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The Exclusionary Rule Applied to Coerced Statements from Nondefendants, 43 J. Marshall L. Rev. 795 (2010)

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THE EXCLUSIONARY RULE APPLIED TO COERCED STATEMENTS FROM NONDEFENDANTS

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I. TISHA'S STORY

"Civilized governments do not take babies away to coerce a victim's testimony—even in the name of protecting that victim and others."[1]

In 1996, Tisha, a fifteen-year-old girl, ran away with Stanley Samuel, a forty-seven-year-old man.[2] When she was found and returned to Wisconsin thirteen months later, she was nine months pregnant and gave birth the day after her return.[3] Two days later, Tisha was put in a room with eight adults for a placement conference to determine the custody of her baby.[4] At this conference, police officers and social workers created the impression that she would lose custody of her baby unless she cooperated with them by providing information to be used against the defendant, the father of her child.[5]

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1. Samuel v. Frank, 525 F.3d 566, 575 (7th Cir. 2008) (Rovner, J., concurring).

2. *Id.* at 567.

3. *Id.* Tisha and Samuel's spree began in Wisconsin, but they left the state soon thereafter. *Id.* They were picked up in Missouri thirteen months later and returned to Wisconsin where Samuel was charged with second-degree sexual assault of a child, interference with child custody, and abduction. *Id.* He was convicted of these charges in a Wisconsin state court and sentenced to thirty-eight years in prison, followed by sixteen years of probation. *Id.*

4. *Id.* at 567-68. Attendees of this conference included: Tisha, her lawyer, her father and his girlfriend, social workers, and police officers. *Id.*

5. *Id.* at 568. Tisha testified at a pretrial suppression hearing that she was told at this placement conference that she would not get her baby back if she failed to cooperate and that she understood this to mean that she must give statements to the police. *Id.* Her testimony was corroborated by her father who testified that the police officers at the placement conference became angry with Tisha when she refused to provide information of where she had been with Samuels and the addresses of people they had stayed with. *Id.* Tisha's lawyer also testified at the pretrial suppression hearing that the impression created at the placement conference was "that unless Tisha gave a

The next day, after her child was placed in temporary foster care pending a second placement hearing, two officers interviewed Tisha at the police station.[6] At this interview, the police obtained information critical to the pending charges against the defendant.[7] The next day, less than twenty-four hours after submitting to the state's pressure, Tisha was given custody of her baby.[8] These statements, coerced from a fifteen-year-old girl by threatening to take away her baby just forty hours after a difficult delivery, were admissible at trial over the defendant's objections.[9]

The exclusionary rule bars these types of coerced statements from being admitted into a trial if made by a defendant.[10] Currently, courts are split over whether statements coerced from nondefendants should be subject to the exclusionary rule.[11] Part II

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full statement concerning the defendant's conduct, she would not get the baby back." *Id.* Even the state's main witness testified that Tisha was told several times that the social workers would "need her cooperation" in order to determine the baby's placement. *Id.* at 572 (Rovner, J., concurring).

6. *Id.* at 568. Officer Sagemeister, who was in charge of the investigation against Samuel and present at this questioning, admitted that Tisha was told she must cooperate in order to determine the baby's placement. *Id.* at 572 (Rovner, J., concurring).

7. *Id.* at 568. A critical issue to the charge of second-degree sexual assault was whether the pair had sexual intercourse while in Wisconsin before they left the state. *Id.* at 567. If Samuels had not had sex with Tisha while in Wisconsin, he would not have violated Wisconsin's sexual-assault statute. *Id.*; *see also* WIS. STAT. § 948.02(2) (stating Wisconsin's second-degree sexual assault statute).

8. *Id.* at 572 (Rovner, J., concurring). Judge Rovner discussed the state's lack of legitimacy in depriving Tisha custody of her baby. *Id.* at 575. He explained that removal of custody is a drastic measure to be pursued only as a last resort and that there were alternatives to assuage the fear of Tisha absconding with the baby. *Id.* at 575-76. Additionally, Justice Rovner pointed out that the only factor which had changed between the removal of Tisha's baby and officials granting her custody was the police obtaining the incriminating statements they needed against Samuel. *Id.* at 575.

9. *Id.* at 567. After Samuel was convicted and his state remedies were exhausted, he petitioned for federal habeas corpus relief, arguing that the admission of a nondefendant's coerced statements violated his Fifth Amendment due process rights. *Id.* Samuel lost that petition and appealed. State v. Samuel, 252 N.W.2d 423, 434 (Wisc. 2002). His case was then heard by the Seventh Circuit, which affirmed the lower court's ruling. *Samuel*, 525 F.3d at 571.

10. *See* United States v. Tingle, 658 F.2d 1332, 1336 (9th Cir. 1981) (holding that police officers' statements that the defendant would lose custody of her child constituted coercion and excluding the statements from trial).

11. *See, e.g.*, United States v. Gonzales, 164 F.3d 1285, 1289 (10th Cir. 1999) (holding that the use of coerced statements from a witness implicates the defendant's due process rights); LaFrance v. Bohlinger, 499 F.2d 29, 35 (1st Cir. 1974) (acknowledging a defendant's Fifth Amendment right to challenge coerced statements from witnesses and the appropriate sanction of excluding such sanctions); People v. Badgett, 895 P.2d 877, 886-87 (Cal. 1995) (holding that coerced statements from nondefendants should be excluded only if they are shown to be unreliable). The Supreme Court has yet to rule on this

of this Comment will discuss the background and purpose of the exclusionary rule in the context of a defendant's Fifth Amendment due process rights.[12] Part II will also discuss the details of Tisha's situation and the rationale behind the court's decision to admit her coerced statements at the defendant's trial. Part III of this Comment will explain and discuss the current conflict in the law, including the two tests used to determine the admissibility of a statement at trial: (1) reliability and (2) egregiousness of police misconduct. Part IV proposes to extend the applicability of the exclusionary rule to include coerced statements obtained from nondefendants.

II. THE EXCLUSIONARY RULE: BACKGROUND, PURPOSE, AND RATIONALE

A. Historical Development of the Exclusionary Rule and Its Purpose

The Fourth Amendment of the United States Constitution protects citizens against "unreasonable searches and seizures."[13] In *Weeks v. United States*,[14] the Supreme Court read the Fourth Amendment as a restraint on a court's power and authority "to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the

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issue. *Samuel*, 525 F.3d at 569.

12. This Comment will not discuss the viability of the exclusionary rule, which has been written about in great length. *See generally* Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmnun's Call to Examine the Rule in Light of Changing Judicial Understanding about Its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45 (1994) (analyzing the costs and benefits of the exclusionary rule in the context of its purpose of deterring future illegal police activity); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363 (1999) (arguing for abolishment of the exclusionary rule because it fails to promote Fourth Amendment values); Nadia B. Soree, *The Demise of Fourth Amendment Standing: From Standing Room to Center Orchestra*, 8 NEV. L.J. 570 (Winter 2008) (discussing the ability of Congress to abolish the exclusionary rule completely); James J. Tomkovicz, Hudson v. Michigan *and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819 (2008) (discussing the possibility of abolishing the exclusionary rule based on indicia of four justices in Hudson v. Michigan, 547 U.S. 586 (2006)). This Comment will understand the exclusionary rule as a fact of the criminal prosecution system and its validity will not be questioned here. This discussion will focus on whether the exclusionary rule should be expanded to include statements obtained from witnesses through coercion.

