Policing the Police: Should *Miranda* Violations Bear Fruit?

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INTRODUCTION

Ever since *Miranda v. Arizona*,[1] the police have been required to inform a suspect in custody,[2] prior to any questioning,[3] that he has a right to remain silent, that his statements may be used against him at trial, and that he may have retained or appointed counsel present during the interrogation.[4] The *Miranda* warnings are intended to counteract the inherently compelling pressures of custodial interrogation,[5] enabling a suspect to exercise his Fifth

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[1] 384 U.S. 436 (1966). Although *Miranda* is now over 25 years old, scholars continue to debate its legitimacy. *See, e.g.*, Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417 (1985); Justice William H. Erickson, *The Unfulfilled Promise of* Miranda v. Arizona, 24 AM. CRIM. L. REV. 291 (1987); Andrew L. Frey, *Modern Police Interrogation Law: The Wrong Road Taken*, 42 U. PITT. L. REV. 731 (1981); Joseph D. Grano, Miranda v. Arizona *and the Legal Mind: Formalism's Triumph Over Substance and Reason*, 24 AM. CRIM. L. REV. 243 (1987); Yale Kamisar, Miranda*: The Case, the Man, and the Players*, 82 MICH. L. REV. 1074 (1984); Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering* Miranda," 54 U. CHI. L. REV. 938 (1987); Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435 (1987); Stephen J. Schulhofer, *The Fifth Amendment at Justice: A Reply*, 54 U. CHI. L. REV. 950 (1987); Welsh S. White, *Defending* Miranda*: A Reply to Professor Caplan*, 39 VAND. L. REV. 1 (1986); Tracey Maclin, *Seeing the Constitution from the Backseat of a Police Squad Car*, 70 B.U. L. REV. 543 (1990).

[2] The police must read the *Miranda* warnings when a suspect is arrested or significantly deprived of his freedom of action. Berkemer v. McCarty, 468 U.S. 420, 435 (1984). In determining whether a suspect is in custody or otherwise deprived of his freedom, the "relevant inquiry is how a reasonable man in the suspect's position would have understood the situation." *Id.* at 442 (footnote omitted).

[3] The *Miranda* warnings are required before express questioning and "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (footnotes omitted). The latter portion of this definition focuses primarily on the suspect's perceptions, rather than on the intent of the police. *Id.*

[4] *Miranda*, 384 U.S. at 444.

[5] *Id.* at 467; *see also* Minnick v. Mississippi, 111 S. Ct. 486, 491 (1990) ("[C]oercive pressures . . . accompany custody and . . . may increase as custody is prolonged."); Pennsylvania v. Muniz, 496 U.S. 582, 583 (1990) (ruling that the inherently coercive environment created by the custodial interrogation precludes the option of remaining silent); Arizona v. Roberson, 486 U.S. 675, 681 (1988) ("[T]he prophylactic protections that the

Amendment right against self-incrimination.[6] If the police fail to read the warnings before questioning, the prosecution may not use the suspect's statements in its case-in-chief in a subsequent criminal trial.[7]

Suppose the police use the suspect's unwarned statements to discover nontestimonial evidence, such as weapons or narcotics. Should the prosecution also be prohibited from introducing this derivative evidence at trial? Consider the following example: The police arrest Jones for allegedly murdering his wife and interrogate him without reading the *Miranda* warnings. The police ask Jones if he owns a gun, in an effort to locate the murder weapon. He responds that he keeps a loaded pistol hidden in the shed in his backyard. The police locate the weapon and conclude that it has been fired. The prosecution offers the gun into evidence in its case-in-chief at Jones's trial for murder.

Does Jones have any legal basis for excluding the gun at his trial? For the past fifty years, the Supreme Court has prohibited the prosecution from introducing the evidentiary "fruits" of illegally obtained evidence under the "fruit of the poisonous tree" doctrine.[8] The primary purpose of the poisonous

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Miranda warnings provide counteract the 'inherently compelling pressures' of custodial interrogation and 'permit a full opportunity to exercise the privilege against self-incrimination' .") (citation omitted); Brown v. Illinois, 422 U.S. 590, 600–01 (1975) (*Miranda* warnings are designed "to protect Fifth Amendment rights against 'the compulsion inherent in custodial surroundings.'") (citation omitted).

[6] The Fifth Amendment provides: "No person shall be compelled in any criminal case to be a witness against himself " U.S. CONST. amend. V

[7] *Miranda*, 384 U.S. at 444. Exclusion of statements made in the absence of the *Miranda* warnings "serves to deter the taking of an incriminating statement without first informing the individual of his Fifth Amendment rights." *Brown*, 422 U.S. at 601.

[8] Nardone v. United States, 308 U.S. 338, 341 (1939). The evidence initially obtained through misconduct is the "poisonous tree." When this evidence leads to other evidence, the latter—or derivative evidence—is the "fruit of the poisonous tree."

The Supreme Court first recognized a derivative evidence rule in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). The Court ruled that the government could not use information gained during an unlawful search and seizure to support a subpoena for the very same articles illegally seized but later returned. Justice Holmes, speaking for the Court, said, "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.* at 392.

The Court's next opportunity to apply a derivative evidence rule came almost two decades later in *Nardone*, the case that first coined the phrase "fruit of the poisonous tree." Following *Silverthorne*, the Court ruled that the government was precluded from using illegal wiretap messages not only as direct proof of the defendant's guilt, but also as a basis to build a case against him on retrial. *Nardone*, 308 U.S. at 340–41. Permitting the accused "to prove that a substantial portion of the case against him was a fruit of the poisonous tree," the Court said, "To forbid the direct use of [illegally obtained evidence] but to put no curb on [its] full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.'" *Id.*

tree doctrine is to deter the police from committing future misconduct by depriving them of the "fruits" of their misdeeds.[9] The doctrine assumes that the police will not be effectively deterred if they may use inadmissible evidence to gather other incriminating proof for use at trial.[10]

Although the Supreme Court has applied the poisonous tree doctrine to constitutional[11] and statutory[12] violations, it has never decided whether the

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In Wong Sun v. United States, 371 U.S. 471, 484 (1963), the Court extended the poisonous tree doctrine to exclude the indirect products of police misconduct. The Court ruled that a suspect's confession, and the narcotics discovered as a result of that confession, were the "fruits" of an unconstitutional entry and arrest. *Wong Sun* gave the poisonous tree doctrine its modern formulation:

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

Id. at 487–88 (quoting JOHN M. MAQUIRE, EVIDENCE OF GUILT: RESTRICTIONS UPON ITS DISCOVERY OR COMPULSORY DISCLOSURE 221 (1959)).

The Court continues to recognize and apply the poisonous tree doctrine. *See, e.g.*, Murray v. United States, 487 U.S. 533, 536–37 (1988); Nix v. Williams, 467 U.S. 431, 441 (1984); Brown v. Illinois, 422 U.S. 590, 597–600 (1975). However, there are several recognized exceptions to the doctrine. *See also infra* note 19.

[9] Nix v. Williams, 467 U.S. 431, 442–43 (1984). The Court has recognized subsidiary justifications for the poisonous tree doctrine: (1) to ensure that courts do not become accomplices to the admission of tainted evidence, Elkins v. United States, 364 U.S. 206, 222–23 (1960); and (2) to prevent the government, as lawbreaker, from signaling to the citizenry that it is appropriate to disobey the law, Mapp v. Ohio, 367 U.S. 643, 659 (1961). *See also* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). In recent years, the Court has relegated these rationales to subordinate status. *See* Stone v. Powell, 428 U.S. 465, 485–86 (1976); United States v. Janis, 428 U.S. 433, 458 n.35 (1976).

[10] Nardone v. United States, 308 U.S. 338, 340–41 (1939). By suppressing derivative evidence, the poisonous tree doctrine places the government and the defendant in the same position as if the wrongdoing had not occurred and allows the prosecution to proceed on the basis of evidence secured independently of misconduct. *Nix*, 467 U.S. at 442–43, 447.

[11] *See, e.g.*, Taylor v. Alabama, 457 U.S. 687, 690–94 (1982) (suppressing confession as fruit of unconstitutional arrest); Dunaway v. New York, 442 U.S. 200, 216–19 (1979) (suppressing confession as fruit of unconstitutional arrest); Brown v. Illinois, 422 U.S. 590, 597–605 (1975) (suppressing confession as fruit of unconstitutional arrest); Fahy v. Connecticut, 375 U.S. 85 (1963) (suppressing tangible evidence as fruit of unconstitutional seizure); Wong Sun v. United States, 371 U.S. 471, 484–88 (1963) (supressing confession, and narcotics discovered as a result of confession, as fruits of unconstitutional entry and arrest).

doctrine applies when the police fail to read the *Miranda* warnings and thereafter use a suspect's statements to discover nontestimonial evidence.[13] Shortly after *Miranda* was decided in 1966, federal and state courts generally excluded such evidence.[14] Since the Supreme Court's 1985 ruling in *Oregon v.*

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[12] Nardone v. United States, 308 U.S. 338, 338–41 (1939); *see also* Nix v. Williams, 467 U.S. 431, 442–43 (1984) (holding that poisonous tree doctrine is "needed to deter police from violations of constitutional and statutory protections").

[13] The Court has had several opportunities to resolve this issue (and related issues), but has avoided doing so. New York v. Quarles, 467 U.S. 649, 660 n.9 (1984) (deciding that police interrogation without *Miranda* warnings about location of gun permissible under "public safety" exception; admissibility of gun itself not addressed); Massachusetts v. White, 439 U.S. 280 (1978) (per curiam), *aff'g by an equally divided Court* Commonwealth v. White, 371 N.E.2d 777 (Mass. 1977) (ruling that absent valid waiver of *Miranda* rights, defendant's statements may not be relied upon to establish probable cause for issuance of search warrant; tangible evidence found during execution of search warrant suppressed); Michigan v. Tucker, 417 U.S. 433, 447 (1974) (holding that testimony of government witness discovered as a result of defendant's statements in violation of *Miranda* admissible). *See also* Patterson v. United States, 485 U.S. 922, 922 (1988) (White, J., and Brennan, J., dissenting from denial of certiorari) (recognizing that the Court has left open the issue of whether nontestimonial fruits of a *Miranda* violation must be suppressed).

[14] *See, e.g.*, United States v. Lee, 699 F.2d 466, 468 (9th Cir. 1982) (deciding that police officers' interrogation of suspect without *Miranda* warnings required suppression of fruit of his confession, a lead pipe allegedly used to murder his wife); United States v. Castellana, 488 F.2d 65, 67–68 (5th Cir. 1974) (ruling that police officer's interrogation of suspect without *Miranda* warnings about existence and location of gun required suppression of weapon), *vacated in part*, 500 F.2d 325 (5th Cir. 1974) (en banc) (holding that police officer's interrogation without *Miranda* warnings about location of gun was justified by concerns for public safety); United States v. Harrison, 265 F Supp. 660, 662 (S.D.N.Y. 1967) (deciding that police officers' failure to read *Miranda* warnings required suppression of fruits of defendants' statements, including gambling materials); *Ex parte* Yarber, 375 So. 2d 1231, 1234–35 (Ala. 1979) (ruling that police officers' interrogation without *Miranda* warnings required suppression of bullet discovered as a result of defendant's confession); People v. Vigil, 489 P.2d 588, 590 (Colo. 1971) (en banc) (holding that police officer's failure to advise defendant of his right to have retained or appointed counsel present at the interrogation required suppression of physical evidence discovered as a result of confession, including an electric shaver and charger, a stereo record player and records, a check and clothing); State v. Lekas, 442 P.2d 11, 19–20 (Kan. 1968) (deciding that parole officer's interrogation without *Miranda* warnings required suppression of gun discovered as a result of defendant's confession; defendant's confession could not be used to support search warrant for pistol); State v. Preston, 411 A.2d 402, 406–09 (Me. 1980) (ruling that police officer's interrogation without *Miranda* warnings required suppression of mattresses discovered as a result of defendant's statements); State v. Greene, 572 P.2d 935, 942–43 (N.M. 1977) (agreeing "in principle" that physical fruits of confessions in violation of *Miranda* must be suppressed); State v. Mitchell, 155 S.E.2d 96, 99 (N.C. 1967) (holding that police officer's failure to advise defendant of right to remain silent required suppression of evidence regarding victim's pocketbook which was discovered as a result of defendant's

Elstad,[15] the trend has been decidedly in favor of admissibility [16] In *Elstad*, the Court ruled that a police officer's failure to read the *Miranda* warnings before a

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statement); Noble v. State, 478 S.W.2d 83, 84 (Tex. Crim. App. 1972) (deciding that police officers' failure to advise defendant of right to remain silent required suppression of physical fruits of his statements, including knife and mask used during robbery); State v. Williams, 249 S.E.2d 758, 764 (W Va. 1978) (ruling that police officers' interrogation without *Miranda* warnings required suppression of boots discovered as a result of defendant's statement). *But see* Rhodes v. State, 530 P.2d 1199, 1202 (Nev. 1975) (holding that physical evidence, including a gun and metal fragments, discovered as a result of confessions obtained in violation of *Miranda* admissible); *cf.* Stamper v. State, 662 P.2d 82, 91 n.8 (Wyo. 1983) (suggesting, without deciding, that *Miranda* violations should not require the suppression of nontestimonial evidence).

Courts also applied the poisonous tree doctrine when the police had failed to honor a suspect's request to remain silent or for counsel and used his statements to discover physical evidence. *See, e.g.*, United States v. Downing, 665 F.2d 404, 407–09 (1st Cir. 1981) (deciding that customs officer's failure to respect defendant's request for counsel following incomplete reading of *Miranda* warnings required suppression of tangible fruits of interrogation, including airplane, charts and other documents); United States v. Massey, 437 F Supp. 843, 862 (M.D. Fla. 1977) (ruling that FBI agents' failure to honor defendant's repeated assertions of right to counsel and to remain silent required suppression of tangible fruits of interrogation); People v. Saiz, 600 P.2d 97, 101 (Colo. App. 1979) (holding that police officers' failure to honor suspect's request to remain silent following reading of *Miranda* warnings a day earlier required suppression of a wallet that was discovered as a result of oral statements); People v. Paulin, 255 N.E.2d 164, 167 (N.Y. 1969) (deciding that police officer's failure to respect defendant's request for counsel following reading of *Miranda* warnings required suppression of tangible fruit of interrogation, a metal cooking pot allegedly used to murder husband); Commonwealth v. Leaming, 247 A.2d 590, 594 (Pa. 1968) (ruling that police officer's failure to read suspect the *Miranda* warnings and to honor request to remain silent and for counsel required suppression of victim's body discovered as a result of suspect's statements). *But see* Wilson v. Zant, 290 S.E.2d 442, 446–48 (Ga. 1982) (holding that police officer's failure to respect defendant's request for counsel following reading of *Miranda* warnings did not require suppression of the nontestimonial fruit of interrogation, a toy gun), *cert. denied*, 459 U.S. 1092 (1982).

Finally, courts applied the poisonous tree doctrine when the police had read the *Miranda* warnings, but obtained a confession and tangible fruits in the absence of a valid waiver of the *Miranda* rights. *See, e.g.*, People v. Braeseke, 602 P.2d 384, 390–92 (Cal. 1979) (suppressing rifle that police learned about as a result of defendant's confession, absent valid waiver of *Miranda* rights), *vacated on other grounds*, 446 U.S. 932 (1980), *opinion reinstated*, 618 P.2d 149 (Cal. 1980), *cert. denied*, 451 U.S. 1021 (1981); *In re* Appeal No. 245 (75) from Circuit Court for Kent County, 349 A.2d 434, 444–47 (Md. Ct. Spec. App. 1975) (suppressing binoculars that police learned about as a result of defendant's confession, absent valid waiver of *Miranda* rights); Commonwealth v. Wideman, 385 A.2d 1334, 1335 (Pa. 1978) (suppressing gun that police discovered as a result of suspect's confessions, absent valid waiver of *Miranda* rights).

[15] 470 U.S. 298 (1985).

suspect's first confession did not require suppression of his second, warned confession under the poisonous tree doctrine.[17] Although *Elstad* involved successive confessions, federal and state courts have read the case broadly to mean that the poisonous tree doctrine is inapplicable when a *Miranda* violation produces *any* derivative evidence.[18]

This Article argues that nontestimonial fruits of a *Miranda* violation should be suppressed under the poisonous tree doctrine, unless the prosecution can show that a recognized exception to the doctrine applies.[19] If nontestimonial fruits are admissible at trial, the police will be rewarded for their misconduct and thus have a significant incentive to ignore the *Miranda* warnings. This undermines the protections that *Miranda* afforded to suspects subject to custodial interrogation. By contrast, the police would be significantly deterred

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[16] *See, e.g.*, United States v. Gonzalez-Sandoval, 894 F.2d 1043, 1047–49 (9th Cir. 1990); United States v. Barte, 868 F.2d 773, 774 (5th Cir. 1989), *cert. denied*, 493 U.S. 995 (1989); United States v. Sangineto-Miranda, 859 F.2d 1501, 1514–19 (6th Cir. 1988); United States v. Bengivenga, 845 F.2d 593, 600–01 (5th Cir. 1988) (en banc), *cert. denied*, 488 U.S. 924 (1988); United States v. Cherry, 794 F.2d 201, 207–08 (5th Cir. 1986), *cert. denied*, 479 U.S. 1056 (1987); *In re* Owen F., 523 A.2d 627, 631–32 (Md. Ct. Spec. App. 1987), *cert. denied*, 528 A.2d 1286 (Md. 1987); People v. Holmes, 536 N.Y.S.2d 289, 291 (N.Y App. Div. 1988), *appeal denied*, 547 N.E.2d 957 (N.Y. 1989); State v. Wethered, 755 P.2d 797, 800–02 (Wash. 1988). *But see* State v. Gravel, 601 A.2d 678, 682–86 (N.H. 1991) (holding that defendant's statements obtained in violation of *Miranda* cannot be relied upon to establish probable cause for issuance of search warrant; tangible evidence found during execution of search warrant suppressed); State v. Miller, 709 P.2d 225, 241 (Or. 1985) (ruling that police officer's failure to read suspect the *Miranda* warnings and to honor his request for assistance of counsel required suppression of physical evidence derived from suspect's statements, unless evidence was admissible on an independent ground such as the inevitable discovery doctrine), *cert. denied*, 475 U.S. 1141 (1986).

[17] *Elstad*, 470 U.S. at 318. For a more detailed discussion of *Elstad*, see *infra* notes 118–53 and accompanying text.

[18] *Gonzalez-Sandoval*, 894 F.2d at 1049; *Barte*, 868 F.2d at 774; *Sangineto-Miranda*, 859 F.2d at 1517; *Bengivenga*, 845 F.2d at 600; *Cherry*, 794 F.2d at 208; *Wethered*, 755 P.2d at 801–02; *In re Owen F.*, 523 A.2d at 631–32; *see infra* notes 154–72 and accompanying text.

[19] The Supreme Court has not required suppression of derivative evidence when the government can show that: (1) the evidence would have been discovered from a source independent of the illegality, Murray v. United States, 487 U.S. 533, 537–39 (1988); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); (2) the evidence inevitably would have been discovered by independent, lawful means, Nix v. Williams, 467 U.S. 431, 444 (1984); or (3) the connection between the illegal conduct and the acquisition of the evidence was so attenuated that the taint of the unlawful acts had dissipated, United States v. Ceccolini, 435 U.S. 268, 274–75 (1978); Nardone v. United States, 308 U.S. 338, 341 (1939). In these situations, the Court has observed, exclusion of derivative evidence would not deter the police from committing misconduct, but would merely put them in a worse position than if no illegality had occurred. *Nix*, 467 U.S. at 443, 445–46.

from committing *Miranda* violations if nontestimonial fruits are excluded. They would know that their failure to read the warnings would result in the suppression of the suspect's confession and any nontestimonial evidence that is discovered. This would send an important message to the police that suspects cannot be exploited for the information necessary to establish their guilt.

This Article begins with an historical review of the Supreme Court's confession cases prior to *Miranda*. The evolution of confession law continues to be relevant today The Court's current approach to *Miranda* violations and the poisonous tree doctrine reflects an eagerness to return to the unworkable standards for determining the admissibility of confessions that existed before, and beckoned the arrival of, *Miranda*.

Accordingly, Section I first discusses the different standards existing before *Miranda* for excluding coerced confessions,[20] and then examines *Miranda* and the considerations which led to that landmark ruling.[21] Section II reviews the recent cases permitting the prosecution to introduce derivative evidence obtained in violation of *Miranda*.[22] The Article then examines the issue of whether nontestimonial fruits of a *Miranda* violation should be admissible at trial, as presented by the opening example.[23]

BACKGROUND

I. COERCED CONFESSIONS AND THE FIFTH AMENDMENT

The Supreme Court has long recognized that interrogation is an essential tool of law enforcement.[24] The primary purpose of interrogation is to obtain information that will further the investigation of a crime, such as the identity of suspects or the location of incriminating evidence.[25] The police also use interrogation to secure a confession of guilt from a person who has committed a crime.[26]

Despite the importance of interrogation as an investigative tool, the government's power to question a suspect is not absolute. The Fifth Amendment privilege against self-incrimination protects a person from being

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[20] *See infra* notes 38–62 and accompanying text.

