Hearing Thy Neighbor: the Doctrine of Attenuation and Illegal Eavesdropping by Private Citizens, 12 Suffolk J. Trial & App. Advoc. 177 (2007). *This Content was originally published in the Suffolk Journal of Trial & appellate Advocacy in 2007.*

HEARING THY NEIGHBOR: THE DOCTRINE OF ATTENUATION AND ILLEGAL EAVESDROPPING BY PRIVATE CITIZENS

I. INTRODUCTION

Historically, evidence obtained by police in violation of the Fourth Amendment's prohibition on illegal search and seizure has fallen under the "rule of exclusion," which requires evidence tainted by government misconduct to be suppressed at trial.[1] The legal and policy considerations underpinning the rule of exclusion are numerous.[2] Among the most persuasive are: (1) the evidence would not have been uncovered without the aid of illegal government conduct; (2) admitting tainted evidence at trial excuses and encourages police misconduct; and (3) the admission of such evidence clogs courts with appeals.[3] Perhaps the strongest rationale supporting the rule of exclusion, however, is that it deters police from violating the Fourth Amendment rights of citizens by preventing the government from obtaining convictions through the use of tainted evidence.[4]

The federal wiretapping statute prohibits both the government and private citizens from eavesdropping on individuals' phone and wire communications without permission.[5] In addition to barring the act of illegal

---

[1] Boyd v. United States, 116 U.S. 616, 641 (1886) (Miller, J., concurring) (holding illegally seized evidence could not be used in a criminal trial).

[2] *See* Denise Robinson, *Supreme Court Review: Kaupp v. Texas: Breathing Life Into the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 761, 763 (2004) (discussing purpose behind and remedies under the constitutional rule of exclusion).

[3] *See* Wong Sun v. United States, 371 U.S. 471, 485 (1963) (explaining how "the exclusionary rule [bars] from trial . . . materials obtained . . . as a direct result of an unlawful invasion").

[4] *See* Hudson v. Michigan, 126 S. Ct. 2159, 2163 (2006). The Court held that the exclusionary rule is applicable "where its deterrence benefits outweigh its 'substantial social costs.'" *Id.* (quoting Pennsylvania Bd. of Prob. and Parole v. Scott, 524 U.S. 357, 363 (1998)).

[5] *See* Commonwealth v. Damiano, 828 N.E.2d 510, 517 (Mass. 2005) (explaining gov-

eavesdropping, the statute makes clear that any evidence "derived from" illegally intercepted phone and wire communications will be inadmissible at trial, thus triggering what amounts to a statutory version of the common law rule of exclusion.[6]

The federal eavesdropping statute makes it illegal for police to wiretap a suspect's phone without a warrant.[7] A private citizen who listens to his neighbor's cordless phone conversation without permission also violates the statute.[8] If the same citizen reports the contents of the neighbor's conversation to police, evidence "derived from" the intercepted conversation will be suppressed at trial.[9] Thus, the rule of exclusion applies to all evidence "derived from" illegal eavesdropping, regardless of whether the eavesdropper is the government, a business associate, or a curious neighbor.[10]

When police receive tips based on a private citizen's illegal eavesdropping, follow-up investigations are difficult because the rule of exclusion calls for the suppression of evidence "derived from" the underlying illegal eavesdropping.[11] Suppressed evidence almost always includes the contents of the eavesdropped conversation itself, but can also include a suspect's subsequent confession or physical evidence gathered during a follow-up investigation.[12] The rule puts police in a difficult position: they have received a private citizen's tip that ties a suspect to a crime, but the "taint" of the tipster's illegal conduct renders related evidence inadmissi-

---

ernment cannot disclose contents of illegally intercepted communication merely because it was not the interceptor).

[6] Miles v. State, 781 A.2d 787, 803-04 (Md. 2001) (agreeing with state's argument that exclusionary provision in wiretapping statute shares "the same principles" as constitutional rule of exclusion).

[7] 18 U.S.C. § 2511 (2002). "[A]ny person . . . who intentionally intercepts . . . any wire, oral, or electronic communication . . . shall be punished . . . or subject to suit." *Id.*

[8] *See Damiano*, 828 N.E.2d at 518-19 (describing how neighbor's eavesdropping violated statute).

[9] *See* United States v. Vest, 813 F.2d 477, 481 (1st Cir. 1987) (holding evidence derived from private citizen's eavesdropping inadmissible when passed to police). *But see* United States v. Murdock, 63 F.3d 1391, 1403 (6th Cir. 1995) (noting that "nothing in the legislative history [of Title III] . . . requires that the government be precluded from using evidence that literally falls into its hands").

[10] U.S. CONST. amend. IV ("The right of the people to be secure . . . against unreasonable searches and seizures . . . shall not be violated, and no warrants shall issue, but upon [a showing of] probable cause"); *see also Damiano*, 828 N.E.2d at 452 (upholding trial court's proper suppression of evidence derived from neighbor's illegal eavesdropping).

[11] *Damiano*, 828 N.E.2d at 514 (describing how eavesdropping statute allows for the suppression of evidence derived from any "unlawfully intercepted 'wire' or 'oral' . . . communications").

[12] *See* Chandler v. United States Army, 125 F.3d 1296, 1302 (9th Cir. 1997) (holding that contents of wife's tape of husband not admissible at trial); *In re* Grand Jury, 111 F.3d 1066, 1077-79 (3d Cir. 1997) (holding that playing illegally wiretapped recording before grand jury would violate Federal Wiretap Statute).

ble.[13] Meanwhile, the police themselves have done nothing wrong.[14] Some of the most difficult instances occur when the illegal eavesdropper listens in on suspects planning a future crime, and then tells police.[15] Police thus face a choice between allowing the crime to occur or making an arrest that probably will not hold up in court.[16]

The purpose behind the rule of exclusion is to deter police from violating the Fourth Amendment rights of individuals.[17] By applying the rule to the acts of private citizens, however, the eavesdropping statute goes considerably farther, penalizing police and prosecutors for the illegal conduct of third parties, even when the government has done nothing wrong.[18]

Courts have identified several exceptions to the rule of exclusion, including the independent source and inevitable discovery doctrines, both of which allow the admission of evidence despite a Fourth Amendment violation when the contested evidence could have been discovered through an independent, untainted source or method.[19] Perhaps the best known exception to the exclusionary rule is the doctrine of attenuation, which permits the admission of evidence despite illegal government conduct

---

[13] *See Miles*, 781 A.2d at 816 (reasoning that "police did exactly what anyone would have expected them to do" by following up on illegally eavesdropped tip). The police in *Miles* received a recording of an incriminating phone conversation between a murder suspect and his wife from the suspect's neighbor, who had illegally eavesdropped on the conversation. *Id.*

[14] *Murdock*, 63 F.3d at 1402 (describing police who received illegally eavesdropped tip as innocent recipients of "a lucky break").

[15] *Damiano*, 828 N.E.2d at 521 (holding that even if tip from neighbor was illegally obtained "the duty of the police was to act" to prevent crime).

[16] *Id.* at 455 n.14 (explaining that even if arrest legal, evidence still suppressed at trial if court finds it was derived from illegal eavesdropping).

[17] *See* Brown v. Illinois, 422 U.S. 590, 599 (1975) (explaining exclusionary rule protects Fourth Amendment by "deterring lawless conduct" by police and "closing the doors of . . . courts to any use of evidence unconstitutionally obtained"); *see also* Coolidge v. New Hampshire, 403 U.S. 443, 487-88 (1971) (holding that exclusionary rule should apply to private citizens when citizen "act[s] as an instrument or agent of the state"); Lisa Ann Wintersheimer, *Privacy Versus Law Enforcement – Can the Two be Reconciled?*, 57 U. CIN. L. REV. 315 (1988) (interpreting Title III as prohibiting all nonconsensual electronic surveillance, regardless of listener's identity).

[18] *See* United States v. Vest, 813 F.2d 477, 481 (1st Cir. 1987) (finding that "[a]llowing the government's use of unlawfully intercepted communications where the government was not the procurer 'would eviscerate the statutory protection of privacy from intrusion by illegal private interception'").