13. U.S. CONST. amend. IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.*

14. Weeks v. United States, 232 U.S. 383, 383 (1914).

guise of law."[15] The Court emphasized that this protection extended to all citizens alike, regardless of a whether a party has been criminally accused.[16] The Court noted that permitting unlawful searches and seizures would be "a manifest neglect, if not an open defiance, of the prohibitions of the Constitution."[17] The Court in *Weeks* established the baseline exclusionary rule, preventing a prosecutor from admitting evidence obtained by federal officers without a warrant or probable cause.[18]

Over thirty years later, the majority opinion in *Wolf v. Colorado*[19] declared that the exclusionary rule in *Weeks* was one of judicial implication,[20] resting not in constitutional requirements but in the Supreme Court's supervisory power to create rules for the lower federal courts.[21] Instead, the Court in *Wolf* laid out alternative remedies to the unlawful seizure of evidence,[22] emphasizing that the exclusion of evidence was a remedy, not a constitutional right.[23] The dissent in *Wolf* also provided the first discussion of using the exclusionary rule as a deterrent against police misconduct.[24] The dissent disagreed with the majority's

15. *Id.* at 391-92. The defendant in *Weeks* was arrested without a warrant. *Id.* at 386. Simultaneously, other police officers searched his home without a warrant and turned some material over to a United States marshal. *Id.* The marshal also returned later to conduct his own search of the defendant's home. *Id.* Neither the police officer nor the United States marshal had a search warrant. *Id.*

16. *Id.* at 392.

17. *Id.* at 393.

18. *Id.* at 398. The Court stated that the admission of the evidence obtained by the federal marshal was a "prejudicial error," but declined to address whether the state police officer's actions were similarly covered, stating that the Fourth Amendment did not reach individual misconduct of state officials. *Id.*

19. Wolf v. Colorado, 338 U.S. 25, 28 (1949).

20. *Id.* In effect, the Court used judicial implication to establish the exclusion of evidence as a remedy, not a constitutional right. *Id.* at 30-31. In doing so, the Court invited states to develop individual procedures to handle evidence obtained in violation of the Fourth Amendment. Mark E. Opalisky, *The Applicability of the Exclusionary Rule to Probation Revocation Proceedings*, 17 MEM. ST. U. L. REV. 555, 559 (1987). Notably, resting the rationale on judicial implication also limited the scope of *Weeks* to apply only in federal cases. Anderson M. Renick, *Orwellian Mischief—Extending the Good Faith Exception to the Exclusionary Rule: Arizona v. Evans*, 25 CAP. U. L. REV. 705, 708 (1996).

21. *Wolf*, 338 U.S. at 30-31.

22. *Id.* at 32. The Court suggested remedies such as private trespass actions or public outcry against oppressive conduct. *Id.*

23. *Id.*

24. *Id.* at 42-43 (Murphy, J., dissenting). In his dissenting opinion, Justice Murphy explained the illusory effect of alternatives to excluding unlawfully obtained evidence, stating that it was unreasonable to believe a district attorney would prosecute himself or his colleagues for "well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered." *Id.* at 42.

alternative remedies, stating that the only alternative to the rule of exclusion was "no sanction at all."[25]

The Court next extended the exclusionary rule to apply to evidence obtained by state officers.[26] In doing so, the Court recognized deterrence as the main rationale for using the exclusionary rule.[27] The Court found that the crux of the rule was not, as Justice Cardozo put it, allowing "[t]he criminal . . . to go free because the constable has blundered,"[28] but to help ensure that the constable has an incentive to take care *not* to "blunder."[29]

In further support of its "deterrence" rationale, the Court has acknowledged that the government owes its citizens the respect of obeying its own laws, and it is only by disregarding its own laws that the criminal will go free.[30] In doing so, the Court rejected the argument that the exclusionary rule rendered law enforcement ineffective as a result.[31] The main idea behind the exclusionary

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25. *Id.* at 41; *see also* Opalisky, *supra* note 20, at 559 (discussing the tantamount importance of the development of police deterrence as a justification for the exclusionary rule).

26. Mapp v. Ohio, 367 U.S. 643, 656-58 (1961). The Court pointed out it would be illogical to prohibit a federal prosecutor from using unlawfully obtained evidence, while allowing a state prosecutor to use it, even though both are subject to the constraints of the Fourth Amendment. *Id.* at 658.

The Court had come close to fully addressing the inconsistency a year earlier in *Elkins v. United States*. Elkins v. United States, 364 U.S. 206 (1960). In *Elkins*, the prosecutor attempted to use evidence obtained in violation of the defendant's Fourth Amendment rights. *Id.* at 207. The Supreme Court vacated and remanded the convictions, holding that "evidence obtained by state officers during a search which, if conducted by federal officers would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment, is inadmissible. *Id.* at 223-24. The application of the exclusionary rule in this context prevented the ability of federal prosecutors to circumvent the rule, pointing out that the rule's purpose was to prevent, not repair, a constitutional violation. Opalisky, *supra* note 20, at 559-60. This decision eliminated the practice prior to *Elkins* of state officers obtaining evidence in violation of the Fourth Amendment and turning that evidence over for use in a federal court, known as the "Silver Platter Doctrine." *Elkins*, 364 U.S. at 208 (citing Lustig v. United States, 338 U.S. 74 (1949)).

27. Opalisky, *supra* note 20, at 560. The *Mapp* Court recognized the exclusionary rule as compelling respect for the constitutional guarantees of the Fourth Amendment "in the only effectively available way—by removing the incentive to disregard it." *Mapp*, 367 U.S. at 656. This decision overruled *Wolf* as the Court once again recognized the constitutional origin of the rule. *Id.* at 656; Renick, *supra* note 20, at 709.

28. People v. Defore, 242 N.Y. 13, 21 (N.Y. 1926).

29. *Mapp*, 367 U.S. at 659.

30. *Id.* If the government does not obey its own laws, it cannot expect its citizens to do so. *Id.*; *see also* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (explaining that the government must set a proper example and its inappropriate conduct can breed contempt for law).

31. *Mapp*, 367 U.S. at 659-60. In applying the exclusionary rule to the states, the Court pointed out that there was no evidence showing that the federal courts or the Federal Bureau of Investigation had been ineffective

rule, then, is that if police know illegally-obtained evidence cannot be used in court, they are less likely to engage in illegal searches and seizures.[32]

The Court has also recognized that beyond the need for deterrence, the exclusionary rule ensures judicial integrity.[33] In order for the criminal system to function properly, the court must ensure that trials are fair and just.[34] That is necessary to ensure the integrity of the criminal prosecution system.