[21] *See infra* notes 63–90 and accompanying text.

[22] *See infra* notes 91–192 and accompanying text.

[23] *See infra* notes 193–319 and accompanying text.

[24] *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973); Haynes v. Washington, 373 U.S. 503, 515 (1963).

[25] CHARLES E. O'HARA & GREGORY L. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 118–19 (1988); ARTHUR S. AUBRY, JR. & RUDOLPH R. CAPUTO, CRIMINAL INTERROGATION 24–28 (1980).

[26] O'HARA & O'HARA, *supra* note 25, at 118–19; AUBRY & CAPUTO, *supra* note 25, at 24.

compelled to incriminate himself.[27] In practice, it "operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer."[28] When the government violates the privilege, it is prohibited from using compelled statements and any information derived from such statements to prove a defendant's guilt in a criminal trial.[29]

The Fifth Amendment privilege reflects a fundamental principle about the criminal justice system in the United States: The accused shall not be forced to participate in the establishment of his own guilt.[30] The privilege ensures that the government does not exploit its superior power over a suspect to compel him to answer questions that might incriminate himself.[31] As Chief Justice Warren observed,

> To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.[32]

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[27] Kastigar v. United States, 406 U.S. 441, 444–45 (1972); Counselman v. Hitchcock, 142 U.S. 547, 580–81 (1892). The privilege does not bar the government from using a confession given voluntarily and free of compelling influences. Miranda v. Arizona, 384 U.S. 436, 478 (1966); *see also* United States v. Washington, 431 U.S. 181, 187 (1977) ("Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions.").

[28] *Kastigar*, 406 U.S. at 461. The privilege can be asserted "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." *Id.* at 444 (and cases cited therein).

[29] *Id.* at 445, 453; Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964); Counselman v. Hitchcock, 142 U.S. 547, 585 (1892). In *Counselman*, the Court construed the Fifth Amendment to exclude both compelled statements *and their fruits*—without the poisonous tree doctrine being applicable. The motivation behind this "built-in" derivative evidence rule was not to discipline the police or to deter future violations of constitutional rights, but to "maintain intact the practical protection against incrimination that the Court conceive[d] the privilege to provide." B. James George, Jr., *The Fruits of* Miranda*: Scope of the Exclusionary Rule*, 39 U. COLO. L. REV 478, 481 (1967).

As discussed more fully below, this Fifth Amendment derivative evidence rule is not applicable to *Miranda* violations. *See infra* notes 95–153 and accompanying text.

[30] Malloy v. Hogan, 378 U.S. 1, 7 (1964); *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (holding that Fifth Amendment reflects "unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt").

[31] Miranda v. Arizona, 384 U.S. 436, 460 (1966); *Malloy*, 378 U.S. at 8.

[32] *Miranda*, 384 U.S. at 460 (citations omitted).

The privilege also forces the government to establish its case on the basis of more reliable evidence than the accused's compelled admissions, which are regarded as an inherently suspect type of proof.[33]

Although the Fifth Amendment privilege against self-incrimination "registers an important advance in the development of our liberty,"[34] it has been applicable to police interrogation only since *Miranda v. Arizona*.[35] Before 1966, the Supreme Court relied on the English common law and, later, a due process approach to limit police interrogation.[36] During this period, the Court developed a fact-sensitive inquiry that focused on the "totality of the circumstances" surrounding the interrogation to determine whether a suspect's confession was involuntary [37]

A. *The Road to* Miranda*: Involuntary Confessions and the Totality of the Circumstances Standard*

The Supreme Court's introduction to confessions came in a series of cases arising from lower federal courts. These cases laid the groundwork for the fact-specific, due process approach that eventually dominated the law of confessions prior to *Miranda*.

1. *Confessions in Federal Court*

In its first confession case in 1884, the Supreme Court adopted the English common-law rule which excluded confessions that were induced by a promise of benefit or the threat of harm.[38] The common-law rule, which had evolved to

[33] EDWARD W CLEARY, MCCORMICK ON EVIDENCE § 118, at 287 (3d ed. 1984); *see* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (holding that Fifth Amendment reflects "distrust of self-deprecatory statements").

[34] Ullman v. United States, 350 U.S. 422, 426 (1956).

[35] *Miranda* was not the first case to apply the Fifth Amendment to police interrogation. In 1897, the Supreme Court ruled that the Fifth Amendment was a significant limitation on police interrogation. Bram v. United States, 168 U.S. 532, 542–44 (1897). But the *Bram* rationale was quickly abandoned and did not reappear until Malloy v. Hogan, 378 U.S. 1 (1964), when the Fifth Amendment was held applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Id.* at 3; *see infra* note 63. "And not until the *Miranda* decision in 1966 was this constitutional provision once more accorded full recognition in confession cases at the federal level." OTIS H. STEPHENS, JR., THE SUPREME COURT AND CONFESSIONS OF GUILT 26 (1973) (footnote omitted).

[36] *See infra* notes 38–62 and accompanying text. In the early 1940s, the Court also looked to its own supervisory power over the administration of criminal justice in federal courts to exclude confessions in federal cases. *See infra* note 46.

[37] *See infra* notes 50–56 and accompanying text.

[38] Hopt v. Utah, 110 U.S. 574, 585 (1884). The Court stated that a confession should be excluded where it

prevent the introduction of unreliable confessions, assumed that a person subject to promises or threats would make a false statement to gain favor from authorities or to prevent further compulsion.[39]

Thirteen years later, the Court's approach to confessions appeared to change. The Court held that the Fifth Amendment privilege against self-incrimination was the appropriate basis for excluding a coerced confession.[40] While reaffirming that confessions elicited by threats or promises were improper, the Court said that the privilege reflected a broader standard requiring consideration of the coercive forces inherent in official interrogation.[41]

> appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.

Id. Cases decided the next two years followed *Hopt* and applied the common-law rule. Wilson v. United States, 162 U.S. 613, 621–24 (1896); Pierce v. United States, 160 U.S. 355, 357 (1896); Sparf v. United States, 156 U.S. 51, 55–56 (1895). In keeping with the inducement theory, the Court refused to find a confession to be per se involuntary when a suspect was not provided counsel or warned of his right to remain silent. *Wilson*, 162 U.S. at 624.

[39] 3 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 822 (3d ed. 1940); The King v. Warickshall, 168 Eng. Rep. 234, 235 (K.B. 1783). However, the fruits of an inadmissible confession under the common law were admissible at trial. *Warickshall*, 168 Eng. Rep. at 235; *see also* McQueen v. Commonwealth, 244 S.W 681 (Ky. 1922). Indeed, if the fruits tended to show that the confession was reliable, both the confession and the nontestimonial fruits were admissible. WIGMORE, *supra*, at §§ 856–59; Note, *Developments in the Law—Confessions*, 79 HARV L. REV 935, 1028 (1966) [hereinafter *Confessions*].

Prior to the emergence of the common-law rule in the latter part of the eighteenth century, confessions were admissible at trial without regard to how they were obtained. *Confessions*, *supra*, at 954. Even confessions extracted by torture were not excluded. E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV 14–15, 18 (1949). For an historical discussion of the common-law rule, see *Confessions*, *supra*, at 954–59.

[40] Bram v. United States, 168 U.S. 532, 542 (1897).

[41] *Id.* at 544–45, 548, 558. The privilege, the Court concluded, "was in its essence comprehensive enough to exclude all manifestations of compulsion, whether arising from torture or from moral causes." *Id.* at 548. The Court also observed that "the generic language of the [Fifth] Amendment was but a crystallization of the [English common-law] doctrine as to confessions, well settled when the Amendment was adopted " *Id.* at 543. Several commentators have argued that this assertion is erroneous. WIGMORE, *supra* note 39, § 823, at 250 n.5 ("[T]here never was any historical connection between the constitutional clause and the confession-doctrine."); Charles T. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV 447, 453 (1938). While the common-

The Supreme Court quickly abandoned the Fifth Amendment as a basis for declaring confessions inadmissible.[42] Although the Court's reliance on a constitutional standard was short-lived, the Court began to move toward a due process approach for judging confessions in the early twentieth century.[43] That approach focused on the abusive methods used to extort a confession and the suspect's ability to give a voluntary statement in the face of such tactics.[44] At the same time, the Court abandoned the English common-law rule, with its emphasis on the probative value of a confession.[45]

The emergent due process approach to federal confession cases would have its greatest impact on the development of state confession standards, for the Court did not again review a federal confession until the early 1940s.[46] By that

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law rule and the privilege appear to have developed separately, recent research indicates that both were motivated by the same concerns, and the rule may be an offshoot of the privilege. *See* LEONARD LEVY, CONSTITUTIONAL OPINIONS, 206-07 (1986); LEONARD LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 325-32, 495 n.43 (1968); *see also* Culombe v. Connecticut, 367 U.S. 568, 583 n.25 (1961) (Frankfurter, J., announcing the judgment of the Court).

[42] For instance, in Powers v. United States, 223 U.S. 303 (1912), the Court held that the privilege did not bar admission of a confession from a suspect who was not warned of his right to remain silent. *Id.* at 313-14. The Court also ruled during this period that the privilege was not applicable to the states through the Due Process Clause of the Fourteenth Amendment. Twining v. New Jersey, 211 U.S. 78, 114 (1908). *Twining* was later overruled in Malloy v. Hogan, 378 U.S. 1, 6 (1964). *See infra* note 63.

[43] *See* Ziang Sung Wan v. United States, 266 U.S. 1 (1924).

[44] *Id.* at 14–15 ("In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made.").

[45] *See* STEPHENS, *supra* note 35, at 28.

[46] The Supreme Court next considered a confession in a federal case in McNabb v. United States, 318 U.S. 332 (1943). However, the Court did not rely on *Ziang* or the self-incrimination clause, but instead looked to the statutory requirements for prompt appearance after arrest. *See* 18 U.S.C. § 595 (former 5 U.S.C. § 300a). The Court ruled that a confession obtained during an unnecessary delay in bringing a suspect before a judicial officer was inadmissible. *McNabb*, 318 U.S. at 342–45. Because the prompt-appearance statutes provided no sanction for noncompliance, the Court based its new exclusionary rule on its own "supervisory authority over the administration of criminal justice in the federal courts." *Id.* at 341. Although Justice Frankfurter's opinion for the Court did not rest on a finding that the confessions were untrustworthy or extracted by improper methods, his opinion was clearly motivated by a concern for coercive interrogation practices. *Id.* at 343–44.

In later cases, the Court applied the *McNabb* exclusionary rule to violations of Rule 5(a) of the Federal Rules of Criminal Procedure, which was promulgated in 1946 to replace the prompt-appearance statutes. Rule 5(a) provides that an officer making an arrest must take the arrested person without unnecessary delay before the nearest available magistrate. *See* Upshaw v. United States, 335 U.S. 410 (1948) (holding that confession obtained during 30-hour delay in appearance before committing officer was inadmissible); Mallory v.

time, the due process approach was well established in state confession cases and widely assumed to apply equally to federal prosecutions.[47]

2. *Confessions in State Court*

Having laid the groundwork for the due process approach in federal cases, the Supreme Court had little difficulty finding a basis for excluding involuntary confessions in cases arising from state courts. When the first state case appeared in 1936, the Court looked to the Due Process Clause of the Fourteenth Amendment to exclude confessions extorted from three illiterate black men through brutality and torture.[48] The Court found that the state's use of the extorted confessions was "revolting to the sense of justice" and constituted a "clear denial of due process."[49]

For the next three decades, the Supreme Court relied exclusively on the Due Process Clause to exclude involuntary confessions in state cases.[50] As police brutality declined and psychological interrogation techniques were employed, the Court was called upon to invalidate subtler forms of coercion.[51]

United States, 354 U.S. 449 (1957) (holding that confession obtained during unnecessary delay in appearance before committing magistrate was inadmissible); *cf.* United States v. Mitchell, 322 U.S. 65 (1944) (holding that confession obtained immediately following arrest and before delay becomes unlawful was admissible).

The *McNabb* rule was not based on any constitutional provision and thus did not apply to the states. *See McNabb*, 318 U.S. at 340–41; *Upshaw*, 335 U.S. at 414 n.2; *see also* Culombe v. Connecticut, 367 U.S. 568, 600–01 (1961) (Frankfurter, J., announcing the judgment of the Court). The rule dominated the law of confessions in the federal courts until the Court in *Miranda* ruled that the Fifth Amendment privilege against self-incrimination was applicable to police interrogation.

In 1968, Congress altered the *McNabb* rule. A voluntary confession is not inadmissible solely because of a delay in bringing a suspect before a magistrate if the confession was given within six hours of arrest or detention. Pub. L. No. 90-351, Title II, § 701(a), 82 Stat. 210 (1968), codified at 18 U.S.C. § 3501.

[47] STEPHENS, *supra* note 35, at 28.

[48] Brown v. Mississippi, 297 U.S. 278 (1936).

[49] *Id.* at 286.

[50] Many of the early cases following *Brown* showed clear instances of coercion. *See, e.g.*, Watts v. Indiana, 338 U.S. 49 (1949) (examining incommunicado detention in solitary confinement and repeated interrogations late into the evening over a period of five days); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (ruling on incommunicado detention and repeated interrogations over 36 hours by relays of police officers and investigators); White v. Texas, 310 U.S. 530 (1940) (examining repeated interrogations of illiterate farmhand in the woods after removal from jail); *see also* Canty v. Alabama, 309 U.S. 629 (1940); Chambers v. Florida, 309 U.S. 227 (1940).

[51] *See, e.g.*, Haynes v. Washington, 373 U.S. 503 (1963) (invalidating incommunicado interrogation over 16 hours and access to counsel and wife conditioned on providing confession); Blackburn v. Alabama, 361 U.S. 199 (1960) (invalidating eight or

Eventually, the Justices developed a fact-specific approach to assess whether a suspect's confession was voluntary [52] This approach focused on the "totality of the circumstances" surrounding the interrogation.[53] Several factors were particularly important in this analysis: the suspect's physical and mental condition;[54] the length and conditions of detention and interrogation;[55] and the suspect's ability to communicate with legal counsel, relatives or friends.[56]

Like the federal confession cases, the rationale of the state cases changed over time. Early on, the Court ruled that confessions should be excluded only when they were unreliable.[57] As the Court's membership changed in later years, the Justices increasingly excluded confessions (whether reliable or not) when they were obtained through police misconduct.[58] In 1961, the "trustworthiness" rationale was finally abandoned.[59] The Court ruled that confessions obtained by "impermissible methods" could not be used at trial,

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nine-hour interrogation of mentally impaired suspect in closely confined room); Spano v. New York, 360 U.S. 315 (1959) (invalidating nighttime interrogation over eight-hour period of foreign-born man with history of emotional instability); *see also* Harris v. South Carolina, 338 U.S. 68 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949).

[52] *See, e.g.*, Davis v. North Carolina, 384 U.S. 737, 740–42 (1966); *Haynes*, 373 U.S. at 513; Leyra v. Denno, 347 U.S. 556, 558 (1954). *See generally* Schneckloth v. Bustamonte, 412 U.S. 218, 225–27 (1973); Culombe v. Connecticut, 367 U.S. 568, 601–02 (1961) (Frankfurter, J., announcing the judgment of the Court).

[53] *See, e.g.*, *Davis*, 384 U.S. at 741–42; *Haynes*, 373 U.S. at 513–14; *Leyra*, 347 U.S. at 558. *See generally Schneckloth*, 412 U.S. at 225–27; *Culombe*, 367 U.S. at 601–02.

[54] *See, e.g.*, *Davis*, 384 U.S. at 742 (suspect was "an impoverished Negro with a third or fourth grade education"); Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (suspect was a 14-year-old boy); Reck v. Pate, 367 U.S. 433, 441 (1961) (suspect was a 19-year-old with low intelligence); *see also* Blackburn v. Alabama, 361 U.S. 199, 200 (1960); Spano v. New York, 360 U.S. 315, 321–22 (1959); Payne v. Arkansas, 356 U.S. 560, 567 (1958).

[55] *See, e.g.*, *Davis*, 384 U.S. at 752 (incommunicado interrogation over a period of 16 days); *Haynes*, 373 U.S. at 513 (incommunicado interrogation over 16 hours and access to counsel and wife conditioned on providing confession); *Watts*, 338 U.S. at 52–53 (incommunicado detention in solitary confinement and repeated interrogations late into the evening over a period of five days); *see also Ashcraft*, 322 U.S. at 153; *Chambers*, 309 U.S. at 238–40.

[56] *See, e.g.*, *Davis*, 384 U.S. at 740–41 (police fail to advise suspect of right to counsel); *Haynes*, 373 U.S. at 514 (police condition access to counsel and wife on suspect providing confession); *Spano*, 360 U.S. at 322–23 (suspect's requests to contact retained attorney rejected); *see also Watts*, 338 U.S. at 53; *Chambers*, 309 U.S. at 231.

[57] *See, e.g.*, Stein v. New York, 346 U.S. 156, 192 (1953); *see* STEPHENS, *supra* note 35, at 108–13.

[58] *See, e.g.*, Jackson v. Denno, 378 U.S. 368, 385–86 (1964); *Blackburn*, 361 U.S. at 207; *Spano*, 360 U.S. at 320–21; Rochin v. California, 342 U.S. 165, 173 (1952); *see* Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REF 537, 543, 546 (1990).

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

even when "independent corroborating evidence left little doubt of the truth of what the defendant had confessed."[60] Justice Frankfurter, writing for the majority, said:

> [C]onvictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.[61]

The Court thus established that involuntary confessions were inadmissible not because they were lacking in probative value, but because they were "the product of constitutionally impermissible methods in their inducement."[62]

B. Miranda v Arizona

By the early 1960s, the Supreme Court had developed a fact-sensitive, due process approach for judging confessions. That approach focused on the totality of the circumstances surrounding the police interrogation to determine whether a confession was voluntary [63]

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[60] *Id.* at 541.

[61] *Id.* at 540–41.

[62] *Id.* at 541.

[63] The early 1960s also witnessed the reemergence of the Fifth Amendment as a possible basis for excluding confessions. In 1964, the Supreme Court ruled that the Fifth Amendment privilege against self-incrimination, discussed over six decades earlier in Bram v. United States, 168 U.S. 532 (1897), was applicable to the states through the Due Process Clause of the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 6 (1964). Although the admissibility of a confession was not at issue, the Court took the opportunity to reassess its federal and state jurisprudence forbidding the use of coerced confessions in criminal prosecutions. Reinterpreting earlier federal and state cases, the Court concluded that state confession standards had evolved to reflect the same standard applied in federal prosecutions since *Bram*—a voluntariness standard based on the Fifth Amendment. *Id.* at 6–8. Under this standard, the

> constitutional inquiry [was] not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was "free and voluntary; that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. " In other words the person must not have been compelled to incriminate himself.

However, many courts had difficulty applying a "voluntariness" standard.[64] Because the voluntariness standard relied heavily on the "totality of the circumstances" of each case, trial courts were given little guidance in resolving confession claims.[65] As a result, they "were virtually invited to give weight to their subjective preferences when performing the elusive task of balancing."[66] Appellate courts did not fare any better, because they were either too remote from the events to second-guess the lower courts or reluctant to release convicted criminals.[67] Given the vagueness of the voluntariness

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Id. at 7 (citations omitted). The shift to a Fifth Amendment standard, the Court noted, reflected that the criminal justice system was "accusatorial, not inquisitorial," and that federal and state officials could not "by coercion prove a charge against an accused out of his own mouth." *Id.* at 7–8.

Malloy resurrected *Bram* and merged the federal and state lines of authority into one standard based on the Fifth Amendment's self-incrimination clause. The Court continued to examine the totality of the circumstances in assessing whether a confession was voluntary, and to focus on the methods used to interrogate suspects.

If *Malloy* provided clarification about the standard governing confessions, the Court's 1964 ruling in Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964), created confusion by suggesting that the Sixth Amendment, as well as the Fifth Amendment, might be the appropriate basis to exclude a confession. The Court held that the defendant's confession must be suppressed because it was obtained in the absence of counsel and without effective warning of the Fifth Amendment right to remain silent. *Id.*

[64] *See* Haynes v. Washington, 373 U.S. 503, 515 (1963) ("The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused."); Spano v. New York, 360 U.S. 315, 321 (1959) ("[A]s the methods used to extract confessions [become] more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made."); Geoffrey R. Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP CT. REV 99, 102 (1977) ("[D]espite the apparent simplicity of the 'voluntariness' concept on its face, it proved to be highly subtle and elusive, involving a delicate balancing of a whole complex of variables concerning the behavior of the police and the subjective attitudes of the suspect."); *Confessions*, *supra* note 39, at 963 ("[T]he fact of voluntariness is extremely difficult to find, since it represents not an observable physical phenomenon but a characterization of varying concatenations of facts.").

[65] Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV 865, 869–70 (1981). *See also* Yale Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV 59, 94–104 (1966); Robert M. Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CAL. L. REV 579, 602 (1968).

[66] Schulhofer, *supra* note 65, at 870.