[19] *See* United States v. Ramirez-Sandoval, 872 F.2d 1392, 1396 (9th Cir. 1989) (discussing three major exceptions to rule of exclusion); *see also* Hudson v. Michigan, 126 S. Ct. 2159, 2178 (2006) (describing inevitable discovery doctrine as one in which discovery of evidence would have occurred "despite" and "independently" of police misconduct); Nix v. Williams, 467 U.S. 431, 444 (1984) (describing inevitable discovery doctrine); United States v. Wade, 388 U.S. 218, 242 (1967) (describing independent source exception); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920) (holding exclusionary rule does not apply to evidence unconnected with, and untainted by, an illegal search under independent source doctrine).

when the discovery of the contested evidence is sufficiently "removed" from the government's illegal conduct.[20] Attenuation occurs when the connection between the government misconduct and the evidence in question is so remote that the "taint" of the government's misconduct has "dissipated."[21]

A court's attenuation analysis turns on a balance of four factors: the passage of time, the presence of intervening events, the nature and scope of the official misconduct, and whether the defendant received *Miranda* warnings.[22] In the landmark attenuation case of *Wong Sun v. United States*, for example, the defendant was illegally arrested by police.[23] Several days after being released, the defendant voluntarily returned to the police station and confessed.[24] The Supreme Court found that the passage of time, combined with the defendant's voluntary choice to return and confess, meant the confession was "attenuated" from the illegal arrest and therefore admissible in court.[25]

The Supreme Court's attenuation jurisprudence has focused exclusively on instances of police misconduct under the Fourth Amendment.[26] Since 2001, however, the state supreme courts of Maryland and Massachusetts have applied the doctrine of attenuation to cases involving the illegal eavesdropping of private citizens; cases in which no Fourth Amendment violation has occurred.[27] The application of the doctrine of attenuation outside the Fourth Amendment context presents courts with an intriguing

---

[20] Wong Sun v. United States, 371 U.S. 471, 491 (1963) (holding that illegally obtained confession was admissible because the statement had "become so attenuated as to dissipate the taint" of the underlying illegality).

[21] *See Brown*, 422 U.S. at 609 (Powell, J., concurring in part) (describing the taint as being "dissipated" when the "detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost").

[22] *See* Kaupp v. Texas, 538 U.S. 626, 633 (2003) (reaffirming four-part Brown test); *see also* Commonwealth v. Damiano, 828 N.E.2d at 510, 518 (Mass. 2005) (describing attenuation analysis); Robinson, *supra* note 2, at 787 (explaining that once defendant proves Fourth Amendment violation has occurred, burden shifts to state to prove attenuation). The *Damiano* Court explained that "In determining whether evidence obtained after such a violation must be suppressed, the issue is not whether 'but for' the prior illegality the evidence would not have been obtained, but 'whether . . . the evidence . . . has been come at by exploitation of [that] illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Damiano*, 828 N.E.2d at 518 (quoting Commonwealth v. Bradshaw, 431 N.E.2d 880, 890 (Mass. 1982)).

[23] *Wong Sun*, 371 U.S. at 484 (finding statements derived from government's illegal acts admissible when attenuation shown).

[24] *Id.* at 491 (describing how confession was admissible despite being unsigned).

[25] *Id.* at 488 (discussing theory of attenuation).

[26] *Miles*, 781 A.2d at 837 (Raker, J., dissenting) (citing helpfulness of constitutional "fruit of the poisonous tree" doctrine in the analysis of eavesdropping case that did not implicate the Fourth Amendment).

[27] *See id.* (explaining how eavesdropping of private citizens does not implicate constitution, but that statute mirrors constitutional rule of exclusion); *see also Damiano*, 828 N.E.2d at 520 (discussing decision of Maryland Court of Appeals in *Miles*).

new option when faced with the eavesdropping of private citizens.[28] It also presents several troubling questions.[29]

At issue is the fact that the Supreme Court's attenuation cases have focused narrowly on instances of police misconduct.[30] In cases in which private citizens pass the contents of illegally intercepted conversations to police, arguably, no police misconduct has occurred.[31] Thus, courts applying attenuation analysis to eavesdropping by private citizens must rely on a constitutional test that turns specifically on "the purpose and flagrancy of the police misconduct" even when no "police misconduct" has occurred.[32] Can the test really be stretched this far? Or does attenuation amount to little more than a loophole for police to admit evidence derived from the illegal eavesdropping of private citizens?

This Note will argue that the doctrine of attenuation was correctly applied to a private citizen's illegal eavesdropping by the Massachusetts Supreme Judicial Court in *Commonwealth v. Damiano* and incorrectly applied by the Maryland Court of Appeals in *State v. Miles*. The Note will further argue that the doctrine of attenuation is applicable to eavesdropping by private citizens and that the government can satisfy the Supreme Court attenuation test set forth in *Brown v. Illinois* in such cases if police do not exploit the contents of the illegally intercepted communication during the interrogation of suspects.

Part II of the Note surveys the history of the doctrine of attenuation and the constitutional and statutory history of illegal eavesdropping. Part III examines the cases in which attenuation has been applied to the eavesdropping of private citizens. Part IV argues that attenuation analysis should only be applied to illegal eavesdropping by private citizens when the state can demonstrate police did not use or exploit the contents of the illegally intercepted message during interrogation.

---

[28] *Damiano*, 828 N.E.2d at 521 (following the *Miles* court's holding in applying attenuation to illegal eavesdropping of a private citizen).

[29] *See Miles*, 781 A.2d at 843 (Raker, J., dissenting) (accusing majority of sidestepping "crucial…analysis" in applying attenuation to private citizen's illegal eavesdropping).

[30] *See generally* Robinson, *supra* note 2, at 773-74 (discussing misconduct prong of *Brown* test).

[31] *See Miles*, 781 A.2d at 837 (Raker, J., dissenting) (explaining how "the constitutional 'fruit of the poisonous tree' doctrine is helpful in interpreting the scope of the exclusionary prohibition against admission of evidence 'derived from' an illegal wiretap").

[32] *Id.* at 805 (majority opinion) (reasoning that "Congress did not intend to alter or circumvent the attenuation doctrine in adopting a statutory exclusionary rule" under Title III).

II. HISTORY

A. The Doctrine of Attenuation

The doctrine of attenuation offers, perhaps, the best-known exception to the constitutional rule of exclusion, which requires that evidence derived from a Fourth Amendment violation be excluded or "suppressed" at trial.[33] In 1914, the Supreme Court unanimously held in *Weeks v. United States*[34] that evidence derived from an illegal search of a defendant's home by federal officials violated the Fourth Amendment and should be excluded at trial.[35] In 1961, the Court extended the exclusionary rule to the states in *Mapp v. Ohio.*[36] In *Mapp*, the Court held that it was "logically and constitutionally necessary . . . that the exclusion doctrine - an essential part of the right to privacy - be also insisted upon as an essential ingredient of the right" to be free from unreasonable searches and seizures.[37] The *Mapp* Court held that illegally-seized evidence must be excluded from both federal and state courts and ruled that state officials were also bound by the Fourth Amendment.[38] Since *Mapp*, numerous courts have held that once a defendant has demonstrated the existence of a Fourth Amendment violation, the burden shifts to the government to prove that the resulting evidence was not "derived from" that violation.[39] Thus, evidence "derived from" the government's illegal act is suppressed by the rule of exclusion.[40]

---

[33] Boyd v. United States, 116 U.S. 616, 641 (1886) (holding that illegally seized evidence could not be used in a criminal trial). The Court's reasoning combined the Fourth Amendment's prohibition of illegal seizures with the Fifth Amendment's prohibition of compelled self-incrimination. *Id.; see also* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 20, 22 (Yale University Press 1997) (describing how courts did not follow the Boyd Court's fusion of Fourth and Fifth Amendment principals).

[34] 232 U.S. 383 (1914).

[35] *Id.* at 392 (describing how Fourth Amendment prohibition on searches and seizures did not apply to state officials).

[36] Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying Fourth Amendment protections to the states through the Due Process Clause of the Fourteenth Amendment).

[37] *Id.* at 655-56 (describing how Fourteenth Amendment affects states).

[38] *Id.* (reasoning "[t]o hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment").

[39] *See* Wong Sun v. United States, 371 U.S. 471, 485 (1963) (holding that verbal evidence such as confessions should be excluded at trial if obtained "either during or as a direct result of an unlawful invasion"); *see also* Alderman v. United States, 394 U.S. 165, 183 (1969) (describing how "ultimate burden of persuasion" lies with government to show evidence untainted); United States v. Parker, 722 F.2d 179, 184 (5th Cir. 1983) (discussing government's burden with respect to exceptions to rule of exclusion); United States v. Taheri, 648 F.2d 598, 601 (9th Cir. 1981) (noting government's burden to show intervening events under attenuation theory); United States v. Cella, 568 F.2d 1266, 1284-85 (9th Cir.

In their application of the rule of exclusion, courts have paid particular attention to confessions obtained following illegal searches.[41] Indeed, courts have noted that "when a suspect is confronted with evidence discovered during an illegal search," the tainted evidence can be used by police to persuade the defendant that "remaining silent" is futile.[42] The suspect, believing she is "caught red-handed," confesses without knowing the information police confronted her with was illegally obtained and inadmissible at trial.[43] Thus, courts have held that the exclusionary rule is at its apex when a confession or consent to search is "induced by confronting a suspect with illegally seized evidence" during a police interrogation.[44]

1978) (describing government's burden under independent source theory); State v. Pau'u, 824 P.2d 833, 836 (Haw. 1992) (describing government's burden to show defendant waved constitutional rights); Commonwealth v. Cephas, 291 A.2d 106, 110 n.4 (Pa. 1972) (describing government's burden under "fruit of the poisonous tree" doctrine); Hart v. Commonwealth, 269 S.E.2d 806, 809 (Va. 1980) (discussing government's burden to show confession "not obtained by exploitation of the illegal action" in attenuation cases).

