “as to the character of the slips, money, envelopes and books found in the home . . .”); *People v. McGurn*, 173 N.E. 754 (Ill. 1930) (in purposely illegal search of suspect McGurn, concealed revolver taken off him by Chicago police, plus their testimony about its discovery, ruled inadmissible).

248. Rosenzweig, *Wire Tapping I*, *supra* note 112, at 514; Margaret L. Rosenzweig, *The Law of Wire Tapping*, 33 CORNELL L.Q. 73, 73 (1947) (*Wire Tapping II*); see Orin S. Kerr, *The Next Generation Communications Privacy Act*, 162 U. PA. L. REV. 373, 378–79 (2014) (“Some state laws prohibiting wiretapping emerged by 1895 . . .”).

249. Rosenzweig, *Wire Tapping I*, *supra* note 112, at 514.

250. See Note, *Exclusion of Evidence Obtained by Wire Tapping: An Illusory Safeguard*, 61 YALE L.J. 1221, 1221 & n.2 (1952); Rosenzweig, *Wire Tapping I*, *supra* note 112, at 532. To protect the secrecy of governmental communications when the government ran the telegraph and telephone systems for a year at the end of World War I, Congress did briefly outlaw wiretapping in 1918, but the law expired the next year when control of phone services returned to private companies. See Rosenzweig, *Wire Tapping I*, *supra* note 112, at 527 n.111.

advance” over the telegraph.²⁵¹ Because intercepting calls was easy,²⁵² made even easier with local phone companies’ cooperation,²⁵³ wiretapping was rampant in the early days of the telephone,²⁵⁴ of which nearly 50,000 were in use by 1880 and more than 100 times that by 1910.

Police were intercepting telephone conversations as early as 1895, but the practice stayed a secret “until 1916 when there were revelations that the Mayor of New York City had ordered the tapping of the telephones of Catholic priests.”²⁵⁵ Nevertheless, “no published federal criminal cases mentioned wiretapping before the Prohibition era,”²⁵⁶ “about fifty years after the invention of the telephone.”²⁵⁷ Even during Prohibition, federal litigation over wiretapping was “sporadic,” given that the Attorney General, FBI, and Treasury Department all opposed the practice.²⁵⁸

It was not until 1928 that the Supreme Court—or any federal court for that matter—picked up a wiretapping case.²⁵⁹ Until then, in the

The federal government’s decision to take control of the U.S. telephone system was part of a broader debate over the proper role of the government during times of both peace and war Were it simply a matter of reflexive support for the state during times of armed conflict, one would expect the takeover to have occurred as soon as war was declared, as was done with respect to radio. Instead, Congress waited eight months to take over the railroads and another nine months to assume control of the telephone system

Michael A. Janson & Christopher S. Yoo, *The Wires Go to War: The U.S. Experiment with Government Ownership of the Telephone System During World War I*, 91 TEX. L. REV. 983, 1006 (2013).

251. Kerr, *supra* note 248, at 378.

252. *See id.* (“Any person with access to the physical wires carrying the call could tap into the wire and intercept the call.”).

253. *See* Susan Freiwald, *Online Surveillance: Remembering the Lessons of the Wiretap Act*, 56 ALABAMA L. REV. 9, 12 (2004) (“Illegal surveillance was often conducted with the cooperation of local phone companies, who conspired with agents to keep surveillance secret in order to maintain public confidence in the telephone networks.”). Carriers’ cooperation, however, has never been all that dependable. *See* Diane C. Piette & Jesselyn Radack, Symposium, *Piercing the “Historical Mists”: The People and Events Behind the Passage of FISA and the Creation of the “Wall”*, 17 STAN. L. & POL’Y REV. 437, 441–42 n.25 (2006) (Carter Administration did not oppose the passage of the Foreign Intelligence Surveillance Act in 1978 because “[e]lectronic surveillance can only be done with phone company cooperation and we weren’t getting it”); Erica Goldberg, Commentary, *How United States v. Jones Can Restore Our Faith in the Fourth Amendment*, 110 MICH. L. REV. FIRST IMPRESSIONS 62, 68 (2012) (In *Olmstead*, “the phone companies argued that wiretapping, even on lines outside one’s home, technically trespasses upon telephone lines belonging to private phone companies and devoted to the exclusive use of the callers.”).

254. Kerr, *supra* note 248, at 378.

255. Wesley MacNeil Oliver, *America’s First Wiretapping Controversy in Context and As Context*, 34 HAMLINE L. REV. 205, 206 (2011).

256. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 842 & n.235 (2004) (citing cases).

257. *Id.* at 884.

258. *Id.* at 843; *see* Carol S. Steiker, *Brandeis in Olmstead: “Our Government Is the Potent, the Omnipresent Teacher,”* 79 MISS. L.J. 149, 152–53 (2009).

259. Kerr, *supra* note 256, at 843–45.

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one-third of homes that even had phones, the device was used for “business and emergency communications,” not socializing, let alone crime.²⁶⁰ An exception was *Olmstead v. United States*,²⁶¹ where agents tapped phone lines from a city street without entering onto any private property,²⁶² intercepting the calls of a young Seattle police-lieutenant-turned-bootlegger *par excellence*,²⁶³ who thereafter moved to suppress all 775 pages of the feds’ transcripts of five months of taps.²⁶⁴ Focusing on the mechanics of telephone networks rather than on their users,²⁶⁵ Justice Taft’s opinion for a 5-4 Supreme Court ruled “that the wire tapping here . . . did not amount to a search or seizure,”²⁶⁶ lawful or otherwise. The “dirty business”²⁶⁷ of wiretapping therefore had no Fourth Amendment implications for “Big Boy” Olmstead because it involved no trespass and captured intangible conversations, not “persons, houses, papers, and effects” in their strict sense.²⁶⁸

Apart from *Olmstead*, the Court’s rulings on wiretapping all took place *after* the Eighteenth Amendment’s repeal, which, as predicted, abated “a very large portion” of federal court business.²⁶⁹ Ironically, an authoritative reading of *Silverthorne* finally came in what was also a liquor investigation, albeit one commenced in 1935, two years after repeal of Prohibition. That reading was *Nardone v. United States*,²⁷⁰ a wiretapping dispute that came twice to the high court and three times to Judge Hand,²⁷¹ who by then had been hearing appeals for fifteen years on the

260. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 513–14 (2011).