[67] *Id.* The Supreme Court's decision in Culombe v. Connecticut, 367 U.S. 568 (1961), is a prime example of the difficulty courts had in resolving voluntariness questions. Justice Frankfurter announced the Court's judgment suppressing an involuntary confession. He authored a lengthy opinion on the principles governing police interrogation, which only

standard, there were few useful precedents to guide future judicial decisionmaking.

Similarly, the police were given insufficient guidance under the voluntariness standard about permissible interrogation practices.[68] There was a fine line between proper methods of questioning a suspect and objectionable tactics that would overbear the suspect's will.[69] Indeed, the standard did not adequately prevent the police from exerting considerable pressure on suspects, especially those who were the most vulnerable.[70] The standard was particularly ineffective in deterring the police from using deception and other manipulative techniques to extract a confession.[71] Indeed, by permitting the police to use some pressure, the standard did not totally eliminate physical brutality and other forms of coercion.[72]

The failure of the voluntariness standard to prevent police abuses was due in large part to the nature of the confrontations between police officers and suspects. Because suspects were frequently interrogated in isolation, trial courts were forced to resolve "swearing contests" between interrogators and suspects about events that occurred in secret.[73] Given the institutional bias against defendants, "there was next to nothing to prevent judges and juries from systematically resolving credibility issues in favor of the police."[74]

In 1966, the Supreme Court attempted to address these problems in its landmark ruling in *Miranda v. Arizona*.[75] Expanding constitutional restrictions

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Justice Stewart joined. Justices Harlan, Clark and Whittaker, while agreeing with the principles delineated in Justice Frankfurter's opinion, construed those principles as requiring a result in the case exactly opposite from the one he reached. Overall, the case produced five opinions—none commanding a majority.

[68] Schulhofer, *supra* note 65, at 869.

[69] *Id.*

[70] *Id.* at 871–72.

[71] *Id.*

[72] *Id.* at 872.

[73] *Id.* at 870–71; *see* Culombe v. Connecticut, 367 U.S. 568, 573–74 (1961) (Frankfurter, J., announcing the judgment of the Court).

[74] Schulhofer, *supra* note 65, at 871.

[75] 384 U.S. 436 (1966). Ernesto Miranda, arrested on rape charges, was taken to the police station and interrogated in isolation. *Id.* at 491–92. He was never informed of his right to remain silent or to have an attorney present during the interrogation. *Id.* at 492. After two hours, Miranda gave a written confession. *Id.* at 491–92. Over objection, his written confession was admitted into evidence, and the police interrogators testified about the prior oral confession he made during the interrogation. *Id.* at 492. Miranda was found guilty of kidnapping and rape and sentenced to 20 to 30 years in prison. The Supreme Court of Arizona affirmed the conviction on appeal. *Id.* (citing State v. Miranda, 401 P.2d 721 (Ariz. 1965) (en banc)). Miranda's case is discussed in full detail in LIVA BAKER, *MIRANDA*: CRIME, LAW AND POLITICS (1983).

on police practices, the Court ruled that the Fifth Amendment privilege against self-incrimination was fully applicable to custodial interrogation because such questioning contained "inherently compelling pressures which work[ed] to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely "[76] To combat these pressures and to ensure a full opportunity to exercise the privilege, the police were required to warn a suspect in custody,[77] prior to any questioning,[78] that he had the right to remain

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The Court also reviewed confessions in three companion cases, Vignera v. New York, Westover v. United States, and California v. Stewart. *Miranda*, 384 U.S. at 456–57, 493–99.

[76] *Miranda*, 385 U.S. at 467. The Court concluded that all the principles embodied in the Fifth Amendment privilege against self-incrimination applied to informal compulsion exerted by law-enforcement officers during in-custody questioning. *Id.* at 461. The Court observed:

> An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.

Id. (footnote omitted). The Court noted that prior judicial precedent, such as Bram v. United States, 168 U.S. 532 (1897), and Ziang Sung Wan v. United States, 266 U.S. 1 (1924), clearly established the application of the Fifth Amendment privilege to incommunicado interrogation. *Miranda*, 384 U.S. at 461–63.

The Court also noted that Congress's adoption of Rule 5(a) of the Federal Rules of Criminal Procedure, and the Court's effectuation of that rule in McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957), had enabled the Court in the past quarter century to avoid reaching the constitutional issues in dealing with federal interrogations. *Miranda*, 384 U.S. at 463. These supervisory rules, the Court said, were nonetheless responsive to the same considerations of Fifth Amendment policy that faced the Court as to the states. *Id.* The Court emphasized that, although it was setting forth new rules for federal interrogations, the *McNabb-Mallory* rule continued to be applicable. *Id.* at 463 n.32.

[77] The police must read the warnings when a suspect is arrested or significantly deprived of his freedom of action. Berkemer v. McCarty, 468 U.S. 420, 428 (1984). In determining whether a suspect is in custody or otherwise deprived of his freedom, the "relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Id.* at 442.

[78] The *Miranda* warnings are required before express questioning and "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (footnotes omitted). The latter portion of this definition focuses on the suspect's perceptions, rather than on the intent of the police. *Id.*

silent; that anything he said could be used as evidence against him; that he had the right to the presence of an attorney during the interrogation; and that if he could not afford a lawyer, one would be appointed for him.[79] If the police failed to read the warnings, the suspect's statements in response to questioning were presumed to be coerced, and the prosecution could not use them at trial without violating the Fifth Amendment.[80]

The Supreme Court emphasized that, although the Constitution did not require "any particular solution for the inherent compulsions of the interrogation process," the police must give the warnings until other procedures were shown to be as effective in apprising the accused of his Fifth Amendment rights.[81] Each warning served a particular purpose. The warning

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[79] *Miranda*, 384 U.S. at 444. The Court set forth the procedures once the warnings had been given. If the suspect indicated in any manner, at any time prior to or during questioning, that he wanted to remain silent, the interrogation had to cease. *Id.* at 473–74. Any statements taken after the person invoked his privilege could not be other than the product of compulsion. *Id.* at 474. If the suspect stated that he wanted an attorney, the interrogation had to cease until an attorney was present. *Id.* At that time, the suspect "must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." *Id.* If the individual could not obtain an attorney and he indicated that he wanted one before speaking to police, the police must respect his decision to remain silent. *Id.*

A suspect could waive his Fifth Amendment rights and his right to retained or appointed counsel and agree to talk. The waiver would be valid only if it was made voluntarily, knowingly and intelligently. *Id.* at 444. For instance, a suspect's failure to ask for a lawyer does not constitute a waiver of the right to counsel. *Id.* at 470. Absent a valid waiver, the suspect's statements could not be introduced into evidence in the prosecution's case-in-chief. *Id.* at 444.

The Supreme Court has since held that a suspect need not be aware of all the crimes about which he may be questioned to provide a valid waiver of the Fifth Amendment privilege. Colorado v. Spring, 479 U.S. 564, 576–77 (1987). Nor must he know and understand every possible consequence of a waiver of the privilege. Moran v. Burbine, 475 U.S. 412, 422 (1986).

[80] *Miranda*, 384 U.S. at 444, 458.

[81] *Id.* at 467. In all four cases, the Court ruled that the defendants' statements were obtained under circumstances that did not meet constitutional standards for protection of the Fifth Amendment privilege against self-incrimination. *Id.* at 491–99. While the defendants' statements may not have been involuntary in "traditional terms," the Court concluded, the potential for compulsion was "forcefully apparent." *Id.* at 457 In each case, the defendant was "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures." *Id.* In none of the cases "did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice." *Id.*

Justices Clark, Harlan, Stewart and White dissented, arguing in three separate opinions that the Court should adhere to the traditional "voluntariness" test, which focused on the "totality of the circumstances" surrounding the interrogation. *Id.* at 499–504 (Clark, J.,

that a suspect had a right to remain silent was the key to overcoming the compelling pressures of the interrogation atmosphere.[82] The warning informed the suspect of his Fifth Amendment right and his ability to exercise it at any time during the interrogation.[83] It also demonstrated that the interrogators were required to honor a request to remain silent.[84] The warning that the suspect's statements could be used against him conveyed the serious consequences of abandoning his Fifth Amendment right—thereby ensuring a "real understanding and intelligent exercise of the privilege"—and indicated that his interrogators were adversaries not acting in his interest.[85] Knowledge of the right to have counsel present at the interrogation (and to have one appointed if indigent)[86] reinforced the right to remain silent and assured the accused that he was truly in a position to exercise it.[87]

Miranda marked a turning point in the development of confession law The Fifth Amendment became a significant check on police practices and the primary basis for judging the admissibility of confessions in federal and state courts. The Court abandoned the "old" due process voluntariness standard which emphasized the "totality of the circumstances" of each case. The new voluntariness standard was effectuated through bright-line rules governing police interrogation. While this new standard did not completely eliminate the failings of the old one,[88] it provided needed guidance to police about

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dissenting); *id.* at 504–26 (Harlan, J., with whom Stewart J., and White, J., join, dissenting); *id.* at 526–45 (White, J., with whom Harlan J., and Stewart, J., dissenting). Justice Harlan argued that the voluntariness test was an "elaborate, sophisticated, and sensitive approach to admissibility of confessions," which was "'judicial' in its treatment of one case at a time, flexible in its ability to respond to the endless mutations of fact presented, and ever more familiar to the lower courts." *Id.* at 508 (citation omitted).

[82] *Id.* at 468–69.

[83] *Id.*

[84] *Id.* at 468.

[85] *Id.* at 469.

[86] The Court concluded that suspects must be apprised of the right to appointed counsel if indigent. "Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one." *Id.* at 473.

[87] *Id.* at 469–73. The presence of counsel at the interrogation, the Court noted, may well serve several subsidiary functions. With a lawyer present, the likelihood that the police would practice coercion was reduced; if coercion was nevertheless exercised, the lawyer could testify to it in court. *Id.* at 470. If the suspect decided to talk to his interrogators, the assistance of counsel could "mitigate the dangers of untrustworthiness." *Id.* The lawyer could help to guarantee that the accused gave a fully accurate statement to the police, and that the statement was rightly reported by the prosecution at trial. *Id.*

[88] *See* Schulhofer, *supra* note 65, at 879–84.

permissible interrogation practices.[89] It also provided better safeguards for suspects and a more focused framework for judicial review [90]

II. *MIRANDA* VIOLATIONS AND THE POISONOUS TREE DOCTRINE

While the Supreme Court in *Miranda* clarified the circumstances in which a confession could be admitted at trial, the case did not address whether evidence discovered as a result of an unwarned confession must be excluded as well.[91] One sentence in Chief Justice Warren's opinion, if taken out of context, suggests that derivative evidence must be suppressed,[92] and Justice Clark in dissent protested that the majority opinion required derivative evidence to be

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[89] *Id.* at 883.

[90] *Id.* Since 1966, the Supreme Court's membership has changed and a more conservative majority has narrowed *Miranda*. For instance, the Court now recognizes a "public safety" exception to the *Miranda* requirements, excusing a police officer's failure to read the warnings when the public's safety is of concern. New York v. Quarles, 467 U.S. 649, 655–56 (1984). The Court also permits the government to use a confession obtained in violation of *Miranda* to impeach a defendant's trial testimony. Harris v. New York, 401 U.S. 222, 225–26 (1971).

Nonetheless, the Court has never abandoned the critical holding of *Miranda*. A suspect's statements in response to police questioning, if not preceded by warnings apprising the suspect of his Fifth Amendment rights, are presumptively coerced and cannot be admitted in the government's case-in-chief in support of conviction. *See, e.g.*, Pennsylvania v. Muniz, 496 U.S. 582, 589 (1990); Oregon v. Elstad, 470 U.S. 298, 317 (1985).

Indeed, the Court reinforced *Miranda*'s protections in Edwards v. Arizona, 451 U.S. 477, 484–85 (1981), ruling that once the accused requests the assistance of counsel, the police must terminate the interrogation and cannot reinitiate questioning until counsel has been made available to him and is present. *Edwards* is "designed to prevent the police from badgering a defendant into waiving his previously asserted *Miranda* rights," Michigan v. Harvey, 494 U.S. 344, 350 (1990), and "ensures that any statement made in subsequent interrogation is not the result of coercive pressures." Minnick v. Mississippi, 111 S. Ct. 486, 489 (1990). *Edwards* "implements the protections of *Miranda* in practical and straightforward terms." *Id.* at 490.

[91] Miranda v. Arizona, 384 U.S. 436, 439 (1966) ("[W]e deal with the admissibility of *statements* obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.") (emphasis added).

[92] *Id.* at 479 ("But unless and until such warnings and waiver are demonstrated by the prosecution at trial, *no evidence* obtained as a result of interrogation can be used against him.") (footnote omitted) (emphasis added). One state court has relied on the Court's dicta to exclude physical evidence discovered as a result of statements in violation of *Miranda*. Commonwealth v. Leaming, 247 A.2d 590, 594 (Pa. 1968).

excluded.[93] Scholars debated the issue shortly after *Miranda* was decided, but they were unable to reach a consensus.[94]

Since 1966, the Supreme Court has considered whether derivative evidence obtained in violation of *Miranda* should be suppressed on only two occasions—in *Michigan v. Tucker*[95] and in *Oregon v. Elstad*.[96] As explained below, the Court not only ruled that a *Miranda* violation was not a Fifth Amendment violation—thereby precluding a "built-in" Fifth Amendment derivative evidence rule for *Miranda* violations[97]—but it also limited the application of the poisonous tree doctrine to *Miranda* violations. Although both cases involved the admissibility of *testimonial* fruits, the Court strongly intimated that *nontestimonial* fruits would not be excluded as fruit of the poisonous tree.

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[93] *Miranda*, 384 U.S. at 500 (Clark, J., dissenting) ("The Court further holds that failure to follow the new procedures requires inexorably the exclusion of any statement by the accused, as well as the fruits thereof."). *But see id.* at 545 (White, J., dissenting) ("Today's decision leaves open such questions as whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation ").

[94] *Compare* HENRY J. FRIENDLY, BENCHMARKS 279 (1967) (arguing that *Miranda* did not decide the issue), George, *supra* note 29, at 487–90, *and* Pitler, *supra* note 65, at 612 & n.168 ("*Miranda* did not explicitly concern itself with the fruits of a confession obtained absent the required warnings.") *with* Justice Herbert B. Cohen, *Derivative Evidence—A Part of the Law of the Land*, in A NEW LOOK AT CONFESSIONS: ESCOBEDO—THE SECOND ROUND 135–43 (B. James George, Jr. ed., 1967) [hereinafter NEW LOOK AT CONFESSIONS] (arguing that *Miranda* requires suppression of evidentiary fruits), NEW LOOK AT CONFESSIONS, *supra*, at 147–51 (remarks of Yale Kamisar) *and* Robert J. Terry, Note, *Miranda's Effect on the Admissibility of Evidence Obtained by Aid of an Involuntary Confession*, 6 WASHBURN L.J. 133, 140–43 (1966). A panel discussion of this issue among legal scholars, judges, prosecutors and others is contained in NEW LOOK AT CONFESSIONS, *supra*, at 145–64.

Suppression of derivative evidence would have been consistent with the Court's interpretation of the Fifth Amendment in 1966. By that time, the Court had already ruled (albeit outside the context of police interrogation) that the privilege prohibited the government from using compelled statements and their fruits as evidence of guilt. *See, e.g.*, Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964); Counselman v. Hitchcock, 142 U.S. 547, 586 (1892). Because the basis of the *Miranda* exclusionary rule was the Fifth Amendment self-incrimination clause, *Miranda*, 384 U.S. at 444, 460–67, 478–79, a strong argument could have been made that the 1966 ruling by logical extension also required exclusion of evidentiary fruits. *See* George, *supra* note 29, at 489.

The Supreme Court has never accepted such a broad reading of *Miranda*, however. In fact, the Court no longer considers a *Miranda* violation to be a Fifth Amendment violation. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 306 n.1 (1985) ("[A] simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment."). *Elstad* is discussed *infra* notes 118–53 and accompanying text.

[95] 417 U.S. 433 (1974).

[96] 470 U.S. 298 (1985).

[97] *See supra* note 29.

A. Miranda *Violations and Testimonial Fruit*

1. Michigan v Tucker

In *Michigan v. Tucker*, the Supreme Court considered whether the testimony of a government witness should be excluded because the police had learned of his identity by questioning the defendant without fully complying with *Miranda*.[98] Tucker was arrested for rape and brought to the police station for questioning.[99] Before the interrogation began, the police informed Tucker that he had the right to remain silent and that any statements he made could be used against him in court.[100] The defendant was also asked whether he wanted an attorney, and he replied that he did not.[101] However, the police failed to advise Tucker that a lawyer would be furnished for him free of charge if he could not pay for one.[102] Although the interrogation occurred before *Miranda*, the ruling was applicable because the defendant's trial took place afterwards.[103]

When Tucker was questioned about the rape, he replied that he had been with Robert Henderson and then at home asleep when the crime occurred.[104] The police contacted Henderson to confirm the defendant's story, but Henderson discredited Tucker's account.[105] Henderson testified for the government and Tucker was convicted of rape.[106] Tucker argued on appeal that

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[98] 417 U.S. 433, 435 (1974).

[99] *Id.* at 436.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.* at 435 (citing Johnson v. New Jersey, 384 U.S. 719 (1966)).

[104] *Id.* at 436.

[105] *Id.* at 436–37 Henderson acknowledged that Tucker had been with him on the night of the crime, but said that Tucker had left at a relatively early period. *Id.* at 436. Henderson also told police that he saw Tucker the following day and asked him at that time about the scratches on his face—whether he "'got hold of a wild one or something.'" *Id.* Tucker replied, "'[S]omething like that.'" *Id.* at 436–37 Then, Henderson asked, "'[W]ho it was'"; Tucker responded, "'[S]ome woman lived the next block over,'" adding, "'She is a widow woman,' or words to that effect.'" *Id.* at 437 (citations omitted).

[106] *Id.* at 437 Tucker was sentenced to 20 to 40 years in prison. *Id.* Both the Michigan Court of Appeals and the Michigan Supreme Court affirmed his conviction. *Id.* (citing People v. Tucker, 172 N.W.2d 712 (Mich. Ct. App. 1969); People v. Tucker, 189 N.W.2d 290 (Mich. 1971)). He later sought habeas corpus relief in federal court. The district court concluded "[r]eluctantly" that Henderson's testimony could not be admitted because the police had learned of his identity only through Tucker's unwarned answers. *Id.* (citing Tucker v. Johnson, 352 F Supp. 266, 268 (E.D. Mich. 1972)). The Sixth Circuit affirmed the grant of the writ of habeas corpus. *Id.* at 435 (citing Tucker v. Johnson, 480 F.2d 927 (6th Cir. 1973)).

Henderson's testimony should have been excluded as violative of the Fifth Amendment privilege against self-incrimination because the police discovered the witness's identity by questioning Tucker without fully complying with *Miranda*.[107]

The Supreme Court ruled that the government could use Henderson's testimony [108] Initially, the Court found that the police did not deprive Tucker of his Fifth Amendment privilege against self-incrimination, "but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda*."[109] The Court noted that the record lacked any evidence that the defendant's statements were coerced, particularly because the police had read several of the *Miranda* warnings to the accused.[110] The Court added that Tucker would not have been exposed to legal sanctions, such as the threat of contempt, had he chosen to remain silent.[111]

Faced simply with an "inadvertent disregard" of *Miranda*'s "prophylactic standards,"[112] the Court concluded that suppression of the witness's testimony would not serve the purpose of an exclusionary rule and deter future police misconduct.[113] The police officers had fully complied with the constitutional principles applicable at the time of the interrogation[114] and thus did not willfully or negligently fail to read all the *Miranda* warnings. The Court observed that suppression of the testimony in these circumstances would not "instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused."[115]

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[107] *Id.* at 438–39.

[108] *Id.* at 450.

[109] *Id.* at 444.

[110] *Id.* at 444–45. The Court specifically noted that the police had warned Tucker that he had the right to remain silent, that any evidence taken could be used against him, and that he could speak to an attorney. *Id.*

[111] *Id.* at 445.

[112] *Id.* at 445–46.

[113] *Id.* at 446–47 The Court noted that the rationale of the exclusionary rule—"to deter future unlawful police conduct"—would seem applicable to the Fifth Amendment context in a proper case. *Id.* (quoting United States v. Calandra, 414 U.S. 338, 347 (1974)).

[114] *Id.* at 447 Those rules were enunciated in Escobedo v. Illinois, 378 U.S. 478 (1964), which required police to inform a suspect of the right to have counsel present during custodial interrogation. Complying with *Escobedo*, the police asked Tucker if he wanted to speak to counsel and he answered that he did not. Michigan v. Tucker, 417 U.S. 433, 447 (1974).