[40] *See* Alan C. Yarcusko, Brown *to* Payton *to* Harris*: A Fourth Amendment Double Play by the Supreme Court*, 43 CASE W. RES. L. REV. 253, 266 (1992) (discussing policy purposes of exclusionary rule).

[41] *See* Miles v. State, 781 A.2d 787, 847 (Md. 2001) (Raker, J., dissenting) (reasoning that suspect confronted by police with illegally obtained evidence is likely to confess based on belief they have been caught); *see also* State v. Abdouch, 434 N.W.2d 317, 321 (Neb. 1989) (emphasizing the differences, for the purposes of the rule of exclusion, between a custodial statement resulting from an illegal arrest and one resulting from an illegal search). In *Abdouch*, the Nebraska Supreme Court concluded that when a suspect is confronted with evidence discovered during an illegal search, there has clearly been an exploitation of the primary illegality which plays a significant role in encouraging him or her to confess by demonstrating the futility of remaining silent, because the suspect in his or her mind, has been "caught red-handed." *Id.* at 327-28.

[42] *See Miles*, 781 A.2d at 846-50 (Raker, J., dissenting) (citing line of cases suggesting danger of tainted evidence is at apex when police confront suspect with such evidence during interrogation); *see also* United States v. Johns, 891 F.2d 243, 245-46 (9th Cir. 1989) (opining that attenuation is a question of the substantiality of the taint); Amador-Gonzalez v. United States, 391 F.2d 308, 318 (5th Cir. 1968) (holding that the defendant's confession was the direct result of the illegal discovery of narcotics and that the taint of the illegally seized evidence had not been removed). If the role of the illegality is insubstantial, then suppression is inappropriate, but if the illegality is "the impetus for the chain of events" leading to the derivative evidence, then it is "too closely and inextricably linked to the discovery for the taint to have dissipated." *Johns*, 891 F.2d at 245-46.

[43] *See Abdouch*, 434 N.W.2d at 329 (examining the "cause-and-effect relationship between an illegal search and a defendant's subsequent incriminating statement"); *Cephas*, 291 A.2d 106 at 111 ("The primary question . . . is not whether the witness voluntarily plead guilty . . . rather it is why she chose to do this"). The *Cephas* court explained that if the defendant's choice to plead guilty "flowed directly from the exploitation of the [illegal] search," then the guilty plea was tainted and must be suppressed. *Id.*

[44] State v. Jennings, 461 A.2d at 361, 363 (R.I. 1983) (holding that confession had been tainted by the exploitation of the illegal search of defendant dwelling). In *Jennings*, the defendant was convicted of manslaughter and possession of a firearm while committing a crime of violence, based on a detailed confession he made to police. *Id.*

Over time, three primary exceptions to the rule of exclusion have emerged: (1) the independent source doctrine holds that evidence authorities would have obtained through an independent source should be admitted at trial, regardless of the Fourth Amendment violation;[45] (2) the inevitable discovery doctrine mandates that evidence police would have inevitably discovered despite the violation should be admissible;[46] and finally, (3) the doctrine of attenuation provides that evidence should be admissible if the official misconduct was not blatant, and enough time and intervening events separate the discovery of the contested evidence from the Fourth Amendment violation.[47]

The Supreme Court first announced the doctrine of attenuation in *Wong Sun v. United States*.[48] After being illegally arrested, the *Wong Sun* defendant was released from jail, only to return several days later and confessed.[49] The Court, recognizing that an exception to the rule of exclusion might be appropriate, examined the circumstances surrounding the defendant's illegal arrest to determine if the subsequent confession was "sufficiently an act of free will to purge the primary taint of the unlawful invasion."[50] The Court held that because the defendant voluntarily returned to confess several days after being released, "the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint'" of the Fourth Amendment violation.[51] Thus, evidence of Wong Sun's alleged confession was admissible at trial despite the illegal arrest.[52]

Attenuation analysis fell into some disfavor after *Miranda v. Arizona*,[53] decided in 1966.[54] Courts, it seemed, no longer felt attenuation analysis was necessary because *Miranda* seemed to provide a clear stan-

---

[45] *See* United States v. Wade, 388 U.S. 218, 248 (1967) (analyzing whether defendant's identification of suspect came from an independent source or was the "tainted fruits of [an] invalidly conducted lineup").

[46] *See* Nix v. Williams, 467 U.S. 431, 444 (1984) (describing how virtually "all courts, both state and federal, recognize an inevitable discovery exception"); United States v. Ramirez-Sandoval, 872 F.2d 1392, 1396 (9th Cir. 1989) (describing rule as when "government can show . . . that the tainted evidence would inevitably have been discovered through lawful means").

[47] *See generally* Robinson, *supra* note 2, at 771-74 (describing origins and development of doctrine of attenuation).

[48] 371 U.S. at 491.

[49] *Wong Sun*, 371 U.S. at 476 (describing facts of case).

[50] *Id.* at 486, 491 (discussing exceptions to the rule of exclusion).

[51] *Id.* at 491 (discussion theory of attenuation).

[52] *Id.* (holding that based on the totality of the surrounding circumstances, the defendant's confession was an act of free will and therefore admissible).

[53] 384 U.S. 436, 444 (1966). The Supreme Court held that "prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney." *Id.*

[54] *See* Robinson, *supra* note 2, at 772 (describing effect of *Miranda* on doctrine of attenuation).

dard for admissibility: if a defendant was read his or her "Miranda rights," many courts believed subsequent statements were automatically admissible.[55] In 1975, the attenuation doctrine returned to prominence with the Supreme Court's decision in *Brown v. Illinois*,[56] which held that the mechanical application of *Miranda* was not sufficient, on its own, to overcome the rule of exclusion.[57]

In *Brown*, the defendant was illegally arrested prior to signing a murder confession.[58] The Court laid out four factors to determine whether an exception to the rule of exclusion was warranted: (1) whether *Miranda* warnings were given; (2) "the temporal proximity of the arrest and the confession"; (3) "the presence of intervening circumstances"; and (4) "the purpose and flagrancy of the official misconduct."[59] The Court found that Brown gave his confession less than two hours after his Fourth Amendment rights were violated, that the police misconduct was blatant, and that no intervening events occurred between the illegal arrest and his confession.[60] The Court reasoned that the mere fact that Brown had received his *Miranda* warnings prior to his confession was not sufficient to overcome the rule of exclusion.[61] In addition to announcing the four-part balancing test, the Court suggested that the core issue underlying attenuation analysis should be whether the evidence in question was acquired though the "exploitation of [the underlying] illegality."[62] The Supreme Court reaffirmed *Brown*'s four-part balancing test in *Kaupp v. Texas*,[63] decided in 2003.[64]

---

[55] *See* Yarcusko, *supra* note 40, at 270 (describing lower courts' reaction to *Miranda*).

[56] 422 U.S. 590 (1975).

[57] *Id.* at 603 (holding that "Miranda warnings, alone . . . cannot always make the act [of confessing] sufficiently a product of free will").

[58] *Brown*, 422 U.S. at 603 (describing facts of case). Police officers wanted to question the defendant about a murder because he was an acquaintance of the victim, but did not have probable cause or a warrant when they arrested him. *Id.* at 591-92.

[59] *Id.* at 603-04 (rejecting lower court's conclusion that *Miranda* warnings were sufficient to remove taint of illegal arrest).

[60] *Id.* at 605 (describing how officers arrested defendant in a way "calculated to cause surprise, fright, and confusion").

[61] *Id.* at 604-05 (describing reading of *Miranda* warnings to defendant). Brown received *Miranda* warnings, but his statement occurred no more than two hours after his illegal arrest. *Id.* at 604.

[62] *Brown*, 422 U.S. at 599 (describing reasoning behind balancing test).

[63] 538 U.S. 626 (2003).

[64] *Kaupp*, 538 U.S. at 633 (applying four-part *Brown* test to facts of case).

B. Illegal Eavesdropping

At common law, eavesdropping was considered a nuisance crime.[65] In 1928, the Supreme Court's ruling in *Olmstead v. United States*[66] gave the government broad powers to conduct electronic eavesdropping on American citizens.[67] *Olmstead* centered on the legality of a warrantless wiretapping program that government authorities had developed to monitor a large-scale bootlegging operation.[68] The *Olmstead* Court declined to extend Fourth Amendment protections to oral communications, reasoning that the amendment protects "tangible material effects" and property rights, not "intangible" communications.[69] In addition, the *Olmstead* Court tied Fourth Amendment violations to common law trespass, reasoning that Fourth Amendment violations only occurred when the defendant's property was invaded by the state.[70] In sum, the government was generally free to intercept phone conversations without running afoul of the constitution in the aftermath of *Olmstead*.[71]

In 1967, the Court revisited electronic eavesdropping in *Berger v. New York*.[72] The *Berger* Court struck down a New York electronic surveillance statute, applying Fourth Amendment protections to intangible verbal communications.[73] Six months later, the Court went a step farther, repudiating the trespass doctrine of *Olmstead* in *Katz v. United States*.[74] The *Katz*

---

[65] Pavesich v. New England Life Ins. Co., 50 S.E. 68, 71 (Ga. 1905) (discussing common law offense of eavesdropping); Commonwealth v. Publicover, 98 N.E.2d 633, 635 (Mass. 1951) (describing modern eavesdropping crime at common law); 4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 168 (1769) (defining eavesdroppers as those who "listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales").

