POLICE COERCION OF WITNESSES

I. INTRODUCTION

Criminal procedure underwent a "revolution" in the 1960's marked by a series of Supreme Court decisions in which several constitutional guarantees were applied to criminal proceedings.[1] An important policy objective of this expanded application of constitutional guarantees to criminal procedures is to deter the police from engaging in illegal methods of law enforcement.[2] As a result of this "revolution," as well as earlier developments, a defendant cannot now be convicted, for example, on the basis of his coerced confession,[3] or on information which he divulges to the police if he has not been advised of his right to remain silent and his right to counsel.[4] A related question remains, however: Can a defendant be convicted on information which is either physically or psychologically coerced from a *witness* in violation of the witness' rights?

A vivid example of police coercion of a reluctant non-defendant wit-

1. Specific Bill of Rights guarantees were extended to state criminal proceedings in: Argersinger v. Hamlin, 407 U.S. 25 (1972) (right of indigent to assistance of counsel in prosecution for petty offense); Benton v. Maryland, 395 U.S. 784 (1969) (ban against double jeopardy); Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process for obtaining witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront opposing witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against self-incrimination); Gideon v. Wainright, 372 U.S. 335 (1963) (right of indigent to assistance of counsel in felony trial); Mapp v. Ohio, 367 U.S. 643 (1961) (search and seizure). The expansion of criminal defendants' rights is also evident in Gilbert v. California, 388 U.S. 263 (1967), and United States v. Wade, 388 U.S. 218 (1967) (evidence of lineup inadmissible if obtained in violation of defendant's sixth amendment rights to counsel and confrontation), and Miranda v. Arizona, 384 U.S. 436 (1966) (confessions and admissions obtained when defendant had not been informed of right to remain silent and right to counsel inadmissible).

2. Miranda v. Arizona, 384 U.S. 436 (1966); Linkletter v. Walker, 381 U.S. 618 (1965); Mapp v. Ohio, 367 U.S. 643 (1961); Rogers v. Richmond, 365 U.S. 534 (1961). In addition to attempting to curb illegal police practices a major policy underlying the cases comprising the criminal law "revolution" was to exclude unreliable evidence. *See* note 17 *infra* and accompanying text.

3. Ward v. Texas, 316 U.S. 547 (1942); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

4. Miranda v. Arizona, 384 U.S. 436 (1966). This would include the more extreme situation in which a defendant is actually deprived of counsel. *See* Escobedo v. Illinois, 378 U.S. 478 (1964).

ness was recently presented in *People v. Portelli*.[5] The defendant, Portelli, had been indicted for the murder of two policemen. At trial the government called as its chief witness Richard Melville, to whose home the defendant had allegedly fled following the crime. Melville testified that three detectives had taken him into custody for questioning, held him in custody for one day without arresting him, and tortured him into giving a statement similar to his later trial testimony.[6] Had Melville been the subject of a criminal prosecution, he clearly would have had standing to exclude his involuntary out-of-court statement from his trial.[7] But when Portelli, the defendant, attempted to exclude Melville's testimony, the trial court held that because the fifth amendment rights of Melville and not Portelli had been violated, Portelli could not have the testimony excluded from his trial.[8] The police, by torturing Melville, were thus able to obtain evidence crucial to Portelli's prosecution and to circumvent the deterrence policies of the aforementioned criminal law revolution by engaging in clearly illegal and unconscion-

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5. 15 N.Y.2d 235, 205 N.E.2d 857, 257 N.Y.S.2d 931 (1965), *cert. denied*, 382 U.S. 1009 (1966).

6. Melville's "interrogation" was allegedly conducted by eight or nine detectives who twisted his arm, beat him with a stick, struck him with open hands, stripped him naked, hit him in the testicles, and touched lighted cigarettes to his back. Brief for Petitioner-Appellant at 11, 12, United States *ex rel.* Portelli v. LaVallee, 469 F.2d 1239 (2d Cir. 1972). Both the trial court and the district attorney strongly condemned the police tactics used, and the judge charged the jury in part:

> I was nauseated, and . . . these cops, who gave this man a beating in that station house, they deserve the most utter condemnation on the part of every citizen in this community. This isn't Russia; this isn't Hitler's Germany; this isn't Castro's Cuba. This is America. This is a glorious country where we don't tolerate things of that sort . . . .

Id. at 11.

7. There is no question that the confessor has standing when a coerced confession is sought to be used against the confessor himself. Townsend v. Sain, 372 U.S. 293 (1963); Rogers v. Richmond, 365 U.S. 534 (1961); *see* note 3 *supra*.

8. Both Portelli and a co-defendant were convicted of first degree murder and sentenced to death; the sentence was subsequently commuted to life imprisonment. The district court denied Portelli's subsequent petition for habeas corpus. United States *ex rel.* Portelli v. LaVallee, Civil No. 72-CV-299 (N.D.N.Y., June 20, 1972). Portelli, however, was granted a certificate of probable cause and leave to proceed in forma pauperis. The Second Circuit Court of Appeals affirmed the district court, 469 F.2d 1239 (2d Cir. 1972), basing its opinion largely on 3 J. WIGMORE, EVIDENCE § 815, at 289-90 (Chadbourn rev. ed. 1970):

> For duress of a witness, not being a party, the same considerations would prescribe that there would be no exclusion on the ground of extrajudicial threats or other forms of coercion. . . .

469 F.2d at 1240. The Supreme Court denied certiorari. 411 U.S. 950 (1973).

able practices.[9]

This Note will examine the conventional approach to the issue of a defendant's ability to assert the constitutional rights of a "coerced" third party, the hitherto unsuccessful arguments for a change in that approach, and the contentions urged unsuccessfully by defense counsel in *Portelli*.

II. PRELIMINARY CONCEPTS: STANDING AND THE EXCLUSIONARY RULE

An understanding of the problems raised by a coerced witness' testimony requires a knowledge of the concepts of standing and the exclusionary rule. Standing, or an adversary interest in the outcome of a controversy, is required for all constitutional challenges.[10] Although a criminal defendant clearly has a sufficient personal stake in the outcome of his own trial, he does not automatically have standing to raise all constitutional issues bearing on his trial but may properly contest only those issues which concern his constitutional rights or, in certain limited circumstances, the rights of third parties.[11]

The exclusionary rule bars the admission at trial of evidence obtained

9. The *Portelli* case is not an isolated instance of such conduct. In People v. Bradford, 10 Mich. App. 696, 160 N.W.2d 373 (1968), *cert. denied*, 394 U.S. 1022 (1969), a similar fact pattern was present. Two policemen had been seriously wounded while investigating a robbery. One suspect was arrested and, after being coerced by the police, implicated the defendant in a confession. The suspect later was the chief witness at the defendant's trial, where he repeated his confession and gave details of the earlier coercion. The appellate court held that the trial court had been correct in not excluding the testimony as untrustworthy since the question of trustworthiness was for the jury. *But cf.* note 66 *infra*.

10. *See* Flast v. Cohen, 392 U.S. 83 (1968); Baker v. Carr, 369 U.S. 186 (1962); Doremus v. Board of Educ., 342 U.S. 429 (1952); Coleman v. Miller, 307 U.S. 433 (1939).