[115] *Tucker*, 417 U.S. at 447 The Court also concluded that the second rationale for the exclusionary rule—"protection of the courts from reliance on untrustworthy evidence"—would not be served by excluding Henderson's testimony. *Id.* at 448–49 (footnote omitted). There was no reason to believe that Henderson's testimony was untrustworthy as a result of Tucker not being advised of his right to appointed counsel. *Id.* at 448–49. Henderson was not subject to custodial pressures, and he was available at trial and subject to cross-

examination. *Id.* at 449. Tucker's "counsel fully used this opportunity, suggesting that Henderson's character was less than exemplary" and that the police had offered him incentives to testify against Tucker. *Id.* Thus, the Court concluded, Henderson's testimony was subject to the "normal testing process of an adversary trial." *Id.*

The Court rejected the suggestion that derivative evidence should be excluded "in recognition of the 'imperative of judicial integrity.'" *Id.* at 450 n.25 (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)). The Court concluded that this rationale was really an assimilation of the deterrence and trustworthiness rationales and did not provide an "independent basis" for excluding derivative evidence. *Id.*

Justice Brennan, together with Justice Marshall, concurred in the judgment. *Id.* at 453 (Brennan, J., with whom Marshall, J., joins, concurring). Justice Brennan argued that, while *Miranda* itself prohibited all fruits of statements made without proper warnings, the decision should be retroactively applied only to those cases in which the fruits were obtained as a result of post-*Miranda* interrogations. *Id.* at 458. Justice Brennan concluded that exclusion of fruits was "necessary to give full effect to the purposes and policies underlying the *Miranda* rules and to its holding that 'unless and until [the *Miranda*] warnings and waiver are demonstrated by the prosecution at trial, *no evidence* obtained as a result of interrogation can be used against [the defendant].'" *Id.* at 460 n.5 (quoting Miranda v. Arizona, 384 U.S. 436, 479 (1966)). The majority disputed Justice Brennan's reading of *Miranda*, concluding that the decision did *not* reach the issue of admissibility of fruits derived from unwarned statements. *Id.* at 452 n.26. In their view, Justice Brennan's "method of disposition [was] to determine in the present case the retroactivity of a holding which the Court ha[d] yet to make." *Id.*

Justice White concurred in the judgment, noting specifically that *Miranda* "did not deal with the admissibility of evidence derived from in-custody admissions obtained without the specified warnings." *Id.* at 460 (White, J., concurring). He would not extend *Miranda's* prophylactic scope to bar the testimony of third parties even though they had been discovered by means of unwarned admissions. *Id.* at 461. He concluded, "the arguable benefits from excluding such testimony by way of possibly deterring police conduct that might compel admissions are, in my view, far outweighed by the advantages of having relevant and probative testimony, not obtained by actual coercion, available at criminal trials to aid in the pursuit of truth." *Id.* He added, however, that the "same results would not necessarily obtain with respect to the fruits of involuntary confessions." *Id.*

Justice Stewart, concurring, joined the majority's opinion and Justice Brennan's concurrence. *Id.* at 453 (Stewart, J., concurring). He believed that the Court's opinion and Justice Brennan's concurrence proceeded along "virtually parallel lines, give or take a couple of argumentative footnotes." *Id.*

Justice Douglas dissented, arguing that the *Miranda* violation was a Fifth Amendment violation which required suppression of all fruits. *Id.* at 462–64 (Douglas, J., dissenting). Justice Douglas took issue with the majority's statement that Tucker's interrogation only departed from the prophylactic standards laid down in *Miranda*. He said, "*Miranda's* purpose was not promulgation of judicially preferred standards for police interrogation, a function we are quite powerless to perform; the decision enunciated '*constitutional* standards for protection of the privilege' against self-incrimination." *Id.* at 465–66 (citing *Miranda*, 384 U.S. at 491).

Tucker was a significant retreat from *Miranda*. The Court rejected *Miranda*'s core premise by declaring that a failure to read the *Miranda* warnings fully, without more, did not constitute a violation of the Fifth Amendment.[116] More importantly, the Court also refused to apply the poisonous tree doctrine to a *Miranda* violation, at least when the police questioning occurred before *Miranda* was decided and the officers otherwise complied with the constitutional requirements applicable at the time of the interrogation.[117] The majority stopped short of deciding, however, whether a total failure to read the *Miranda* warnings—after *Miranda* had been decided—required exclusion of evidentiary fruits.

2. Oregon v. Elstad

The Supreme Court waited a decade before considering the issues left open in *Tucker*.[118] In *Oregon v. Elstad*, the Court considered whether a police officer's failure to read the *Miranda* warnings before a suspect's first confession required suppression of a second confession, which he gave after being fully advised of and waiving his Fifth Amendment rights.[119] The police confronted Elstad at his home with a warrant for his arrest on burglary

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[116] *See* David Sonenshein, Miranda *and the Burger Court: Trends and Countertrends*, 13 LOY. U. CHI. L.J. 405, 425-26 (1982); Stone, *supra* note 64, at 118-19.

[117] The Court refused to "resolve the broad question of whether evidence derived from statements taken in violation of the *Miranda* rules must be excluded regardless of when the interrogation took place." *Tucker*, 417 U.S. at 447 (footnote omitted).

[118] The Court had an opportunity to consider these issues in New York v. Quarles, 467 U.S. 649 (1984). It was asked to decide whether a police officer's failure to read the *Miranda* warnings before questioning a suspect in custody about the location of his gun required suppression of both his responses and the weapon. However, the Court ruled that the officer's questioning was justified in the first instance for reasons of "public safety," *id* at 651, 655-66, and thus avoided resolving whether the gun should be suppressed as a frui of the *Miranda* violation. *Id.* at 660 n.9.

Only Justice O'Connor (and Justice Marshall briefly in rebuttal) addressed this issue *Id.* at 665-74 (O'Connor, J., concurring in part, dissenting in part); *id.* at 688 n.1 (Marshall, J., dissenting). Justice O'Connor's opinion is discussed *infra* notes 173-92 an accompanying text.

The Court also had an opportunity in 1977 to consider a related issue—whether defendant's statements in violation of *Miranda* could be relied upon to establish probab cause for issuance of a search warrant that uncovered tangible evidence. However, t Court affirmed the lower court by an equally divided vote. Massachusetts v. White, 4 U.S. 280 (1978), *aff'g by an equally divided Court* Commonwealth v. White, 371 N.E. 777 (Mass. 1977).

[119] 470 U.S. 298, 300 (1985).

charges[120] and questioned him about the crime without reading the *Miranda* warnings.[121] Elstad admitted being at the scene of the burglary.[122] He was then taken to police headquarters and was first read the warnings about an hour after the initial questioning.[123] After Elstad indicated that he understood and wished to waive his Fifth Amendment rights, he gave an oral confession concerning his involvement in the burglary.[124] He later read and signed a written confession.[125]

The trial court suppressed Elstad's initial oral statement under *Miranda*, but admitted his signed confession upon finding that it was given after a knowing and voluntary waiver of his Fifth Amendment rights.[126] Elstad was convicted,[127] but the Oregon Court of Appeals reversed. The court concluded that the written confession should have been excluded as fruit of the unwarned confession.[128] Given the brief period separating Elstad's initial oral statement

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[120] In December 1981, the Gross home was burglarized of art objects and furnishings valued at $150,000. *Id.* A witness to the burglary contacted the Polk County Sheriff's office and implicated Elstad, an 18-year-old neighbor, and a friend of the Gross's teenage son. *Id.*

[121] *Id.* at 301.

[122] *Id.* Officer Burke asked Elstad if he knew a person by the name of Gross. Elstad said that he did, adding that he heard there was a robbery at their house. *Id.* Officer Burke then told the defendant that he felt he was involved in the robbery. Elstad responded, "Yes, I was there." *Id.* (citation omitted). Elstad explained that he knew that the Gross family was out of town. He had been paid to show several acquaintances how to gain entry into the Gross residence through a defective sliding glass door. *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.* "The statement was typed, reviewed by [Elstad], read back to him for correction, initialed and signed by Elstad and both officers. As an afterthought, Elstad added and initialed the sentence, 'After leaving the house Robby & I went back to [the] van & Robby handed me a small bag of grass.'" *Id.* at 301–02 (citation omitted).

[126] *Id.* at 302. "The [trial court] ruled that the statement, 'I was there,' had to be excluded because [Elstad] had not been advised of his *Miranda* rights." *Id.* As to the second confession, the trial court concluded:

> [H]is written statement was given freely, voluntarily and knowingly by the defendant after he had waived his right to remain silent and have counsel present which waiver was evidenced by the card which the defendant had signed. [It] was not tainted in any way by the previous brief statement between the defendant and the Sheriff's Deputies that had arrested him.

Id. (alteration in original) (citation omitted).

[127] Elstad received a five-year sentence and was ordered to pay $18,000 in restitution. *Id.*

[128] *Id.* at 302–03. The Oregon Court of Appeals identified "the crucial constitutional inquiry as 'whether there was a sufficient break in the stream of events between [the] inadmissible statement and the written confession to insulate the latter statement from the

and his subsequent confession, the court reasoned, the "'cat was sufficiently out of the bag to exert a coercive impact on [his] later admissions.'"[129]

The Supreme Court reinstated Elstad's conviction, ruling that his written confession should not have been suppressed as tainted fruit of the *Miranda* violation.[130] Writing for the majority, Justice O'Connor concluded that a suspect who makes an incriminating statement without the benefit of *Miranda* warnings is not thereafter precluded from providing an admissible, "voluntary" confession after being informed of and waiving his *Miranda* rights.[131]

Expanding upon the *Tucker* analysis, the Court first indicated that a police officer's failure to give the *Miranda* warnings, without more, did not violate the Fifth Amendment.[132] The majority indicated that the "prophylactic" *Miranda* warnings were not themselves rights protected by the Constitution, but were simply measures to ensure that the Fifth Amendment privilege against self-incrimination was protected.[133] Given this retreat from *Miranda*'s core premise, the Court explained the basis for excluding unwarned statements in the prosecution's case-in-chief. The *Miranda* exclusionary rule, the Court noted, swept more broadly than the Fifth Amendment and was triggered even in the absence of coercion.[134] An unwarned confession was presumed to be coerced, but nevertheless could be "voluntary" under the Fifth Amendment.[135] Thus, a defendant could take advantage of the *Miranda* presumption to exclude the confession, even though he had suffered no identifiable constitutional harm.[136]

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effect of what went before.'" *Id.* at 303 (alteration in original) (quoting State v. Elstad, 658 P.2d 552, 554 (Or. Ct. App. 1983)).

[129] *Id.* at 303 (quoting *Elstad*, 658 P.2d at 555). The Oregon court concluded:

> Regardless of the absence of actual compulsion, the coercive impact of the unconstitutionally obtained statement remains, because in a defendant's mind it has sealed his fate. It is this impact that must be dissipated in order to make a subsequent confession admissible. In determining whether it has been dissipated, lapse of time, and change of place from the original surroundings are the most important considerations.

Id. (quoting *Elstad*, 658 P.2d at 554). The Oregon Supreme Court declined to accept review. *Id.* at 303.

[130] *Id.* at 318.

[131] *Id.*

[132] *Id.* at 304–09.

[133] *Id.* at 305.

[134] *Id.* at 306–07; *see also id.* at 306 n.1 ("A *Miranda* violation does not *constitute* coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements.").

[135] *Id.*

[136] *Id.* at 307

The Court continued that the *Miranda* presumption of coercion, although "irrebuttable" for purposes of the prosecution's case-in-chief, did not require the fruits to be discarded as "inherently tainted."[137] A broad application of the poisonous tree doctrine was only necessary, the Court indicated, when the police committed a Fifth Amendment violation as distinguished from a *Miranda* violation—that is, where there was actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will.[138]

Because Elstad's unwarned statement was not "actually coerced" under the Fifth Amendment (even though presumptively coerced under *Miranda*),[139] the Court found little justification for excluding his subsequent written confession following the administration of *Miranda* warnings.[140] The *Miranda* warnings "remove[d] the conditions that precluded admission of the earlier statement," enabling Elstad to make a "rational and intelligent choice whether to waive or invoke his rights."[141] According to the Court, Elstad was "free to exercise his own volition" in deciding whether to give a confession to authorities, and there was no reason to believe that his written statement was untrustworthy [142]

The Court added that a subsequent warned confession should not be excluded when police officers make errors in deciding when a person is in "custody" for purposes of reading the *Miranda* warnings.[143] The Court

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[137] *Id.* As an example, Justice O'Connor cited Harris v. New York, 401 U.S. 222 (1971), in which the Court permitted a "voluntary" statement taken in violation of *Miranda* to be used for impeachment purposes on cross-examination. *Elstad*, 470 U.S. at 307

[138] *Id.* at 307–09. The Court explained that "a procedural *Miranda* violation differ[ed] in significant respects from violations of the fourth amendment, which have traditionally mandated a broad application of the 'fruits' doctrine." *Id.* at 306.

[139] *Id.* at 315.

[140] *Id.* at 308, 312. The Court said:

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indefinite period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Id. at 309.

[141] *Id.* at 314.

[142] *Id.* at 308, 314–15. Justice O'Connor indicated in a footnote that this case was unlike the situation where police officers flatly ignored a suspect's invocation of the right to remain silent or to have counsel present and continued the interrogation. *Id.* at 312 n.3 (and cases cited therein).

[143] *Id.* at 309.

indicated that police officers sometimes will err in making this determination and fail to give the warnings.[144] In those situations, the Court concluded, the errors should not "breed the same irremedial consequences" as infringement of the Fifth Amendment itself.[145] Only when a suspect's statements are actually coerced should these errors result in suppression of the fruits themselves.[146]

Finally, the Supreme Court rejected the Oregon appellate court's view of a "subtle form of lingering [Fifth Amendment] compulsion."[147] The majority read the state court's opinion as immunizing a suspect who had made an unwarned statement from the consequences of his subsequent informed waiver.[148] This immunity, the Court said, came at a "high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself."[149] Rather than employ a "rigid rule" that the unwarned statement compromised the voluntariness of the later confession, the Court indicated, courts should decide, based on the surrounding circumstances and the entire course of police conduct, whether the second confession was voluntary under the "old" due process voluntariness standard.[150] "The fact that a suspect [chose] to speak after being informed of his rights [would be] highly probative" of a voluntary confession.[151]

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[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.* at 309–14. "The Oregon court believed that the unwarned remark compromised the voluntariness of [Elstad's] later confession, and that only lapse of time and change of place could dissipate the 'coercive impact' of the inadmissible statement." *Id.* at 309–10.

[148] *Id.* at 312.

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

[150] *Id.* at 317–18.

[151] *Id.* at 318. The Court concluded that Elstad's earlier remark was voluntary under the Fifth Amendment, and that he "knowingly and voluntarily waived his right to remain silent" after being read the *Miranda* warnings. *Id.* at 314–15. Whatever the reason for the police oversight in failing to read the *Miranda* warnings at the outset, the Court concluded, "the incident had none of the earmarks of coercion." *Id.* at 316. "Nor did the officers exploit the unwarned admission to pressure [Elstad] into waiving his right to remain silent." *Id.*

Justice Brennan, together with Justice Marshall, dissented, arguing that, at least with respect to successive confessions, the majority had stripped remedies for *Miranda* violations of the poisonous tree doctrine. *Id.* at 319 (Brennan, J., with whom Marshall, J. joins, dissenting). Justice Brennan argued that a confession obtained in violation of an accused's *Miranda* rights presumptively tainted a subsequent confession, and that *Miranda* warnings alone could not dissipate that taint. *Id.* at 323.

Elstad dealt a heavy blow to *Miranda*. The Court rejected *Miranda*'s core premise by ruling that a total failure to read the *Miranda* warnings does not violate the Fifth Amendment. After *Elstad*, a defendant cannot rely on the *Miranda* presumption of coercion to suppress a subsequent confession under the poisonous tree doctrine. Instead, he must show that the first unwarned statement is in fact coerced under the pre-*Miranda* voluntariness standard. Failing that, he must make the difficult showing that the second statement (made after a knowing and voluntary waiver of rights) has been coerced. More importantly, although *Elstad* only addressed the admissibility of a subsequent warned confession,[152] the case contained language suggesting that the poisonous tree doctrine was inapplicable when a *Miranda* violation produced *any* evidentiary fruit.[153]

B. Miranda *Violations and Nontestimonial Fruit*

1. *Lower Court Decisions*

Following *Elstad*, federal and state courts have almost uniformly ruled that the prosecution can introduce nontestimonial fruits of a *Miranda* violation in a

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Justice Stevens also dissented, arguing that a *Miranda* violation was in fact a Fifth Amendment violation which created a presumption of coercion that attached to subsequent statements. *Id.* at 364–72 (Stevens, J., dissenting).

[152] The Court's rationale was clearly premised on the fact that the defendant was challenging a subsequent *warned* confession. *See id.* at 308–09, 314 (relying on the suspect's "volition" as a significant factor in a case of successive confessions).

[153] *See, e.g., id.* at 307 ("[T]he *Miranda* presumption [of coercion], though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements *and their fruits* be discarded as inherently tainted.") (emphasis added); *id.* at 308 ("We believe that this reasoning [of *Michigan v. Tucker*] applies with equal force when the alleged 'fruit' of a noncoercive *Miranda* violation is neither a witness *nor an article of evidence* but the accused's own voluntary testimony.") (emphasis added). *But see id.* at 319 n.2 (Brennan, J., dissenting) ("The Court repeatedly casts its analysis in terms of the 'fruits' of a *Miranda* violation, but its dicta nevertheless surely should not be read as necessarily foreclosing application of derivative-evidence rules where the *Miranda* violation produces evidence other than a subsequent confession by the accused.") (citations omitted); *id.* at 347 n.29 ("Notwithstanding the sweep of the Court's language, today's opinion surely ought not be read as also foreclosing application of the traditional derivative-evidence presumption to physical evidence obtained as a proximate result of a *Miranda* violation. The Court relies heavily on individual 'volition' as an insulating factor in successive-confession cases."). *See also* State v. Miller, 709 P.2d 225, 241 (Or. 1989) (noting that although *Elstad* stated in *dicta* that evidence which is the "fruit" of a *Miranda* violation need not be suppressed, the "actual holding in *Elstad*, a successive interrogation case, is considerably narrower"), *cert. denied*, 475 U.S. 1141 (1986).

criminal trial.[154] The poisonous tree doctrine will be applicable only if there is evidence of actual coercion or other circumstances designed to overbear the suspect's will.[155]

The Ninth Circuit's ruling in *United States v. Gonzalez-Sandoval*[156] is an example. Gonzalez-Sandoval appeared at a local police station as a condition of parole and was arrested on the charge of being an illegal alien who had previously been deported.[157] Agent Mario Vasquez of the United States Border Patrol transported Gonzalez-Sandoval to the border patrol station for questioning.[158] The agent also ran a series of record checks to determine the defendant's immigration status.[159] After the first check revealed that Gonzalez-Sandoval was an immigrated alien, Agent Vasquez asked Gonzalez-Sandoval if he had ever used an alias.[160] Agent Vasquez did not read the *Miranda* warnings.[161] Gonzalez-Sandoval answered that he had previously used the name "Guillen."[162] Agent Vasquez then ran a records check under that name and discovered the record of Gonzalez-Sandoval's previous deportation.[163] The defendant was then read his *Miranda* rights for the first time and charged with being found illegally in the United States after deportation.[164]

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[154] *See, e.g.*, United States v. Gonzalez-Sandoval, 894 F.2d 1043, 1047–48 (9th Cir. 1990); United States v. Barte, 868 F.2d 773, 774 (5th Cir. 1989), *cert. denied*, 493 U.S. 995 (1989); United States v. Sangineto-Miranda, 859 F.2d 1501, 1514–19 (6th Cir. 1988); United States v. Bengivenga, 845 F.2d 593, 600–01 (5th Cir. 1988) (en banc), *cert. denied*, 488 U.S. 924 (1988); United States v. Cherry, 794 F.2d 201, 207–08 (5th Cir. 1986), *cert. denied*, 479 U.S. 1056 (1987); *In re* Owen F., 523 A.2d 627, 631–32 (Md. Ct. Spec. App. 1987), *cert. denied*, 528 A.2d 1286 (Md. 1987); People v. Holmes, 536 N.Y.S.2d 289, 291 (1988), *appeal denied*, 547 N.E.2d 957 (N.Y. 1989); State v. Wethered, 755 P.2d 797, 800–02 (Wash. 1988). *But see* State v. Gravel, 601 A.2d 678, 682–86 (N.H. 1991) (holding that defendant's statements obtained in violation of *Miranda* cannot be relied upon to establish probable cause for issuance of search warrant; tangible evidence found during execution of search warrant suppressed); State v. Miller, 709 P.2d 225, 241 (Or. 1985) (ruling that police officer's failure to read suspect the *Miranda* warnings and to honor his request for assistance of counsel required suppression of physical evidence derived from suspect's statements, unless evidence was admissible on an independent ground such as the inevitable discovery doctrine), *cert. denied*, 475 U.S. 1141 (1986).

[155] *Gonzalez-Sandoval*, 894 F.2d at 1048; *Barte*, 868 F.2d at 774; *Sangineto-Miranda*, 859 F.2d at 1517; *Bengivenga*, 845 F.2d at 601; *Cherry*, 794 F.2d at 208; *In re Owen F.*, 523 A.2d at 631–32; *Wethered*, 755 P.2d at 801–02.

[156] 894 F.2d 1043 (9th Cir. 1990).