[66] 277 U.S. 438 (1928).

[67] *Id.* at 466 (holding that because wiretap did not involve a physical trespass on defendant's property, there was no fourth amendment violation).

[68] *Id.* (describing government's surveillance program). Evidence against the defendants was gathered by inserting small wires along the ordinary telephone wires without any physical trespass onto the defendants' property. *Id.* at 457.

[69] *Olmstead*, 277 U.S. at 464-66 (reasoning that phone wires outside of house do not warrant same protection as those within house).

[70] *Id.* at 466 (holding that the mere tapping of telephone wires outside defendant's home did not constitute a search and seizure under the Fourth Amendment).

[71] *Id.* at 465 (opining that protecting phone conversations outside home would involve "applying an enlarged and unusual meaning to the Fourth Amendment").

[72] 388 U.S. 41 (1967).

[73] *Berger*, 388 U.S. at 60 (holding that statute violated the Fourth Amendment because it failed to describe the persons or things to be seized in sufficient detail). The Court suggested a more narrowly tailored statute could pass constitutional muster. *Id.* The Court reasoned that "[t]he need for particularity and evidence . . . is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privacy that is broad in scope." *Id.* at 57.

[74] 389 U.S. 347, 358 (1967) (holding that government's surveillance activities consti-

Court held that the warrantless bugging of a telephone booth frequented by the petitioner was an unconstitutional invasion of privacy despite the lack of trespassing by the government, reasoning that the Fourth Amendment "protects people, not places."[75] Taken together, *Berger* and *Katz* extended the zone of privacy by extending Fourth Amendment protection to "intangible conversations," even when such conversations took place on public property.[76] Where the eavesdropping took place, the Court emphasized, was less important than the individual's legitimate expectation of privacy.[77]

1. The Federal Wiretapping Statute

Soon after *Katz*, Congress passed Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (hereinafter "Title III"), sometimes referred to as the "federal wiretapping statute."[78] Title III is generally considered Congress's response to the Supreme Court's holdings in *Berger* and *Katz*.[79] Where the Court outlined the narrow circumstances under which the government could conduct warrantless surveillance in *Berger* and *Katz*, Title III codified these limitations, laying out the circumstances in which law enforcement agencies could wiretap in explicit detail.[80] Specifically, Title III allowed electronic surveillance, but limited the application by: (1) requiring probable cause as to person, crime, conversation, and place or facility of communication; and (2) limiting the duration of surveillance to thirty days.[81] In addition, Title III mandated the suppression at

tuted an illegal search and seizure despite no physical trespass because defendant has reasonable expectation of privacy).

[75] *Katz*, 389 U.S. at 360-61 (Harlan, J., concurring) (suggesting that that an invasion of privacy depends on the individual's reasonable expectation of privacy). By the holding in *Katz*, the Court specifically overruled the controlling premise of *Olmstead*, which relied on the presence or absence of an actual physical intrusion. *Id.* The Court suggested, however, that the wiretapping would have been appropriate had police obtained a warrant. *Id.* at 359.

[76] Michael Goldsmith, *Eavesdropping Reform: the Legality of Roving Surveillance*, 1987 ILL. L. REV. 401 (1987) (describing cumulative effect of *Berger* and *Katz* holdings).

[77] *Katz*, 389 U.S. at 360-61 (Harlan, J., concurring) (describing reasonable expectation of privacy).

[78] Miles v. State, 781 A.2d 787, 815 (Md. 2001) (describing Title III as "federal wiretapping statute").

[79] Goldsmith, *supra* note 76, at 412 (explaining that Congress designed the Omnibus act to comply with the constitutional standards described in *Berger* and *Katz*).

[80] *Id.* at 421 (explaining that the "purpose of Title III was not to eliminate the use of electronic surveillance, but to provide for its use under proper conditions"); *see also* Wintersheimer, *supra* note 17, at 319 (explaining that Congress interpreted *Berger* and *Katz* holdings to require that wiretaps comply with the warrant requirements of every other search and seizure).

[81] 18 U.S.C. §§ 2518(1)(b), (3)(a), (3)(b), (3)(d), (4) (1982); 18 U.S.C. § 2518(5) (1982).

trial of any intercepted wire or oral communication, as well as any evidence "derived therefrom."[82]

In addition to prohibiting illegal eavesdropping and suppressing evidence derived from illegal eavesdropping at trial, Title III bars the use and disclosure of an illegally obtained communication.[83] Indeed, a civil cause of action is available to "any person" whose wire or oral communication is intercepted, disclosed, or used, and may be brought against "any person" who "intercepts, discloses, or uses, or procures any other person to intercept, disclose or use such communication."[84] To address, in part, the rise in popularity of cellular phones, cordless phones and pagers, Congress amended Title III with the Electronic Communications and Privacy Act of 1986 ("ECPA").[85] States too, have enacted their own wiretapping statutes.[86] States have avoided preemption by adopting more stringent standards than required under Title III or the ECPA.[87]

2. The Sixth Circuit's "Clean Hands" Exception: a Voice of Dissent

It is the majority view that the evidence suppressing portion of Title III is best construed as a statutory version of the constitutional rule of exclusion.[88] Thus, evidence "derived from" an illegally eavesdropped con-

[82] 18 U.S.C. § 2515 (2000). Title III states in part the following: "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial." *Id.*

[83] 18 U.S.C. §§ 2511(1)(b)-(d) (2000). The plaintiff must demonstrate that the defendant acted with knowledge that the information used or disclosed came from the intercepted communication and knew or could determine that such interception was prohibited. *Id.*

[84] 18 U.S.C. § 2520 (2000).

[85] 18 U.S.C. § 2510(12) (2000). Title I of the ECPA defines electronic communications as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system . . ." *Id.*

[86] *See generally* Stacy L. Mills, *He Wouldn't Listen to Me Before, But Now…: Interspousal Wiretapping and an Analysis of State Wiretapping Statutes*, 37 BRANDEIS L.J. 415, 429 (1998) (discussing differences among state wiretapping statutes generally). Vermont is the only state that has not enacted its own wiretap statute to date. *Id.*

[87] Commonwealth v. Vitello, 327 N.E.2d 819, 834 (Mass. 1975) (explaining that states may exclude evidence that would be admissible in Federal courts by adopting more stringent standards than are required under Federal law).

[88] *See* Alderman v. United States, 394 U.S. 165, 183 (1969) (holding that burden lies with accused to show a Fourth Amendment violation has occurred before attenuation analysis can begin). Once it has been shown that a violation has occurred, the burden shifts to the government to prove that the resulting evidence was not derived from the official misconduct. *Id.*; *see also* United States v. Spagnuolo, 549 F.2d 705, 711-12 (9th Cir. 1977) (discussing the helpfulness of the constitutional "fruit of the poisonous tree" doctrine in interpreting the exclusionary prohibition in § 2515).

versation can be suppressed at trial.[89] A minority view exists, however. In 1995, the Sixth Circuit Court of Appeals ruled in *United States v. Murdock*[90] that Title III contains a "clean hands" exception for law enforcement officials who are the innocent recipients of illegally eavesdropped recordings provided by private citizens.[91]

The Sixth Circuit reasoned that when the government gets a "lucky break" and "stumbles across" illegally eavesdropped recordings it had no hand in intercepting, Title III does not require the suppression of such recordings.[92] The *Murdock* decision created a split among the federal circuits and state supreme courts, having been followed by the Second and Fifth Circuits and opposed by the remainder of federal appellate and state supreme courts who have ruled on the issue.[93] Notably, courts adopting the "clean hands" doctrine with respect to eavesdropping by private citizens need not engage in attenuation analysis, since the "clean hands" presumption of admissibility extends beyond evidence "derived from" the illegal eavesdropping to include the eavesdropped communication itself.[94] Thus, jurisdictions following *Murdock* will admit a recording of an illegally eavesdropped communication as well as evidence "derived from" the eavesdropped conversation, so long as police did not encourage or participate in the illegal conduct.[95]

3. Constitutional and Statutory Authority Under Title III: A Subtle Distinction

Through Title III, Congress sought to balance the privacy interests of the individual with the needs of law enforcement.[96] Title III provides

---

[89] *See* Commonwealth v. Damiano, 828 N.E.2d at 510, 518 (Mass. 2005) (describing constitutional "fruit of the poisonous tree" doctrine).

[90] 63 F.3d 1391 (6th Cir. 1995).