261. *Olmstead v. United States*, 277 U.S. 438 (1928).

262. Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357, 383 (2003).

263. See Steiker, *supra* note 258, at 150–53 (as Seattle’s youngest police lieutenant, “Big Boy” Olmstead got sacked for smuggling booze from Canada, after which he made it big smuggling full-time, his downfall being that with local officials in his pocket, he justifiably but mistakenly counted out wiretapping by the feds).

264. *Olmstead*, 277 U.S. at 471 (Brandeis, J., dissenting).

265. See Kerr, *supra* note 262, at 384.

266. *Olmstead*, 277 U.S. at 466.

267. *Id.* at 470 (Holmes, J., dissenting).

268. *Olmstead*, 277 U.S. at 465 (Liberalized constitutional protections “cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.”).

269. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 510 & n.69 (1986) (citation omitted).

270. 308 U.S. 338 (1939) (*Nardone II*).

271. See *United States v. Nardone*, 127 F.2d 521, 521 (2d Cir. 1942) (L. Hand, Swan, & Chase, JJ.) (*Nardone III*) (“This case comes before us now for the third time. The general nature of the charge and the evidence in support of it have been so fully set out in the two opinions of the Supreme Court and in our own that we may dispense with any introduction . . .”) (citations omitted).

Second Circuit.²⁷² In academic circles, *Nardone* is known for a linguistic move on Justice Frankfurter's part that pushed *Silverthorne's* notion of independent sources toward the deployment of a second doctrinal box for making admissibility calls. The real rub in *Nardone*, however, is in reconciling Judge Hand's positions in *Kraus* and *Nardone* both with each other and with the Supreme Court's position.

A. *Nardone I*: A Statutory Basis for the Suppression of Wiretapped Conversations

In *Nardone I*, federal revenue agents' unauthorized wiretaps intercepted 500 phone calls, seventy-two of which were admitted at Frank Carmine Nardone's trial,²⁷³ where he was convicted of smuggling untaxed alcohol by boat into the U.S.²⁷⁴ The case against Nardone "was principally prepared by one Dunigan, an 'assistant supervisor of the Alcohol Tax Unit,'"²⁷⁵ who had learned from informant Murray that Nardone was in a smuggling ring. After observing the group for a while, including meetings at New York's Hotel Astor, Dunigan illegally seized three telegrams that "absolutely convinced" him of the conspiracy.²⁷⁶ On December 20, 1935, four days after intercepting the telegrams, Dunigan began three months of wiretaps.²⁷⁷ On December 28, 1935, Nardone's group shipped 2400 cases of untaxed liquor from near Newfoundland, got busted around January 12, 1936 off the South Carolina coast by the Coast Guard with 1/3 of the load, and then unloaded the balance on March 17, 1936 at Pier 72 on the Hudson, bringing about more arrests, including Nardone's,²⁷⁸ at New York City's Belford Restaurant on March 20.²⁷⁹

On Nardone's appeal to the Second Circuit, Judge Chase rejected Nardone's search-and-seizure claim for "attributing an enlarged and

272. See Gerald Gunther, *Reflections on Judicial Administration in the Second Circuit, from the Perspective of Learned Hand's Days*, 60 BROOK. L. REV. 505, 506 (1994) (Appointed by President Coolidge in 1924, "Hand served as chief judge of the Circuit from February 1939 . . . until 1951, when Hand retired 'from regular, active service.'" (citation omitted).

273. *United States v. Nardone*, 90 F.2d 630, 631 (2d Cir. 1937) (Chase, L. Hand, & Manton, JJ.) (*Nardone I*).

274. *Id.* at 630; *Nardone III*, 127 F.2d at 522. "Apparently Nardone was one of the ringleaders." *United States v. Nardone*, 106 F.2d 41, 42 (2d Cir. 1939) (L. Hand, Swan, & A. Hand, JJ.) (*Nardone II*).

275. *Nardone III*, 127 F.2d at 521. Another Dunigan, Assistant U.S. Attorney Lester C., was on the brief to the Second Circuit in both *Nardone I* and *Nardone II*.

276. *Id.*

277. *Id.* at 522.

278. *Id.*

279. *Nardone I*, 90 F.2d at 630-32. The guilty vessel was seized the same day in Bridgeport, Connecticut. *Id.* at 631.