[157] *Id.* at 1046.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.*

The Ninth Circuit ruled that Gonzalez-Sandoval's statements to Agent Vasquez about his immigration status were obtained in violation of *Miranda*,[165] but that the record of Gonzalez-Sandoval's prior deportation should not be suppressed as fruit of the unwarned statements.[166] Relying on *Elstad* and *Tucker*, the court of appeals held that the poisonous tree doctrine was inapplicable when there was no violation of the Fifth Amendment—that is, when the police merely failed to administer the prophylactic *Miranda* warnings.[167] The court found the reasoning of *Elstad* and *Tucker* to be applicable whether the fruit of the *Miranda* violation was a subsequent confession or, as in the instant case, nontestimonial evidence.[168] The critical inquiry, the court observed, was whether the unwarned statements preceding a subsequent, warned confession or discovery of nontestimonial evidence were made voluntarily [169] The court concluded that "[w]here there is no evidence of coercion or a denial of due process in elicitation of the statements, the object of the fifth amendment exclusionary rule—assuring trustworthiness of evidence introduced at trial—is not served by barring admission of the derivatively obtained evidence or statements."[170] The court indicated that there was no evidence that Agent Vasquez's actions were coercive or that Gonzalez-Sandoval's unwarned statements were involuntary [171] Because the defendant's Fifth Amendment rights were not violated, the deportation record was admissible at trial.[172]

2. *Justice O'Connor's Concurrence in* New York v Quarles

A year before Justice O'Connor authored *Elstad*, she argued in *New York v. Quarles*[173] that nontestimonial fruits of a *Miranda* violation should be admissible in evidence. Her concurrence in *Quarles* is significant because it provides an alternative rationale for admitting nontestimonial fruits to that suggested in *Elstad* and articulated in recent cases like *Gonzalez-Sandoval*.

In *Quarles*, the Supreme Court was asked to decide whether the police had violated Quarles's rights by failing to read the *Miranda* warnings before asking him questions designed to locate his abandoned gun.[174] Justice O'Connor refused to join the majority in recognizing a "public safety" exception to

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[165] *Id.* at 1046-47
[166] *Id.* at 1048.
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] 467 U.S. 649 (1984).
[174] *Id.* at 651.

Miranda,[175] arguing instead that the gun should not have been suppressed under the poisonous tree doctrine as tainted fruit of the *Miranda* violation.[176]

Justice O'Connor relied principally on the Court's ruling in *Schmerber v. California*,[177] which held that state officials did not violate the Fifth Amendment privilege against self-incrimination by extracting blood from a suspect and admitting the chemical analysis at trial as proof of intoxication.[178] The *Schmerber* Court reasoned that the Fifth Amendment only protected an accused from being compelled to testify against himself or otherwise provide evidence of a testimonial or communicative nature; it did not prohibit compulsion that made a suspect the source of real or physical evidence (such as fingerprints or writing exemplars).[179] The Court noted that the defendant's testimonial capacities were in no way implicated either in the extraction of the blood or in the chemical analysis: "Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved."[180] Had the state tried to show that the accused had incriminated himself when told he would have to be tested, the Court added in dicta, the state would have to forego the testimonial (but not the nontestimonial) products of administering the test.[181]

Relying on *Schmerber* and its progeny, Justice O'Connor argued in *Quarles* that official compulsion which made a suspect the source of nontestimonial evidence (such as a gun) did not violate either the Fifth

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[175] *Id.* at 661–65 (O'Connor, J., concurring in part, dissenting in part). Justice O'Connor argued that the "public safety" exception blurred the "clear strictures" of *Miranda* and made it more difficult to understand. *Id.* at 660, 663. She noted that "[i]n some cases, police will benefit because a reviewing court will find that an exigency excused their failure to read the warnings. But in other cases, [they] will suffer because, though they thought an exigency excused their noncompliance, a reviewing court will view the 'objective' circumstances differently and require exclusion [of a suspect's unwarned admissions]." *Id.* at 663. The end result, she concluded, would be a "finespun new doctrine on public safety exigencies incident to custodial interrogation, complete with the hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence." *Id.* at 663–64.

Justice Marshall, together with Justices Brennan and Stevens, dissented, arguing that the majority had abandoned the clear guidelines enunciated in *Miranda*—"condemn[ing] the American judiciary to a new era of *post hoc* inquiry into the propriety of custodial interrogations"—and "endorsed the introduction of coerced self-incriminating statements in criminal prosecutions." *Id.* at 674 (Marshall, J., with whom Brennan J., and Stevens, J., join, dissenting).

[176] *Id.* at 665–74.

[177] 384 U.S. 757 (1966).

[178] *Id.* at 761.

[179] *Id.* at 764–65.

[180] *Id.* at 765.

[181] *Id.* at 765 n.9.

Amendment or *Miranda*.[182] She recognized that the case was "problematic" because the police had compelled Quarles "in the *Miranda* sense" not only to provide the gun, but also to admit, without the benefit of the *Miranda* warnings, where the gun was located and that he owned it.[183] She concluded, however, that *Schmerber* was controlling, because the Court had indicated in dicta that it would permit the admission of nontestimonial evidence even when the state's compulsion also produced inadmissible testimonial evidence.[184]

Justice O'Connor conceded that the admission of nontestimonial fruits of a *Miranda* violation would reduce the incentives to read the *Miranda* warnings.[185] But that fact, she said, begged the question of how much enforcement was appropriate.[186] Because the *Miranda* warnings were only necessary to ensure that a suspect's "testimony" was voluntary, Justice O'Connor argued, the failure to administer the warnings should cease to be a concern once the testimonial products of custodial interrogation are suppressed.[187] She concluded that the "harm caused by failure to administer *Miranda* warnings relates only to admission of testimonial self-incriminations, and the suppression of such incriminations should by itself produce the optimal enforcement of the *Miranda* rule."[188]

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[182] New York v. Quarles, 467 U.S. 649, 665–72 (1984).

[183] *Id.* at 667.

[184] *Id.* at 667–68. In *Schmerber*, the Court noted:

> This conclusion [that the chemical analysis of the blood was admissible] would not necessarily govern had the State tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any *testimonial* products of administering the test—products which would fall within the privilege.

Schmerber v. California, 384 U.S. 757, 765 n.9 (1966).

[185] *Quarles*, 467 U.S. at 668.

[186] *Id.*

[187] *Id.* at 668–69.

[188] *Id.* at 669. Justice O'Connor acknowledged that the Court had previously held that the privilege against self-incrimination required suppression of compelled statements and all evidence derived therefrom. *Id.* (citing Maness v. Meyers, 419 U.S. 449 (1975); Kastigar v. United States, 406 U.S. 441 (1972); McCarthy v. Arndstein, 266 U.S. 34 (1924); Counselman v. Hitchcock, 142 U.S. 547 (1892)). Those cases, she noted, involved persons appearing before a court or tribunal vested with the contempt power. *Id.* The witnesses in those situations were subject to "'the cruel trilemma of self-accusation, perjury, or contempt.'" *Id.* (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)). The tribunal thus could require a witness to appear and testify even if he had formally and expressly asserted a privilege of silence. *Id.* "If the witness' invocation of the privilege at [a

Justice O'Connor concluded by looking to the experience of countries like England, Scotland and India to determine whether the gun should be suppressed.[189] She noted that the learning of other countries was important to development of the initial *Miranda* rule.[190] She found that "nontestimonial evidence derived from confessions 'not blatantly coerced' was and still is admitted."[191] Admission of such evidence, she noted, was based on the "very sensible view that procedural errors should not cause entire investigations and prosecutions to be lost."[192]

DISCUSSION

The Supreme Court has communicated the wrong message to federal and state courts confronting *Miranda* violations: The poisonous tree doctrine is not

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subsequent criminal] trial [was] not to be defeated by the State's refusal to let him remain silent at an earlier proceeding, the witness [had] to be protected 'against the use of his compelled answers and any evidence derived therefrom.'" *Id.* at 669–70 (quoting Lefkowitz v. Turley, 414 U.S. 70, 78 (1973)).

Justice O'Connor argued, by contrast, that a suspect subject to custodial interrogation was not in the same position. *Id.* at 670. She noted that when a suspect merely interjects a "*post hoc* complaint that the police failed to administer [the] *Miranda* warnings, he invokes only an irrebuttable presumption that the interrogation was coercive. He does not show that the privilege was raised and that the police actually or overtly coerced him to provide testimony and other evidence to be used against him at trial." *Id.* The suspect "could have remained silent and the interrogator could not have punished him for refusing to speak." *Id.* Thus, she argued that the interrogation did not subject the accused to this cruel trilemma of self-accusation, perjury or contempt, and he had a "much less sympathetic case for obtaining the benefit of a broad suppression ruling." *Id.*

Justice O'Connor was willing to recognize a "broader exclusionary rule" covering evidentiary fruits when a suspect was "subject to abusive police practices and actually or overtly compelled to speak." *Id.* at 672. In that situation, she believed it was reasonable to infer "both an unwillingness to speak and a perceptible assertion of the privilege [against self-incrimination]." *Id.*

189 *Id.* at 672–73.

190 *Id.* at 673.

191 *Id.* (citing HENRY J. FRIENDLY, BENCHMARKS 282 (1967); Commissioners of Customs & Excise v. Harz, 1 All E.R. 177, 182 (1967); The King v. Warickshall, 168 Eng. Rep. 234 (K.B. 1783)).

192 *Id.* (citation omitted). Justice Marshall rejected Justice O'Connor's approach, arguing that her concurring opinion "represent[ed] a much more radical departure from precedent" than it acknowledged. *Id.* at 688 n.11 (Marshall, J., dissenting). He argued that the gun should have been suppressed as "the direct product of a coercive custodial interrogation." *Id.* at 688. He concluded, however, that the proper disposition was to let the New York Court of Appeals decide the issue, because the poisonous tree doctrine had changed since the lower court's ruling. *Id.* at 689–90 (citing Nix v. Williams, 467 U.S. 431 (1984) (recognizing inevitable discovery exception to poisonous tree doctrine)).

applicable to such police misconduct. In so doing, the Court has denigrated the import of *Miranda*, lost sight of the underlying rationale of the poisonous tree doctrine, and overlooked its own precedents requiring suppression of nontestimonial fruits. Cases like *Elstad* and *Tucker*, by minimizing the seriousness of the police misconduct producing the evidentiary fruits, breed contempt for the law and encourage the same conduct that *Miranda* was designed to prevent.

The Court should send a very different message: The poisonous tree doctrine must be applied to *Miranda* violations. The opening example is just such a situation.[193] The police interrogated Jones in custody without reading the *Miranda* warnings and used his confession to discover the gun. The gun has been "'come at by exploitation of [the] illegality '"[194] Thus, the gun should be suppressed as tainted fruit of the *Miranda* violation, unless the prosecution can show that one of the exceptions to the poisonous tree doctrine is applicable.[195]

I. NONTESTIMONIAL FRUIT AS TAINTED EVIDENCE

Although the Supreme Court has abandoned *Miranda's* core premise[196]—that a *Miranda* violation is a Fifth Amendment violation[197]—suppression of

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[193] *See supra* p.807.

[194] Wong Sun v. United States, 371 U.S. 471, 488 (1963) (citation omitted).

[195] The Supreme Court has recognized several exceptions to the poisonous tree doctrine. *See supra* note 19.

[196] *See, e.g.*, Yale Kamisar, *The "Police Practice" Phases of the Criminal Process and the Three Phases of the Burger Court*, *in* THE BURGER YEARS—RIGHTS AND WRONGS IN THE SUPREME COURT, 1969–1986, 140, 150–57 (Herman Schwartz ed., 1987).

[197] The Court in *Elstad* undermined *Miranda's* core premise in a few words. After characterizing the *Miranda* warnings as "prophylactic" and "not protected by the Constitution," the Court reasoned that the failure to administer these warnings was not a violation of the Fifth Amendment. Oregon v. Elstad, 470 U.S. 298, 305–06 & n.1 (1985). The Court made a similar observation a year earlier in New York v. Quarles, 467 U.S. 649, 654 (1984). Both *Elstad* and *Quarles* relied on *Tucker* to reach this conclusion.

The Court's reasoning is faulty in several critical respects. First, and foremost, *Tucker* does not support the Court's conclusion in *Elstad*. It is one thing to say, as in *Tucker*, that the failure to read only one of the warnings (the right to have counsel appointed if indigent) is not a Fifth Amendment violation, particularly when the interrogation occurred before *Miranda* was decided. It is quite another thing to say, as the Court did in *Elstad* and *Quarles*, that the failure to read *all* the warnings should have the same result. Whatever compulsion was inherent in the custodial situation in which Tucker found himself was no doubt dissipated by the police officer's warnings that he had the right to remain silent and to request an attorney (both of which he refused to exercise). The same cannot be said when the police fail to read any of the warnings.

To be sure, the *Miranda* warnings are not "protected" by the Constitution in the sense that no substitutes will be recognized. As the majority in *Miranda* indicated, the Constitution does not require adherence to a particular litany as a prerequisite to informing a suspect of his rights. Miranda v. Arizona, 384 U.S. 436, 467 (1966). However, the *Miranda* Court made clear that, unless other procedures were shown to be as effective, a total failure to provide any of the warnings *is* a Fifth Amendment violation. *Id.*, *see also* Stone, *supra* note 64, at 119. Indeed, the Court expressly adopted the high standard of proof for the waiver of constitutional rights first enunciated in Johnson v. Zerbst, 304 U.S. 458 (1938), as the standard for waiver of *Miranda* rights. *Miranda*, 384 U.S. at 475. The Court reaffirmed that a *Miranda* violation was of constitutional magnitude three years later in Orozco v. Texas, 394 U.S. 324, 326 (1969) ("[T]he use of [any] admissions obtained in the absence of the required [*Miranda*] warnings [is] a flat violation of the Self-Incrimination Clause of the Fifth Amendment ").

The *Elstad* Court's contrary conclusion reflects a fundamental retreat from *Miranda*. The Court in *Miranda* indicated in clear and unmistakable language that the warnings were necessary to combat the inherently compelling pressures of custodial interrogation and to ensure an informed and voluntary relinquishment of rights. *Miranda*, 384 U.S. at 467. Without being "adequately and effectively apprised" of his rights, the Court ruled, the suspect is subject to compulsion in violation of the Fifth Amendment. *Id.*

Moreover, the *Elstad* Court's view of the *Miranda* warnings as nonconstitutional safeguards cannot be squared with its ruling that statements taken in violation of *Miranda* are "irrebuttabl[y]" presumed to be coerced. *Elstad*, 470 U.S. at 307 The Court's schizophrenic characterization of such unwarned statements as at once "coerced" and "voluntary" is illogical and can only breed confusion. *Id.* at 352 (Brennan, J., dissenting). The Court cannot have it both ways. If unwarned statements are "irrebuttabl[y]" presumed to be coerced, they should be excluded (along with their fruits) under the Fifth Amendment. If, on the other hand, the statements are voluntary, there is no basis for excluding them under the Constitution in the first place.

As it now stands, the Court is requiring suppression of statements that it believes are not compelled under the Fifth Amendment. While the Court may have the supervisory authority to require that result in federal courts, it has no such authority—in the absence of a constitutional basis—to require suppression in state courts. As Justice Stevens observed in his *Elstad* dissent:

> This Court's power to require state courts to exclude probative self-incriminatory statements rests entirely on the premise that the use of such evidence violates the Federal Constitution. The same constitutional analysis applies whether the custodial interrogation is actually coercive or irrebuttably presumed to be coercive. If the Court does not accept that premise, it must regard the holding in the *Miranda* case itself, as well as all of the federal jurisprudence that has evolved from that decision, as nothing more than an illegitimate exercise of raw judicial power.

Id. at 370–71 (Stevens, J., dissenting) (footnotes omitted); *see also* Sonenshein, *supra* note 116, at 426–27; Stone, *supra* note 64, at 119–20.

The correct approach is as *Miranda* originally intended. Unwarned statements elicited through custodial interrogation cannot be "voluntary"; they are coerced and must be suppressed under the Fifth Amendment. Once it is recognized that the failure to administer

nontestimonial fruits remains necessary for the following compelling reasons: to deter the police from failing to read the *Miranda* warnings; to restore the status quo prevailing before the *Miranda* violation; to provide the police with clear guidelines about permissible interrogation tactics; and to prevent the incorporation of the unworkable, pre-*Miranda* voluntariness standard into the derivative evidence analysis.

A. *Deterrence of Police Misconduct*

When the police seek to obtain a confession from a suspect in custody, they must decide whether to read the *Miranda* warnings before the interrogation begins. They will be presented with two options. They can either: (1) forego the warnings and any confession the suspect makes; or (2) read the warnings and risk having the suspect exercise his right to remain silent. The certainty that the suspect's confession will be suppressed if the *Miranda* warnings are not read serves as a strong deterrent against committing a *Miranda* violation and encourages police officers to choose the second option.

The police have different incentives when they know that nontestimonial fruits of a *Miranda* violation will be admissible at trial. Again, their choices will be twofold: (1) forego the warnings and the suspect's confession, but with the understanding that the confession can be used to discover admissible nontestimonial evidence; or (2) read the warnings and risk losing both the confession and the resultant nontestimonial evidence if the suspect exercises his right to remain silent. Given the potential benefits of the first option, the police will have a significant incentive to ignore the *Miranda* warnings.[198] The

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the *Miranda* warnings constitutes a Fifth Amendment violation, it follows that nontestimonial fruits must be suppressed as well. Wong Sun v. United States, 371 U.S. 471, 488 (1963); Nardone v. United States, 308 U.S. 338, 340 (1939).

[198] *See Elstad*, 470 U.S. at 357 (Brennan, J., with whom Marshall, J., joins, dissenting) ("If the police through illegal interrogation could discover contraband and be confident that the contraband 'ordinarily' would not be suppressed, what possible incentive would [the police] have to obey *Miranda*?"); United States v Downing, 665 F.2d 404, 409 n.5 (1st Cir. 1981) ("The possibility of obtaining admissible derivative evidence would seem to remove much of the incentive for police to follow the dictates of *Miranda*."); People v. Schader, 457 P.2d 841, 852 (Cal. 1969) ("The exclusionary rule is applied to the [physical] fruits as well as the words of an illegally obtained confession. A contrary rule would undermine the rights to counsel and to remain silent by providing police the simple expedient of conducting illegal interrogations for the purpose of obtaining physical evidence of guilt while foregoing the use at trial of the statements of the accused."); State v. Preston, 411 A.2d 402, 408 (Me. 1980) ("The deterrent effect on police misconduct of excluding admissions obtained as [the defendant's (*i.e.*, without *Miranda* warnings)], would be substantially reduced if real evidence delivered to the police as part of the suspect's direct response to the unwarned custodial interrogation were permitted in evidence."); State v. Gravel, 601 A.2d 678, 685 (N.H. 1991) ("To allow the police the freedom to disregard the

deterrent effect of suppressing the suspect's confession is significantly reduced by the opportunity to uncover highly probative, admissible evidence.[199] As one commentator has observed:

> [I]t is clear that if the police were permitted to utilize illegally obtained confessions for links and leads rather than being required to gather evidence independently, then the *Miranda* warnings would be of no value in protecting the privilege against self-incrimination. The requirement of a warning would be meaningless, for the police would be permitted to accomplish indirectly what they could not accomplish directly, and there would exist no incentive to warn.[200]

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requirements of *Miranda* and thereby risk losing only the direct product of such action, but not the evidence derived from it, would not only not deter future *Miranda* violations but might well tend to encourage them."); Alan M. Dershowitz & John Hart Ely, Harris v. New York*: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1219 (1971) ("[T]here is no reason to expect an exclusionary rule to deter deliberate violations unless it has eliminated all significant incentives toward that conduct.").

[199] The fear that the *Miranda* warnings will inhibit self-incriminating statements makes the first option even more attractive than the second. *See, e.g.*, Cooper v. Dupnik, 963 F.2d 1220, 1224–25 (9th Cir. 1992) (en banc) (police officer testified that the suspect purposefully was not advised of his *Miranda* rights to ensure that he would not rely on his right to remain silent); Yarber v. State, 375 So. 2d 1212, 1215 (Ala. Crim. App. 1977) (police officer testified that the defendant purposely was not advised of his *Miranda* rights "for the sole reason that the officers thought that if he was advised of his rights he would not testify"), *rev'd on other grounds*, *Ex parte* Yarber, 375 So. 2d 1229 (Ala. 1978); H. RICHARD UVILLER, TEMPERED ZEAL, A COLUMBIA LAW PROFESSOR'S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE 206 (1988) ("[A] number of experienced line officers believed that the *Miranda* warnings actually do inhibit self-incriminating revelations.").

[200] Pitler, *supra* note 65, at 620 (footnotes omitted). Professor Kamisar has made a similar observation:

> What is the point of formulating comprehensive rules as the Court did in *Miranda* if the police still have a substantial incentive to continue to disregard these rules, if the police can still make use of all the leads and clues stemming from the inadmissible statements or confessions? You are not going to influence police practices greatly, you are not likely to get the police to change their procedures, if you permit them to operate on the premise that even if they pay no attention to *Miranda* they can still obtain and introduce in a trial valuable evidence derived from the suspect's statements.
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> If *Miranda* is to make any sense, if *Miranda* is to be taken seriously, if *Miranda* is to be afforded a real chance of deterring objectionable and impermissible police interrogation practices, then the stolen property and the murder weapon and other physical evidence obtained as a result of these inadmissible statements must be thrown out.