[91] *Id.* at 1404 (discussing Congressional intent behind Title III).

[92] *Id*. at 1402 (explaining that suppression of evidence would have no deterrent effect on police who did nothing wrong). The *Murdock* court admitted the eavesdropped tape itself at trial, precluding any analysis of whether questionable evidence was "derived from" the recording. *Id.* at 1404.

[93] Shana K. Rahavy, *The Federal Wiretap Act: The Permissible Scope of Eavesdropping in the Family Home*, 2 J. HIGH TECH. L. 87, 92 (2003) (describing circuit split); *see also* State v. Capell, 966 P.2d 232, 235 (Or. Ct. App. 1998) (following *Murdock* in application of "clean hands" rule when police not involved in illegal interception). *Contra* United States v. Vest, 813 F.2d 477, 481 (1st Cir. 1987) (declining to "to read into section 2515 an exception permitting the introduction in evidence of an illegally-intercepted communication by an innocent recipient thereof").

[94] *Murdock*, 63 F.3d at 1403 (holding that eavesdropped conversations admissible so long as police did not perpetrate illegal interception).

[95] *Id.* (reasoning that Congress did not intend to suppress illegally eavesdropped conversations when citizen eavesdropper not agent of state).

[96] *1984 Civil Liberties and the National Security State: Hearings Before the Subcomm.*

definitive guidance for law enforcement: electronic surveillance is completely prohibited when conducted without the consent of one of the parties or without the prior authorization of a court order.[97] The eavesdropping prohibition found in Title III, however, is not limited to law enforcement.[98] It also extends to eavesdropping by ordinary citizens who are unaffiliated with law enforcement.[99] This is a subtle, but important, distinction.[100]

The Fourth Amendment concerns articulated by the Supreme Court in *Berger* and *Katz* apply only to the eavesdropping of government authorities; eavesdropping by private citizens does not fall under the Fourth Amendment, which protects individuals from imposition by the state.[101] Yet the language of Title III does not differentiate between eavesdropping performed by the state and private citizens.[102] Indeed, under the statute, the identity of the eavesdropper is completely irrelevant.[103]

Despite the equal treatment under Title III, the difference between government and private eavesdropping is significant.[104] The eavesdropping provisions of Title III, as applied to government wiretaps, restate and embody the Fourth Amendment rulings contained in *Berger* and *Katz*.[105] When applied to the eavesdropping of ordinary citizens, the authority of

on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary, 98th Cong. 46 (1983-84) (statement of James Carr, United States magistrate).

[97] *See* 18 U.S.C § 2511(2)(c) (2002). Title III states in part the following: "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." *Id.*

[98] *See Vest*, 813 F.2d at 481 (reasoning that allowing the government to use unlawfully intercepted communications of private citizens would eviscerate Title III).

[99] *See* 18 U.S.C. § 2511 (2002). Title III makes it a crime, except in limited circumstances, to intentionally intercept a "wire," "oral," or "electronic communication," or to intentionally disclose the contents of such a communication. *Id.*

[100] Commonwealth v. Damiano, 828 N.E.2d at 510, 520 (Mass. 2005) (noting that constitutional considerations do not apply to cases involving eavesdropping by private citizens).

[101] Wintersheimer, *supra* note 17, at 321 (explaining that primary purpose of Title III was the desire of Congress to satisfy the Fourth Amendment concerns expressed by the Supreme Court in *Berger* and *Katz*).

[102] *See* Chandler v. United States Army, 125 F.3d 1296, 1302 (9th Cir. 1997) (explaining that Congress intended the exclusionary provisions of Title III to match the constitutional rule of exclusion).

[103] *See Vest*, 813 F.2d at 481 (noting that government cannot disclose contents of eavesdropped conversation even when it is "innocent recipient" of interception).

[104] *See Miles*, 781 A.2d at 837 (Md. 2001) (Raker, J., dissenting) (noting that constitutional "fruit of the poisonous tree" doctrine is "helpful" but not controlling when analyzing eavesdropping by private citizens).

[105] Wintersheimer, *supra* note 17, at 321 (suggesting that "[t]he purpose of Title III was not to eliminate the use of electronic surveillance, but to provide for its use under proper conditions").

Title III is merely statutory.[106] There are no Fourth Amendment protections against eavesdropping by one's curious neighbor.[107]

In most cases, the distinction between governmental surveillance and individual eavesdropping under Title III is inconsequential, since evidence derived from either type of illegal conduct is suppressed under Title III.[108] Complications can arise, however, when courts attempt to apply common law, constitutionally-based tests and exceptions – such as the doctrine of attenuation – to cases involving eavesdropping by private citizens.[109] The test for attenuation, for example, is traditionally applied only when the government has violated a defendant's rights under the Fourth Amendment.[110] Further, the four-part attenuation test announced by the Supreme Court in *Brown* is "particularly" concerned with the "the purpose and flagrancy of the official misconduct."[111] Does the *Brown* test's "particular" focus on incidents of "official misconduct" make it unsuitable for evaluating cases involving illegal eavesdropping by private citizens, where the misconduct is decidedly unofficial? By applying *Brown* to two cases involving eavesdropping by private citizens, the state supreme courts of Massachusetts and Maryland have sparked the discussion.

C. Attenuation and Eavesdropping

The Maryland Court of Appeals first applied the doctrine of attenuation to eavesdropping by private citizens in 2001, in the case of *Miles v. State*.[112] Citing the reasoning of *Miles*, the Massachusetts Supreme Judicial Court (SJC) followed suit in *Commonwealth v. Damiano*, decided in 2005.[113] In each case, the court found that the *Brown* test was satisfied and that the contested evidence was admissible through the doctrine of attenuation, despite the presence of illegal eavesdropping by a private citizen.[114]

---

[106] United States v. Spagnuolo, 549 F.2d 705, 711-12 (9th Cir. 1977) (interpreting the federal wiretap statute as codifying the "fruit of the poisonous tree" doctrine with respect to its exclusionary provision).

[107] *Damiano*, 828 N.E.2d at 520 (noting that defendant's constitutional rights were not violated by neighbor's eavesdropping).

[108] *Id.* at 514 (describing exclusionary provisions of Federal Eavesdropping Statute).

[109] *See Miles*, 781 A.2d at 805 (explaining why attenuation was applicable to case involving eavesdropping of private citizen).

[110] *Damiano*, 828 N.E.2d at 521 (citing *Miles* decision before applying attenuation to private citizen's illegal eavesdropping).

[111] Brown v. Illinois, 422 U.S. 590, 603-04 (1975).

[112] *Miles*, 781 A.2d at 805 (holding that attenuation applicable to private eavesdropper's tip to police).

[113] *Damiano*, 828 N.E.2d at 521 (adopting reasoning of *Miles* court to apply attenuation to case involving private citizen's eavesdropping).

[114] *Miles*, 781 A.2d at 817 (upholding trial court's decision to admit defendant's confession and voluntary statement of defendant's wife to police through attenuation doctrine); *see also Damiano*, 828 N.E.2d at 519-23 (applying *Brown* test to facts of case).

1. *Miles v. State*

In 2001, the Maryland Court of Appeals faced the intersection of the doctrine of attenuation and eavesdropping by a private citizen in *State v. Miles*.[115] According to the defendant, police had obtained his confession, as well as permission to search his home, by exploiting an illegally eavesdropped conversation between him and his wife, a recording of which was provided to police by the defendant's neighbor.[116] The defendant argued that the intercepted recording fell under Title III and the corresponding Maryland Wiretapping Statute, requiring that all evidence "derived therefrom" be suppressed at trial.[117] The tainted evidence, he argued, included his confession and evidence gathered in the search of his home.[118]

The state argued that because Title III and the Maryland Wiretapping Statute amount to a codification of the constitutional rule of exclusion, the court should be permitted to apply attenuation analysis, a common exception to the rule of exclusion.[119] It argued that the attenuation test set forth by the Supreme Court in *Brown* could be applied, even though a private citizen performed the eavesdropping and no Fourth Amendment violation had occurred.[120] Because *Brown* turns on "the purpose and flagrancy of the official misconduct," the state asserted that no official misconduct had occurred, since the police did not participate in the neighbor's illegal eavesdropping.[121] The *Miles* court agreed.[122]

In the absence of "official misconduct," the *Miles* court focused on the remaining three prongs of *Brown*: (1) whether *Miranda* warnings were given; (2) "the temporal proximity of the [illegal act] and the confession;" and (3) "the presence of intervening circumstances."[123] The *Miles* majority

---

[115] *See Miles*, 781 A.2d at 805 (reasoning that Congress intended attenuation to apply to Title III).

[116] *Miles*, 781 A.2d at 795-96 (describing facts of case). According to the court, "the information contained in the cellular phone conversation led the police to believe that appellant and his wife were conspiring to get rid of the evidence." *Id.* at 796.

[117] *Id.* at 798 (explaining that "[t]he Maryland Wiretapping Act provides broader protection than Title III").