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unusual meaning to the Fourth Amendment” that was false to “the common law of evidence.”²⁸⁰ As for the statutory issue, the Federal Communications Act of 1934 allowed “no person” without the sender’s consent to “intercept” and “divulge” “any communication” to “any person.”²⁸¹ Because Congress made no mention of any remedy for violations, the Second Circuit panel unanimously affirmed the conviction, seeing no point in worrying whether wiretapping violated the statute if nothing was at stake.²⁸²

Deeming a federal agent a “person,” wiretapping an “interception,” a telephone conversation a “communication,” and an agent’s testimony a “divulging,” the Supreme Court, through Justice Owen Roberts, reversed in what became known as *Nardone I*, which nullified the feds’ divulging through exclusion of the taps on retrial.²⁸³

B. *Nardone II*: A Statutory Basis for the Suppression of Derivative Evidence

On remand, *Nardone* was re-convicted, this time seemingly based on evidence *derived* from the taps,²⁸⁴ though the intercepted conversations themselves were excluded. On *Nardone*’s second appeal to the Second Circuit, Judge Hand’s ruling eschewed looking “beyond the character of the evidence itself” and into the causal relation between the taps and the derivative testimony presented at *Nardone*’s re-trial.²⁸⁵ Key to Hand’s ruling in *Nardone II* is that at the time, the Supreme Court still held the *Olmstead* view that tapping wires is not a search or seizure if executed, as it was in *Nardone*, neither by entering the aggrieved party’s property by trespass nor by seizing an actual thing, not a

280. *Id.* at 632, quoting *Olmstead v. United States*, 277 U.S. 438 (1928).

281. *Id.*, citing 47 U.S.C.A. § 605 (1934).

282. *Id.*

283. See *Nardone v. United States*, 302 U.S. 379, 381–82 (1937) (*Nardone I*). *Nardone I* was a controversial ruling. See Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York Court of Appeals’ Quest for Principled Decisionmaking*, 62 BROOKLYN L. REV. 1, 59 n.199 (1996); Notes and Legislation, *Wiretapping and Law Enforcement*, 53 HARV. L. REV. 863, 865–67 (1940). But cf. L. Rush Atkinson, *The Fourth Amendment’s National Security Exception: Its History and Limits*, 66 VAND. L. REV. 1343, 1377 n.172 (2013) (“While executive officials condemned the *Nardone* decisions, many members of Congress embraced the evidentiary bar.”). For the pros and cons of wiretapping set forth when its function was most disputed, see Rosenzweig, *Wire Tapping II*, *supra* note 248, at 94–97.

284. See *Nardone II*, 106 F.2d at 42 (at *Nardone*’s retrial, “the same transactions were proved by what, generally speaking, was the same evidence, omitting the ‘taps’”). In its brief to the Supreme Court, the U.S. would elaborate its independent-source argument in unsuccessfully defending *Nardone*’s second conviction. See Brief for the United States, *Nardone v. United States*, No. 240, 308 U.S. 539 (1939) 1939 WL 48428 at *44–46 (*Nardone II*).

285. *Nardone II*, 106 F.2d at 43–44.

conversation.²⁸⁶ That meant the exclusionary rule was inapplicable because *Nardone* involved no Fourth Amendment violation.

In Judge Hand's view, however, *Olmstead* was on its way out,²⁸⁷ in fact, Hand was so "doubtful" about his own imminent ruling that he enlarged Nardone on bail so he could prepare his second petition for certiorari.²⁸⁸ If *Olmstead* is overruled, Hand predicted, then Nardone, like Kraus before him, would be entitled to a "complete exposure" of the prosecution's case pre-trial. That, Hand regretted, would render the prosecution "hopelessly handicapped" by "a single misstep" if it is enough for exclusion that "[o]ne thing leads to another," even though evidence typically fails to "bear the ear-marks of its acquisition."²⁸⁹ If, however, Nardone's right to discover "how the case against him has been prepared" must await the close of testimony, then "a mistrial will be necessary unless . . . the prosecution has not used the 'taps' at all, or so little as not to count."²⁹⁰ To avoid either of these "embarrassments," Judge Hand anticipated limits on the exclusionary rule along the lines of those imposed on coerced confessions, such as by excluding only "the very transaction—the document seized, the talk overheard."²⁹¹

The admissibility of secondary evidence derived from an illegal search and seizure, Hand posited, was an open question. "The Supreme Court has never committed itself on the point," he summarized, "for in all its decisions except *Silverthorne*, the very document or other evidence seized was offered; and in that case, although the unlawfully seized papers were not offered, the prosecution was proposing to compel their production."²⁹²

Judge Hand was correct in *Nardone II* that there was nothing derivative about compelling production of "the very document" the U.S. had illegally seized in *Silverthorne*,²⁹³ but he is mistaken that the Court had "never committed itself on the point,"²⁹⁴ either in *Silverthorne* itself or in the nineteen-year run-up to *Nardone II*. It had. As a reminder, the year after *Silverthorne*, *Gouled* excluded as secondary fruits

286. See *id.* citing *Olmstead v. United States*, 277 U.S. 438 (1928).

287. See *id.* at 43 (*Olmstead*, "so far as we can see, still stands"); *id.* at 44 ("if *Olmstead* . . . should be treated as overruled . . ."); *id.* ("Possible *Olmstead* . . . is no longer law"). The idea was that the Federal Communications Act of 1934 had effectively overruled *Olmstead*. See, e.g., *Lopez v. United States*, 373 U.S. 427, 462 (1963) (Brennan, J., dissenting).

288. *Nardone II*, 106 F.2d at 44.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* (citation omitted).

293. *Id.*

294. *Id.*

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“a duplicate original, obtained from Steinthal,”²⁹⁵ just as the same day, *Amos* excluded as secondary fruits Prohibition agents’ testimony about “blockade whiskey.”²⁹⁶ While the poisonous tree in both *Gouled* and *Amos* was warrantless trespassory searches, *Nardone* was still governed by *Olmstead*, under which non-trespassory wiretapping was a non-search. As such, there was no poisonous tree to bear any fruit.