B. The Exclusionary Rule Applied to Coerced Statements

The Supreme Court has since extended the exclusionary rule to apply to coerced statements and confessions obtained from a defendant.[35] The Court first recognized this application of the exclusionary rule in *Brown v. State of Mississippi*, when it found that coercing criminals into confessing and then using the confession against them was against the principals of the Constitution.[36] The Court conceded that "[i]t would be difficult to conceive of methods more revolting to the sense of justice" than those used in *Brown*.[37] However, the Court has not restricted the application of the exclusionary rule solely to statements obtained through physical violence.[38]

The exclusion of coerced statements developed from the

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since the application of the exclusionary rule to the federal system by *Weeks*. *Id.*

32. Eugene Milihizer, *The Exclusionary Rule Lottery*, 39 U. TOL. L. REV. 755, 756 (2008); *see also* Colorado v. Connelly, 479 U.S. 157, 166 (1986) (holding that the purpose of excluding unlawfully-obtained evidence is to deter future violations of the Constitution). Although these reasons have been used primarily to argue against the inclusion of a defendant's coerced statements, this Comment will discuss their application to the exclusion of the coerced statements from a nondefendant as well.

33. *Elkins*, 364 U.S. at 222.

34. *Id.*

35. *See* Brown v. Mississippi, 297 U.S. 278, 286 (1936) (holding that the use of self-incriminating statements obtained from the defendant through violence violates his right to due process); Spano v. New York, 360 U.S. 315, 322 (1959) (excluding statements obtained from a defendant through nonviolent coercion).

36. *Brown*, 297 U.S. at 285. The Court held that the use of statements obtained through coercion, brutality, and violence violated the defendant's right to due process. *Id.* The defendant in *Brown* was hung by a rope from the limb of a tree and whipped until he confessed. *Id.* at 281.

37. *Id.* at 286. In its initial application, the Court recognized the extreme nature of the circumstances. *Id.*

38. Chambers v. Florida, 309 U.S. 227, 239 (1940). The Court found the exclusionary rule just as applicable in *Chambers*, where the coerced statements were obtained as a result of prolonged interrogation and psychological coercion rather than the physical coercion used in *Brown*. *Id.*; *see also* Blackburn v. Alabama, 361 U.S. 199, 206 (1960) (stating "the blood of the accused is not the only hallmark of an unconstitutional inquisition").

English common law rule, which excluded such statements based on their inherent unreliability.[39] American courts then began to recognize that the necessity of voluntariness had two constitutional roots: the Fifth Amendment's right against self-incrimination and the Fourteenth Amendment Due Process Clause.[40] During the middle third of the twentieth century, the Court shifted away from self-incrimination as the basis for excluding coerced statements and focused on the notions of due process.[41]

In determining whether a statement was coerced, the Supreme Court looked to "'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession."[42] To be coercive, the action must be shown to have deprived the accused of "his free choice to admit, to deny, or to refuse to answer."[43] This voluntariness test reviews the totality of the circumstances, including "the characteristics of the accused and the details of the interrogation."[44] Factors to be considered when determining voluntariness include: (1) age of the accused,[45] (2) education level,[46] (3) whether the accused was advised of his or

39. Kim D. Cahnbonin, *Ditching "The Disposal Plan:" Revising Miranda in an Age of Terror*, 20 ST. THOMAS L. REV. 155, 176 (2008); *see also* Amos N. Guiora, *Interrogation of Detainees: Extending a Hand or a Boot?*, 41 U. MICH. J.L. REFORM 375, 404 (2008) (discussing the English courts' emphasis on the questionable reliability of a coerced confession).

40. Guiora, *supra* note 40, at 404; *see also* Bram v. United States, 168 U.S. 532, 543-44 (1897) (using the Fifth Amendment's self-incrimination clause as the basis for excluding coerced statements by a defendant); *Brown*, 297 U.S. at 285 (holding that the use of coerced statements against a defendant violated the Due Process Clause of the Fourteenth Amendment and, by extension, the Fifth Amendment Due Process Clause); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (holding the Fifth Amendment is incorporated and applicable to the states through the Fourteenth Amendment).

41. Dickerson v. United States, 530 U.S. 428, 433-34 (2000); *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973) (holding the Fourth and Fourteenth Amendments require voluntariness); Haynes v. Washington, 373 U.S. 503, 513 (1963) (stating that coerced statements violate due process).

42. *Dickerson*, 530 U.S. at 435 (citing *Schneckloth*, 412 U.S. at 223).

43. Lisenba v. California, 314 U.S. 219, 240 (1941). In *Lisenba*, the Court found that the defendant's statement was not involuntary because he was afforded counsel, and "no threats, promises, or acts of physical violence" were made to him during the interrogation. *Id.* This evidence, with the defendant's own "coolness" during his trial negated the claim of coercion and involuntariness. *Id.*

44. *Schneckloth*, 412 U.S. at 226.

45. *See* Haley v. Ohio, 332 U.S. 596, 599 (1948) (describing a fifteen-year-old defendant as a "mere child" who is an "easy victim of the law," requiring special scrutiny of the record).

46. *See generally* Payne v. Arkansas, 536 U.S. 560 (1958) (reversing a conviction of a nineteen-year-old defendant with a fifth grade education because of admittance of coerced confession).

her constitutional rights,[47] (4) length of detention,[48] (5) nature of the questioning,[49] and (5) use of physical punishment in procuring the statements.[50] Additionally, a court weighs the factual circumstances, assesses the psychological impact on the person being interrogated, and evaluates the significance of his reaction.[51]

In its landmark decision of *Miranda v. Arizona*,[52] the Supreme Court created a presumption of coerciveness during a custodial interrogation because of the "inherently compelling pressures" present.[53] The *Miranda* Court discussed in great detail tactics used by police in interrogations,[54] and in doing so, put the focus on the nature and atmosphere of an interrogation as coercive.[55]

Reliability has been cited as the foremost reason to exclude coerced statements.[56] States have employed different methods in order to determine the viability of a coerced statement, and the Supreme Court has formulated rules to govern the viability, and therefore the use of, a defendant's coerced statement at trial.[57]

Beyond the unreliability of a coerced statement, however, the

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47. Davis v. North Carolina, 384 U.S. 737, 739 (1966) (specifically noting that the failure to warn the defendant of his rights was a significant factor in finding the confession to be involuntary).

48. *See Chambers*, 309 U.S. at 239 (holding that interrogations lasting over five days resulting in confessions indicated compulsion).

49. *See* Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944) (holding that repeated and prolonged questioning weighed against the voluntariness of the statement).

50. *See* Reck v. Pate, 367 U.S. 433, 440 (1961) (holding that although physical mistreatment is a factor to be weighed heavily, other circumstances may also show coerciveness in the absence of such mistreatment).

51. *Schneckloth*, 412 U.S. at 226.

52. Miranda v. Arizona, 384 U.S. 436, 436 (1966).

53. *Id.* at 467. The *Miranda* decision focused on implementing procedural safeguards to protect a defendant's constitutional rights during custodial interrogation. *Id.* at 444.

54. *See id.* at 452-53 (discussing tactics such as good cop/bad cop, use of trickery, isolation, and psychological conditioning in order to procure the desired statements).

55. *See generally id.* (discussing the presumptive compulsion and pressure present during interrogation which creates a burden on the state to safeguard against such compulsion).