[118] *Id.* at 797 (explaining how defendant sought to suppress evidence related to his gun and cellular phone, both seized by police).

[119] *Miles*, 781 A.2d at 805 (analogizing violations of Title III by private citizens to unlawful searches and seizures under the Fourth Amendment).

[120] *Id.* (holding that "not all evidence obtained following an unlawful wiretap must be suppressed under the federal statutory exclusionary rule").

[121] *Id.* at 816 (discussing lack of police involvement in illegal eavesdropping).

[122] *Id.* (agreeing with trial court's determination that "police did exactly what anyone would have expected them to do").

[123] *Id.* at 816-17 (discussing likely outcome if police had failed to listen to tape). The court noted that "[a]t the hearing on appellant's pretrial motion to suppress, the trial court aptly stated, 'the horrifying thing about the whole situation, really, is that if the police had done nothing, having this information, I cannot imagine what would have been thought by

found that the remaining three prongs of *Brown* were satisfied and ruled that the defendant's confession, as well as evidence derived from the police search of the defendant's home, was admissible, despite the neighbor's illegal eavesdropping.[124]

The dissent in *Miles* criticized the Court's conclusions regarding the first three prongs of *Brown* test, arguing, among other things, that the consent to search the defendant's home, given to police by the defendant's wife, did not constitute an "intervening event" under *Brown*.[125] The dissent's primary focus, however, was the majority's analysis of the fourth, "official misconduct" prong of the *Brown* test.[126] It assailed the majority's contention that police had engaged in no official misconduct merely because the eavesdropping was performed by a private citizen.[127]

The *Miles* dissent noted that the police made extensive "use" of the illegally eavesdropped recording while interrogating the defendant and his wife.[128] According to the dissent, the police exploited the illegally-obtained recording to gain permission from the defendant's wife to search the marital home.[129] The dissent argued that the defendant's wife, confronted by the contents of the eavesdropped conversation during the police interrogation, believed she was "caught red handed," which led to her granting permission to search the home.[130] In support of this point, the dissent cited numerous Fourth Amendment cases in which the rule of exclusion was applied to confessions obtained by police relying on illegally-

---

the public.'" *Id.* The majority went on to conclude that "[t]o construe the Wiretapping Act to require … the police … [to] refrain … from listening to the tape provided by Mr. Towers … while appellant and his wife eliminated evidence of the crime would produce a result which is 'unreasonable, illogical, inconsistent with common sense, and absurd.'" *Id.* (quoting Edgewater Liquors, Inc. v. Liston, 709 A.2d 1301, 1304 (Md. 1998)).

[124] *Miles*, 781 A.2d at 817 (explaining that not every factor must be satisfied under *Brown* to find attenuation).

[125] *Id.* at 848 (Raker, J., dissenting) (explaining that "[t]here were no intervening events to break the causal chain other than the reading of the Miranda warnings, which does not per se purge the taint of the illegality").

[126] *Id.* at 840 (arguing police engaged in misconduct when they "listened to an obviously illegally taped conversation and then used its contents" to interrogate the defendant and his wife).

[127] *Id.* (arguing that the absence of police involvement in the eavesdropping had no bearing on the "purposefulness and flagrancy" of the police misuse of the recording, and was irrelevant to the question of whether official misconduct occurred).

[128] *Miles*, 781 A.2d at 846 (Raker, J., dissenting) (asserting that "[i]t is mindboggling how the majority can assert, given this factual record, that the statements of Jona Miles and [the defendant] … are not the direct result of the illegally wiretapped conversation and the search executed on its basis").

[129] *Id.* at 844 (citing "inherent pressure to confess generated by a suspect's being confronted with tangible evidence that is the result of the illegal search").

[130] *Id.* at 845 (explaining how police questioned the defendant's wife about information present in the eavesdropped conversation).

seized evidence.[131] The dissent argued that confronting a suspect with information obtained through illegal eavesdropping, then pressuring the same suspect to confess by exploiting the illegally obtained information, constituted precisely the "exploitation of … illegality" that *Brown* urged vigilance against.[132]

The *Miles* dissent argued that the police did more than "exploit" the eavesdropped conversation, however.[133] The dissent asserted that the police's use and exploitation of the eavesdropped recording was itself a violation of Title III, and that this illegal behavior constituted "official misconduct" that was separate and distinct from the neighbor's initial eavesdropping.[134] The dissent based this argument on the portions of Title III (and the Maryland Wiretapping Statute) that prohibit the "use and disclosure" of illegally eavesdropped communications.[135] The police's reliance on the recording during the interrogation, the dissent argued, constituted "use and disclosure" of an illegally eavesdropped communication, and therefore violated Title III.[136]

According to the *Miles* dissent, the majority's holding was little more than a re-packaged version of the Sixth Circuit's "clean hands" rule.[137] In the dissent's eyes, the *Brown* test – a test specifically conceived and refined to analyze cases of police misconduct – required an expansive interpretation of "official misconduct" that looked beyond the illegal interception to analyze how police behaved after receiving the illegally eavesdropped communication.[138] By interrogating the defendant's wife with the contents of her eavesdropped conversation, the dissent argued that police not only exploited the underlying illegality, but engaged in "official misconduct" by violating the eavesdropping statute with their "use and disclosure" of the conversation's contents.[139] According to the dissent, the state had failed to satisfy the "official misconduct" prong of the *Brown* test, and

---

[131] *Id.* at 846-50.

[132] *Miles*, 781 A.2d at 851 (Raker, J., dissenting) (finding that defendant's confession "flowed directly from the exploitation of the illegality").

[133] *Id.* at 839 (arguing that police "should have known" that "further use" of eavesdropped conversation was illegal).

[134] *Id.* at 842 (explaining record shows "police specifically used the contents of the wiretapped conversation in eliciting Ms. Miles's statements").

[135] 18 U.S.C. § 2511(1)(b)-(d) (2000).

[136] *Miles*, 781 A.2d at 846 (Raker, J., dissenting) (discussing use and disclosure under Title III and Maryland Wiretapping Statute).

[137] *Id.* at 840 (arguing that police behavior constituted official misconduct under *Brown*).

[138] *Id.* (examining how police used illegally eavesdropped recording to effectuate search on defendant's property).

[139] *Id.* (arguing that police decision to listen to eavesdropped recording violated Title III). After listening to the tape, "[p]olice informed Ms. Miles that they knew [the defendant] had called her and told her to get rid of the gun." *Id.*

the contested evidence should not have been admitted through the attenuation exception to the rule of exclusion.[140]

2. *Commonwealth v. Damiano*

Commonwealth v. Damiano, an eavesdropping case decided by the Massachusetts Supreme Judicial Court (SJC) in 2005, was factually distinct from *State v. Miles*.[141] Like the Maryland court did in *Miles*, the SJC applied the doctrine of attenuation in a case involving eavesdropping by a private citizen and found the contested evidence admissible.[142] Unlike the facts in *Miles*, the police in *Damiano* did not use or exploit the eavesdropped conversation while interrogating the defendant.[143]

The eavesdropping in *Damiano* differed from that in *Miles*.[144] In *Miles*, a neighbor recorded a phone conversation during which the defendant and his wife discussed concealing evidence related to a past murder.[145] The *Miles* neighbor then gave a recording of the conversation to police.[146] In *Damiano*, a neighbor intercepted a conversation between the defendant and another man as they planned a drug deal for later that day.[147] The *Damiano* neighbor did not record the conversation.[148] Rather, she called the police and reported that a crime was about to occur.[149] The *Damiano* police felt compelled to intervene, despite the illegal origin of the tip.[150]

After receiving the neighbor's tip, the *Damiano* police staked out the meeting place discussed in the eavesdropped call.[151] A short time later, police observed what appeared to be a drug deal between the defendant

---

[140] *Miles*, 781 A2.d at 851 (Raker, J., dissenting) (arguing that admitted evidence should have been suppressed). "The State has failed to meet its burden of showing that the taint of the prior illegal wiretap and illegal search had been dissipated..." *Id.*

[141] Commonwealth v. Damiano, 828 N.E.2d 510, 522-23 (Mass. 2005) (describing police surveillance of suspect after tip provided by neighbor).

[142] *Id.* at 521 (applying reasoning of *Miles* court).

[143] *Id.* at 520 (finding that police acted properly in arrest and interrogation of defendant).

[144] *Id.* at 513 (describing actions of eavesdropping of defendant's neighbor).

[145] *Miles*, 781 A.2d at 794 (explaining how "the tape of the phone conversation included a discussion of concealing evidence").

[146] *Id*. (describing how eavesdropper thought the conversation might be related to the news story involving local murder).

[147] *Damiano*, 828 N.E.2d at 513 (explaining that "[a]lthough it was possible [for the listener] to change to a different frequency," neighbor chose to eavesdrop).

[148] *Id.* at 513 (describing neighbor's call to police).

[149] *Id.* (explaining how neighbor listened to store-bought police scanner in her home when intercepting telephone conversation).

[150] *Id.* (describing police stakeout of parking lot).