That meant *Nardone*’s relief in the Second Circuit would have to come from the statute. Stuck with the Supreme Court’s ruling that the statute required exclusion of the taps, Judge Hand found “the nub” of the case, just as he had in *Kraus*, not to be the taps themselves, but testimony *derived from* the taps:

Congress had not also made incompetent testimony which had become accessible by the use of unlawful ‘taps’, for to divulge that information was not to divulge an intercepted telephone talk. Indeed, the officer might lock what he had heard in his breast, and yet use it effectively enough. He would of course be taking advantage of his crime, but that would not be enough; the testimony he secured would not itself be a forbidden disclosure.²⁹⁷

Accordingly, Hand ruled that *Nardone* “had no right to a discovery of how the prosecution’s case was prepared.”²⁹⁸

When *Nardone II* reached the Supreme Court, the Justice Department’s brief took Hand’s contrary position in *Kraus* as “clearly dictum,”²⁹⁹ even though Hand had characterized the admissibility of derivative evidence as the very “nub” of *Kraus*.³⁰⁰ “Moreover,” the DOJ went on, “Judge Hand, in writing the opinion in the instant case in the court below, cited the *Kraus* case without feeling bound to follow it.”³⁰¹ Yet any doubt that *Gouled/Amos* would exclude derivative, not just

295. *Gouled v. United States*, 255 U.S. 298, 307 (1921).

296. *Amos v. United States*, 255 U.S. 313, 315 (1921).

297. *Nardone II*, 106 F.2d at 44.

298. *Id.*

299. Brief for the U.S., *Nardone v. United States*, 308 U.S. 539 (1939) (No. 240), 1939 WL 48428 at *26–27 (*Nardone II*), quoting *United States v. Kraus*, 270 F. 578, 580 (S.D.N.Y. 1921) (L. Hand, J.). The federal reporter’s synopsis of *Kraus* does state that wholesale liquor dealers moved “for the return of papers claimed to have been illegally seized” by Prohibition agents. That no copies were there mentioned apparently led DOJ to conclude that Judge Hand “was acting upon a petition for the return of the very papers which had been illegally seized.” *Id.*

300. *United States v. Kraus*, 270 F. 578, 581 (S.D.N.Y. 1921) (L. Hand, J.).

301. Brief for the U.S., *Nardone v. United States*, 308 U.S. 539 (1939) (No. 240), 1939 WL 48428 at *27 (*Nardone II*).

primary evidence, would soon after be removed by the high court in *Nardone II*,³⁰² where the Court reversed again.

Faced with a “far-reaching problem”³⁰³ “of morality and public well-being,”³⁰⁴ Justice Frankfurter’s opinion for the Court predicted that bans on privacy invasions by federal agents would be “self-defeating”³⁰⁵ if trial courts do not “allow the accused to examine the prosecution as to the uses to which it had put the information” owing to the wire-taps.³⁰⁶ What followed was a restatement of the “natural limitation”³⁰⁷ of *Silverthorne*: “Sophisticated argument may prove a causal connection between information obtained through illicit wiretapping and the Government’s proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.”³⁰⁸ The Court went on that once an accused demonstrates that “a substantial portion of the case against him was a fruit of the poisonous tree,” the prosecution may “convince the trial court that its proof had an *independent* origin.”³⁰⁹ Declining to perform “a finicking appraisal of the record . . . as to the existence of independent sources for the Government’s proof,”³¹⁰ *Nardone II* offered no examples of what might count as attenuated, dissipated, or independent.

C. *Nardone III*: Judge Hand’s Application of the Independent-Source Doctrine

Such an appraisal would occur on remand at a hearing decided in the prosecution’s favor before *Nardone*’s third trial,³¹¹ which ended in yet another conviction. On *Nardone*’s appeal from that judgment, Judge Hand concluded that while the prosecution failed at the pre-trial hearing to prove that the telegrams “had not led Dunigan to begin to ‘tap’ the telephones four days later; or that without the ‘taps’ he would have pressed through his investigation to a successful conclusion,”³¹² that failure didn’t matter. Reviewing each item of intelligence gathered

302. *Nardone II*, 308 U.S. at 340–41, citing *Gouled*, 255 U.S. at 307 (referencing the inadmissibility of a copy of the illegally seized Steinthal contract).

303. *Id.* at 339.

304. *Id.* at 340.

305. *Id.* at 341.

306. *Id.* at 339.

307. JOHN M. MAGUIRE, EVIDENCE OF GUILT § 5.07, at 219 n.7 (1959).

308. *Nardone II*, 308 U.S. at 341.

309. *Id.*

310. *Id.* at 342–43.

311. *Nardone III*, 127 F.2d at 521.

312. *Id.* at 522.

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on the smuggling ring prior to the intercepted telegrams, including indictments issued against members prior to the telegrams, Judge Hand ruled out that members' decisions to cooperate with authorities were prompted by illicit information.³¹³ The one member of the ring on whom authorities had nothing before the taps, they had nothing on afterward, either.³¹⁴ In affirming, the Second Circuit ruled that the illegal taps "did not, directly or indirectly, lead to the discovery of any of the evidence used upon the trial, or to break down the resistance of any unwilling witnesses."³¹⁵ Whether the taps somehow "spurred the authorities to press an investigation which they might otherwise have dropped" Judge Hand would not entertain, lest the law fetishize privacy in a way not prescribed by the Supreme Court in either of its reversals.³¹⁶ From there the Supreme Court refused to hear *Nardone III*.³¹⁷

The United States was correct in arguing that Judge Hand's position in *Nardone II* and *Nardone III* had shifted in the two decades since *Kraus*.³¹⁸ While Judge Hazel had conceded in *Silverthorne* "that there was evidence showing that the basis for the [Silverthornes'] indictment was procured from independent sources, and not from any wrongful act,"³¹⁹ he found that trying to decouple the illegally seized documents from those sources was "manifestly impossible."³²⁰ Like Judge Hazel, Judge Hand in *Kraus* saddled the prosecution with the burden of disentangling the wrong from the evidence.³²¹ So, Hand either changed his mind about the nature of the prosecution's task or found the evidence in *Nardone* more easily decoupled from the wrongs than he had in *Kraus*, a finding that is difficult to assess, given that *Kraus* presumed that the task was not quite humanly possible.