56. Carol Ann Rohr & Keith A. Fink, *Scylla and Charybdis: Chartering a Course for Law Enforcement Officers Caught Between 42 U.S.C. § 1983 and 18 U.S.C. §§ 241 and 242*, 41 FED. B. NEWS & J. 370, 378 (1994); *see also* Guiora, *supra*, note 40, at 404 (discussing the English common law rule of exclusion based on unreliability); *Spano*, 360 U.S. at 320 (recognizing that the jury was given an instruction that the defendant's confession could be relied on only if it was found to be voluntary); *Samuel*, 525 F.3d at 573 (Rovner, J., concurring) (stating the only inquiry to be made in regards to the question of federal due process is whether the statement is so unreliable that it deprives the defendant of due process of law).

57. *Lisenba*, 314 U.S. at 236.

Supreme Court has also recognized police misconduct as a concern in using these statements at trial.[58] A coerced statement's inadmissibility rests in a violation of due process and police misconduct, not the inherent truth or falsity of the statement.[59] This represents the long-standing belief "that the police must obey the law while enforcing the law."[60] For a statement to be excluded because of coercion, it must have been obtained through a police officer's coercive conduct.[61] This coercion can be either mental or physical.[62]

Excluding such coerced statements in order to protect due process rights recognizes that their use is "so offensive to a civilized system of justice that they must be condemned."[63] Therefore, a due process violation lies not just in the inherent unreliability of coerced statements, but also in "prevent[ing] fundamental unfairness in the use of the evidence."[64] In light of these concerns, the Court has vitiated convictions even when there is additional corroborating evidence to support such convictions beyond the coerced statements.[65]

Additionally, in *Haynes v. Washington*,[66] the Supreme Court

58. Rohr & Fink, *supra* note 56, at 378; *see also Spano*, 360 U.S. at 320-21 (discussing the necessity of excluding illegally-obtained evidence in order to deter police misconduct).

59. *Spano*, 360 U.S. at 320-21.

60. *Id.* Unlawful behavior of police, such as illegally obtaining confessions and statements through coercion, can threaten a person's life and liberty as much as the criminal activity it seeks to prevent and punish. *Id.*; *see also* Rogers v. Richmond, 365 U.S. 534, 541 (1961) (explaining that even when coerced statements have been determined reliable by independent corroborating evidence, they were still held inadmissible because of the violation of the Due Process Clause); *Blackburn*, 361 U.S. at 206 (stating that despite the importance of convicting those who have committed crimes, other considerations "transcend the question of guilt or innocence," and a court enforces the societal recognition that human values are sacrificed when a governmental agency obtains a coerced statement).

61. *Connelly*, 479 U.S. at 165. It is not enough for the witness to be insane or mentally incapacitated; the police must have exhibited coercive actions. *Id.* The requirement of the presence of state action to sustain a Fourteenth Amendment's Due Process Clause violation is settled law. *Id.*

62. *Blackburn*, 361 U.S. at 206. The Court found that isolating a person and interrogating him for a prolonged amount of time can be just as coercive and offensive as physical coercion or torture. *Id.; see also Payne*, 356 U.S. at 561 (holding the use of a confession obtained through either physical or mental coercion is forbidden by the right to due process).

63. Miller v. Fenton, 474 U.S. 104, 109 (1985); *see also Brown*, 297 U.S. at 286 (holding that convictions could not be secured by confessions obtained through beatings or other forms of physical and psychological torture).

64. *Lisenba*, 314 U.S. at 236.

65. *See Haynes*, 373 U.S. at 517 (holding the admission of an involuntary confession as reversible error despite other evidence sufficient to sustain the conviction).

66. *Id.* at 519.

recognized the burden and expense placed on the government in having to retry a defendant after such a reversal, but emphasized that the deprivation of individual rights "is fundamental and the most regrettable" not only because of their effect on the individual, but because of the impact on the overall American system of law and justice.[67]

Finally, coerced statements are excluded for the same reason as the general purpose of the exclusionary rule already discussed: to deter police misconduct.[68] Deterrence in relation to coerced statements lies in the violation of due process rather than self-incrimination.[69]Because self-incrimination occurs in the courtroom, that is where the Constitutional violation takes place.[70]

III. ANALYSIS

The recent case of *Samuel v. Frank*[71] specifically addressed the admission of coerced statements made by a nondefendant.[72] There was no dispute that Tisha's statements were, in fact, coerced.[73] The court found that "torture and taking away a person's child are not considered proper methods of obtaining evidence against criminals."[74] The court also recognized that the problem with coercion is that, to make threats credible, it would require the police to at times follow through with such threats.[75]

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67. *See id.* (discussing violations of constitutional rights through coercion breeds disrespect for law).

68. Rohr & Fink, *supra* note 56, at 378.

69. James J. Tomkovicz, *Saving Massiah from Elstad: The Admissibility of Successive Confessions following a Deprivation of Counsel,* 15 WM. & MARY BILL RTS. J. 711, 752-53 (2007).

70. *Id.*; *see also* Chavez v. Martinez, 538 U.S. 760, 766-67 (2003) (Souter, J., concurring) (confining Fifth Amendment rights to the courtroom); *Id.* at 779-80 (Souter, J., concurring) (writing for five Justices that pretrial mistreatment constitutes a due process violation); *see generally* James J. Tomkovicz, *The Massiah Right to Exclusion: Constitutional Premises and Doctrinal Implications,* 67 N.C. L. REV. 751 (1989) (discussing the constitutional premises and rationale of the Sixth Amendment exclusionary rule).

71. *Samuel*, 525 F.3d at 566.

72. *See generally id.* (holding that the police conduct was not so egregious as to rise to a constitutional violation).

73. *Id.* at 568. The court acknowledged that had Tisha been a defendant, her statements would not have been admitted at trial against her because of the coercive nature of their inducement. *Id.* Additionally, there was ample independent evidence provided by testimony at the pretrial suppression hearing that the statements were coerced. *See supra* note 5 and accompanying text (explaining Tisha's testimony about the coercive circumstances of the placement conference, and the corroboration of her testimony by her father, her lawyer, and the state's main witness).

74. *Samuel*, 525 F.3d at 568.

75. *Id.* Although the court acknowledged the inherent injustice and potential problems with using coercion to obtain statements, it limited the scope of constitutional concerns only to the defendant. *Id.*

In *Samuel*, the court rested its decision primarily on the level of egregiousness of the police conduct against Tisha and the potential unreliability of her statements because of such conduct.[76]

Although acknowledging that the police threatened Tisha with losing custody of her baby in order to obtain the needed statements from her, the court nevertheless determined such conduct was not so egregious as to require suppression.[77] Instead, the court concluded that the appropriate remedy was for Tisha to bring a private tort action against the officials.[78]

The court in *Samuel* declined to exclude coerced statements by nondefendants and distinguished them from those obtained from defendants.[79] The court reasoned that confessions by defendants were more devastating evidence than those made by a nondefendant witness.[80]

The *Samuel* court also discussed whether a coerced statement should be suppressed simply because it may be unreliable.[81] The

76. *Id.* at 571. The court held that in order to suppress coerced statements by a witness, the egregiousness of the police misconduct must rise to the level of producing *unreliable* statements. *Id.* (emphasis added). As a reviewing court, *Samuel* also relied on determining simply whether the lower court was "unreasonable" in determining that such conduct did not rise to the necessary level of egregiousness. *Id.*

77. *Id.* at 571. The *Samuel* court reasoned that the state was justified in threatening Tisha with the loss of her baby because of her weeks on the run. *Id.* The court reasoned that the mere fact that she was on the run provided the authorities with reason to question her ability to be a fit mother. *Id.* The problem with that reasoning is that the court failed to recognize that Tisha was a minor child herself, certainly suffering from emotional strain at having been on the run with a pedophile for several months.