[151] *Damiano*, 828 N.E.2d at 513 (describing police observation of defendant's drug deal).

and the other man.[152] Police then followed the car the men left in, pulled the car over, and arrested both men after finding marijuana on each of them.[153]

The SJC held that the arrests were legal.[154] While Title III and the corresponding Massachusetts wiretapping statute provide for the suppression of evidence derived from illegal eavesdropping, the court held that neither Title III nor the state statute prevented police from independently establishing probable cause and making a legal arrest.[155] After the arrest was made, the defendant was transported to the police station and twice advised of his *Miranda* rights.[156] At the same time, police gathered outside the home of the defendant, anticipating that they would soon obtain a search warrant.[157] The defendant's wife and young child were inside his home at the time.[158]

The *Damiano* police did not confront the defendant with the contents of the eavesdropped conversation once he was in custody.[159] Rather, the defendant, concerned with the fate of his wife and child, consented to a police search of his home, presumably to speed the process of the police leaving his home.[160] After receiving the defendant's written permission, the police conducted a search and uncovered a large quantity of cocaine hidden behind a small door off the defendant's kitchen.[161]

Following *Miles*, the *Damiano* court applied attenuation analysis.[162] The court found that the neighbor's interception of the phone call violated Title III.[163] Likewise, the court found that evidence derived from the

---

[152] *Id*. at 513 (describing defendant making exchange with other man while under surveillance).

[153] *Id.* (describing police pulling over defendant's car, searching defendant, and finding marijuana).

[154] *Id.* at 521-22 (finding that arrest was legal). The court explained:

> While the conduct of the private citizen in intercepting Damiano's telephone conversation may have been patently unlawful, the actions of the police in responding to the information, placing the defendant under surveillance in a public place and arresting him after they observed what they believed to be a drug transaction, were reasonable and undertaken in good faith.

Id.

[155] *Id.* at 523 n.18 (explaining that "outside of the statutory context, evidence illegally obtained by a private party and turned over to the police does not violate the Fourth Amendment"). *Id.* at n.18.

[156] *Id.* at 513-14 (describing defendant's arrest and trip to police station).

[157] *Damiano*, 828 N.E.2d at 513 (describing how police officer noticed child looking out defendant's window).

[158] *Id.* at 513-14 (describing defendant's concerns about wife and child).

[159] *Id.* at 521 (explaining that police did not exploit "underlying illegal interception").

[160] *Id.* 513-14 (describing defendant's motivation for consenting to search).

[161] *Damiano*, 828 N.E.2d at 514 (describing location of hidden cocaine).

[162] *Id.* at 520-21 (explaining facts and holding of *Miles*).

[163] *Id.* at 522 (describing neighbor's actions as "patently unlawful").

eavesdropped conversation, including the defendant's arrest for possession of marijuana, should be suppressed.[164] At issue was the cocaine police discovered after gaining the defendant's consent to search his home.[165] The court's analysis turned on whether the defendant's consent to search, given after his arrest with little prompting from police, was sufficiently attenuated from the illegal eavesdropping to render the cocaine stash admissible.[166]

Like the *Miles* court, the SJC applied the *Brown* test.[167] The SJC held that the first three prongs of *Brown* were satisfied, finding sufficient *Miranda* warnings were provided and enough time had elapsed, while identifying several intervening events, including the defendant's voluntary consent to search his property and his admission that he was motivated by a desire to protect his wife and child from prolonged exposure to police.[168] Unlike the situation in *Miles*, however, there was no evidence in *Damiano* that police exploited or otherwise referred to the contents of the eavesdropped conversation while interrogating the defendant.[169] According to the facts before the court, the *Damiano* defendant was motivated not by the belief that he was "caught red-handed," but by a desire to limit his wife and child's exposure to a police investigation.[170]

III. ANALYSIS

In *United States v. Giordano*,[171] the Supreme Court emphasized the applicability of the attenuation doctrine to Title III by citing a portion of a Congressional report, which specifically noted that Title III "suppress[es] evidence directly or indirectly obtained in violation of the chapter. There is, however, no intention to change the attenuation rule."[172] Clearly, Congress intended the attenuation doctrine to apply to at least some Title III violations.[173] Congress's primary purpose in enacting Title III, however, was to address the Fourth Amendment concerns articulated by the Su-

---

[164] *Id.* at 519 (upholding lower court's decision to suppress evidence of marijuana and eavesdropped conversation).

[165] *Damiano*, 828 N.E.2d at 514 (explaining how defendant "signed a written consent form, permitting the police to search the house").

[166] *Id.* at 521 (finding cocaine admissible).

[167] *Id.* at 519 (describing elements of attenuation test under *Brown*).

[168] *Damiano*, 828 N.E.2d at 522 (summarizing attenuation analysis).

[169] *Id.* at 521 (explaining how "the complete lack of police involvement in the underlying illegal interception is not an insignificant fact in assessing the … adequacy of the attenuating circumstances").

[170] *Id.* at 513-14 (describing defendant's concern for wife and child).

[171] 416 U.S. 505, 528-29 (1974).

[172] *Giordano*, 416 U.S. at 529-30 (citing S. Rep. No. 1097, 90th Cong., 2d Sess. at 96, 106 (1968)).

[173] *Id.*

preme Court in *Berger* and *Katz*.[174] Did Congress also intend the doctrine of attenuation to apply to the illegal eavesdropping of private citizens?[175]

It was not until *State v. Miles*, decided in 2001, that a court attempted to apply attenuation analysis to eavesdropping by a private citizen under Title III.[176] In *Miles*, the decision of the Maryland Court of Appeals permitted the police's use, disclosure, and exploitation of an illegally eavesdropped conversation in the interrogation of a defendant and his wife, who was also a suspect.[177] In 2005, the Massachusetts Supreme Judicial Court again applied attenuation to a private citizen's eavesdropping in *Commonwealth v. Damiano*.[178] Like the Maryland court, the SJC admitted evidence through attenuation, but there were important differences between the conduct of police in the two cases.[179] Unlike *Miles*, the police in *Damiano* did not use, disclose, or exploit the illegally eavesdropped conversation while interrogating the defendant or other suspects.[180]

Taken together, *Damiano* and *Miles* provide a blueprint of how attenuation analysis should and should not be applied to cases involving the illegal eavesdropping of private citizens. The *Miles* court's narrow conception of "official misconduct" seems to provide a virtual blank check to police officers receiving illegally eavesdropped tips from private citizens.[181] Under the *Miles* approach, police who use and exploit the contents of illegally eavesdropped tips can evade Title III's exclusionary provisions through the doctrine of attenuation.[182] The *Miles* decision was little more than a reconfiguration of the Sixth Circuit's "clean hands" rule, obscured by the doctrine of attenuation, but similar in outcome and effect.[183]

---

[174] *See generally* Goldsmith, *supra* note 78, at 401.

[175] Miles v. State, 781 A.2d 787, 805 (Md. 2001) (finding use of doctrine of attenuation appropriate in cases of private citizen eavesdropping).

[176] *See Miles*, 781 A.2d at 817 (holding that evidence should be admitted under doctrine of attenuation).

[177] *Id.* at 843 (explaining how "police confronted [the defendant's wife] with the contents of [the illegally] tape recorded conversation" during interrogation).

[178] *See Damiano*, 828 N.E.2d at 521 (noting that arresting officers were not aware that initial tip was illegally eavesdropped).

[179] *Id.* at 521 n.17 (noting that "[t]here is no evidence in the record that the police made use of the substance of the illegally intercepted communication in an effort to obtain [the defendant's] statement or consent"). The *Miles* dissent argued that police made use of the illegally eavesdropped conversation to obtain the defendant's statement and the consent of the defendant's wife. *Miles*, 781 A.2d at 840 (Raker, J., dissenting)

[180] *Damiano*, 828 N.E.2d at 521-22 (finding police's actions "reasonable and undertaken in good faith").

[181] *Miles*, 781 A.2d at 839-40 (Raker, J., dissenting) (arguing that police decision to listen to tape it knew was illegally procured constituted an illegal act and was itself official misconduct).

[182] *Id.* (citing majority's creation of a new "clean hands" exception to wiretap statute).

[183] *Id.* Unlike in *Murdock* , the *Miles* majority refused to admit the eavesdropped recording itself into evidence. *Id.* at 816 n.14 (majority opinion).