If Hand had changed his mind, then there was no obvious sign. In the twenty-one years between *Kraus* and *Nardone III*, Hand, sitting by designation on the court of appeals, participated in three published opinions that addressed motions to return/suppress property;³²² none

313. *Id.*

314. *Id.* at 522–23.

315. *Id.* at 523.

316. *Id.*

317. *Nardone v. United States*, 316 U.S. 698 (1942) (*Nardone III*).

318. Brief for the United States, *Nardone v. United States*, 308 U.S. 338 (1939) (No. 240) 1939 WL 48428 at *27 (*Nardone II*), quoting *United States v. Kraus*, 270 F. 578, 580 (S.D.N.Y. 1921).

319. *United States v. Silverthorne*, 265 F. 859, 863 (W.D.N.Y. 1920).

320. *Id.* at 862.

321. See *United States v. Kraus*, 270 F. 578, 581–82 (S.D.N.Y. 1921).

322. See *In re Hollywood Cabaret*, 5 F.2d 651, 659 (2d Cir. 1924) (Rogers, J., with L. Hand & A. Hand, JJ., both by designation) (invalidating search warrants obtained by Treasury Department agents, but limiting restoration of liquor "to one who at least claims to be the owner, or to have

are revelatory about *Silverthorne*'s "natural limitation." If *Kraus* and *Nardone III* are distinguishable, it is not clear in what way, other than by their causal complications stirring up in Hand a different sensibility. That new sensibility might have been provoked by the peculiar capacity of wiretapping to capture a large web of human entanglements, thereby producing evidence that, as Hand had said in *Nardone II*, "does not bear the ear-marks of its acquisition."³²³ He had apparently come to see it as unfair to place that mystery entirely on the prosecution to resolve, as he had done in *Kraus*, which involved a liquor ring that was penetrated by an old-fashioned raid, not wiretapping.

IV. The Second Circuit's Resistance to Doctrinal Boxes

As early as 1923, Judge Hand did betray a cynicism toward an adversarial game beset by "archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime," while giving the accused "every advantage," all just to prevent the "unreal dream" of "the innocent man convicted" from coming true.³²⁴ Cynical or not,

had it in his possession when it was wrongfully seized"); *In re No. 191 Front St.*, 5 F.2d 282, 286 (2d Cir. 1924) (Rogers & Manton, JJ., & L. Hand, J., by designation) (ordering return of records of liquor transactions discovered by way of defective search warrant); *Linn v. United States*, 251 F. 476, 479–80 (2d Cir. 1918) (Rogers & Hough, JJ., & L. Hand, J., by designation) (corporations may not resist subpoenas on grounds of compelled self-incrimination).

323. *Nardone II*, 106 F.2d at 44 ("One thing leads to another," continues Hand, "and if the original taint pervades the last scrap of evidence eventually found, the accused will not get his rights short of a complete disclosure.")

324. *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923) (L. Hand, J.). Later, Hand would note that exclusion of evidence can be "extremely embarrassing" to an otherwise just judgment. *United States v. White*, 124 F.2d 181, 186 (2d Cir. 1941) (L. Hand, A. Hand, & Clark, JJ.). By 1958, at age 87, Hand had degraded to the point that he condemned *Brown v. Board of Education* as misguided judicial activism. See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 564–66, 572–79 (Oxford 2011). Judge Posner, among others, was unimpressed. See Richard A. Posner, Book Review, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 *YALE L.J.* 511, 519 (1994) (calling Hand's position on *Brown* "eloquent twaddle"). Biographer Gerald Gunther excused Hand's condemnation of *Brown* as a "delayed surrender" to the manipulations of Justice Frankfurter. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 578 (Oxford 2011), who had become quite "embittered." John Frank, Book Review, *The Great Judge*, 108 *HARV. L. REV.* 931, 943 (1995). Blaming Hand's stance toward *Brown* on Frankfurter has been ruled a cop-out. See Michael J. Gerhardt, Review Essay, *Art of Judicial Biography*, 80 *CORNELL L. REV.* 1595, 1622–23 (1995); Linda Przybyszewski, *The Dilemma of Judicial Biography or Who Cares Who Is the Great Appellate Judge?*, 21 *LAW & SOCIAL INQUIRY* 135, 161–62 (1996); Edward A. Purcell, Jr., *The Historical Significance of Judge Learned Hand: What Endures and Why?*, 50 *ARIZ. ST. L. REV.* 855, 896–97 (2018); Charles A. Wright, *A Modern Hamlet in the Judicial Pantheon*, 93 *MICH. L. REV.* 1841, 1851–53 (1995). Hand's public recantation also flopped. See Frank, *supra*, at 944. Hand's late position on *Brown* does have its defenders, apart from Gunther. See McGeorge Bundy, Book Review, *The Bill of Rights*, 67 *YALE L.J.* 944, 948–49 (1958); Jak Allen, *Political Judging and Judicial Restraint*, 60 *AM. J. LEGAL HIST.* 169, 180 (2020).