78. *Id.* at 570. The court advocated allowing the evidence in at trial but punishing the individual officer guilty of misconduct by bringing a tort claim against him. *Id.* The court argued that tort remedies were more appropriate in a case such as Tisha's, involving a nondefendant, as opposed to a tort remedy by a defendant. *Id.* Generally, a criminal defendant is not an appealing plaintiff in a tort claim because of the negative connotations surrounding one who committed a crime. *Id.* The court stated that in contrast, because Tisha was the victim of a crime, she would make a more appealing and sympathetic plaintiff. *Id.*

79. *Id.* The court emphasized that concern over coerced statements, historically, had been limited to confessions or other self-incriminating statements. *Id.* By characterizing the importance of suppressing coerced statements for this reason, the court placed the defendant's standing to object to admitting coerced statements by a nondefendant solely on the self-incrimination clause of the Fifth Amendment. *Id.*

80. *Id.* The court used these reasons to conclude that the suppression of coerced nondefendant statements would be the "creation of new law rather than the application of an existing principle." *Id.*

81. *Id.* The court pointed out that not all evidence introduced at a trial is reliable. *Id.* Whether a single item is reliable is determined by whether it is supported by independent, corroborating evidence. *Id.* at 571. Coerced statements are not different in this regard, and the court reasoned that if their truthfulness can be determined through independent, corroborating evidence,

court specifically pointed out that Tisha's statements were corroborated by other witnesses and therefore were considered just as reliable.[82] Additionally, Judge Rovner's concurring opinion in *Samuel* is instrumental in highlighting the use of reliability as the touchstone for admitting coerced statements made by a nondefendant.[83] Judge Rovner argued that the *only* inquiry to make in determining whether there was a due process violation is whether the coerced statement is unreliable.[84]

A. The Conflicting State of the Law: Admissibility Tests of a Nondefendant's Coerced Statement

1. Admissibility of a Nondefendant's Coerced Statements Are Dependent on Reliability

Some courts have held that the reliability of a nondefendant's coerced statement determines its admissibility.[85] Specifically, these courts argue that if unreliable evidence is used to convict a defendant, a court cannot be assured that his guilt was proven beyond a reasonable doubt, resulting in a violation of his due process rights.[86] However, by using reliability as the only factor to consider in determining admissibility, it ignores the Supreme Court's willingness to exclude coerced confessions even when they

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then it should not be suppressed because of unreliability. *Id.*

82. *Id.* The court added that Tisha's statements were "plausible," and that because she continued to be loyal to the defendant, her statements were unlikely to have been made if they were false, regardless of the pressure the police exerted on her. *Id.*

83. *See generally id.* (Rovner, J., concurring) (agreeing with the majority in the suppression of the nondefendant's coerced statements as well as the absence of the defendant's standing to challenge admission of such statements).Judge Rovner also questioned the majority's declaration of the legitimacy of the state's motives and disagreed with the level of egregiousness as the test of admissibility of a nondefendant's coerced statement. *Id.* He emphasized reliability as the touchstone for the test of admissibility of coerced statements by nondefendants. *Id.*

84. *Id.* at 573. In this respect, Judge Rovner echoes other courts that have used reliability in determining the admissibility of coerced statements made by nondefendants; *see also* People v. Badgett, 895 P.2d 877, 886-87 (1995) (holding that coerced statements made by nondefendants should be excluded only if the defendant shows that the coercion impaired the reliability of the testimony).

85. *Id.* at 887; *see also* Bradford v. Johnson, 354 F. Supp. 1331, 1337 (E.D. Mich. 1972) (recognizing that a coerced statement is not necessarily unreliable and that coerciveness does not "necessarily poison all future in-court testimony"); *Samuel*, 525 F.3d at 572 (Rovner, J., concurring) (arguing that the determination of the admissibility of a nondefendant's coerced statement must focus on the reliability of that statement).

86. *Samuel*, 525 F.3d at 569; *see also* Jackson v. Virginia, 443 U.S. 307, 317-18 (1979) (emphasizing the importance of the standard of proof beyond a reasonable doubt in protecting the defendant's right to due process and how the use of unreliable evidence undermines this standard).

could be considered reliable because they are supported by other evidence.[87] Using reliability as the touchstone for admissibility is contrary to the spirit of the exclusionary rule, under which it is irrelevant whether the statement or evidence is reliable.[88] The Supreme Court has held that a defendant's due process rights are violated if his conviction rests on an involuntary statement, regardless of the truth or falsity of that statement.[89]

Judge Rovner applied this reliability test to the admission of a nondefendant's coerced statement in his concurring opinion in *Samuel*.[90] Judge Rovner pointed out that despite the coercive nature of Tisha's statements, the prosecution presented "an overwhelming amount of corroborating evidence" to support that testimony.[91] Judge Rovner argued that the reliability of the testimony then should be decided by the jury in weighing the totality of the evidence.[92] However, Judge Rovner's argument ignored the myriad of decisions by the Supreme Court that have found that the truth or falsity of a coerced statement is irrelevant when determining admissibility.[93]

Even if the test of admissibility is based on reliability, a coerced statement obtained from a nondefendant cannot logically be viewed as any more reliable than one obtained from a defendant.[94] The testimony of a witness is often critical to determining the outcome of a case,[95] and even using statements

87. Rohr & Fink, *supra* note 56 at 378.

88. *See LaFrance*, 499 F.2d at 32 (holding that coerced confessions are to be excluded regardless of whether the confessions are true or false because the method used to procure them offends constitutional principles).

89. Jackson v. Denno, 378 U.S. 368, 376 (1964); *see also* Rogers, 365 U.S. at 540-41 (1961) (holding that the truth of a coerced statement is irrelevant because the methods used to extract such a statement offends a principle of the United States criminal system that the government must obtain the conviction through evidence "independently and freely secured"); Stroble v. California, 343 U.S. 181, 190 (1952) (declaring that a conviction cannot stand in light of an involuntary confession even in the face of evidence which could be sufficient to sustain a conviction).

90. *See Samuel*, 525 F.3d at 572-73 (Rovner, J., concurring) (concluding that in light of other evidence, Tisha's coerced statements were not so inherently unreliable that they denied Samuel due process).

91. *Id.* at 573.

92. *Id.*

93. *See supra* notes 57-59, 61 and accompanying text (discussing the weight of importance on the constitutional requirements of due process rather than the reliability of a statement in determining whether to exclude evidence).