11. Tileston v. Ullman, 318 U.S. 44 (1943). The Supreme Court has allowed some parties to assert the constitutional rights of others in certain limited circumstances. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (professional relationship of appellants to patients allowed them to raise rights of patients); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (NAACP permitted to assert rights of members in refusing to disclose membership lists); Barrows v. Jackson, 346 U.S. 249 (1953) (party permitted to contest restrictive covenant even though not a member of restricted race); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (party permitted to raise property rights of parents in action on statute requiring parents to send children to public schools). The generalization emerges from these cases that where the constitutional rights of a group of persons cannot be effectively presented except through representatives, owing to the size of the group, a representative may assert the rights of all members of the group provided the representative's rights have also been infringed.

in violation of the Constitution.[12] Since the fifth amendment specifically prohibits the use of "compelled" testimony in a criminal case, the exclusionary rule found ready application to violations of that amendment.[13] The Supreme Court later extended the rule to cover violations of the fourth amendment,[14] and the exclusionary rule is now recognized as the proper vehicle to raise all constitutional challenges to the admissibility of evidence obtained by unconstitutional police practices.[15]

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12. Ker v. California, 374 U.S. 23, 33 (1963); Mapp v. Ohio, 367 U.S. 643, 657 (1961); Boyd v. United States, 116 U.S. 616, 630 (1886).

13. *See* Boyd v. United States, 116 U.S. 616 (1886).

14. Weeks v. United States, 232 U.S. 383 (1914). The *Weeks* doctrine was not at once considered to be a constitutional requirement. In Wolf v. Colorado, 338 U.S. 25 (1949), the Court ruled that, although the fourth amendment was applicable to the states under the fourteenth amendment, state courts need not exclude all evidence obtained in violation of the fourth amendment. A concurring opinion by Justice Black maintained that the exclusionary rule as applied in federal cases was merely a judicially created rule of evidence adopted under the Court's supervisory powers over the federal court system. The Supreme Court later applied the exclusionary rule to the states in Mapp v. Ohio, 367 U.S. 643 (1961). The Court rejected the "factual" grounds on which *Wolf* was based and noted that other remedies, such as tort suits against offending officers, had proved to be ineffective deterrents. The Court considered the exclusionary rule as the only way to guarantee respect for the fourth amendment. The Court also observed that the trend in state courts had shifted to adoption of the exclusionary rule. The Court noted that the maintenance of judicial integrity was worth the possible price of a criminal's going free: "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Id.* at 659.

15. The exclusionary rule has been the subject of considerable criticism. *See* 8 J. WIGMORE, EVIDENCE § 2184 (3d ed. 1940); Burns, Mapp v. Ohio*: An All-American Mistake*, 19 DEPAUL L. REV. 80 (1969). Congress has attempted to limit the impact of Miranda v. Arizona, 384 U.S. 436 (1966), which applied the exclusionary rule to confessions obtained without advising the suspect of his rights, by enacting 18 U.S.C. § 3501(b) (1970):

> The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

Chief Justice Burger has criticized some of the more recent events in the criminal procedure "revolution." His dissent in Bivens v. Six Unknown Named Agents of Fed.

The basic policies underlying the exclusionary rule are to deter the government from using unconstitutional methods of law enforcement[16] and to bar the admission of unreliable evidence.[17] In the fourth amendment context the rule rests primarily on the deterrence policy since tangible evidence is usually seized precisely because of its reliability. As applied to fifth amendment violations, however, the exclusionary rule serves both the deterrence and unreliability policies since confessions obtained illegally not only exemplify unlawful police conduct but also present obvious risks of unreliability.[18]

III. THIRD-PARTY STANDING AND THE FOURTH AMENDENT

The issues of fourth amendment third-party standing will be examined because they involve policy considerations similar to those underlying the question of a defendant's standing to assert the fifth amendment rights of a coerced witness. As the police can defeat the policy objectives of fifth amendment protections by torturing witnesses, they can similarly destroy the protections afforded society in the fourth amendment by violating the rights of a third party and using the evidence obtained against a defendant.

A person has standing to assert a fourth amendment violation only if he is "aggrieved" by an unlawful search and seizure.[19] He is " ag-

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Bureau of Narcotics, 403 U.S. 388, 411 (1971), lists major criticisms of the exclusionary rule.

The excerpt, "the criminal is to go free because the constable has blundered" from People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926), is often quoted in criticisms of the exclusionary rule.

16. *See, e.g.*, Linkletter v. Walker, 381 U.S. 618, 636-37 (1965); Mapp v. Ohio, 367 U.S. 643, 656 (1961); Elkins v. United States, 364 U.S. 206, 217 (1960); Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); Weeks v. United States, 232 U.S. 383, 394 (1914).

17. *See, e.g.*, United States v. Wade, 388 U.S. 218, 228-33 (1967); Jackson v. Denno, 378 U.S. 368, 385-86 (1964); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

18. In Jackson v. Denno, 378 U.S. 368, 385-86 (1964), the Court stated:

> It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will," Blackburn v. Alabama [361 U.S. 199, 206-07 (1960)], and because of "the deep-rooted feeling that the police must obey the law while enforcing the law . . ." Spano v. New York [360 U.S. 315, 320-21 (1959)].

19. Jones v. United States, 362 U.S. 257, 261 (1960); Goldstein v. United

grieved" if he has either a reasonable expectation of freedom from governmental intrusion[20] or a possessory interest in the premises searched[21] or property seized.[22] The first branch of this test currently allows a person to contest a search if he was legitimately on the searched premises, so long as the search was directed at him.[23] The second branch of the test normally requires that the defendant either have a right to occupy the premises, such as would derive from ownership of a home or lease of an apartment,[24] or maintain a present interest in the property seized.[25] The problem of fourth amendment third-party

States, 316 U.S. 114, 120 (1942).

Jones centered on a discussion of the proper interpretation of Federal Rule of Criminal Procedure 41(e). The question therefore arises whether the standing requirement set forth in *Jones* derives from the federal rule or from the Constitution. The answer appears to be that the standard given in *Jones* is a constitutional standard. In Ker v. California, 374 U.S. 23, 34 (1963), in which the Court declared that the states were not precluded from developing their own rules for searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement," the Court, relying on *Jones*, added the following qualification:

> provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain.

Also, in Spinelli v. United States, 382 F.2d 871 (8th Cir. 1967), *rev'd on other grounds*, 393 U.S. 410 (1969), the court stated:

> The Fourth Amendment to the Constitution is aimed at the protection of the privacy of citizens. . . . Therefore, to be aggrieved by a search in violation of this Amendment a person must be able to show that his privacy was invaded by the search. Prior to *Jones*, most of the courts applied strict doctrines of common law property rights and required for standing a showing of some very significant possessory interest in the premises. *Jones*, however, supplanted this line of authority and held that if the defendant could show that he was legally upon the premises and the fruits of the search were proposed to be used against him, his privacy had been invaded to the degree necessary to give him standing to object to the search.

Id. at 878-79. *See also* United States *ex rel.* Coffey v. Fay, 344 F.2d 625 (2d Cir. 1965).

20. Jones v. United States, 362 U.S. 257 (1960). Prior to *Jones* a person had to have a possessory interest in the premises for standing. For an excellent discussion of fourth amendment standing before the *Jones* decision, see Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 NW. U.L. REV. 471 (1952).

21. Under this rationale, someone lawfully staying in a hotel room has the necessary interest for standing. *See* Stoner v. California, 376 U.S. 483, 489 (1964).

22. Jones v. United States, 362 U.S. 257, 261-62 (1960).

23. *Id.* at 267. Thus, a person wrongfully on the premises, such as a trespasser, would not have standing under this rationale. *Id.*

24. *See* Stoner v. California, 376 U.S. 483 (1964); Chapman v. United States, 365 U.S. 610 (1961).