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Hand made what should be appreciated as a deep and wide mark on fruits doctrine. A historically significant illustration is *Somer v. United States*,³²⁵ a post-prohibition dispute over untaxed alcohol. There, federal investigators from the Alcohol Tax Unit and a local police officer found an operative still in an unjustifiable search of Somer’s Brooklyn apartment. When Somer’s wife said that he would be home in twenty minutes, agents waited outside until he arrived as predicted, when a search of his car revealed jugs of alcohol, which agents could smell from outside the car. Relying on *Silverthorne*, the Second Circuit ruled that the car search owed to information unlawfully gotten in the home search. But the panel remanded the case because

it does not follow that the seizure was inevitably invalid. Possibly, further inquiry will show that, quite independently of what Somer’s wife told them, the officers would have gone to the street, have waited for Somer and have arrested him, exactly as they did. If they can satisfy the court of this, so that it appears that they did not need the information, the seizure may have been lawful.³²⁶

Characteristic of Second Circuit rulings of the era, *Somer* was free from what would become the more technical, torts-influenced, post-1963 attempts by the Supreme Court at precision in fruits cases.

From 1963 on, fruits depended on three doctrinal boxes that act as “exceptions to the exclusionary rule—the ‘independent source,’ ‘inevitable discovery,’ or ‘attenuation’ doctrines.”³²⁷ There is irony in that all three exceptions arose out of the Second Circuit, which itself never identified any exceptions as such. That work was all a projection on the Supreme Court’s part, begun in 1963, continuing today in a perpetual state of “being and becoming.”³²⁸ In 1963, the Court projected two distinct doctrinal boxes, the first onto *Silverthorne* (admitting evidence from a source “independent” of the wrong) and the second onto *Nardone II* (admitting evidence “attenuated” from the wrong).³²⁹ The occasion was *Wong Sun v. United States*,³³⁰ where federal narcotics agents searched Wong Sun’s San Francisco residence without justification. No narcotics were found, but Wong Sun was arrested anyway, then promptly charged, arraigned, and released. A few days later, Wong Sun voluntarily visited

325. *Somer v. United States*, 138 F.2d 790, 791 (2d Cir. 1943) (L. Hand, Chase, & Clark, JJ.).

326. *Id.* at 791–92.

327. *United States v. Crews*, 445 U.S. 463, 469–70 & n.11 (1980).

328. See Robert Bolton, *Plato’s Distinction between Being and Becoming*, 29:1 REV. OF METAPHYSICS 66 (1975).

329. See *Wong Sun v. United States*, 371 U.S. 471, 487 (1963).

330. *Id.* at 471.

the Narcotics Bureau, where he confessed on his own accord, rendering the confession admissible as “attenuated” from the illegal search and seizure he had suffered.³³¹ Just as easily, however, could the Court have declared the confession admissible as “independent” from the illegal search and seizure.

As an interpretation of *Silverthorne*, the Court in *Nardone II* intended “no doctrinal significance at the time” in tacking attenuation/dissipation on to *Silverthorne*’s allusion to independence. The add-on was “only an idiosyncratic turn of phrase,” the sort of “odd and often inexplicable” flourish to which its author, Justice Frankfurter (who actually used “palimpsest” and “gallimaufry” in opinions) was prone.³³² Commentators credit *Somer* as the basis of what four decades later would become the Court’s third doctrinal box,³³³ the inevitable discovery exception.³³⁴ Those boxes, however, whatever their value, are false to the Second Circuit’s way of dealing with derivative evidence.

For Judge Hand and his colleagues, application of *Silverthorne*’s “natural limitation” was a commonsense endeavor cut off from the algebraic BPL risk assessment he would later impose on tort law (and torts students alike).³³⁵ Faced with the “concrete complexities” that Justice Frankfurter accurately predicted for fruits analysis,³³⁶ the Second Circuit consistently ruled in a mode devoid of the mincing multi-factor balancing tests the Supreme Court would tie itself to,³³⁷ even when the

331. *Id.* at 491.

332. See Brent D. Stratton, *The Attenuation Exception to the Exclusionary Rule: A Study in Attenuated Principle and Dissipated Logic*, 75 J. CRIM. L. & CRIMINOLOGY 139, 153–55 & nn.71–74 (1984) (citation omitted).

333. See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 9.3(e) (4th ed.) (Nov. 2021 Update); Robert M. Bloom, *Inevitable Discovery: An Exception Beyond the Fruits*, 20 AM. J. CRIM. L. 79, 82 (1992); Stephen E. Hessler, *Establishing Inevitability without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule*, 99 MICH. L. REV. 238, 241 n.22 (2000); Frank H. Easterbrook & David L. Shapiro, *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 118, 123 & n.47 (1984); Harold S. Novikoff, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 COLUM. L. REV. 88, 90 (1974). *But see* Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 144–46 (1984) (arguing that *Somer* is not an inevitable-discovery case).

334. See *Nix v. Williams*, 467 U.S. 431, 444 (1984).

335. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173–74 (2d Cir. 1947); RESTATEMENT (SECOND) TORTS § 291 (1965) (“Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the . . . act is negligent if the risk is of such magnitude as to outweigh . . . the utility of the act or of the particular manner in which it is done.”).

336. *Nardone II*, 308 U.S. at 341.

337. See *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975) (five-factor attenuation test); *cf.* *United States v. Wade*, 388 U.S. 218, 241 (1967) (six-factor independent-source test); *Unger v. Young*, 571 U.S. 1015 (2013) (Alito, J., dissenting from denial of certiorari) (calling out Court for passing up opportunity to apply and clarify *Wade*’s six-factor test).

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fit of the facts to the factors is poor.³³⁸ The validity,³³⁹ application,³⁴⁰ and implications³⁴¹ of the exceptions themselves and their elements have engaged the Court and commentators without end, the result being a perhaps misplaced consensus that making causal judgments is more science than art, more technique than knack, more learning than feel.