94. *LaFrance*, 499 F.2d at 34. The court acknowledged that a coerced statement made by a defendant should be excluded due to its inherent reliability; however, it then follows that one cannot logically allow a coerced statement from a nondefendant, which is clearly just as presumptively unreliable. The *LaFrance* court deemed that, at the very least, a hearing should be held to determine the reliability of the coerced statement. *Id.*

95. *Id.*

obtained unlawfully to impeach a witness does not relieve the government from the requirements of due process.[96] Coercive methods of obtaining evidence which are deemed offensive when used against a defendant do not become less so when those methods are employed against a nondefendant.[97]

2. *Admission of a Nondefendant's Coerced Statement Based on the Egregiousness of Police Misconduct*

The majority in *Samuel* rested its admission of Tisha's coerced statement on the determination that the police conduct was not so egregious as to necessitate exclusion.[98] By using this standard, the *Samuel* court asserted a different standard of conduct in determining admission of coerced statements made by nondefendants rather than those made by defendants.[99] The *Samuel* court still discussed the reliability of Tisha's statements, but only so far as whether the police conduct was egregious enough to procure "inherently unreliable" statements.[100]

The problem with the *Samuel* court's egregiousness test is not only that it continues to base the admissibility of a coercive statement on reliability, but also that it only prevents *extreme* misconduct by police officers. Although this type of test will prevent the type of physical cruelty long recognized by the Supreme Court as coercion,[101] it will not be as effective in preventing the types of psychological and mental coercion also recognized as unacceptable.[102] This will allow officials to push the boundaries of coercion and threats as far as possible, knowing a statement procured through such methods will be admissible as long as it does not rise to a certain level of egregiousness.

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96. *Id.* at 35. The court emphasized that witness credibility is often a key issue at trial, but this issue does not relieve the government from its constitutional obligations. *Id.* at 34-35.

97. *Id.* at 34. The court reasoned that if a defendant cannot be convicted based on his own coerced statement by due process, the same protections should prevent his conviction by the coerced statements of another. *Id.*

98. *Samuel*, 525 F.3d at 571.

99. *Id.* at 571; *see also Samuel*, 252 Wis. 2d at 32 (concluding the standard for admission of coerced statements from nondefendants is that the misconduct must be so egregious it produces a statement unreliable as a matter of law); United States v. Chiavola, 744 F.2d 1271, 1273 (7th Cir. 1984) (holding that due process is implicated when a conviction is obtained through evidence procured through "extreme coercion or torture," thereby violating the defendant's right to a fair trial).

100. *Samuel*, 525 F.3d at 571.

101. *See generally Brown*, 297 U.S. 278 (describing how the defendants were physically tortured in order to procure confessions).

102. *See Haynes*, 373 U.S. at 520 (finding that a defendant's confession procured through verbal threats and promises was "subtle, but no less offensive" than physical coercion, thus warranting exclusion of the statements).

B. Distinguishing Coerced Statements by Nondefendants from Defendants

Courts refusing to exclude coerced statements from nondefendants have discussed "significant" differences between defendant and nondefendant statements.[103] In *LaFrance v. Bohlinger*[104] the court discussed these differences at length.[105] First, the *LaFrance* court claimed that a witness's statement is not as damning as a defendant's confession and does not deserve as close scrutiny in determining whether it should be admitted.[106] In contrast, however, other courts have found that a witness's statement can be just as influential on the jury and damning to the defendant as his own confession.[107]

In addition, the *LaFrance* court recognized the inconsistency when applying the exclusionary rule to a nondefendant's coerced statements.[108] The court acknowledged that the common law excluded coerced confessions, but pointed out there "is no such clear legal tradition" in excluding a witness's involuntary statements.[109] While the inconsistency in applying the exclusionary rule is notable, its mere existence should not form the basis of reason to admit evidence rather than exclude it.

The *LaFrance* court also discussed a defendant's dilemma when deciding whether to rebut coercive testimony.[110] The court questioned the rationale of requiring a defendant to take the stand and risk incriminating or impeaching himself.[111] However, a nondefendant witness does not have that same problem and can take the stand to assert the coerciveness of a statement or rebut its reliability.[112]

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103. State v. Vargas, 420 A.2d 809, 814 (R.I. 1980).

104. *LaFrance*, 499 F.2d at 33-34.

105. *Id.*

106. *Id.* at 33; *see also Samuel*, 525 F.3d at 570 (discussing the devastating impact of a confession on a jury because of the jury's difficulty in imagining a person confessing to a crime of which he is not guilty, "unless the pressures exerted on him to confess were overwhelming").

107. *LaFrance*, 499 F.2d at 34; *see also* Napue v. Illinois, 360 U.S. 264, 269 (1959) (holding that the principle forbidding the government from using false evidence to obtain a conviction does not fail to apply when the false evidence is applied to the credibility of the witness).

108. *LaFrance*, 499 F.2d at 33. *Id.* The court recognized that some jurisdictions will allow involuntary confessions to be used for impeachment purposes. *Id.*

109. *Id.*

110. *Id.* The *LaFrance* court focused on a defendant's need for a separate hearing outside of the jury's presence to determine the voluntariness of his confession. *Id.*

111. *Id.*

112. *Id.*

In its *LaFrance* opinion, the court also expressed concern over further trial complications which may result from an extension of the exclusionary rule.[113] With such a concern, the court further questioned the prudence of excluding important evidence from a jury.[114] However, the court mitigated its own assertion by reiterating the importance of protecting the integrity of the criminal justice system by ensuring that those enforcing the law obey the law.[115]

Finally, the *LaFrance* court recognized that defendants typically lack standing to assert the constitutional rights of others.[116] In *Alderman v. United States*,[117] the Supreme Court declined to exclude evidence illegally obtained from one defendant from another defendant's trial, defining Fourth Amendment rights as "personal"[118] and therefore unable to be invoked vicariously.[119] Therefore, a defendant's ability to exclude coerced statements made by a nondefendant must stem from the defendant's own due process rights.[120] A defendant's right to due process, as well as the right against self-incrimination, is guaranteed by the Fifth Amendment.[121]

However, many courts have found that a defendant has standing to object to the admission of coerced statements by a nondefendant based on the Fifth Amendment's right to a fair trial.[122] It is clear that this standing rests not in the defendant's

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113. *Id.* at 33-34. The court claimed that a further complication of "legal technicalities" would be "undesirable." *Id.* at 34.

114. *Id.* at 33-34.

115. *Id.*; *see also Spano*, 360 U.S. at 320-21 (discussing society's concern with the endangerment to life and liberty by the use of illegal activities by those entrusted with upholding the law).

116. *LaFrance*, 499 F.2d at 34. The court specified that to the extent that only the nondefendant's rights were violated, the defendant cannot "invoke vicariously" the exclusionary rule. *Id.*; *see also* Alderman v. United States, 394 U.S. 165, 174 (1969) (declining to extend the Fourth Amendment exclusionary rule to protect multiple defendants); United States v. Pruitt, 464 F.2d 494, 495 (9th Cir. 1972) (refusing to allow the defendant to complain of his companion's incriminating statements, whether or not they were obtained in violation of *Miranda*).

117. *Alderman*, 394 U.S. at 174.

118. *Id.*

119. *See id.* (emphasizing a victim's ability to object to an illegal search).