25. For a time this requirement placed defendants in a harsh dilemma when the offense alleged was a possessory one, such as possession of narcotics or stolen goods. The court in Connolly v. Medalie, 58 F.2d 629, 630 (2d Cir. 1932), stated:

standing arises when the defendant who seeks to assert the fourth amendment violation is not the direct victim of the unreasonable search and seizure. The majority of lower federal courts have refused to grant third-party standing in such circumstances.[26] The Supreme Court's most definitive pronouncement denying third-party standing was in *Alderman v. United States*,[27] in which the defendants claimed that evidence produced by electronic surveillance was unconstitutional "regardless of whose Fourth Amendment rights the surveillance violated."[28] The majority held:

> Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obligated to choose one horn of the dilemma.

The Supreme Court in *Jones* provided an escape for the defendant by conferring automatic standing in possessory offenses without a need for an initial showing of an interest in the contraband. Because of the Court's holding in Wong Sun v. United States, 371 U.S. 471 (1963), the rule as to automatic standing for possessory offenses may not be clear. *See* Note, *Standing to Object to an Unlawful Search and Seizure*, 1965 WASH. U.L.Q. 488, 501. *Jones* was construed to confer standing on persons in possession of a stolen automobile in Simpson v. United States, 346 F.2d 291 (10th Cir. 1965), for:

> Federal officers [otherwise] could search cars at will and, of all defendants prosecuted for automobile theft, only those who actually owned the automobiles could raise Fourth Amendment objections successfully. . . . The sole prerequisite to a defendant's raising the Fourth Amendment issue is that he claim a proprietary or possessory interest in the searched or seized property.

Id. at 294.

The dissent on petition for rehearing, however, maintained that a thief in possession of an automobile had no greater right to the application of the exclusionary rule than a trespasser on real property, stating: "The end result is that Simpson is permitted to use the very property which he stole as a cloak of immunity." *Id.* at 300 (Pickett, J., dissenting).

26. Glisson v. United States, 406 F.2d 423 (5th Cir. 1969); United States v. Graham, 391 F.2d 439 (6th Cir. 1968); Granza v. United States, 377 F.2d 746 (5th Cir.), *cert. denied*, 389 U.S. 939 (1967); United States v. Grosso, 358 F.2d 154 (5th Cir.), *rev'd on other grounds*, 390 U.S. 62 (1967); United States v. Bozza, 365 F.2d 206 (2d Cir. 1966); D'Argento v. United States, 353 F.2d 327 (9th Cir. 1965), *cert. denied*, 384 U.S. 963 (1966). Nor can the victim of the search claim the protection of the fourth amendment for his co-conspirators. Alderman v. United States, 394 U.S. 165 (1969); Haywood v. United States, 268 F. 795 (7th Cir. 1920). A fortiori, incriminatory evidence seized from one person by a violation of the fourth amendment may be used against another person where the latter and the victim of the unreasonable search are neither co-conspirators nor co-defendants. Lewis v. United States, 92 F.2d 952 (10th Cir. 1937); Newfield v. Ryan, 91 F.2d 700 (5th Cir.), *cert. denied*, 302 U.S. 729 (1937).

27. 394 U.S. 165 (1969).

28. *Id.* at 171.

> The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing.[29]

Although Justice Fortas' dissent in *Alderman* acknowledged that several commentators had urged an exception to the third-party standing rule in order to reinforce the deterrence goal of the exclusionary rule,[30] the majority held that the additional benefits of extending the fourth amendment exclusionary rule did not "justify further encroachments on the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."[31]

The California Supreme Court had granted fourth amendment third-party standing prior to *Alderman*,[32] basing its decision on the deter-

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29. *Id.* at 171-72. The Court noted, however, that Congress or state legislatures could extend the exclusionary rule to provide that illegally seized evidence be inadmissible against anyone for any purposes. *Id.* at 175. It also reaffirmed the possibility of allowing third-party standing when required by the presence of special circumstances, as in NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958), and Barrows v. Jackson, 346 U.S. 249 (1953). 394 U.S. at 174. *See* note 11 *supra.*

30. But if the exclusionary rule follows from the Fourth Amendment itself, there is no basis for confining its invocation to persons whose right of privacy has been violated by an illegal search. The Fourth Amendment, unlike the Fifth, is couched in terms of a guarantee that the Government will not engage in unreasonable searches and seizures.

394 U.S. at 205 (Fortas, J., dissenting). *See generally* Grove, *Suppression of Illegally Obtained Evidence: The Standing Requirement on Its Last Leg*, 18 CATHOLIC U.L. REV. 150 (1968); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319; Note, *Standing and the Fourth Amendment*, 38 U. CIN. L. REV. 691 (1969); Note, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria*, 115 U. PA. L. REV. 1136 (1967); Note, *Standing to Object to an Unlawful Search and Seizure*, 1965 WASH. U.L.Q. 488.

31. 394 U.S. at 174-75. Justice Harlan, concurring in part and dissenting in part, argued that granting third-party standing would create great administrative difficulties, yet produce only a marginal increase in fourth amendment protection. *Id.* at 188 n.1.

32. People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955). California had earlier adopted the exclusionary rule as a sanction for violations of the fourth amendment because

> other remedies have failed to secure compliance with the constitutional provision on the part of police officers with the attendant result that the courts under the old rule had been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.

People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911-12 (1955).

The *Martin* court relied in part on McDonald v. United States, 335 U.S. 451 (1948), in which the Supreme Court held that a pretrial motion to suppress by a defendant

rence policy which had supported earlier United States Supreme Court cases.[33] The California court reasoned that if the police could obtain evidence in violation of the rights of third parties and use this evidence against defendants, the deterrent effect of the exclusionary rule would be nullified[34] since the police could trade off the possible conviction of persons whose rights they violated for the conviction of others by the use of illegally obtained evidence. In addition to the California Supreme Court several other courts have granted fourth amendment third-party standing,[35] but most federal and state courts have refused to grant it.[36]

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whose rights had been violated had been erroneously denied by the trial court, and then reversed the conviction of *both* defendants:

> Even though we assume, without deciding, that Washington, who was a guest of McDonald, had no right of privacy that was broken when the officers searched McDonald's room without a warrant, we think that the denial of McDonald's motion was error that was prejudicial to Washington as well. In this case . . . the unlawfully seized materials were the basis of evidence used against the codefendant.

Id. at 456. The California court reasoned:

> There is no basis for concluding, however, that a defendant whose rights have not been violated should have standing to challenge a pre-trial ruling against his codefendants, if he has no standing to challenge the legality of the original seizure. In either situation his right to object to the use of the evidence must rest, not on a violation of his own constitutional rights, but on the ground that the government must not be allowed to profit by its own wrong and thus encourage the lawless enforcement of the law.

45 Cal. 2d at 761, 290 P.2d at 857.

33. *See* notes 9 & 15 *supra* and accompanying text.

34. People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955). The present status of the *Martin* decision is uncertain. In Kaplan v. Superior Court, 15 Cal. App. 3d 785, 93 Cal. Rptr. 482 (1971), the court held that the enactment of the 1965 California Evidence Code had the effect of abolishing all judicially created and non-constitutionally required exclusionary rules, such as that of *Martin*.

35. *See, e.g.*, Rosencranz v. United States, 334 F.2d 738 (1st Cir. 1964); United States v. Thompson, 113 F.2d 643 (7th Cir. 1940); People v. McDonnell, 18 N.Y.2d 509, 223 N.E.2d 785 (1966).