A. State v. Miles: Attenuation Misapplied

The *Miles* decision illustrates the fundamental problem with applying the Supreme Court's attenuation test, set forth in *Brown*, to cases involving eavesdropping by private citizens. The difficulty lies in the "official misconduct" prong of the test.[184] The Supreme Court developed its *Brown* test to address Fourth Amendment violations by police.[185] As such, the test focuses on the actions of the government, labeling the underlying illegality as "the … official misconduct."[186]

In cases involving illegal eavesdropping by private citizens, the underlying illegality is anything but "official."[187] The illegal act is performed by a private actor and the government is the innocent recipient of the "tip."[188] To the extent the government's conduct can be evaluated in such cases, it is in how the government treats the eavesdropped information once it has been received.[189] The *Miles* court willfully ignored this inconsistency, reasoning that police did not engage in misconduct because they did not themselves perform the eavesdropping .[190] This rhetorical trick served the dual purpose of satisfying the technical requirements of *Brown* while diverting attention from how the police treated the illegally eavesdropped information once it was in their possession.[191] The notorious defendant's murder conviction was upheld, but there was a cost: the evisceration of the exclusionary provision of Title III.[192]

---

[184] *Miles*, 781 A.2d at 841 (Raker, J., dissenting) (arguing that the fact "that the police did not participate in the taping of the conversations … is irrelevant to the question of whether their use of the illegally obtained recordings was permissible or whether evidence derived therefrom is admissible").

[185] *Damiano*, 828 N.E.2d at 519 (noting that while *Brown* test useful "for guidance," eavesdropping of private citizens constitutes "a different form of illegality, and one not involving the police or other government officials").

[186] *Miles*, 781 A.2d at 839-40 (Raker, J., dissenting) (arguing that misconduct occurred in police decision to "use of the contents of an unlawfully taped conversation," which "is, in itself, an unlawful act").

[187] *Damiano*, 828 N.E.2d at 519 (noting that "illegality" did not involve "the police or other government officials").

[188] *Miles*, 781 A.2d at 803-04 (arguing that allowing defendant to destroy evidence would have created "unreasonable" outcome, rendering police decision to act on eavesdropped information appropriate).

[189] *Id.* at 851 (Raker, J., dissenting) (arguing that police exploited eavesdropped recording to gain access to defendant's property).

[190] *Id.* at 839 (arguing that police knew or should have known that use of eavesdropped recording was illegal).

[191] *Id.* at 840 (explaining that "police listened to an obviously illegally taped conversation and then used its contents to effectuate the search of appellant's home and seize evidence of his involvement in the murder").

[192] *Miles*, 781 A.2d at 817 (holding that Title III and the Maryland Wiretapping Statute did not bar police from listening to and using illegally eavesdropped conversation during investigation).

The application of attenuation to illegal eavesdropping by private citizens requires a fundamental re-thinking of the "official misconduct" prong of the *Brown* test. The analysis should not be limited to whether or not police participated in the illegal eavesdropping.[193] Rather, the court's "official misconduct" examination should turn on the conduct of police *after* they receive the tip from the private citizen.[194] If, as in *Miles*, police use and exploit an illegally eavesdropped conversation to interrogate suspects, extract confessions, or obtain consent to search a suspect's property, the door to the attenuation exception should close.

There are three reasons why attenuation analysis should not be applied to cases in which police use, disclose, or exploit a private citizen's illegal eavesdropping while interrogating a suspect: (1) the "use and disclosure" of an illegally eavesdropped communication violates Title III and constitutes an act of "official misconduct" that is separate and distinct from the underlying eavesdropping;[195] (2) the exploitation of an illegally eavesdropped conversation contradicts the central purpose of *Brown*, which seeks to determine "whether … the evidence … has been come at by exploitation of the illegality"[196]; and (3) an interrogation that relies on the use and disclosure of an illegally eavesdropped communication is "derived from" the eavesdropping itself, and therefore tainted by the underlying illegality.[197]

B. Commonwealth v. Damiano: the Proper Application

In *Damiano*, the Massachusetts Supreme Judicial Court applied the doctrine of attenuation to the illegal eavesdropping of a private citizen without running afoul of *Brown*.[198] The *Damiano* police did not use, disclose, or exploit the illegally eavesdropped communication in obtaining the defendant's consent to search his home. Having directly observed the

---

[193] *Id.* at 840 (Raker, J., dissenting) (claiming majority creates "a new 'clean hands' exception to the exclusionary rule of the Maryland wiretap statute").

[194] *Miles*, 781 A.2d at 845 (Raker, J., dissenting) (arguing that question should center on whether police used eavesdropped conversation during "questioning in order to obtain [the defendant's] confession, which they did when they discussed the evidence with him").

[195] *Id.* at 839-40 (explaining that "the law … is certainly clear that the use of the contents of an unlawfully taped conversation is, in itself, an unlawful act").

[196] *Miles*, 781 A.2d at 850 (Raker, J., dissenting) (reasoning that the "exploitation of the illegal search … led the police not merely to the live-witness testimony of a particular witness, but to appellant's identity, the identity of an accessory …, the murder weapon, and other physical evidence").

[197] *Id.* at 851 (concluding that defendant's confession and wife's consent "flowed directly" from illegal intercepton).

[198] Commonwealth v. Damiano, 828 N.E.2d 510, 521 (Mass. 2005) (finding "the evidence garnered … was not obtained by exploiting the underlying illegal interception but by way of [the defendant's] voluntary acts").

defendant's drug deal, the police made a legal arrest.[199] They had no reason to exploit the neighbor's illegal eavesdropping when the time came to interrogate the defendant.

The actions of the police in *Damiano* provide a blueprint for government agents who receive tips from illegally eavesdropping citizens. The police in Damiano could have pulled over the defendant's car and conducted a search immediately after receiving the tip. After all, the neighbor's tip gave them reason to believe the defendant was carrying drugs.[200] Indeed, the police in *Damiano* could have gone directly to the defendant house after receiving the tip, where they could have relied on the neighbor's illegal eavesdropping to pressure the defendant into letting them search the house. They did none of these things, instead choosing to observe the defendant until they had gathered enough independent evidence to make an arrest.

The discipline and patience of the *Damiano* police allowed them to take advantage of the eavesdropper's tip without relying on it to the exclusion of all other evidence. Their initial investigation may have been "derived from" the illegal tip, but their independent observation of the defendant's criminal conduct constituted the first of several "intervening events," the last of which was the defendant's uncoerced consent to search his property.[201] The *Damiano* court, in evaluating the "official misconduct" prong of the Brown test, placed the proper focus on the actions of police, analyzing whether the police exploited the illegally eavesdropped conversation to obtain access to the defendant's home.[202] The court found that Brown was satisfied only after determining that the police did not exploit the underlying illegality during their interrogation of the defendant.[203]

The police in *Miles* could have similarly followed suit. Had they engaged in surveillance and arrested the defendant after observing his attempt to destroy evidence, they could have pressured him to confess without exploiting the eavesdropped conversation during the interrogation. Instead, the *Miles* police acted hastily.[204] They rushed to exploit a plainly illegal tip, and in doing so, destroyed any opportunity to establish the defendant's guilt through independent means. The Miles defendant's convic-

---

[199] *Id.* (explaining how, "[e]ven if there had been time … for a definitive assessment that the information had been illegally obtained, the duty of the police was to act").

[200] *Id.* at 513 (explaining that eavesdropper "inferred" that defendant was planning a drug transaction).

[201] *Damiano*, 828 N.E.2d at 520 (describing defendant as "motivated by a desire to hasten the departure of the police from his home").

[202] *Id.* at 521-22 (examining police actions after tip received).

[203] *Id.* at 520 (holding "that (1) Damiano's admissions were made voluntarily; (2) his consent to the search was voluntary; and (3) his actions were motivated by a desire to hasten the departure of the police from his home").

[204] Miles v. State, 781 A.2d 787, 842 (Md. 2001) (Raker, J., dissenting) (analyzing transcript of police interrogation of defendant).

tion was only preserved by the Maryland Court of Appeals' misapplication of *Brown*.

IV. CONCLUSION

Police and government officials who receive tips from illegal eavesdroppers are placed in an awkward position. The temptation to exploit such a tip is enormous, particularly when the alternative involves allowing a suspect to commit a crime. Police who receive illegal tips are not without options, however. Often, the tip provides enough background information for the police to identify the suspects, as well as the time, place, or nature of the crime.

As *Damiano* demonstrates, courts will often reward careful police work. The Massachusetts Supreme Judicial Court applied the attenuation test set forth by the Supreme Court in *Brown* in a principled and legally legitimate manner in *Damiano*, providing Massachusetts police with a means for dealing with illegally eavesdropped tips in the future. The SJC's decision strikes the proper balance between the needs of law enforcement and the statutory requirements of Title III, and should serve as a blueprint for courts facing similar situations around the country.

Miles, however, illustrates the dangers of applying attenuation to cases involving eavesdropping by private citizens. The *Miles* court warped the *Brown* test to fit its needs, namely, the need to preserve a high profile murder conviction. In doing so, the court created a troubling precedent that encourages police to aggressively exploit illegally eavesdropped tips instead of engaging in the careful, patient investigation carried out by the police in *Damiano*. Although the Maryland Court of Appeals' decision in *Miles* will present an attractive option for prosecutors around the nation, its "clean hands" approach neither protects the rights of individuals nor adheres to the basic requirements of Title III.

Courts should only apply attenuation analysis in cases involving illegal eavesdropping by private citizens when the state can demonstrate that police did not use or exploit the contents of the illegally intercepted message while interrogating a suspect.

Jason V. Owens