120. *Id.*

121. U.S. CONST. amend. V. The Fifth Amendment states, in relevant part: "[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ." *Id.*

122. United States v. Merkt, 764 F.2d 266, 274 (5th Cir. 1985). Introducing statements made by nondefendants as the result of "coercion or inquisitional tactics" violates a defendant's right to a fair trial. *Id.*; *see also* Chiavola, 744 F.2d at 1273 (stating that a Fifth Amendment violation of another can constitute a violation of the defendant's right to a fair trial because due process is implicated when the government uses "evidence obtained by

Fifth Amendment right to protect himself against self-incrimination, but on the Fifth Amendment right to due process.[123] Here, the relevant question is whether the violation of the rights of another affected the defendant's own constitutional right to due process and a fair trial.[124] Under the holdings of these courts, in asserting a Fifth Amendment violation through the coerced statements of another, the defendant must show two things.[125] First, the defendant must show that the nondefendant's rights were violated through police misconduct in procuring the coerced statements.[126] Second, the defendant must show that the violation resulted in an unfair trial.[127] The unfairness of a conviction rested upon a defendant's coerced confession does not disappear when that conviction is rested upon a coerced statement from a nondefendant.[128]

IV. PROPOSAL

Two purposes are served by the application of the exclusionary rule: to deter "abhorrent methods of coercive interrogation" and to prevent the use of inherently unreliable coerced statements "from undermining the integrity of the courts."[129] In order to continue to achieve these twin aims, the

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extreme coercion or torture" in order to obtain a conviction); United States v. DeRobertis, 719 F.2d 892, 896 (7th Cir. 1983) (finding that a defendant may assert violation of his own Fifth Amendment rights through the violation of another's constitutional rights due to coercion, but the evidence must have been introduced at trial); *Merkt*, 764 F.2d at 273-74 (recognizing the defendant had standing to assert her own Fifth Amendment right to a fair trial in objecting to the admission of a nondefendant's coerced statements).

123. United States v. Fredericks, 586 F.2d 470, 481 (5th Cir. 1978). This court held that although a defendant can assert Fifth Amendment standing against coerced statements made by a co-defendant or co-conspirator, it does not extend to statements made by a witness. *Id.*

124. *LaFrance*, 499 F.2d at 33. The court was careful to state that the defendant lacked standing because he had asserted the violation of another person's constitutional rights, distinguishing it from asserting a violation of his own constitutional rights.; *see also Chiavola*, 744 F.2d at 1273 (stating a person's due process may be implicated when the violation of another's rights violates his right to a fair trial through the government's use of statements obtained by coercion or torture to procure his conviction); *Cunningham*, 719 F.2d at 896 (concluding a defendant may raise a due process claim if the violation of another's constitutional right affects his own right to a fair trial).

125. *Cunningham*, 719 F.2d at 892. In this case, the court found that the defendant's claim could not stand because his codefendant's rights were not violated and the allegedly coerced confession was not introduced at the defendant's trial. *Id.*

126. *Id.*

127. *LaFrance*, 499 F.2d at 34.

128. *See id.* (stating that because due process does not allow a person to be convicted based on his own coerced confession, it should also not allow him to be convicted upon a coerced statement obtained from a nondefendant).

129. United States v. Massey, 437 F. Supp. 843, 856 (D.C. Fla. 1977); *see*

exclusionary rule should be expanded to coerced statements obtained from nondefendants.

As discussed, some courts have excluded coerced statements from nondefendants only if such statements were deemed unreliable.[130] Using reliability as the touchstone of admissibility, however, runs contrary to Supreme Court holdings excluding coerced statements *regardless* of reliability.[131] In fact, the Supreme Court has repeatedly explained that "the true test of admissibility is that [the statements were] made freely, voluntarily, and without compulsion or inducement of any sort."[132] This admissibility test, outlined by the Supreme Court for use in applying the exclusionary rule to coerced statements from defendants, should be the same one followed in testing admissibility of coerced statements from nondefendants: keeping the focus on voluntariness rather than reliability.

Additionally, the exclusion of *reliable* evidence obtained illegally or through coercion would be a more effective deterrent.[133] Excluding unreliable evidence obtained illegally is a rather moot point since, as courts have found, a defendant's conviction could not stand on the face of wholly unreliable evidence, regardless of how it was procured.[134] Allowing coerced, but reliable, statements provides no deterrence effect against misconduct. In fact, this would actually encourage law enforcement officials to coerce a

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also Brown v. Illinois, 422 U.S. 590, 599-600 (1975) (describing the exclusionary rule as a preventative rule that is used to deter misconduct and compel respect for constitutional guarantees); *Spano*, 360 U.S. at 321 (stating the abhorrence of society to the use of coerced statements turns not just on their inherent unreliability but on the deep-rooted feelings that the police must obey the laws they enforce); United States v. Cannon, 529 F.2d 890, 893 (7th Cir. 1976) (arguing that because a defendant's coerced statement is excluded because of society's abhorrence of the methods used to procure it, "the same taint attaches to the fruits of the statement").

130. *See supra* Part III(A)(1) (outlining the use of reliability as the touchstone for admissibility of coerced statements obtained from nondefendants).

131. *See Haynes*, 373 U.S. at 512-13 (reversing conviction resting on coerced, though reliable statements). The *Haynes* Court pointed out that using coercive tactics to obtain evidence which was already obtained, or could be obtained, through "proper investigative efforts," made the constitutionally impermissible actions "perhaps more unwarranted because so unnecessary." *Id.* at 519.

132. Wilson v. United States, 162 U.S. 613, 623 (1896); *see also Haynes*, 373 U.S. at 513 (emphasizing the voluntariness of a statement over reliability in determining whether evidence should be admitted); *Bram*, 168 U.S. at 541-42 (holding that "the measure of proof" of the evidence did not determine its admissibility, but rather whether or not it was freely given).

133. *See supra* Part II(A) (discussing deterrence as the foundation of the exclusionary rule and the absence of other remedies in lieu of the rule).

134. *Samuel*, 525 F.3d at 569; *see also Jackson*, 443 U.S. at 317-18 (discussing how due process requires a conviction to be reversed when no rational trier of fact could find for the conviction).

statement from a nondefendant if they believed it would be reliable and therefore admissible in court, contradicting the purpose of the exclusionary rule's deterrence impact.

Determining the admissibility of Tisha's statements under only a reliability standard would not have resulted in a check on the police misconduct.[135] By declaring the coerced statements admissible, the *Samuel* court legitimized the police actions of surrounding a teenage mother with state officials and threatening her with losing custody of her baby. This holding will encourage police to act similarly in the future.

The *Samuel* court also found that the coerciveness was not egregious enough to warrant exclusion.[136] In contrast to the *Samuel* court, the court in *United States v. Gonzales*[137] held that the standards used to determine the voluntariness of a statement is the same regardless of whether the statement was obtained from a defendant or a nondefendant.[138] Yet, by resting the test of admissibility on the egregiousness of conduct, the court in *Samuel* essentially set a different standard for the admission of coerced statements made by nondefendants.[139] Although there is "no absolute parallel" between the exclusionary rule in application to defendants' and nondefendants' statements, a point exists where the same considerations must be applied to both.[140] Therefore, if the same voluntary standards are to be applied to both defendant and nondefendant coerced statements, then it follows that the logic of excluding a defendant's coerced statement regardless of their reliability should also result in the exclusion of a nondefendant's coerced statement.

The inapplicability of the exclusionary rule to coerced statements made by a nondefendant, such as in *Samuel*, allows police misconduct to go unchecked.[141] There is no doubt that

135. *See Samuel*, 525 F.3d at 569 (discussing the prosecutor's ability to prove the reliability and truthfulness of Tisha's statements through independent, corroborating evidence).