36. *See, e.g.*, Lovette v. United States, 230 F.2d 263 (5th Cir. 1956); United States v. White, 228 F.2d 832 (7th Cir. 1956); Baskerville v. United States, 227 F.2d 454 (10th Cir. 1955); Wilson v. United States, 218 F.2d 754 (10th Cir. 1955); Steeber v. United States, 198 F.2d 615 (10th Cir. 1952); Church v. State, 151 Fla. 24, 9 So. 2d 164 (1942); State v. Dunn, 44 Idaho 636, 258 P. 553 (1927); People v. Tabet, 402 Ill. 93, 83 N.E.2d 329 (1949); Piedmont v. State, 198 Ind. 511, 154 N.E. 282 (1926); Vogler v. Commonwealth, 255 Ky. 511, 75 S.W.2d 11 (1934); Rizzo v. State, 201 Md. 206, 93 A.2d 280 (1952); People v. Anscomb, 234 Mich. 203, 208 N.W. 45 (1926); Brown v. State, 192 Miss. 314, 5 So. 2d 426 (1942); State v. Egan, 272 S.W.2d 719 (Mo. App. 1954); Stephens v. State, 285 P.2d 467 (Okla. Crim. App. 1955); State v. Hilton, 119 Ore. 441, 249 P. 1103 (1926); Allen v. State, 161 Tenn. 71, 29 S.W.2d 247 (1929).

IV. THIRD-PARTY STANDING AND THE FIFTH AMENDMENT

A. *The Majority Position*

The fifth amendment provides that no person "shall be compelled in any criminal case to be a witness against himself."[37] The Supreme Court has long held that the privilege against self-incrimination is personal to the witness himself and cannot be asserted by another person.[38] Thus a defendant cannot prevent a witness from incriminating himself while testifying at the defendant's trial.[39] Even if a witness is en-

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In 1972 the *Model Code of Pre-Arraignment Procedure* adopted a middle ground between a proposal to preserve the "standing" requirement and an alternative proposal to eliminate it totally. The *Code* provides:

> A motion to suppress may be made by any defendant against whom things seized are to be offered in evidence at a criminal trial, if such things were obtained by a search or seizure from:
> (a) the defendant; or
> (b) a spouse, parent . . . or any member of his household; or
> (c) any person with whom the defendant resides or sojourns; or
> (d) a co-defendant, co-conspirator, or any person chargeable with the same crime with which the defendant is charged; or
> (e) any person with whom the defendant conducts a business; or
> (f) any other person if, from the circumstances, it appears that the search or seizure was intended to avoid the application of this Part II to any of the persons described in clauses (a) to (e) inclusive.

MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS290.1(5) (Official Draft No. 1, 1972).

37. U.S. CONST. amend. V, § 3.

38. Hale v. Henkel, 201 U.S. 43 (1906); McAlister v. Henkel, 201 U.S. 90 (1906). The Court in *Hale* was particularly forceful in asserting that:

> The right of a person under the 5th Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person.

201 U.S. at 69-70. The bases of the two *Henkel* holdings were reaffirmed in Rogers v. United States, 340 U.S. 367 (1951). At least one lower federal court held that fifth amendment rights were personal before the Supreme Court reached the same conclusion. Morgan v. Halberstadt, 60 F. 592 (2d Cir.), *cert. denied*, 154 U.S. 511 (1894).

Typically, the rule that the privilege against self-incrimination is personal is stated briefly and without argument. *See, e.g.*, Bowman v. United States, 350 F.2d 913, 916 (9th Cir. 1965), *cert. denied*, 383 U.S. 950 (1966); Poole v. United States, 329 F.2d 720, 721 (9th Cir. 1964); Hudson v. United States, 197 F.2d 845, 846 (5th Cir. 1952).

39. 8 J. WIGMORE, EVIDENCE § 2270 (J. McNaughton rev. ed. 1961) (emphasis original):

> The privilege [against self-incrimination] of course may be claimed by the *witness*, whether or not he is a party to the controversy. Where the witness is not a party, however, a *party* may not make the claim for the witness . . . .

See McAlister v. Henkel, 201 U.S. 90 (1906); Sachs v. Canal Zone, 176 F.2d 292 (5th Cir.), *cert. denied*, 338 U.S. 858 (1949); People v. Mann, 148 Cal. App. 2d 851,

couraged to testify by an improper grant of immunity from prosecution, the defendant cannot exclude the witness' testimony.[40] The rationale of the fifth amendment cases applies to the coerced witness situation, for as the police beating of the witness in *Portelli* gave the police information needed to convict the defendant, violation of the witness' fifth amendment rights allows the prosecution the opportunity to elicit additional trial testimony without fear of having the testimony excluded by the defendant.

B. *Post*-Portelli

The *Portelli* rationale has provided authority for some later cases.[41] In *Long v. United States*[42] the Court of Appeals for the District of Columbia Circuit held that third parties could not exclude the testimony of witnesses whose *McNabb-Mallory*[43] rights had been violated. Just as *Portelli* allows the police to avoid the deterrence policies of the coerced confession rule, *Long* permits the police partially to avoid the effects of the *McNabb-Mallory* rule. For, so long as the police are willing to risk losing the possible conviction of the incarcerated party, they may willfully violate the *McNabb-Mallory* rule in hopes that the incarcerated party will give information which incriminates a party

853, 307 P.2d 684, 685 (1957); Barr v. People, 30 Colo. 522, 71 P. 392 (1903); Bolen v. People, 184 Ill. 338, 56 N.E. 408 (1900); Butz v. State, 221 Md. 68, 156 A.2d 423 (1959); State v. Hamilton, 304 Mo. 19, 263 S.W. 127 (1924); State v. Britton, 27 Wash. 2d 336, 178 P.2d 341 (1947).

40. United States *ex rel.* Berberian v. Cliff, 300 F. Supp. 8, 15 n.4 (E.D. Pa. 1969). *See also* People v. Carpenter, 32 App. Div. 2d 827, 828, 302 N.Y.S.2d 452, 455 (1969).

41. *See* Long v. United States, 360 F.2d 829 (D.C. Cir. 1966); United States *ex rel.* Berberian v. Cliff, 300 F. Supp. 8 (E.D. Pa. 1969); People v. Carpenter, 32 App. Div. 2d 827, 302 N.Y.S.2d 452 (1969). The *Portelli* rationale predictably was used in the trial of Portelli's co-defendant in United States *ex rel.* Rosenberg v. Mancusi, 445 F.2d 613 (2d Cir. 1971), *cert. denied*, 405 U.S. 956 (1972).

42. 360 F.2d 829 (D.C. Cir. 1966).

43. Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943). Taken together these two cases hold that a confession obtained by federal officers could be excluded from use in a federal prosecution if it was obtained during a period of "unnecessary delay" in bringing the defendant before a magistrate. This rule, however, was grounded on the Supreme Court's supervisory power over the federal courts and, therefore, was not binding on the states as a constitutional rule. Culombe v. Connecticut, 367 U.S. 568, 600-01 (1961); Payne v. Arkansas, 356 U.S. 560, 567 (1958). The rule was purportedly changed by Congress in 18 U.S.C. § 3501 (1970). Two recent cases have failed to reach the issue of the constitutionality of the new law. United States v. Keeble, 459 F.2d 757, 760 (8th Cir. 1972); Frazier v. United States, 419 F.2d 1161, 1164 (D.C. Cir. 1969).

in whose conviction the police are more interested.

Two cases denying third-party standing to challenge violations of fifth amendment rights deserve special mention, the first because it signals a reluctance to grant fifth amendment third-party standing by a court which had previously granted third-party standing in fourth amendment cases, the second because it highlights dramatically the possibility of deliberate police practices that proponents of third-party standing have claimed can be prevented only if such standing is granted.