Most notable for the absence of a preoccupation with the mechanics of causation that occupies tort lawyers is the Second Circuit's ruling in *Parts Manufacturing Corporation v. Lynch*,³⁴² a case more factually tricky than any fruits case the Supreme Court has decided since *Nardone*. The Cliffs Notes version is that in December 1941, acting on a district judge's defective order, the FBI seized stolen Ford auto parts stashed in a NYC warehouse.³⁴³ The Second Circuit ordered the return of the parts,³⁴⁴ of which the FBI made a list for Ford's lawyers,³⁴⁵ who turned the list into a replevin suit enforced by New York sheriffs, who reclaimed the parts from accused thieves who ran Parts Manufacturing, which then got its own replevin order for the parts.³⁴⁶ But the FBI beat the thieves to the parts under a warrant sought by an AUSA who relied on affiants who had confirmed a year before the original invalidated search that Parts Manufacturing had ripped the parts off from Ford.³⁴⁷ On appeal, in an unencumbered, perhaps too playful passage,

338. See, e.g., *Utah v. Strieff*, 579 U.S. 232 (2016) (finding only three of the five so-called *Brown* factors applicable).

339. For example, the inevitable-discovery exception has been criticized for having “neglected to define adequately when a discovery is truly inevitable,” Stephen E. Hessler, *Establishing Inevitability without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule*, 99 MICH. L. REV. 238, 242 n.22 (2000), or “offer any precise formulation of the exception.” Leading Cases, *Exclusionary Rule–Inevitable Discovery Exception*, 98 HARV. L. REV. 118, 127 (1984). Likewise has the attenuation exception been criticized for its individual elements/factors. See Bryan H. Ward, *Restoring Causality to Attenuation: Establishing the Breadth of a Fourth Amendment Violation*, 124 W. VA. L. REV. 147, 198–99 (2021) (criticizing an attenuation factor for being insufficiently causal); *Dunaway v. New York*, 442 U.S. 200, 220 (1979) (Stevens, J., concurring) (“The temporal relationship between the arrest and the confession may be an ambiguous factor. If there are no relevant intervening circumstances, a prolonged detention may well be a more serious exploitation of an illegal arrest than a short one. Conversely, even an immediate confession may have been motivated by a prearrest event such as a visit with a minister.”).

340. See, e.g., WAYNE R. LAFAVE, *SEARCH & SEIZURE* § 11.4(f) (6th ed. Oct. 2022 Update) (calling Court's application of independent-source test in *Segura v. United States*, 468 U.S. 796 (1984) “unsound”).

341. See, e.g., Kit Kinports, *Illegal Predicate Searches and Tainted Warrants after Heien and Strieff*, 92 TUL. L. REV. 837, 869–79 (2018) (mapping *Strieff* on to an unfamiliar set of facts).

342. *Parts Mfg. Corp. v. Lynch*, 129 F.2d 841 (2d Cir. 1942).

343. See *Weinberg v. United States*, 126 F.2d 1004, 1005–06 (2d Cir. 1942) (companion case to *Parts Manufacturing*).

344. See *id.* at 1006–09.

345. See *Parts Manufacturing*, 129 F.2d at 841–42.

346. *Id.* at 856.

347. *Id.* at 857–58.

Judge Charles Clark ended by refusing to say to the thieves that “[s]ince the first seizure was illegal, you now have a chance to spirit away the evidence”³⁴⁸

Indeed, Judge Clark’s reluctance to view the relation of police wrongdoing to evidence as one of tortfeasor to plaintiff aligns well with Judge Hand’s reading in *Nardone III* that the Supreme Court in *Nardone II* had “made it abundantly clear that it did not contemplate a chase after will-o’-the-wisps.”³⁴⁹ One will find no cites in *Parts Manufacturing* to Prosser, nor to events that are intervening, foreseeable, or causal-chain-breaking, or for that matter any other feature of tort law, to which contemporary fruits is considered sufficiently “akin”³⁵⁰ to draw from. And draw from it the Court does.³⁵¹ Once in a blue moon, the Court does catch itself getting caught up in the mechanistic, wooden inquiries toward which tort law can tend, as where the Court noted that whether evidence is a fruit “cannot be decided on the basis of causation in the logical sense alone”³⁵² But those moments are too rare to count as representative. More typical is the Court’s failure to absorb that even in torts, for an “independent” event to cut off responsibility for a prior risk-taking action, the new event need only be *independent enough*.³⁵³

In contrast, a virtue of the Second Circuit is that it approaches the relation of police wrongdoing to evidence as we might any other coincidence in the world. Professor Eric Johnson has argued persuasively that to call the relation of two events “independent” refers to the idea that the relation of police wrongdoing to the evidence is *coincidental*.³⁵⁴ As coincidences go, some come from out of nowhere and cut off official

348. *Id.* at 843.

349. *Nardone III*, 127 F.2d at 523.

350. See Eric A. Johnson, *Causal Relevance in the Law of Search and Seizure*, 88 B.U.L. REV. 113, 115 (2008).

351. See, e.g., *Utah v. Strieff*, 579 U.S. 232, 257-58 (2016) (Kagan, J., dissenting); *Hudson v. Michigan*, 547 U.S. 586, 592 (2006); *Powell v. Nevada*, 511 U.S. 79, 89 (1994) (Thomas, J., dissenting); *New York v. Harris*, 495 U.S. 14, 26 (1990) (Marshall, J., dissenting); *Oregon v. Elstad*, 470 U.S. 298, 333 (1985) (Brennan, J., dissenting); *Segura v. United States*, 468 U.S. 796, 815 (1984); *Brown v. Illinois*, 422 U.S. 590, 600-04 (1975).

352. *United States v. Ceccolini*, 435 U.S. 268, 274 (1978).