Indeed, there are many reported cases where the police have arrested suspects and interrogated them without the *Miranda* warnings in order to discover the existence or location of nontestimonial evidence.[201] This should not come as a surprise to those knowledgeable about police practices. Expert interrogators have long recognized, and continue to instruct, that a confession is a primary source for determining the existence and whereabouts of the fruits of a crime, such as documents or weapons.[202] "The process of interrogation

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NEW LOOK AT CONFESSIONS, *supra* note 94, at 150; *see also* Kamisar, *supra* note 196, at 156 ("How can we expect the police to comply with *Miranda* when we prohibit only the confessions obtained in violation of that doctrine, but permit the use of everything these confessions bring to light?"); Howard R. Shapiro, Note, Miranda *Without Warning: Derivative Evidence as Forbidden Fruit*, 41 BROOK. L. REV 325, 343–44 (1974) ("[T]he inadmissibility of the statements themselves would hardly offset the potential benefits [of evidence obtained by *Miranda* violations], and there would exist no real incentive to comply with *Miranda*."); *Confessions*, *supra* note 39, at 1029 ("Insofar as confessions are excluded in order to deter police violation of other rights of a suspect, the indications that police seek to elicit confessions to obtain leads to other evidence as well as to obtain the confessions themselves argue in favor of excluding the products as well.") (footnotes omitted).

[201] *See, e.g.*, United States v. Carter, 884 F.2d 368, 373 (8th Cir. 1989) (finding that police officers "persistently interrogated [suspect] for nearly an hour," failed to read *Miranda* warnings, induced him to reveal the contents of his wallet, and then confronted him with the information that it contained bait money); United States v. Sangineto-Miranda, 859 F.2d 1501, 1515 (6th Cir. 1988) (finding facts in which police officers arrested and handcuffed suspects, failed to read *Miranda* warnings, and interrogated one of them about means of transportation to place of arrest); United States v. Rullo, 748 F Supp. 36, 39 (D. Mass. 1990) (finding that police officers punched and kicked suspect in custody, failed to read *Miranda* warnings, and repeatedly interrogated him about location of gun); State v. Wethered, 755 P.2d 797, 798 (Wash. 1988) (finding that police officer arrested suspect, failed to read *Miranda* warnings, and interrogated him about location of hashish); UVILLER, *supra* note 199, at 205 (recounting several police officers' admissions that when they fail to read the *Miranda* warnings, they are seeking "confirmation of suspicion or leads to accomplices or weapons").

[202] O'HARA & O'HARA, *supra* note 25, at 119 (stating that purpose of interrogation is to "learn of the existence and locations of physical evidence such as documents or weapons"); AUBRY & CAPUTO, *supra* note 25, at 27–28 (explaining that interrogation is "valuable in developing information leading to the recovery of the fruits of the crime"); WAYNE W BENNETT & KAREN M. HESS, CRIMINAL INVESTIGATION 182 (1987) (stating that "questioning can provide leads for finding physical evidence"); ART BUCKWALTER, INTERVIEWS & INTERROGATIONS 189 (1983) (explaining that objective of interrogation is to "recover stolen goods or other fruits of a crime"); *see also* UVILLER, *supra* note 199, at 184 (recounting a sergeant's "heavy-handed interrogation [which] might well have been excessive, but [whose] only purpose seem[ed] to have been the recovery of the weapon"); STEPHENS, *supra* note 35, at 192 (1973) (survey-research findings).

ideally lends itself to the accomplishment of the recovery of the fruits of a crime, particularly in the areas of stolen property, contraband, and money "[203]

Suppression of a suspect's unwarned statements alone will not provide sufficient deterrence of police misconduct. Police officers seeking physical evidence are not likely to view the loss of an unwarned confession as particularly great when weighed against the opportunity to recover highly probative nontestimonial evidence, such as a murder weapon or narcotics.[204] Recovery of such evidence might well convince a suspect to forego a trial and plead guilty, thereby preventing the *Miranda* issue from ever being raised. Because most criminal cases are resolved on the basis of guilty pleas, the loss of the unwarned confession may have little practical (or deterrent) effect.

At trial, physical evidence is likely to have a greater impact on the ultimate determination of guilt or innocence than a confession. Confessions tend to be viewed with skepticism and even mistrust, particularly when they are recounted by police officers or subsequently challenged by the defendant.[205] On the other hand, nontestimonial evidence typically is "the most important element" in a case, establishing, for instance, the *corpus delicti*.[206] It is "mute proof of fact that hardly need[s] the same degree of corroboration as an outright confession, let alone a statement subject to contradiction."[207] Such evidence particularly carries a great deal of weight at trial when it is introduced through the

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[203] AUBRY & CAPUTO, *supra* note 25, at 28. *See, e.g.*, Orozco v. Texas, 394 U.S. 324, 325 (1969) (finding that police interrogated suspect to locate pistol); United States v. Barte, 868 F.2d 773, 773–74 (5th Cir. 1989) (finding that postal inspectors interrogated letter carrier to locate letter containing transmitter), *cert. denied*, 493 U.S. 995 (1989); People v. Saiz, 620 P.2d 15, 17 (Colo. 1980) (finding that police interrogated suspect to locate victim's wallet); Stamper v. State, 662 P.2d 82, 85 (Wyo. 1983) (finding that police interrogated suspect to locate victim's boots); *see* Murphy v. Waterfront Comm'n, 378 U.S. 52, 103 (1964) (White, J., concurring) (stating that a coerced confession "is as revealing of leads as testimony given in exchange for immunity").

[204] State v. Gravel, 601 A.2d 678, 685 (N.H. 1991) ("An officer more concerned with the physical fruits of an unlawfully obtained confession than with the confession itself might reasonably decide that the benefits of securing admissible derivative evidence outweighed the loss of the statements. *Miranda* would thus have lost a substantial amount of its value in protecting against compelled self-incrimination.").

[205] UVILLER, *supra* note 199, at 185; O'HARA & O'HARA, *supra* note 25, at 141. A conviction cannot be based solely on an uncorroborated confession of guilt; the confession requires extrinsic corroboration. Wong Sun v. United States, 371 U.S. 471, 488–89 (1963); Smith v. United States, 348 U.S. 147, 152–53 (1954); Opper v. United States, 348 U.S. 84, 89–91 (1954).

[206] AUBRY & CAPUTO, *supra* note 25, at 28.

[207] LEONARD L. LEVY, CONSTITUTIONAL OPINIONS: ASPECTS OF THE BILL OF RIGHTS 217 (1986).

testimony of an expert witness. Indeed, many criminal prosecutions would fail without nontestimonial evidence.[208]

Whatever deterrent effect results from suppressing an unwarned confession is virtually eliminated when, under *Elstad*, the police can "recover" the lost confession (after discovering nontestimonial evidence) by simply reading the suspect the *Miranda* warnings and continuing the interrogation.[209] By requesting an encore performance from a suspect who has already incriminated himself once, the police are likely to elicit the same confession as they had before,[210] only this time the suspect's statements will be admissible at trial.[211] The probability that the suspect will confess a second time will be even greater if the police confront the suspect with the nontestimonial evidence.[212] Hence, there appears to be little reason for the police to read a suspect the *Miranda* warnings before initiating the interrogation when they will be rewarded by their failure to do so—by discovering nontestimonial evidence and, after a belated reading of the warnings, by eliciting an admissible confession.

In short, police officers will come away with the wrong message: It is better to interrogate a suspect without the *Miranda* warnings than to use legitimate means to investigate crime.[213] Permitting such interrogation would send an ominous signal to the police and prosecutors that citizens may be "exploited for the information necessary to condemn them before the law."[214]

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[208] *Id.* ("The trustworthiness of physical evidence is such that without it a case may not be supported."); BENNETT & HESS, *supra* note 202, at 182 (explaining that a confession "cannot legally stand alone," but "must be supported by physical evidence or other corroboration"); JAMES GILBERT, CRIMINAL INVESTIGATION 117 (2d ed. 1986) (stating that "few criminal prosecutions will be successful without additional evidence"); *see* Walder v. United States, 347 U.S. 62, 62–63 (1954) (government dismissed its 1950 heroin prosecution against defendant when the narcotics were suppressed as illegally seized).

[209] *See* Oregon v. Elstad, 470 U.S. 298, 318 (1985).

[210] *See* Brown v. Illinois, 422 U.S. 590, 605 n.12 (1975); Darwin v. Connecticut, 391 U.S. 346, 350–51 (1968); United States v. Bayer, 331 U.S. 532, 540 (1946); *see also Elstad*, 470 U.S. at 325–32, 356–57 (Brennan, J., with whom Marshall, J., joins, dissenting); Irene M. Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV 69, 95 (1989).

[211] *See Elstad*, 470 U.S. at 318.

[212] *See, e.g.*, United States v. Carter, 884 F.2d 368, 373 (8th Cir. 1989) (finding police officers persistently interrogated suspect for nearly an hour, failed to read *Miranda* warnings, induced him to reveal the contents of his wallet, and then confronted him with the information that it contained bait money).

[213] Haynes v. Washington, 373 U.S. 503, 519 (1963) ("[H]istory amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence ").

[214] Culombe v. Connecticut, 367 U.S. 568, 581 (1961) (Frankfurter, J., announcing the judgment of the Court).

On the other hand, the police would be significantly deterred from committing *Miranda* violations if the poisonous tree doctrine were applicable to nontestimonial fruits.[215] They would know that their failure to read the *Miranda* warnings would result in the suppression of both the suspect's confession and any nontestimonial evidence that is discovered.[216] The police would thus have every incentive to comply with *Miranda*.[217]

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[215] The poisonous tree doctrine's effectiveness in deterring future police misconduct in the opening example distinguishes that situation from Michigan v. Tucker, 417 U.S. 433 (1974). In *Tucker*, the exclusionary rule's deterrence rationale was not served by suppressing the fruits of the defendant's statement because the police had fully complied with the constitutional principles applicable at the time of the interrogation (which antedated *Miranda*). As Justice Brennan noted in his *Elstad* dissent, "Because the questioning in *Tucker* occurred before *Miranda* was announced and was otherwise conducted in an objectively reasonable manner, the exclusion of the derivative evidence solely for failure to comply with the then-nonexistent *Miranda* requirement would not significantly deter future *Miranda* violations." Oregon v. Elstad, 470 U.S. 298, 355-56 (1985) (Brennan, J., dissenting). In the opening example, by contrast, the police have no excuse for failing to comply with the *Miranda* requirements, and thus suppression of Jones's pistol *would* deter this misconduct in the future. Several courts have distinguished *Tucker* on this basis. *See, e.g.*, United States v. Downing, 665 F.2d 404, 407 (1st Cir. 1981); *In re* Appeal No. 245 (75) from Circuit Court for Kent County, 349 A.2d 434, 445 (Md. Ct. Spec. App. 1975).

[216] Studies indicate that the exclusionary rule in the Fourth Amendment context has a deterrent effect on unlawful police behavior. *See, e.g.*, Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV 24 (1980); Myron W Orfield, Jr., Note, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV 1016 (1987). "When evidence is suppressed, the police officers learn about the law of search and seizure and apply these lessons to bring their search into line with the requirement of the fourth amendment." Orfield, *supra*, at 1039. Based on these studies, it is reasonable to assume that the same conclusion would apply in the Fifth Amendment context. *See* Stone, *supra* note 64, at 113 n.71 ("*Miranda* is likely to have a significant deterrent impact because 'the predominant incentive for interrogation is to obtain evidence for use in court. Consequently, police conduct in this area is likely to be responsive to judicial rules governing the admissibility of that evidence.'" (quoting Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV 665, 722 (1970)).

[217] The prosecution has no legitimate claim to evidentiary fruits that the police have acquired through misconduct. As Justice Stewart has observed:

> The exclusion of an illegally procured confession and any [evidentiary fruits] obtained in its wake deprives the Government of nothing to which it has any lawful claim and creates no impediment to legitimate methods of investigating and prosecuting crime. On the contrary, the exclusion of evidence causally linked to the Government's illegal activity no more than restores the situation that would have prevailed if the Government had itself obeyed the law.

B. *Trustworthiness of Nontestimonial Evidence*

The Supreme Court's refusal in *Elstad* to apply the poisonous tree doctrine to *Miranda* violations appears to have been motivated by a concern for excluding relevant and trustworthy evidence from a defendant's trial.[218] There can be little doubt that the poisonous tree doctrine occasionally will exact a high cost by allowing a guilty person to go free.[219] The existence of a countervailing governmental interest, however, does not resolve the issue.

Although the government has a legitimate interest in making probative evidence available at trial, the Supreme Court long ago struck the balance in favor of society's need to deter illegal police conduct. Ever since *Weeks v. United States*,[220] the Court has accepted the notion that the only effective way to deter police misconduct is to exclude tainted evidence, even when the evidence is highly probative of guilt.[221] Over 30 years ago, Justice Frankfurter,

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Harrison v. United States, 392 U.S. 219, 224 n.10 (1968). Thus, the poisonous tree doctrine restores the status quo prevailing before the *Miranda* violation and ensures that the government is not "in a better position than it would have been in if no illegality had transpired." Nix v. Williams, 467 U.S. 431, 443 (1984). At the same time, the prosecuting authorities are precluded from making the courts an accomplice to the admission of tainted evidence. *See* Elkins v. United States, 364 U.S. 206, 222–23 (1959) (stating that exclusion of evidence seized in violation of the Fourth Amendment is required by the "imperative of judicial integrity"); McNabb v. United States, 318 U.S. 332, 345 (1943) ("[A] conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law.").

[218] *See* Oregon v. Elstad, 470 U.S. 298, 312 (1985).

[219] *See* James v. Illinois, 493 U.S. 307, 319 (1990) ("The cost to the truth-seeking process of evidentiary exclusion invariably is perceived more tangibly in discrete prosecutions than is the protection of privacy values through deterrence of future police misconduct.").

[220] 232 U.S. 383 (1914). As Professor Kamisar reminds us, the exclusionary rule was not an "innovation" of the Warren Court, but a rule established by the White Court in *Weeks* and reaffirmed by the Taft, Hughes, Stone and Vinson Courts. Kamisar, *supra* note 58, at 539 n.14.

[221] *See James*, 493 U.S. at 311 ("The occasional suppression of illegally obtained yet probative evidence has long been considered a necessary cost of preserving overriding constitutional values: '[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.'") (citation omitted); Nix v. Williams, 467 U.S. 431, 442–43 (1984) ("The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections."); *see also* Brown v. Illinois, 422 U.S. 590, 600–01 (1975); *Weeks*, 232 U.S. at 391–93.

writing for the Court in *Rogers v. Richmond*,[222] made this clear in a confession case, concluding that a coerced confession must be excluded at trial even though "independent corroborating evidence" left little doubt about its truth.[223] The tainted evidence must be excluded essentially to teach the police an important and costly lesson: Failure to respect a suspect's rights will have adverse consequences and should not be repeated.[224]

Indeed, the poisonous tree doctrine is an effective deterrent precisely because it requires suppression of highly relevant and trustworthy evidence. The police are more apt to obey the law and honor a suspect's rights when they know that, if they commit misconduct, evidence highly probative of guilt will be inadmissible at trial. If the evidence were inconsequential, the police would not likely be too concerned about the consequences of their conduct.

Just as the prosecution cannot argue that a coerced confession should be admissible on the ground that other evidence demonstrates its truthfulness,[225] the prosecution must also be precluded from arguing that nontestimonial fruits of a *Miranda* violation are trustworthy and thus admissible at trial. In both situations, a compelling need exists to suppress the tainted evidence in order to instill in the offending officers and in their future counterparts the importance of observing a suspect's rights.[226]

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[222] 365 U.S. 534 (1961).

[223] *Id.* at 541; *see supra* notes 59–62 and accompanying text.

[224] The purpose of the poisonous tree doctrine, like the exclusionary rule itself, is to deter—to compel respect for the accused's rights "in the only effectively available way—by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960).

In Wong Sun v. United States, 371 U.S. 471, 487–88 (1963), the Court excluded a confession that the police obtained after an unconstitutional entry of the defendant's living quarters and his unlawful arrest, as well as the narcotics discovered as a result of the confession. The Court concluded that suppression of the "physical" and "verbal" fruits was necessary to deter lawless police conduct—regardless of the probativity of the narcotics—and to "clos[e] the doors of the federal courts to any use of evidence unconstitutionally obtained." *Id.* at 484–86.

[225] Michigan v. Tucker, 417 U.S. 433, 448 n.23 (1974); Jackson v. Denno, 378 U.S. 368, 384–85 (1964); *Rogers*, 365 U.S. at 540–41.

[226] Even those who believe that the poisonous tree doctrine should not apply to *Miranda* violations concede that nontestimonial fruits of a "coerced" confession should be suppressed, regardless of the reliability of those fruits. *See* New York v. Quarles, 467 U.S. 649, 672 (1984) (O'Connor, J., concurring in part, dissenting in part); *Tucker*, 417 U.S. at 461 (White, J., concurring); FRIENDLY, *supra* note 94, at 282; Brief for United States as Amicus Curiae Supporting Petitioner, at 26–27, New York v. Quarles, 467 U.S. 649 (1984) (No. 82-1213); Brief for the United States as Amicus Curiae, at 44 n.29, Michigan v. Tucker, 417 U.S. 433 (1974) (No. 73-482). Many courts have so held. *See, e.g.*, United States v. Rullo, 748 F Supp. 36, 43–45 (D. Mass. 1990); People v. Robinson, 210 N.W.2d 372, 376 (Mich. Ct. App. 1973); State v. Jensen, 349 N.W.2d 317, 321 (Minn. Ct. App. 1984); State v. Badger, 450 A.2d 336, 349–50 (Vt. 1982). Yet, the nontestimonial fruits of

Despite the Supreme Court's concern in *Elstad* that exclusion of nontestimonial fruits will have a negative impact on law enforcement, a broad application of the poisonous tree doctrine is not likely to handicap the investigation and prosecution of crime. The police have a variety of methods at their disposal to search for the fruits of a crime. For instance, they can question persons who are not in custody or otherwise deprived of their freedom in a significant way without reading the *Miranda* warnings,[227] and they may dispense with the warnings when public safety concerns are involved.[228] The police are allowed to use a suspect's volunteered statements as a means of discovering evidentiary fruits.[229] They can also pose as inmates in a jail and

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a coerced confession are no less reliable than those of a confession in violation of *Miranda*. As Justice Herbert B. Cohen of the Pennsylvania Supreme Court has remarked:

> If by the exercise of brute force and physical coercion, law enforcement officers obtain a confession which leads them to other incriminating evidence and there is no independent source of that evidence available to the officers and no attenuation, there is little doubt that both the confession and the derivative evidence are inadmissible. This is so even though the derivative evidence corroborates the confession and is reliable. Reliability is no longer the test of the admissibility of confessions and derivative evidence.
>
> Under *Miranda* the interest protected—the psychological security of the accused—is in legal theory no different from the interest protected by the earlier cases, the physical security of the defendant. In either case the purpose of the exclusionary rule is to prevent police intimidation of a criminal suspect and to guarantee that a confession given while a person is in custody will be a free and voluntary product of the exercise of the confessor's will and that derivative evidence obtained therefrom will not suffer the taint of a police intrusion upon the will of the accused. Accordingly, logic and good sense dictate that the same rule governing admissibility of derivative evidence be applied in a case involving a confession obtained by psychological overbearing as is applied to a confession obtained by physical coercion. The result is identical—the information gleaned is tainted evidence. The applicable rule of admissibility should be identical, too.

NEW LOOK AT CONFESSIONS, *supra* note 94, at 142.

[227] California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam); *see, e.g.*, United States v. Gale, 952 F.2d 1412, 1414–17 (D.C. Cir. 1992) (holding that suspect's remarks about possession of drugs and the drugs themselves were admissible when he was not in custody at time of police interrogation), *cert. denied*, 112 S. Ct. 1302 (1992).

[228] *Quarles*, 467 U.S. at 655–56; *see, e.g.*, Fleming v. Collins, 954 F.2d 1109, 1112–14 (5th Cir. 1992) (en banc) (holding that police interrogation without *Miranda* warnings about location of gun permissible under "public safety" exception).

[229] *See, e.g.*, United States v. Valencia, 558 F Supp. 1270, 1274–75 (E.D.N.Y. 1983) (ruling that drugs discovered as a result of suspect's voluntary statements to police are admissible), *aff'd*, 742 F.2d 1443 (2d Cir. 1984); State v. Golman, 536 So. 2d 481, 490 (La. Ct. App. 1988) (stating that gun discovered as a result of volunteered confession, following valid waiver of *Miranda* rights, admissible), *cert. denied*, 493 U.S. 832 (1989);

question other inmates about the fruits of a crime without reading the *Miranda* warnings.[230]

Even when the police fail to read the *Miranda* warnings to a person in custody, the prosecution can introduce derivative evidence if the evidence was in fact discovered independent of the misconduct[231] or would have been inevitably discovered through lawful means already being pursued when the illegality occurred.[232] Derivative evidence will also be admissible if the connection between the illegal conduct and the acquisition of the evidence was so attenuated that the taint of the unlawful acts was dissipated.[233]

C. *Whither Went* Nardone?

The Supreme Court in *Elstad* refused to apply the poisonous tree doctrine to *Miranda* violations because the police did not violate a constitutional right.[234] However, the objective of the poisonous tree doctrine—effective deterrence of police misconduct—is equally applicable when the offending conduct fails to rise to the level of a constitutional violation as when it does. In both situations, the offending officers and their counterparts will be effectively deterred from committing future misconduct only if the derivative evidence is suppressed.[235]

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see Miranda v. Arizona, 384 U.S. 436, 478 (1966) (holding that volunteered statements of any kind are a proper element of law enforcement and are not barred by the Fifth Amendment).