In the first case, *People v. Varnum*,[44] the police questioned two prisoners, without informing them of their *Miranda* rights, about the hiding place of a gun. Although the court reaffirmed that in California a defendant has standing to object to a search and seizure conducted in violation of the fourth amendment even when his own rights have not been infringed,[45] the court nevertheless saw no need to accord the same right to a defendant when a *Miranda* fifth amendment violation was involved. The court held:

> Noncoercive questioning is not in itself unlawful, however, and the Fifth and Sixth Amendment rights protected by . . . *Miranda* are violated only when evidence obtained without the required warnings and waiver is introduced against the person whose questioning produced the evidence. The basis for the warnings required by *Miranda* is the privilege against self-incrimination . . . and that privilege is not violated when the information elicited from an unwarned suspect is not used against him . . . . Unlike unreasonable searches and seizures, which always violate the Constitution, there is nothing unlawful in questioning an unwarned suspect *so long as the police refrain from physically and psychologically coercive tactics condemned by due process* and do not use against the suspect any evidence obtained. Accordingly, *in the absence of such coercive tactics,* there is no basis for excluding physical or other non-hearsay evidence acquired as a result of questioning a suspect in disregard of his Fifth and Sixth Amendment rights when such evidence is offered at the trial of another person.[46]

Since the *Varnum* court was concerned with *noncoercive* questioning, the court framed its decision on facts far removed from those of *Portelli*, where the witness was physically abused by the police rather than merely

44. 66 Cal. 2d 808, 427 P.2d 772, 59 Cal. Rptr. 108 (1967), *cert. denied*, 390 U.S. 529 (1968).

45. *See* notes 32-34 *supra* and accompanying text.

46. 66 Cal. 2d at 808, 427 P.2d at 775-76, 59 Cal. Rptr. at 111-12 (emphasis added) (footnote omitted).

deprived of his *Miranda* rights.[47] Violations of the *Miranda* rule, as in *Varnum,* are not shocking in themselves but are objectionable only in the context of the criminal prosecution of the defendant. Physical coercion by the police, however, as in *Portelli,* is both shocking in itself[48] as well as objectionable in the context of the criminal prosecution of the defendant. Thus, although the deterrence policy underlies both the *Miranda* rule and the coerced confession rule, enforcement of the policy is more significant in relation to coerced confessions since such enforcement would theoretically prevent police conduct far more harmful in its effects on the coerced witness than the effects of a *Miranda* violation. Furthermore, physical abuse of a witness is more likely to produce an unreliable confession because the witness may well yield to police persecution in order to end the coercion, whereas there is no such immediate pressure on the witness to produce a confession when he is merely denied his *Miranda* warnings.

The second case, *Dimmick v. State,*[49] is notable for the conscious police avoidance of the deterrence considerations underlying *Miranda.* Dimmick and his co-defendant were informed of their *Miranda* rights and the co-defendant asked for a lawyer. Nevertheless, the police continued to question the co-defendant and elicited a confession which implicated both him and Dimmick. The police testified at the trial that:

> The decision was made to go ahead and interview [the co-defendant] after he had requested an attorney full-well knowing that then this confession could not be used against him but merely for the value of the confession against Mr. Dimmick.[50]

Despite this blatant violation of the policy objectives of *Miranda* the majority of the court refused to allow Dimmick standing to allege this infringement of his co-defendant's rights, holding that the privilege against self-incrimination is personal in nature.[51]

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47. *See* note 6 *supra* and accompanying text.

48. In Rochin v. California, 342 U.S. 165, 172 (1952), the Court described a forced pumping of defendant's stomach made at the instigation of the police as "conduct that shocks the conscience."

49. 473 P.2d 616 (Alas. 1970).

50. *Id.* at 619.

51. *Id.*:

> The privilege pertains solely to the person who makes a statement under impermissible conditions where the statement is to be used to convict him, and not some other person. The right is personal in nature—it pertains only to the person from whom a statement is obtained. It cannot reasonably be construed as requiring the exclusion of evidence against one not making any statement in order to protect the rights of the person from whom a statement

The *Dimmick* majority, however, like the *Varnum* majority, indicated that its decision might have been different had the fifth amendment violation involved physical coercion, similar to the beatings in *Portelli*:

> Whether the use of coerced statements from [the witness] to convict appellant would . . . violate due process, may involve considerations different from those involved in the privilege against self-incrimination. Statements which are the product of coercion may be unreliable and untrustworthy, and thus should be excluded as evidence against one not coerced into making them. But more important, coerced statements are condemned because . . . human values may be as much involved and in need of protection when an involuntary statement is used to convict one not coerced into making it as well as when used against the one from whom the statement was obtained.[52]

Thus *Dimmick* does not eliminate the application in *Portelli* coerced-witness situations of the fifth amendment policies of preventing the use of unreliable and untrustworthy evidence and of deterring illegal law enforcement practices.

V. Joint Trials and the Fourteenth Amendment: Evading the Standing Question

A defendant may in some instances exclude the testimony of a coerced witness when the witness is a co-defendant. In *Anderson v. United States*[53] six defendants made out-of-court confessions which implicated all twenty defendants. The confessors repudiated their confessions at trial. The Supreme Court reversed the convictions of the confessing defendants because their confessions had been improperly admitted[54] and also reversed the convictions of the non-confessing defendants because the jury instructions had not restricted the use of the confessions to a determination of only the confessors' guilt.[55]

In *Bruton v. United States*[56] the Court relied on the sixth amendment to protect a defendant implicated by a co-defendant's extrajudicial

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was obtained in violation of the *Miranda* rule.

Other courts have held that police failure to give *Miranda* warnings to an accomplice does not permit a defendant to exclude the accomplice's statements from trial. Byrd v. Comstock, 430 F.2d 937 (9th Cir. 1970), *cert. denied*, 401 U.S. 945 (1971); United States v. Schennault, 429 F.2d 852 (7th Cir. 1970); Bryson v. United States, 419 F.2d 695 (D.C. Cir. 1969); State v. Willis, 260 La. 439, 256 So. 2d 436 (1972).

52. 473 P.2d at 619-20 (footnotes omitted).

53. 318 U.S. 350 (1942).

54. *Id.* at 351-55.

55. *Id.* at 356-57.

56. 391 U.S. 123 (1968).

confession. The confessor in *Bruton* did not testify at trial but his out-of-court statement was admitted into evidence against a co-defendant. Although the trial judge properly limited the jury's use of the confession to determining only the declarant's guilt, the Court held that the jury instructions were not a valid substitute for the defendant's sixth amendment right of confrontation.[57] Thus the non-confessing defendant's right to have the confession excluded was not dependent on the admissibility of the confession, but rather on his right to cross-examine the declarant at trial.[58]

While *Bruton* clearly establishes a defendant's right to exclude references to himself in a non-testifying co-defendant's out-of-court confession, conceptual difficulties may arise in cases in which the confessing defendant takes the stand. In *California v. Green*[59] the Court read *Bruton* as eliminating any confrontation problem if the declarant takes the stand.[60] In *Anderson*, a pre-*Bruton* case, the non-confessing defendants had the opportunity at trial to cross-examine the confessing co-defendants whose confessions had been illegally obtained. The Court

57. *Id.* at 137, *overruling* Delli Paoli v. United States, 352 U.S. 232 (1957).

58. California courts interpreted *Bruton* as requiring that the right of confrontation apply when the confession was initially made. *See In re* Hill, 71 Cal. 2d 997, 458 P.2d 449, 80 Cal. Rptr. 537 (1969). Under this interpretation it would be unlikely that any confession implicating a co-defendant could ever be admitted at trial. The California court's reading of *Bruton* was rejected in California v. Green, 399 U.S. 149 (1970).