353. While it is conventional to say that “[t]he term ‘independent’ means the absence of any connection or relationship of cause and effect between the original and subsequent act of negligence,” *R.H. Macy & Co, Inc. v. Otis Elevator Co.*, 554 N.E.2d 1313, 1317 (Ohio 1990), such a claim is overstated. More accurate would be to say, as the Supreme Court has, that an independent (read “superseding”) event occurs “where the defendant’s negligence in fact *substantially contributed* to the plaintiff’s injury, but the injury was actually brought about by a later cause of independent origin that was not foreseeable.” *Exxon Co., USA v. Sofec, Inc.*, 517 U.S. 830, 837 (1996) (emphasis added).

354. See Eric A. Johnson, *Two Kinds of Coincidence: Why Courts Distinguish Dependent from Independent Intervening Causes*, 25 GEO. MASON L. REV. 77, 94-101 (2017).

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responsibility for the outcome. In contrast, Johnson goes on, other coincidences are predictably within the scope of the prior wrongful action and, as such, keep officials on the hook for the coincidence.³⁵⁵ Certainly, neither *Silverthorne* nor *Nardone* literalized the term “independent source” in a way that required that we identify new exceptions/doctrinal boxes to classify coincidental discoveries of evidence.

What those now forgotten Second Circuit cases were expressing is that ascriptions of responsibility are moral not scientific judgments, be they about the Long Island Railroad Company’s responsibility to Helen Palsgraf³⁵⁶ or the Narcotics Bureau’s responsibility to Wong Sun,³⁵⁷ two celebrated controversies that unfortunately hide this reality behind the mechanics of causation.³⁵⁸ For better or worse, no basis for moral judgments can prevent borderline cases from arising. And when those borderline cases do arise, what that tells us is *not* that the rule has failed and is in need of more precision. Rather, borderline cases tell us that the rule has succeeded, or we wouldn’t be able to identify borderline cases *as* borderline cases.³⁵⁹ The Supreme Court’s fruits docket is dedicated to sharply divided borderline cases,³⁶⁰ which are disposed of in no more graceful a way today than they were when they had only a single box, a flexible notion of independence, to be applied not by “a learned lawyer,” but by a “sensible” person, under rules that “are practical and discretionary,” not technical and exacting.³⁶¹

355. *See id.*

356. *See Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928).

357. *See Wong Sun v. United States*, 371 U.S. 471 (1963).

358. *Wong Sun* has been cited more than *Brown v. Board of Education*, 347 U.S. 483 (1954), *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Roe v. Wade*, 410 U.S. 113 (1973).

359. *See JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 10 (1974). Searle elegantly makes this point in his discussion of analyticity—that which makes a statement “true in virtue of its meaning or by definition.” For example, “Rectangles are four-sided” is analytic, whereas “My son is now eating an apple” is not; the latter statement is not analytic because its truth must be verified. *Id.* at 4–11. Answering a critic who found where the meaning of analyticity becomes unclear, Searle writes:

The example has its effect precisely because it is a borderline case. We do not feel completely comfortable classifying it either as analytic or non-analytic. But our recognition of it as a puzzling case, far from showing that we do not have any adequate notion of analyticity, tends to show precisely the reverse. *We could not recognize borderline cases of a concept as borderline cases if we did not grasp the concept to begin with.*

Id. at 8 (emphasis added).

360. *See, e.g., Utah v. Strieff*, 579 U.S. 232 (2016) (5-3, Justice Scalia having died nine days before argument); *Herring v. United States*, 555 U.S. 135 (2009) (5-4); *Hudson v. Michigan*, 547 U.S. 586 (2006) (5-4); *New York v. Harris*, 495 U.S. 14 (1990) (5-4); *Murray v. United States*, 487 U.S. 533 (1988) (4-3); *Segura v. United States*, 468 U.S. 796 (1984) (5-4); *Taylor v. Alabama*, 457 U.S. 687 (1982) (5-4); *Wong Sun v. United States*, 371 U.S. 471 (1963) (5-4).

361. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 123 (Oxford 2011).

Conclusion

The two world wars are connected by a quarter-century, within which the rule of admissibility dubbed “fruit of the poisonous tree” originated. Supreme Court rulings for which that quarter-century is known, however, are themselves relatively unknown. Relegated to blurby, shorthand, stick-figure accounts, those cases would repay close study by perhaps allowing for some correction of perceptions about what those cases, now useful only for generalized propositions, did and did not rule.

Close study of the first quarter of fruits history also illuminates socio-political conditions, such as an economy that required the expansion of federal criminal law and enforcement (particularly through mail fraud and conspiracy allegations), which coincided with the expansion of Supreme Court review of criminal convictions. Chief among those socio-political conditions was the interplay between Prohibition and law enforcement, including electronic surveillance. Yet, along with Prohibition came a hiatus on the part of the Court, whose energies were diverted from the exclusionary rule to other pressing matters.

That space in the development of fruits doctrine was filled by the lower courts, particularly the lower federal courts, led by the Second Circuit, which in turn was led by Judge Learned Hand, both as trial and appellate judge. Judge Hand and his Second Circuit colleagues were the first to articulate the scope of the exclusionary rule, that is, the extent to which the rule would reach secondary/derivative evidence, even before the Supreme Court. Equally remarkable is the headway Hand and his colleagues would make not only on specific issues *within* fruits (e.g., confessions, inevitable discovery, burdens of proof) but also on matters *related to* fruits (e.g., harmless error, standing), all both ahead of their time and without acknowledgment to this day for their contributions.

Mostly, close study of the Second Circuit highlights their sensibility toward fruits that is distinct from what would come to characterize the Supreme Court. Whether a Supreme Court more faithful to the teachings of the Second Circuit would improve, impoverish, or make no difference at all to the sense, legitimacy, and predictability of fruits doctrine, this history commends to you.