230 Illinois v. Perkins, 496 U.S. 292, 294 (1990).

231 Murray v. United States, 487 U.S. 533, 537–39 (1988); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

232 Nix v. Williams, 467 U.S. 431, 444 (1984); *see, e.g.*, United States v. Lee, 699 F.2d 466, 469 (9th Cir. 1982) (holding that defendant's shoes discovered as a result of his confession in violation of *Miranda* were admissible under inevitable discovery doctrine); State v. Miller, 709 P.2d 225, 242–44 (Or. 1985) (stating that deceased victim's body discovered as a result of defendant's statements in violation of *Miranda* was admissible under inevitable discovery doctrine), *cert. denied*, 475 U.S. 1141 (1986).

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

234 Oregon v. Elstad, 470 U.S. 298, 317–18 (1985).

235 *Nix*, 467 U.S. at 442–43. When the police fail to honor a suspect's request to remain silent or for assistance of counsel—unlike the situation where the police only fail to read the *Miranda* warnings in the first place—a constitutional violation *has* occurred. Wainwright v. Greenfield, 474 U.S. 284, 293 (1986); Shea v. Louisiana, 470 U.S. 51, 52 (1985); Edwards v. Arizona, 451 U.S. 477, 484–86 (1981); Fare v. Michael C., 442 U.S. 707, 719 (1979). Even under the *Elstad* Court's view of *Miranda*, nontestimonial fruit must be suppressed in order to deter future constitutional violations. *See, e.g.*, United States v. Downing, 665 F.2d 404, 408 (1st Cir. 1981); People v. Winsett, 583 N.E.2d 589, 595–96 (Ill. App. Ct. 1991); State v. Miller, 709 P.2d 225, 241 (Or. 1985), *cert. denied*, 475 U.S. 1141 (1986); State v. Sampson, 808 P.2d 1100, 1116 & n.27 (Ut. App. 1991) (on rehearing), *cert. denied*, 817 P.2d 327 (Ut. 1991); *see Elstad*, 470 U.S. at 312 n.3

Ironically, the Supreme Court applied the poisonous tree doctrine to a *non*constitutional violation in the seminal case on the doctrine itself, *Nardone v. United States*.[236] The Court ruled that the government's violation of the federal wiretapping statute implicated the poisonous tree doctrine.[237] As a result, the government was precluded from using illegal wiretap messages not only as direct proof of guilt, but also as a basis to build a case against the defendant on retrial.[238] Permitting the accused "to examine the prosecution as to the uses to which it had put the information,"[239] the Court said, "[t]o forbid the direct use of [illegally obtained evidence] but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty '"[240] The Court's ruling in *Nardone* shows that the poisonous tree doctrine is concerned with the lawlessness of official conduct, not with its constitutional significance.

Nardone is not an aberration. The Court again applied the poisonous tree doctrine to a *non*constitutional violation in *Harrison v. United States*.[241] The Court ruled that when the prosecution introduces a defendant's confession at trial in violation of *Mallory v. United States*,[242] and the defendant is compelled to testify in rebuttal, the testimony is the fruit of the inadmissible confession and cannot be used on retrial.[243] The *Mallory* exclusionary rule, which requires suppression of a confession obtained during an unnecessary delay in bringing a suspect before a judicial officer after arrest, is based on Federal Rule of Criminal Procedure 5(a) and the Court's supervisory powers over the administration of criminal justice in federal courts. Like *Nardone*, *Harrison*

(suggesting that poisonous tree doctrine would apply to cases in which the police ignored a suspect's invocation of right to remain silent or to have counsel present and subjected him to continued interrogation). The same rule should be applicable when the police interrogate a suspect without obtaining a valid waiver of *Miranda* rights. *See, e.g., In re* Appeal No. 245 (75) from Circuit Court for Kent County, 349 A.2d 434, 444–47 (Md. Ct. Spec. App. 1975).

[236] 308 U.S. 338 (1939). It is telling that the *Elstad* Court never mentions *Nardone*. Instead, the Court asserts that the figure of speech—"fruit of the poisonous tree"—is drawn from Wong Sun v. United States, 371 U.S. 471 (1963). *Elstad*, 470 U.S. at 305.

[237] *Nardone*, 308 U.S. at 340–41.

[238] *Id.* at 341.

[239] *Id.* at 339.

[240] *Id.* at 340.

[241] 392 U.S. 219 (1968).

[242] 354 U.S. 449 (1957).

[243] Harrison v. United States, 392 U.S. 219, 222 (1968). The *Harrison* Court found that the defendant testified "to overcome the impact of confessions illegally obtained and hence improperly introduced" and thus the testimony was "tainted by the same illegality that rendered the confessions themselves inadmissible." *Id.* at 223.

demonstrates that the rationale of the poisonous tree doctrine fully applies to police misconduct that does not rise to the level of a constitutional violation.[244]

Once the underlying premise of the poisonous tree doctrine is accepted, no logical basis exists for refusing to apply the doctrine to *Miranda* violations. Indeed, if Congress had required the police to read the *Miranda* warnings, rather than the Supreme Court itself, *Nardone* and *Harrison* would be controlling and mandate exclusion of derivative evidence.[245] The fact that the warnings are instead "judicially-created protections"[246] should not change that result, unless the Court is willing to acknowledge, at great expense to its own prestige and constitutional standing, that its own rules demand less respect than corresponding statutory rules.

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[244] In Oregon v. Elstad, 470 U.S. 298, 316–17 (1985), the majority cites *Harrison* for the following proposition: "If the prosecution has actually violated the defendant's Fifth Amendment rights by introducing an inadmissible confession at trial, compelling the defendant to testify in rebuttal," the prosecution is prohibited from using that testimony on retrial. The *Elstad* majority fails to recognize, however, that *Harrison* did not involve a Fifth Amendment violation.

[245] Congress has, in fact, legislated the *Miranda* warnings *and* a derivative evidence rule for the military. *See infra* notes 306–19 and accompanying text.

The American Law Institute's *Model Code of Pre-Arraignment Procedure* recommends that the fruits of statements obtained without adequate warnings should be suppressed:

> If a statement is obtained in such a manner that it would be subject to suppression pursuant to Sections 150.2 and 150.3, and if as a result of such statement other evidence is discovered subsequently and offered against the defendant, such evidence shall be subject to suppression unless the prosecution establishes that such evidence would probably have been discovered by law enforcement authorities irrespective of such statement and the court finds that exclusion of such evidence is not necessary to deter violations of this Code.

A.L.I. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 150.4 at 70–71 (1975) (Proposed Official Draft Complete Text and Commentary); *see also id.* at 410 (commentary on § 150.4) ("[I]f the purpose of the exclusionary rule is to deter unacceptable police behavior, then the exclusion of fruits may also be necessary to achieve this deterrence."). The statement of a suspect or an arrested person will be suppressed under §§ 150.2 and 150.3 if he was not provided *Miranda*-type warnings: that "he is not obliged to say anything, and anything he says may be used in evidence against him," "he will not be questioned unless he wishes, he may consult a lawyer before being questioned and he may have a lawyer present during any questioning," and that "if he wishes to consult a lawyer or to have a lawyer present during questioning, but is unable to obtain one, he will not be questioned until a lawyer has been provided for him; such advice shall also include information on how he may arrange to have a lawyer so provided." *Id.* at §§ 120.8(1)(d), 140.8(1), 150.2(3). The violation also must be "substantial" or otherwise prohibited by the Constitution. *Id.* at § 150.3(1).

[246] Michigan v. Harvey, 494 U.S. 344, 351 (1990).

Even if the *Elstad* Court were justified in concluding that certain official misconduct should not implicate the poisonous tree doctrine, a *Miranda* violation should not fall in that category A *Miranda* violation represents a failure to adhere to the Supreme Court's own rules designed to safeguard the Fifth Amendment privilege against compulsory self-incrimination.[247] Such impropriety cannot be understated. The accused will be interrogated in an inherently coercive setting without the assistance of counsel; without knowing that he may remain silent in the face of accusations; without appreciating that the interrogators must honor that right and stop all questioning; and without understanding that all statements, if volunteered, can be used against him.[248] The gravity of this misconduct begs for a broad application of the poisonous tree doctrine.[249]

D. *Two-Tier Analysis*

From a practical perspective, the analytical framework for assessing whether nontestimonial fruits of a *Miranda* violation should be suppressed is anachronistic and unfairly skewed against defendants. The Supreme Court has constructed a two-tier approach. First, a trial court must determine whether the police improperly interrogated a suspect in custody without first reading the *Miranda* warnings.[250] If so, the confession is presumed to be coerced and must be excluded.[251] Then, the trial court must engage in fact-finding to determine whether, based on the totality of the circumstances, the confession was in fact "voluntary" under the Fifth Amendment.[252] Only upon a finding of "actual" coercion will the nontestimonial fruits be inadmissible.[253]

This two-tier approach introduces the shortcomings of the "old" voluntariness standard that existed before *Miranda* into the derivative evidence

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[247] Arizona v. Roberson, 486 U.S. 675, 680–81 (1988).

[248] Miranda v. Arizona, 384 U.S. 436, 468–70 (1966). "Very, very few individuals know their constitutional rights concerning the making of a confession of guilt to a crime." AUBRY & CAPUTO, *supra* note 25, at 34.

[249] Ironically, the Court's refusal to apply the poisonous tree doctrine to *Miranda* violations will hurt those who most need to be advised of their rights—first-time arrestees and the mentally ill.

[250] *See* United States v. Gonzalez-Sandoval, 894 F.2d 1043, 1046–47 (9th Cir. 1990); United States v. Sangineto-Miranda, 859 F.2d 1501, 1515–16 (6th Cir. 1988).

[251] Oregon v. Elstad, 470 U.S. 298, 317 (1985).

[252] *See Gonzalez-Sandoval*, 894 F.2d at 1048; *Sangineto-Miranda*, 859 F.2d at 1517

[253] *See Gonzalez-Sandoval*, 894 F.2d at 1048; *Sangineto-Miranda*, 859 F.2d at 1517; United States v. Bengivenga, 845 F.2d 593, 601 (5th Cir. 1988) (en banc), *cert. denied*, 488 U.S. 924 (1988).

analysis.[254] Instead of implementing the poisonous tree doctrine in a practical and straightforward way, trial courts are required to expend additional time and effort in "making difficult determinations of voluntariness."[255] Although trial courts are not unfamiliar with the voluntariness test,[256] they can no longer simply focus on whether the suspect was in custody and the *Miranda* warnings were read. They must conduct additional, time-consuming, fact-finding hearings to determine all the circumstances surrounding the interrogation and make judgments about the suspect's ability to give a voluntary confession.[257] All of this comes at a time when trial courts are already overburdened with criminal cases resulting from the so-called "war on drugs."

Moreover, the voluntariness standard provides defendants with very little protection against the erroneous admission of tainted evidence. Because the standard relies so heavily on a "swearing contest" about events that occurred in secret, trial courts in the vast majority of cases can be expected to find the police more credible than defendants and to resolve voluntariness questions in favor of the government.[258]

The standard's inherent bias against defendants will no doubt further encourage the police to ignore the *Miranda* warnings in their search for nontestimonial evidence. An interrogator seeking derivative evidence is not likely to view the voluntariness standard as a barrier to admission of such evidence. Indeed, the interrogator may even view the standard as an invitation to bring considerable pressure to bear on the accused in the hope of discovering some hidden fruit. Consequently, the re-emergence of the "old" due process voluntariness standard may be accompanied by an increase in the number of coerced confessions.[259]

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[254] *See* Shapiro, *supra* note 200, at 340–41. For a discussion of the limitations of the "old" voluntariness standard, see *supra* notes 64–74 and accompanying text.

[255] Minnick v. Mississippi, 498 U.S. 146, 149 (1990).

[256] The "voluntariness" standard is still relevant in several situations. *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 423 (1986) (holding that waiver of *Miranda* rights must be voluntary); Harris v. New York, 401 U.S. 222, 226 (1971) (holding that statement elicited in violation of *Miranda* must be voluntary before it can be used to impeach defendant's trial testimony).

[257] *See* United States v. Griffin, 922 F.2d 1343, 1355 (8th Cir. 1990) ("The motivation and purpose of the *Miranda* opinion, as well as the ease of its application, are undermined if its effect is to simply substitute the endless chain of voluntariness questions that crowded court dockets prior to its announcement with a new class of case-by-case determinations "); United States v. Carter, 884 F.2d 368, 374 (8th Cir. 1989).

[258] Schulhofer, *supra* note 65, at 870–71.

[259] *See, e.g.*, United States v. Rullo, 748 F Supp. 36, 39 (D. Mass. 1990) (stating that police officers punched and kicked apprehended suspect in an effort to locate gun); *see* Schulhofer, *supra* note 65, at 871–72. Police coercion of witnesses and suspects—even physical brutality—continues to exist as an ugly remnant of the past. *See, e.g.*, United States v. Jenkins, 938 F.2d 934, 936–37 (9th Cir. 1991) (holding that confession was involuntary

Unlike the two-tier approach, the poisonous tree doctrine has the virtue of being easily understood and applied. Police officers who ignore the *Miranda* warnings will know that both the confession and the nontestimonial fruits will be suppressed. Trial courts faced with *Miranda* violations will know that exclusion of the tainted derivative evidence is required. No additional fact-finding will be necessary Most importantly, a clear message will be sent to the police and prosecutors that the judiciary will not tolerate or reward police misconduct of this kind.

E. *Bright-Line Rules for Police*

The Court in *Elstad* also refused to apply the poisonous tree doctrine to *Miranda* violations in the belief that police officers sometimes err in deciding when a person is in custody for purposes of reading the warnings.[260] The Court believes such errors should not "breed the same irremediable consequences" as police infringement of the Fifth Amendment itself.[261]

There can be little dispute, however, that *Miranda* has provided clear guidelines to the police.[262] Even Justice O'Connor, the author of *Elstad*, has

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when police officers threw defendant to the ground, repeatedly kicked him in the groin, stomach and back, and threatened him with death); Cooper v. Scroggy, 845 F.2d 1385, 1391 (6th Cir. 1988) (holding that confession was involuntary when detective struck defendant in the face and threatened him with further physical abuse); United States Attorney, District of Massachusetts, Press Release (July 10, 1991) (on file with author) (summarizing results of joint investigation by United States Attorney and Federal Bureau of Investigation into allegations that officers of the Boston Police Department violated federal civil rights statutes while investigating the homicide of Carol Stuart) (finding coercion and intimidation of civilian witnesses through the use of actual or implied threats of arrest, imprisonment and physical beatings; efforts to trick witnesses into adopting incriminating facts or information that were previously rejected; use of abusive, profane and threatening language to witnesses who were interrogated; and use of coerced statements within affidavits to obtain search warrants); REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (July 9, 1991) (investigation of excessive force by officers of the Los Angeles Police Department in the wake of the videotaped beating of Rodney King) (finding a significant number of officers who repetitively used excessive force against the public and a majority of civil lawsuits involving "clear and often egregious officer misconduct resulting in serious injury or death to the victim").

[260] Oregon v. Elstad, 470 U.S. 298, 309 (1985).

[261] *Id.*

[262] The Court in Arizona v. Roberson, 486 U.S. 675, 680 (1988) (citations omitted), recently observed: "A major purpose of the Court's opinion in *Miranda v. Arizona*, 384 U.S. at 441–42, was 'to give concrete guidelines for law enforcement agencies and courts to follow.' As we have stressed on numerous occasions, '[o]ne of the principal advantages' of *Miranda* is the ease and clarity of its application." *Accord*, Moran v. Burbine, 475 U.S. 412, 425 (1986); Fare v. Michael C., 442 U.S. 707, 718 (1979); *see also* Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring) ("The meaning of *Miranda* has

recognized this fact.[263] The long history of *Miranda* shows that police officers understand when the *Miranda* warnings are necessary Indeed, in the vast majority of cases, the need for the warnings is clear.[264]

The *Elstad* Court offered no evidence that most *Miranda* violations result from inadvertent error.[265] To be sure, occasional cases exist in which the police fail to read the *Miranda* warnings under the mistaken belief that they are not required. However, the possibility that police officers might occasionally err in deciding whether to read the warnings—which they could easily prevent by giving them in ambiguous situations[266]—should not justify abandoning the poisonous tree doctrine in all cases, including cases in which the police have deliberately committed a *Miranda* violation.

Significant irony exists in the Court's position. On the premise that the task of defining "custody" is a "slippery one,"[267] the Court is willing to substitute an amorphous voluntariness standard for the bright-line approach of the poisonous tree doctrine. The question of whether custodial interrogation has occurred is "much more focused than the voluntariness inquiry "[268] The

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become reasonably clear and law enforcement practices have adjusted to its strictures "); Schulhofer, *supra* note 65, at 879 ("*Miranda* certainly provided plenty of guidance for the police. There was some potential ambiguity at the fringes of 'custody' and 'interrogation,' but the Court had taken a big step toward clarifying the ground rules of permissible interrogation."); Minnick v. Mississippi, 498 U.S. 146, 150 (1990) (stating that "the *Edwards* rule provides 'clear and unequivocal' guidelines to the law enforcement profession") (citation omitted).

263 New York v. Quarles, 467 U.S. 649, 660 (1984) (O'Connor, J., concurring in part, dissenting in part) (noting *Miranda*'s "now clear strictures").

264 *Elstad*, 470 U.S. at 359 (Brennan, J., with whom Marshall, J., joins, dissenting). If the Court were truly concerned about the custody issue, it would alter *Miranda* itself rather than jettison the poisonous tree doctrine.

265 The Court has focused on the perception of the suspect, rather than on a police officer's motives for failing to read the warnings. "This focus reflects the fact that *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

266 As the Eighth Circuit has noted recently:

> We see no reason why doubts as to the presence or absence of custody should not be resolved in favor of providing criminal suspects with the simple expedient of *Miranda* warnings. As noted in the *Miranda* opinion, and as demonstrated by case law and legal authority appearing in the intervening years since the announcement of the *Miranda* decision, the effectiveness of law enforcement is not undermined by informing suspects of their rights.

United States v. Griffin, 922 F.2d 1343, 1356 (8th Cir. 1990) (citations omitted).

267 Oregon v. Elstad, 470 U.S. 298, 309 (1985).

268 Schulhofer, *supra* note 65, at 880.

custody issue is, in short, an insufficient justification for abandoning the poisonous tree doctrine.

F Elstad *Distinguished*

Despite the broad language in *Elstad* suggesting that the poisonous tree doctrine is inapplicable to all fruits of a *Miranda* violation, the decision is distinguishable from the opening example in one significant respect. After making an initial unwarned statement, the defendant in *Elstad* was read the *Miranda* warnings before confessing a second time.[269] The warnings conveyed to him the substance of his constitutional rights and enabled him to "exercise his own volition" in deciding whether to make a second statement to the police.[270] Thus, the warnings arguably were sufficient "to remove the [coercive] conditions that precluded admission of the earlier statement" and enabled the defendant to make a rational and informed choice whether to waive or invoke his rights.[271]

In the opening example of this Article, by contrast, Jones was never given the *Miranda* warnings before or during the interrogation. Unaware of his constitutional rights, he could not make a rational and intelligent decision to waive his rights and reveal the location of the gun. Because there was nothing to remove the coercive conditions precluding admission of the suspect's statement, the derivative evidence must be suppressed as a product of that coercion.[272] *Elstad*, therefore, should not bar courts from suppressing nontestimonial fruits of a *Miranda* violation.[273]

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[269] *Elstad*, 470 U.S. at 301.

[270] *Id.* at 308–09, 314–15.

[271] *Id.* at 314. *Elstad* is distinguishable in a second respect from the opening example. In *Elstad*, there was no evidence that the defendant's second confession was motivated by his first statement. In the opening example, by contrast, the police learned of the location of the weapon as a direct result of the suspect's unwarned statement.

[272] The Supreme Court of New Hampshire recently recognized this distinguishing feature of *Elstad*. State v. Gravel, 601 A.2d 678, 684 (N.H. 1991).