The Supreme Court subsequently clarified *Bruton* by holding that the right of confrontation is satisfied if the confessor takes the stand, even if he repudiates or refuses to substantiate his out-of-court confession. Nelson v. O'Neil, 402 U.S. 622 (1971).

If the declarant testifies at a *pretrial* judicial proceeding, there would be no confrontation objection if the declarant were actually unavailable for testimony at the subsequent trial, provided that the non-confessing defendant had an opportunity for cross-examination at the pretrial proceeding. California v. Green, 399 U.S. 149, 165-66 (1970), *citing* Barber v. Page, 390 U.S. 719, 725-26 (1968), Pointer v. Texas, 380 U.S. 400, 407 (1965), *and* Mattox v. United States, 156 U.S. 237 (1895). In such circumstances, a transcript of the declarant's testimony at the pretrial proceeding would be admissible at trial because it would satisfy the " 'indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant,' Dutton v. Evans [400 U.S. 74, 89 (1970)]," and because " 'the trier of fact [would be afforded] a satisfactory basis for evaluating the truth of the prior statement,' California v. Green [399 U.S. 149, 161 (1970)]." Mancusi v. Stubbs, 408 U.S. 204, 213 (1972).

59. 399 U.S. 149 (1970).

60. *Id.* at 163 (footnote omitted):

> The Court [in *Bruton*] again emphasized that the error arose because the declarant "does not testify and cannot be tested by cross-examination," . . . suggesting that no confrontation problem would have existed if Bruton had been able to cross-examine his co-defendant.

nonetheless found a due process violation in the judge's failure to give limiting jury instructions. While it is clear that *Bruton* and *Green* remove any *confrontation* objections in an *Anderson* situation, does *Anderson* continue to require, on *due process* grounds, limiting jury instructions even when, as in *Anderson*, the opportunity to cross-examine exists? It may be argued that pre-*Bruton* cases, such as *Anderson*, which were decided on the basis of whether proper jury instructions were given, would after *Bruton* be resolved on sixth amendment right-to-confrontation grounds; it cannot be said with certainty, however, that satisfying the confrontation requirements of *Bruton* will necessarily satisfy *Anderson*.

VI. Denial of Fair Trial

One argument used by Portelli's counsel to attempt to overcome the coerced-witness standing obstacle was that the due process clause of the fourteenth amendment guaranteed the defendant a personal right to a trial in which due process and fundamental fairness were rigidly maintained.[61] The argument proceeds that a defendant cannot get a fair trial when a coerced witness is involved, not only because the witness' rights were violated, but because the defendant's own right to a trial with a reliable fact-finding procedure is infringed. This approach was urged, although not in its fullest form, in Justice Rutledge's dissent in *Malinski v. New York*.[62] In *Malinski* one defendant was coerced into giving a confession which implicated a co-defendant. The trial court allowed the confession to be introduced into evidence using a masking device purportedly designed to prevent the jury from knowing that the confession implicated both defendants.[63] On appeal Justice Rutledge, pointing out that the device was so obvious as to actually identify the second defendant, argued:

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61. Brief for Appellant at 24-35, United States *ex rel.* Portelli v. LaVallee, 469 F.2d 1236 (2d Cir. 1972).

62. 324 U.S. 401 (1945).

63. *Id.* at 430-31. The device employed was to substitute letters for the names of the implicated parties, to instruct the jury that the confession was to be used against defendant Malinski alone, and to submit the case against co-defendant Rudish separately from the one against Malinski. Justice Rutledge argued that this procedure aimed at the impossible, and that in a capital case like this one the judgment against Rudish should be reversed. *Id.*

The plurality opinion noted that *Anderson* involved review of a federal district court proceeding, over which the Supreme Court had more control than it had over state criminal trials. *Id.* at 411.

> Due process does not permit one to be convicted upon his own coerced confession. It should not allow him to be convicted upon a confession wrung from another by coercion. A conviction supported only by such a confession could be but a variation of trial by ordeal.[64]

Rutledge's due process argument has not been expressly adopted by other courts as a valid ground for challenging a violation of a coerced witness' rights, although subsequent decisions[65] and at least one dissent[66] have relied on the underlying premise of Rutledge's opinion. In *Stovall v. Denno*[67] the Supreme Court acknowledged the possibility of a due process challenge based on unfair police procedures. Stovall, unaccompanied by counsel, had been identified by the victim in a lineup in the victim's hospital room. Stovall was the only Black in the lineup and was handcuffed to another lineup member. Despite the absence of counsel at the lineup, the Court declined to apply *Gilbert v. California*[68] and *United States v. Wade*[69] because the lineup had been conducted prior to the dates of those decisions.[70] The Court held, however, that "it remains open to all persons to allege and prove, as Stovall attempts to do in this case, that the confrontation resulted in such unfairness that it infringed his rights to due process of law."[71] Although the Court in *Stovall* re-

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64. *Id.* at 430-31 (Rutledge, J., dissenting), *citing* Hysler v. Florida, 315 U.S. 411 (1942).

65. Stovall v. Denno, 388 U.S. 293 (1967); Jackson v. Denno, 378 U.S. 368 (1964).

66. Bradford v. Michigan, 394 U.S. 1022 (1969), *denying cert. to* 10 Mich. App. 696, 160 N.W.2d 373 (1968). Chief Justice Warren, dissenting with Justices Douglas and Marshall from denial of certiorari, spoke of the general untrustworthiness of coerced confessions, and stated that it should be irrelevant that the coercion was exercised against a witness rather than the accused. Relying on the Rutledge dissent in *Malinski*, the Chief Justice argued that admission of a witness' trial testimony was a violation of due process since it was "cut from the same fabric that produced his original statement." 394 U.S. at 1023-24.

67. 388 U.S. 293 (1967). *See generally* 58 GEO. L.J. 621 (1970).

68. 388 U.S. 263 (1967).

69. 388 U.S. 218 (1967).

70. 388 U.S. at 302. *Stovall* held *Gilbert* and *Wade* to apply prospectively. *Id.* at 296-301.

71. *Id.* at 299. The Court held that when a lineup containing the suspect of an alleged crime is "unnecessarily suggestive and conducive to irreparable mistaken identification," the identification must be suppressed because it denied the accused due process of law. *Id.* at 301-02. *See, e.g.*, Palmer v. Peyton, 359 F.2d 199, 202 (4th Cir. 1966) (footnotes omitted):

> In their understandable zeal to secure an identification, the police simply destroyed the possibility of an objective, impartial judgment by the prosecutrix as to whether Palmer's voice was in fact that of the man who had attacked her. Such a procedure fails to meet "those canons of decency and fairness" established as part of the fundamental law of the land. A state may not

jected the unfairness challenge on the facts of that case,[72] it left the door open for a remedy based not on a specific constitutional provision such as the privilege against self-incrimination or the right to confrontation or counsel, but rather on the general fairness of the police procedures as reflected by the totality of circumstances surrounding the challenged police practice.[73]

VII. THE SIGNIFICANCE OF IN-COURT REPETITION OF THE COERCED TESTIMONY

The *Portelli* decision rested in part on the witness' repetition of his statement in court eight months after his coerced confession. When a defendant makes two confessions, the first coerced, the court must determine if the second confession is so influenced by the first that it too is involuntary and must be suppressed.[74] Since the prosecution will normally want to put the accusing witness on the stand to substantiate its case against the defendant, the coerced witness situation will frequently involve an in-court repetition of the initial coerced testimony. The question of the continuation of the original involuntariness will thus be present.