136. *See id.* (holding that the state had legitimate reasons to threaten Tisha with losing custody of her baby based on her behavior); *but see id.* at 572 (Rovner, J., concurring) (arguing the that because the state returned the baby only after Tisha provided evidence to the police officers, their conduct was illegitimate).

137. *Gonzales*, 164 F.3d at 1289.

138. *Id.*

139. *Samuel*, 525 F.3d at 571.

140. *See LaFrance*, 499 F.2d at 35 (holding that the court has a duty to inquire into the coerciveness of an impeachment statement of a witness and exclude it if found to be coercive).

141. *Samuel*, 525 F.3d at 568. Judge Posner, writing for the majority, "assume[d] without having to decide" that Tisha's statements would have been inadmissible if she had been a defendant rather than merely a nondefendant. *Id.*

Tisha's statements were in fact coerced from her by the police.[142] Allowing Tisha's statements to be used at trial in effect praised the police officers' conduct, rewarding the government with the successful conviction of Samuel.[143]

The issue, essentially, is why coercing a nondefendant is acceptable behavior and coercing a defendant is not. In using tests such as reliability and egregiousness of conduct, both of which admit nondefendant statements which would be excluded if made by a defendant, coercive conduct directed at a nondefendant goes unpunished. The court has repeatedly stated that the most effective deterrence of police misconduct is the exclusion of evidence procured through illegal methods.[144] It is illogical to hold that illegal, coercive conduct is less offensive when directed at a nondefendant rather than a defendant. If anything, using coercive tactics on a nondefendant is even more offensive, since a nondefendant is not being charged with any criminal misconduct.

In a situation such as Tisha's, it is repulsive to our notions of American justice that police officers should be able to intimidate, threaten, and essentially blackmail a fifteen-year-old girl with losing custody of her baby in order to procure evidence. As even the *Samuel* majority admits, "torture and taking away a person's child are not considered proper methods of obtaining evidence against criminals."[145]

One of the most famous and oft-cited criticisms of the exclusionary rule, offered by Justice Cardozo, claims it rewards the criminal for the "blunder" of the police.[146] Justice Cardozo

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142. *Id.; see also id.* at 572 (Rovner, J., concurring) (detailing in great length that the circumstances of the coercion and the supporting testimony established the testimony as coercive).

143. *Id.* at 571.

144. *See* United States v. Leon, 468 U.S. 897, 916 (1984) (discussing deterrence as the purpose of the exclusionary rule, rather than punishment); *see also supra* Part II(A) (discussing the purposes and rationale of the exclusionary rule, particularly deterrence as one of its central bases).

145. *Samuel*, 525 F.3d at 568. The *Samuel* court admitted Tisha's statements, ignoring the very police behavior of "taking away a person's child" they had just condemned with their words. The court's reasoning, which it supported through tests of reliability and egregiousness of conduct, essentially only came down to the fact that Tisha's statements, and therefore Tisha herself, were not afforded protection simply because she is a nondefendant. *Id.* at 568-69.

146. *Defore*, 242 N.Y. at 21; *see also* Michigan v. Jackson, 475 U.S. 625, 637 (Burger, C.J., concurring) (calling for reexamination of the exclusionary rule because of its ability to allow "more and more 'criminals to go free because the constable has blundered'"); Anderson v. Terhune, 516 F.3d 781, 801 (Cal. 2008) (Tallman, J., dissenting) (declaring that the majority set free a murderer because the "constable has blundered"); United States v. Johnson, 364 F.3d 1185, 1190 (2004) (recognizing that although the exclusionary rule does sometimes allow a guilty defendant to go free, its objective is "to protect *all* citizens, particularly the innocent, by deterring overzealous police behavior.").

predicted that "[t]he pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon an offender for crimes the most flagitious."[147] But these characterizations present the misconduct as harmless errors by a police officer, setting a criminal free. The use of the word "blunder" connotes the image of a bumbling police officer who makes a mistake out of stupidity or ignorance.[148] But these are not issues of innocent mistakes by police.[149] The Supreme Court has recognized that punishing innocent mistakes by police does not serve the deterrent purpose of the exclusionary rule.[150] In cases of coercive police conduct, however, the constable has not "blundered"—he has acted intentionally to threaten, intimidate, or coerce an involuntary statement from a defendant or nondefendant.[151]

V. CONCLUSION

This oft-quoted passage from Justice Cardozo voices the true concern of expanding the exclusionary rule: that it will allow criminals to go free when they should be behind bars. Crime is always a concern to citizens, and they want to feel that the criminal justice system is effective in placing criminals where they belong: in prison. However, there has been no evidence to suggest that the use of the exclusionary rule has made law enforcement ineffective.[152] Instead, it should reassure citizens that if they were to be arrested, perhaps unjustly, they would be afforded a level of respect from police officers, free from coercive conduct. Additionally, citizens often do not concern themselves with the possibility of a violation of a criminal's constitutional rights simply because he is a criminal,[153] especially if a violation of the criminal's constitutional rights will help them feel safer in their

147. *Defore*, 242 N.Y. at 21.

148. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 137 (11th ed. 2006)

149. In fact, the Supreme Court carved out a "good faith" exception to the Fourth Amendment exclusionary rule when the police officer reasonably relied on a warrant which turned out to be ineffective. *Leon*, 468 U.S. at 916.

150. *Id.*

151. *See* United States v. Payner, 447 U.S. 727, 746 (1980) (finding that evidence is illegally obtained when "the agent has intentionally violated the law for the explicit purpose of obtaining the evidence.") Permitting the use of such evidence in a conviction, then, taints the integrity of the federal court. *Id.*

152. *See supra* note 33 and accompanying text (discussing that because there was no evidence implying federal courts or the Federal Bureau of Investigation were rendered ineffective by application of the exclusionary rule, there was no reason to believe the state courts would be rendered ineffective by the same application).

153. *See Weeks*, 232 U.S. at 393 (discussing the Supreme Court's emphasis on Fourth Amendment protection for all citizens regardless of criminal accusation).

homes. But the Constitution is not there for only some citizens; it protects all United States citizens.[154]

It will always be difficult to protect individual rights while ensuring the protection does not provide immunity from crimes. But it is imperative not to let the importance of prosecuting crimes and punishing criminals "lure us into forsaking our commitment to protecting individual liberty and privacy."[155] As Justice Brennan noted in *United States v. Leon*,[156] the Constitution specifically protects against this danger by "insist[ing] that law enforcement efforts be permanently and unambiguously restricted in order to preserve personal freedoms."[157] Courts must sometimes have the "unpopular task" of ensuring the government's conduct remains within the boundaries set forth by the Constitution.[158]

Expansion of the exclusionary rule to nondefendants' coerced statements will not prevent police officers from doing their work, but only ensure their work is conducted in a way that continues to ensure the constitutional protections of individuals. Excluding nondefendants' coerced statements will help deter future police misconduct and preserve the integrity of the American judicial system, allowing America to remain a "civilized government."[159]

154. In fact, the Eighth Amendment could be read to only protect criminals, in protecting against "cruel and unusual punishment," for who would be punished except for a criminal? U.S. CONST. amend. VIII.

155. *Leon*, 468 U.S. at 929-930 (Brennan, J., concurring).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Samuel*, 525 F.3d at 575 (Rovner, J., concurring).