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rely in a criminal prosecution upon evidence secured by pumping a man's stomach, by breaking into his home, or by employing subtle psychological methods on him; nor may it rely on an identification secured by a process in which the search for truth is made secondary to the quest for a conviction.

See also Rochin v. California, 342 U.S. 165, 173-74 (1952); Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944); Lisenba v. California, 314 U.S. 219 (1941).

The fact that the identification might be conducive to mistake means, of course, that it may be unreliable, making unnecessary a finding of actual unreliability.

72. The Court noted that in this case an immediate confrontation at the hospital had been imperative. Only the victim could have exonerated the accused, the hospital was not far from the jail, and no one knew how much longer the victim would live. 388 U.S. at 302.

73. *Cf. id.*: "However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it . . . ."

74. Lyons v. Oklahoma, 322 U.S. 596, 603 (1944):

> The admissibility of the later confession depends upon the same test—is it voluntary. Of course the fact that the earlier statement was obtained from the prisoner by coercion is to be considered in appraising the character of the later confession. . . . If the relation between the earlier and later confession is not so close that one must say the facts of one control the character of the other, the inference is one for the triers of fact and their conclusion, in such an uncertain situation, that the confession should be admitted as voluntary, cannot be a denial of due process.

In *Lyons* the Court upheld the admissibility of a second confession made twelve hours after Lyons had made a confession following a beating by the police.

The Supreme Court has recognized that a second confession is almost always a partial result of the first, but has held that this consideration is not controlling.[75] The final determination of whether the second confession is voluntary depends on an examination of the totality of the circumstances, just as when the voluntariness of any confession is in question.[76] Thus, an in-court confession may be ruled inadmissible when it somehow was induced by the prosecution's erroneous introduction of a previous inadmissible confession.[77] To sustain the validity of a challenged second confession, the state typically must show that the second confession followed a break in the causative chain extending from the first confession.[78] Although the time between the two confes-

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75. United States v. Bayer, 331 U.S. 532, 540-41 (1947):

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.

76. In Hopt v. Utah, 110 U.S. 574 (1884), the Supreme Court, in examining the admissibility of confessions in the federal courts, employed a common law evidentiary rule barring confessions obtained by threats and promises. Later, in Bram v. United States, 168 U.S. 532 (1897), the Court used a "voluntariness" test somewhat derived from the fifth amendment privilege against self-incrimination. Beginning with Brown v. Mississippi, 297 U.S. 278 (1936), the Court began barring the use in state courts of confessions which did not pass a test of voluntariness, dependent upon the "totality of the circumstances." Since this necessitated a case-by-case examination of all factors present in a challenged confession, the test was difficult to administer. As the test evolved, it aimed at excluding from trial any confession that (1) was of doubtful reliability because of the method used to obtain it, Chambers v. Florida, 309 U.S. 227 (1940); (2) was obtained by an offensive police practice, Rogers v. Richmond, 365 U.S. 534 (1961); or (3) was obtained in a manner that significantly overrode the defendant's free choice, Townsend v. Sain, 372 U.S. 293 (1963). The decision in Miranda v. Arizona, 384 U.S. 436 (1966), set out a per se exclusionary rule under which a confession must be excluded at trial unless the defendant had first been advised "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, either retained or appointed." *Id.* at 444. *Miranda*, however, does not totally negate the importance of the prior voluntariness cases. Since *Miranda* does not apply to volunteered statements, *id.* at 478, "inquiry into *Miranda* issues is not coextensive with an investigation of voluntariness generally." United States v. Bernett, No. 71-1465, at 13 (D.C. Cir., Jan. 10, 1974). For a discussion of the relationship between *Miranda* and voluntariness, and of voluntariness generally, see *id.* at 10-37.

77. *See, e.g.*, People v. Spencer, 66 Cal. 2d 158, 424 P.2d 715, 57 Cal. Rptr. 163 (1967); People v. Polk, 63 Cal. 2d 443, 406 P.2d 641, 47 Cal. Rptr. 1 (1965).

78. *See, e.g.*, Harrison v. United States, 392 U.S. 219 (1968); Darwin v. Connec-

sions is a factor,[79] an interval of several days will not be sufficient to make the second confession admissible when elements of coercion remain.[80]

Determination of the admissibility of a second confession often involves the "fruit-of-the-poisonous-tree" rule, which holds that the illegality of an initial police practice taints not only the illegally obtained evidence itself, but also evidence later acquired through information discovered by the improper tactic.[81] The doctrine would appear to help defendants in a *Portelli* situation, but the prosecution might make use of one of two exceptions to the poisonous tree rule. The first exception makes evidence admissible if it comes from an independent source;[82] the second

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ticut, 391 U.S. 346 (1968); Beecher v. Alabama, 389 U.S. 35 (1967); Clewis v. Texas, 386 U.S. 707 (1967); Reck v. Pate, 367 U.S. 433 (1961).

79. *See, e.g.*, Beecher v. Alabama, 389 U.S. 35 (1967) (second confession five days after first not admissible); Clewis v. Texas, 386 U.S. 707 (1967) (second confession nine days after first not admissible); Reck v. Pate, 367 U.S. 433 (1961) (second confession one day after first not admissible); Leyra v. Denno, 347 U.S. 556 (1954) (second confession five hours after first not admissible); United States v. Bayer, 331 U.S. 532 (1947) (second confession six months after first admissible); Malinski v. New York, 324 U.S. 401 (1945) (second confession four days after first not admissible); Lyons v. Oklahoma, 322 U.S. 596 (1944) (second confession twelve hours after first admissible).

Note that in *Portelli*, Melville's in-court testimony came eight months after the testimony obtained by torture, an interval supporting, by its length, the voluntary nature of the in-court testimony.

80. *See, e.g.*, Beecher v. Alabama, 389 U.S. 35 (1967) (while recovering from wounds and under influence of drugs, defendant signed second confession); Clewis v. Texas, 386 U.S. 707 (1967) (defendant, who had only fifth-grade education and no prior experience with the law, was not advised of right to counsel or right to remain silent, was questioned for prolonged periods, and was allowed inadequate sleep and food); Leyra v. Denno, 347 U.S. 556 (1954) (defendant visited by "doctor" who had considerable knowledge of hypnosis and who obtained confession; this confession not used against defendant, but other confessions obtained that same evening were used at trial).

81. The phrase "fruit of the poisonous tree" was coined in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), in which the Court held that the Government could not use evidence obtained through a subpoena when the information justifying the subpoena had been acquired through an illegal search. The Court stated:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired should not be used before the court, but that it should not be used at all.

Id. at 392.

82. This first exception to the rule was created in *Silverthorne* itself:

> [T]his 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, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed.

Id.

admits evidence if its connection with the initial illegality is "so attenuated as to dissipate the taint."[83] One means used to broaden these exceptions[84] emphasizes the individual witness' ability to formulate his

83. The attenuation exception was formulated in Nardone v. United States, 308 U.S. 338, 341 (1939):

> Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.

The attenuation exception was further expounded in Wong Sun v. United States, 371 U.S. 471 (1963). Federal narcotics agents had illegally entered defendant Toy's home and arrested him. Toy told the agents the identity and location of Johnny Yee; a search of Yee's home revealed narcotics, which were sought to be introduced at trial against Toy. The Supreme Court held the narcotics inadmissible:

> Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Id. at 488 (citation omitted). The case was even more involved, however, as Yee in turn implicated Wong Sun, who was arrested illegally. Several days after being released on his own recognizance, Wong Sun voluntarily made an oral confession. The Supreme Court used the attenuation doctrine to rule that Wong Sun's voluntary action in confessing after release and a warning of his rights had dissipated the taint of his initial, illegal arrest. *Id.* at 491.

84. For listings of how state and lower federal courts have split on the application of the two exceptions, see State v. Moore, 275 N.C. 141, 166 S.E.2d 53 (1969); Comment, *Voluntary Incriminating Statements Made Subsequent to an Illegal Arrest—A Proposed Modification of the Exclusionary Rule*, 71 DICKINSON L. REV. 573 (1967); Comment, *Admissibility of Confessions Made Subsequent to an Illegal Arrest: Wong Sun v. United States Revisited*, 61 J. CRIM. L.C. & P.S. 207 (1970). The last article points out that the Supreme Court's reliance in *Wong Sun* on two contrasting factors has caused a split. On the one hand, the Court emphasized the issue of voluntariness in that Wong Sun had returned freely to make a confession; on the other hand, the Court noted the element of deterrence when it saw no logical distinction between the effects of physical and verbal evidence on the policy underlying the exclusionary rule. Therefore, cases in which the Court emphasizes the deterrence factor typically exclude all confessions after an illegal arrest, whereas cases in which the Court emphasizes the voluntariness element usually pass over improper police conduct and permit admission of a confession following an illegal search or arrest on the questionable assumption that a defendant can decide to confess apart from the undue pressure generated by the illegal police activity. *Id.* at 210-11.

Some lower courts have attempted to widen the independent source exception by admitting evidence if the prosecution can show that the derivative evidence *would* have been discovered even if the unlawful police act had never occurred. *See* Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. CRIM. L.C. & P.S. 307 (1964); Note, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria*, 115 U. PA. L. REV. 1136 (1967). This approach, however, has been criticized for its opposition to the deterrence purposes of the exclusionary rule. *See, e.g.*, United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962); Parts Mfg. Corp. v.

own testimony free from the influence of prior tainted evidence. Although police may have obtained the identity of the witness through illegal means, his testimony is admitted because "the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give."[85]

Thus, even if a court recognized a defendant's third-party standing to challenge a witness' coerced confession, the court conceivably might use the aforementioned exceptions to the poisonous tree doctrine to admit the witness' testimony despite the defendant's contention that the witness' in-court testimony should be excluded because derived from illegal police action. The development of exceptions to the poisonous tree doctrine may, then, allow the police to be relatively confident that the coerced witness' subsequent testimony will be admitted.

VIII. Exclusion versus Jury Determination

Exclusion of improperly gained evidence is not the only means of discouraging the police from engaging in undesirable tactics against witnesses. Given the proper instructions, the jury might also disregard unlawful activity in determining guilt or innocence by refusing to consider a witness' testimony which is based on the witness' prior involuntary statement. When a trial judge excludes evidence which has been coerced from a witness for reasons unrelated to reliability, he limits the information the jury may use to make its factual determinations. How-

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Lynch, 129 F.2d 841 (2d Cir. 1942); People v. Bilderbach, 62 Cal. 2d 757, 401 P.2d 921 (1965).

85. Smith v. United States, 324 F.2d 879, 881 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 954 (1964). *See also* Lockridge v. Superior Court, 3 Cal. 3d 166, 474 P.2d 683, 89 Cal. Rptr. 731 (1970).

This approach was employed recently in a case in which the court expressly noted an analogy to *Portelli*. In People v. Mendez, 28 N.Y.2d 94, 268 N.E.2d 778 (1971), the identity of the complainant in an abortion prosecution had been learned by means of an illegal wiretap on the defendant's phone. Police then followed the defendant to the complainant's home, and later questioned the complainant without telling her that her identity had been discovered by the illegal tap. The complainant gave the police information upon which the affidavit for a search warrant was based. The court held that evidence found in a search pursuant to this warrant was admissible. The information given by the complainant was not induced by her knowledge of the illegal tap, the court stated, because the witness was an independent voluntary source of information that became productive "only upon the application of additional, interacting forces . . . which were exerted without confrontation of the witness with the fact of the wiretap or by like exploitation of the illegal act." *Id.* at 101, 268 N.E.2d at 782.

ever, if the jury hears the evidence and determines for itself how much weight to give it, the overall fact-finding process is arguably strengthened in that the jury has more data on which to base its conclusion. Thus, in *Portelli* the New York Court of Appeals held that the jury could hear the testimony regarding the police beating and thereby determine the truthfulness of the witness.[86]

However, jury determination of the voluntariness of a coerced *witness'* testimony has the shortcomings of any case involving jury instructions. The problem of failure to follow jury instructions was recognized by the Supreme Court in *Jackson v. Denno*,[87] in which the Court held that the trial judge had to make a separate ruling on the voluntariness of a *defendant's* confession. The Court later cited *Denno* for the proposition that

> there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.[88]

The ability of the jury to follow instructions also had been discussed in *Krulewitch v. United States*: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."[89] More recently, *Bruton v. United States*[90] noted the inadequacy of jury instructions to protect a defendant from prejudicial matters.[91] Of course, the sixth amendment guarantee of confrontation gives the defendant the right to cross-examine the coerced witness and thereby possibly show the jury the shortcomings of the evidence. But cross-examination is not a cure-all. As the Supreme Court warned in *United States v. Wade*, "[E]ven though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability."[92] Moreover, while cross-examination presumably serves to test the reliability of a coerced witness' in-court repetition of an illegally obtained extrajudicial statement, it does not fulfill the deterrence function of an exclusionary rule.

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86. 15 N.Y.2d at 239, 205 N.E.2d at 858, 260 N.Y.S.2d at 932-33.
87. 378 U.S. 368 (1964).
88. Bruton v. United States, 391 U.S. 123, 135 (1968).
89. 336 U.S. 440, 453 (1949) (Jackson, J., concurring).
90. 391 U.S. 123 (1968).
91. *Id.* at 135-36. *See* notes 56-60 *supra* and accompanying text.
92. 388 U.S. 218, 235 (1967).

IX. CONCLUSION

Defendants have had little success in excluding the testimony of coerced witnesses. Although there has been no Supreme Court case in point, analogy to fourth amendment Supreme Court cases and state and lower federal court cases indicates a reluctance to exclude testimony of coerced witnesses. Such reluctance may well serve to defeat the deterrence objectives of the exclusionary rule. *Dimmick v. State*[93] disclosed a conscious police decision to violate a witness' rights in order to secure the conviction of another party. *Portelli* dramatizes how such a decision can lead to the unconscionable practices of law enforcement which the exclusionary rule was designed to prevent.[94]

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93. 473 P.2d 616 (Alas. 1970). *See* text accompanying note 49 *supra.*

94. *Cf.* People v. Varnum, 66 Cal. 2d 808, 819, 427 P.2d 772, 780, 59 Cal. Rptr. 108, 116 (concurring opinion):

> Now [the police officer] is impliedly told by the majority that, where there are multiple suspects, he may, without giving the required warnings and despite the suspect's request for counsel or desire to remain silent, interrogate one suspect in violation of these rights in the hope of getting admissible evidence against the other suspects. The majority opinion can be interpreted as not only condoning but in effect encouraging such violation of fundamental constitutional rights.

This concurring opinion also argued that a reading of *Miranda* would demonstrate that its rules "were adopted largely to deter improper police activities, just as the unlawful search and seizure rules were adopted for the same purposes. The same rule should be applied to both situations." *Id.* at 816, 427 P.2d at 780, 59 Cal. Rptr. at 114.