[273] Even assuming *Elstad* should be read broadly to permit the introduction of nontestimonial fruits of a *Miranda* violation, state courts may suppress such evidence as a matter of state law. Each state remains free to hold that its privilege against self-incrimination or a state poisonous tree doctrine provides greater protection than their federal counterparts. *See, e.g.*, State v. Gravel, 601 A.2d 678, 682–86 (N.H. 1991) (holding that defendant's statements in violation of *Miranda* cannot be relied upon to establish probable cause for issuance of search warrant; tangible evidence found during execution of search warrant suppressed under New Hampshire's guarantee against compelled self-incrimination). *See generally* Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting) ("Each State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution."); Mary A. Crossley, Note,

II. THE FIFTH AMENDMENT AND NONTESTIMONIAL FRUIT

As explained earlier, Justice O'Connor argued in *New York v. Quarles*[274] that nontestimonial fruits of a *Miranda* violation should be admissible.[275] Relying on Fifth Amendment case law, she argued that *Miranda*, like the Fifth Amendment, should only protect a suspect from being compelled to testify against himself or otherwise give evidence of a testimonial or communicative nature; *Miranda* should not prohibit the police from using compelled statements to discover nontestimonial fruits.[276]

Justice O'Connor relies on an overly narrow reading of the Fifth Amendment to limit the scope of the *Miranda* exclusionary rule. The Fifth Amendment protects a suspect from being compelled to testify against himself or to provide evidence of a testimonial or communicative nature.[277] The Fifth Amendment also prohibits the use of compelled communications against the accused *in any way*.[278] The Fifth Amendment "contains a self-executing rule

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Miranda and the State Constitution: State Courts Take a Stand, 39 VAND. L. REV 1693 (1986).

Several state supreme courts have also taken a first step in that direction, refusing to follow the reasoning of *Elstad* as a matter of state law. Commonwealth v. Smith, 593 N.E.2d 1288 (Mass. 1992); State v. Smith, 834 S.W.2d 915 (Tenn. 1992); People v. Bethea, 493 N.E.2d 937 (N.Y. 1986). In *Bethea*, the Court of Appeals of New York ruled that the state privilege against self-incrimination would have "little deterrent effect if the police [knew] that as part of a continuous chain of events" they could first question a suspect in custody without the *Miranda* warnings and then seek a subsequent confession after the warnings had been given. *Bethea*, 493 N.E.2d at 938. Confronted with the opening example, the Court of Appeals of New York would likely suppress the nontestimonial fruits on a similar basis—to deter police misconduct and thus to ensure that suspects' Fifth Amendment rights are respected. *See also* People v. Quarles, 444 N.E.2d 984, 985 (N.Y. 1982) (requiring suppression of nontestimonial fruit of a *Miranda* violation), *rev'd on other grounds*, New York v. Quarles, 467 U.S. 649 (1984); People v. Paulin, 255 N.E.2d 164, 167 (N.Y. 1969) (holding that police officer's failure to respect defendant's request for counsel following reading of *Miranda* warnings required suppression of tangible fruit of interrogation, a metal cooking pot allegedly used to murder husband). *But see* People v. Holmes, 536 N.Y.S.2d 289, 291 (N.Y. App. Div. 1988) (admitting knife sheath discovered as a result of a confession obtained without *Miranda* warnings), *appeal denied*, 547 N.E.2d 957 (N.Y. 1989).

274 467 U.S. 649 (1984).

275 *Id.* at 667–74 (O'Connor, J., concurring in part, dissenting in part); *see supra* notes 173–92 and accompanying text.

276 *Quarles*, 467 U.S. at 665–74.

277 *See* Schmerber v. California, 384 U.S. 757, 761 (1961).

278 Kastigar v. United States, 406 U.S. 441, 453 (1972) (The Fifth Amendment "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect."); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).

commanding the exclusion of evidence derived from [compelled] communications."[279] Thus, the police are prohibited from using compelled statements to gather evidence, including nontestimonial fruits, for use at trial.[280] The Fifth Amendment is inapplicable only when nontestimonial evidence is divorced from a testimonial or communicative act.[281]

Far from supporting Justice O'Connor, *Schmerber v. California*[282] actually undermines her position. In *Schmerber*, the Court ruled that state officials could extract a blood sample from a suspect in order to determine the chemical

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[279] Oregon v. Elstad, 470 U.S. 298, 350 (1985) (Brennan, J., dissenting).

[280] *See, e.g.*, Maness v. Meyers, 419 U.S. 449, 461 (1975); Lefkowitz v. Turley, 414 U.S. 70, 78 (1973); *Kastigar*, 406 U.S. at 453; Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

[281] *See, e.g.*, Pennsylvania v. Muniz, 496 U.S. 582, 593–600 (1990); Doe v. United States, 487 U.S. 201, 209–10 n.8 (1988); United States v. Dionisio, 410 U.S. 1, 7 (1973); Gilbert v. California, 388 U.S. 263, 266–67 (1967).

If a suspect—without a verbal response—shows police officers where physical evidence is located or produces the evidence in response to custodial interrogation in violation of *Miranda*, both the act of revealing the location of the evidence or the act of producing it and the physical evidence itself should be suppressed under the Fifth Amendment. The Supreme Court has held that the act of producing physical evidence constitutes testimonial communications protected under the Fifth Amendment when the act entails implicit assertions of fact or discloses information. *Doe*, 487 U.S. at 209; United States v. Doe, 465 U.S. 605, 612 (1984); Fisher v. United States, 425 U.S. 391, 410 (1976). The suspect's act of producing the nontestimonial evidence would convey to the police that the evidence existed and that the suspect knew the evidence existed and where it was located. People v. Hoffman, 419 N.E.2d 1145, 1149 (Ill. 1981) (holding that defendant's nonverbal act of leading police to pistol in response to custodial interrogation without *Miranda* warnings was testimonial in nature and must be suppressed); *In re* Owen F., 523 A.2d 627, 630 (Md. Ct. Spec. App. 1987) (ruling that defendant's nonverbal act of gesturing to location of bag in response to custodial interrogation without *Miranda* warnings was inadmissible admission), *cert. denied*, 528 A.2d 1286 (Md. 1987); State v. Wethered, 755 P.2d 797, 798–800 (Wash. 1988) (en banc) (stating that defendant's nonverbal act of producing hashish in response to custodial interrogation without *Miranda* warnings was testimonial in nature and must be suppressed); State v. Moreno, 585 P.2d 481, 483 (Wash. Ct. App. 1978) (holding that defendant's nonverbal act of producing three baggies of cocaine from his person in response to custodial interrogation without *Miranda* warnings was testimonial and must be suppressed), *rev. denied*, 91 Wash. 2d 1014 (1979); *see Doe*, 487 U.S. at 209; *Doe*, 465 U.S. at 613 n.11; *Fisher*, 425 U.S. at 409–10. For the reasons stated in Part I, the physical evidence itself also must be suppressed as the fruit of this compelled testimonial communication. *See Hoffman*, 419 N.E.2d at 1149 (ruling that pistol that suspect revealed to police in response to custodial interrogation without *Miranda* warnings was suppressed as fruit of unwarned interrogation); State v. Preston, 411 A.2d 402, 408 (Me. 1980) (stating that mattresses that suspect delivered to police in response to custodial interrogation without *Miranda* warnings were suppressed as fruit of unwarned interrogation).

[282] 384 U.S. 757 (1966).

makeup of his blood and thereby draw an inference about his state of intoxication.[283] The state's compulsion failed to implicate the Fifth Amendment not only because the evidence was nontestimonial, but also because "the evidence was *obtained* in a manner that did not entail any testimonial act on the part of the suspect."[284] As the Court in *Schmerber* noted, "Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated."[285] The post-*Schmerber* cases reflect this crucial distinction between a suspect being compelled himself to serve as evidence, and a suspect being compelled to disclose or communicate information that might serve as or lead to incriminating nontestimonial evidence.[286]

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[283] *Id.* at 761.

[284] Pennsylvania v. Muniz, 496 U.S. 582, 593 (1990).

[285] *Schmerber*, 384 U.S. at 765.

[286] *See, e.g.*, *Muniz*, 496 U.S. at 593 ("This compulsion [in *Schmerber*] was outside of the Fifth Amendment's protection, not simply because the evidence concerned the suspect's physical body, but rather because the evidence was *obtained* in a manner that did not entail any testimonial act on the part of the suspect "); Doe v. United States, 487 U.S. 201, 211 n.10 (1988) (The *Schmerber* line of cases "distinguished between the suspect's being compelled himself to serve as evidence and the suspect's being compelled to disclose or communicate information or facts that might serve as or lead to incriminating evidence.").

Justice O'Connor's attempt to limit the Court's prior Fifth Amendment cases prohibiting the use of compelled confessions and their fruits to those situations where a person is compelled to appear before "a court or other tribunal vested with the contempt power" is unconvincing. New York v. Quarles, 467 U.S. 649, 669 (1985); *see supra* note 188. The Fifth Amendment exclusionary rule applies not only in such "formal" proceedings, but also in custodial interrogations. Kastigar v. United States, 406 U.S. 441, 444 (1972); Miranda v. Arizona, 384 U.S. 436, 467 (1966).

Although Justice O'Connor is correct that custodial interrogation does not subject the accused to the cruel trilemma of self-accusation, perjury or contempt, custodial interrogation raises analogous choices and concerns. *Muniz*, 496 U.S. at 596-97 & n.10. For instance, the pressure to respond flows from the inherently coercive environment of custodial interrogation rather than the threat of contempt sanctions. *Id.* at 598-99; *Miranda*, 384 U.S. at 467 Moreover, false testimony may give rise to indirect sanctions—for instance, "the prosecution might later prove at trial that the suspect lied to the police, giving rise to an inference of guilty conscience." *Muniz*, 496 U.S. at 597 n.10. Thus, the suspect faced with custodial interrogation confronts a "modern-day analog" of the cruel trilemma of truth, falsity or silence just as surely as the person compelled to speak before a tribunal with the contempt power. *Id.* at 596.

Justice O'Connor apparently now agrees with this assessment, given her agreement with Part III-B of Justice Brennan's opinion in *Muniz*. Justice Brennan indicated there that, despite the differences between official proceedings and custodial interrogations, "'all the principles embodied in the privilege apply to informal compulsion exerted by law-

In support of her position, Justice O'Connor relied on dicta in *Schmerber* indicating that nontestimonial evidence is admissible even when the state's compulsion also produces testimonial evidence.[287] But the compelled statements in *Schmerber*, unlike the statement in the opening example, are *not* exploited to reveal nontestimonial evidence. State officials can extract the suspect's blood regardless of any statements he makes. The statements are nothing more than a by-product of administering the blood test. They do not, as in the opening example, enable the police to *uncover* incriminating evidence.

Even if the Fifth Amendment only protected a suspect's communications, as Justice O'Connor argues, the poisonous tree doctrine would require suppression of nontestimonial fruits. When the police coerce a suspect to reveal the whereabouts of physical evidence, such evidence must be suppressed in order to deter future constitutional violations.[288] For the reasons discussed in Part I above, when the police fail to read a suspect the *Miranda* warnings and use the suspect's statements to discover nontestimonial evidence, the fruits must be suppressed in order to deter future *Miranda* violations.[289]

Finally, Justice O'Connor has looked to the experience of foreign countries to limit the scope of the *Miranda* exclusionary rule.[290] She is correct in that the learning of countries like England, Scotland and India was "important to the development of the initial *Miranda* rule."[291] Those countries had adopted similar procedural rules to regulate the methods that the police used to secure confessions from suspects.[292]

Justice O'Connor errs, however, in suggesting that the Court in *Miranda* looked to foreign rules in determining the *maximum* protections to be afforded defendants in the United States.[293] The Court did not feel compelled to mimic those rules, noting that the foreign rules gave "*at least as much protection* to [Fifth Amendment] rights as is given in the jurisdictions described."[294] Rather, the Court looked to foreign law as a way of ascertaining whether its own new restrictions would have an adverse impact on criminal law enforcement.[295] Finding "no marked detrimental effect" on law enforcement in any foreign

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enforcement officers during in-custody questioning.'" *Id.* at 596 n.10 (quoting *Miranda*, 384 U.S. at 461).

287 *Quarles*, 467 U.S. at 667–68 (quoting *Schmerber*, 384 U.S. at 765 n.9); *see supra* note 184.

288 Justice O'Connor appears to concede this point, given her recognition of a "broader exclusionary rule" covering evidentiary fruits in cases of actual coercion. *Quarles*, 467 U.S. at 672; *see supra* note 226.

289 *See supra* notes 196–273 and accompanying text.

290 *Quarles*, 467 U.S. at 672–73; *see supra* notes 189–92 and accompanying text.

291 New York v. Quarles, 467 U.S. 649, 673 (1985).

292 *Id.* (citing *Confessions*, *supra* note 39, at 1090–1114).

293 *Id.*

294 Miranda v. Arizona, 384 U.S. 436, 489 (1966) (emphasis added).

295 *Id.* at 486–89.

jurisdiction, the Court concluded that lawlessness would not result in this country from requiring police to warn suspects of their Fifth Amendment rights and allowing them to exercise those rights.[296]

Justice O'Connor's reliance on foreign law as compelling authority for limiting the scope of the *Miranda* exclusionary rule must be rejected for a more fundamental reason.[297] Foreign law cannot serve as an appropriate reference for an American standard, for the legal traditions of other countries in the area of criminal law differ markedly from the United States. In England and other common-law countries, for instance, courts generally do not believe that illegally obtained evidence should be excluded in order to deter police misconduct.[298] As one court noted pithily, "It is not the function of the court to exclude evidence in order to discipline the police."[299] The tradition of England and other common-law countries has been to exclude tainted evidence only when it is considered unreliable and to leave the punishment of police wrongdoing to separate proceedings.[300] Given this history, it is not surprising that derivative evidence often is admitted regardless of police misconduct.[301]

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[296] *Id.* at 489.

[297] New York v. Quarles, 467 U.S. 649, 673 (1984).

[298] *See* J.B. Dawson, *The Exclusion of Unlawfully Obtained Evidence: A Comparative Study*, 31 INT'L & COMP L.Q. 513, 536–37, 547 (1982); STEPHEN MITCHELL ET AL., ARCHBOLD—PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES §§ 15-82, 15-93 (43rd ed. 1988); GERALD A. BEAUDOIN & ED RATUSHNY, THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 825, 835–36 (2d ed. 1989).

[299] R. v. Dickson, 4 C.R.D. 850.60-01 (Ont. Co. Ct. 1984); *see also* R. v. Collins, 1 S.C.R. 265, 268 (Can. Sup. Ct. 1987).

[300] *See* Dawson, *supra* note 298, at 547; BEAUDOIN & RATUSHNY, *supra* note 298, at 825.

[301] *See, e.g.*, Police and Criminal Evidence Act, 1984, § 76(4)(a) (Eng.), *reprinted in* 17 HALISBURY STATUTES OF ENGLAND AND WALES § 76 (1986) ("The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence of any facts discovered as a result of the confession."); The King v. Warickshall, 168 Eng. Rep. 234 (K.B. 1783). However, Canadian courts have recently excluded derivative evidence under the Canadian Charter of Rights and Freedoms. *See* P.K. MCWILLIAMS, CANADIAN CRIMINAL EVIDENCE § 3:10800 (3d ed. 1991). Moreover, English and Scottish courts have discretion to exclude such evidence when police misconduct threatens the fairness of the criminal proceedings. *See* Police and Criminal Evidence Act § 78(1) ("In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."); MICHAEL ZANDER, THE POLICE AND CRIMINAL EVIDENCE ACT OF 1984 116–17 (1985); B. MIRFIELD, CONFESSIONS 168 (1985); DAVID FIELD, THE LAW OF EVIDENCE IN SCOTLAND 315–16 (1988); Scottish Law Commission, Memo No. 46 (Law of Evidence) ¶ U21.02–.04 (Sept. 4, 1980); Department Comm. on Criminal Procedure in Scotland (2d Report) (Cmnd. 6218) ¶ 7.27 (1975).

This is in stark contrast with the experience in the United States. The Supreme Court has long played a paramount role in ensuring that the police comply with constitutional protections.[302] For nearly a century, the Court has believed that the most effective way to prevent lawless police activities is to enforce an exclusionary rule.[303] Thus, the primary reason for excluding evidence obtained by illegal means has been to discourage police abuses.[304] The probative value of the evidence has not been considered sufficient to overcome the need for deterrence.[305]

For a more appropriate analogy, Justice O'Connor should look to the experience of the United States military.[306] The military provides an appropriate comparison because the Fifth Amendment protections afforded suspects in the military essentially are identical to those afforded to civilians. Service personnel are protected from being compelled to incriminate themselves under the Fifth Amendment and Article 31(a) of the Uniform Code of Military Justice.[307] If an officer intends to interrogate[308] a suspect[309] about an offense, the officer must first give the *Miranda* warnings[310] and advise the suspect of the statutory rights set forth in Article 31(b).[311] The *Miranda* and

[302] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391–92 (1920); Weeks v. United States, 232 U.S. 383, 398 (1914); Bram v. United States, 168 U.S. 532, 542–43 (1897).

[303] *Weeks*, 232 U.S. at 398.

[304] *See, e.g.*, Illinois v. Krull, 480 U.S. 340, 347 (1987) (stating that "prime purpose" of exclusionary rule is to deter "future unlawful police conduct"); Nix v. Williams, 467 U.S. 431, 442–43 (1984); Elkins v. United States, 364 U.S. 206, 217 (1960).

[305] *See, e.g.*, Rogers v. Richmond, 365 U.S. 534, 541 (1961).

[306] The Court in *Miranda* reviewed the rules prevailing in the military to assess the danger to law enforcement from curbs on interrogation. Miranda v. Arizona, 384 U.S. 468, 489 (1966).

[307] Uniform Code of Military Justice, Art. 31(a), 10 U.S.C. § 831(a) (1983) [hereinafter U.C.M.J.] ("No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.").

[308] "Interrogation includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." MIL. R. EVID. 305(b)(2), *reprinted in* STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL (3d ed. 1991).

[309] A suspect is a service member whom the military questioner believes or reasonably should believe committed an offense under the Code. United States v. Hilton, 32 M.J. 393, 396 (C.M.A. 1991); United States v. Good, 32 M.J. 105, 108 (C.M.A. 1991).

[310] United States v. Tempia, 16 C.M.A. 629 (C.M.A. 1967).

[311] Article 31(b) of the U.C.M.J. requires a military interrogator, prior to any questioning, to inform the suspect "of the nature of the accusation and advis[e] him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial."

Article 31(b) warnings are normally merged so that the suspect is advised that he has the right to remain silent, and that any statement he makes can be used as evidence against him.[312] The suspect is also advised of the right to have counsel appointed, to consult with counsel, and to have counsel present during questioning.[313] Once proper warnings are given, the suspect's statements will be admissible only if he has validly waived his rights and voluntarily chosen to speak.[314] If the suspect indicates a desire to stop talking or to see counsel at any time during questioning, the interrogation must cease until counsel has been provided or the suspect himself initiates further conversation.[315]

When an officer fails to give the appropriate warnings, the suspect's subsequent statements are deemed involuntary and will be suppressed.[316] More

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[312] *See* MIL. R. EVID. 305(c); DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE & PROCEDURE § 5-2(B), at 157 (2d ed. 1987). The warnings are not required when public safety is of concern. United States v. Jones, 26 M.J. 353, 357 (C.M.A. 1988).

[313] *See* MIL. R. EVID. 305(d). If the interrogator knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect, counsel must be notified of the intended interrogation and be given a reasonable time to attend before questioning begins. *Id.* at 305(e). Failure to provide such notice to counsel may result in an inadmissible statement. *Id.* at 305(a).

[314] MIL. R. EVID. 305(g). The confession must also satisfy the due process requirement of voluntariness. *Id.* at 304(a), 304(c)(3); United States v. Butner, 15 M.J. 139, 143 (C.M.A. 1983) (threats rendered statement involuntary). "An admission or confession may be considered evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth." MIL. R. EVID. 304(g). "Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence." *Id.* "The independent evidence [necessary to establish corroboration] need raise only an inference of the truth of the essential facts admitted." *Id.* at 305(g)(1). "It need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession." *Id.*

[315] MIL. R. EVID. 305(f).

[316] U.C.M.J., Art. 31(d) ("No statement obtained in violation of [Article 31], or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against a suspect in a trial by court-martial."); MIL. R. EVID. 304(a) ("[A]n involuntary statement may not be received in evidence against any accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule."); *id.* at 304(c)(3) ("A statement is 'involuntary' if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement."); United States v. Phillips, 32 M.J. 76, 78–79 (C.M.A. 1991) (failing to give Article 31 warnings results in involuntary statements which must be suppressed); United States v. McCoy, 31 M.J. 323, 328 (C.M.A. 1990).

The Military Rules of Evidence recognize several exceptions to the foregoing requirements. MIL. R. EVID. 304(b)(1) (statements that are involuntary only in terms of

importantly, military courts will also suppress "any derivative evidence,"[317] unless the prosecution can show that the evidence "was not obtained by use of the statement[s],"[318] or that the evidence "would have been obtained even if the statement[s] had not been made."[319] Thus, military courts faced with the opening example would exclude both the suspect's unwarned statements and the nontestimonial fruits, absent a sufficient showing that one of the exceptions is applicable.

The Supreme Court should emulate the military by ruling that nontestimonial evidence derived from statements in violation of *Miranda* should be suppressed as fruit of the poisonous tree. It would be anomalous indeed if civilians had fewer protections than those serving in the military

CONCLUSION

The Supreme Court would deliver a "crippling blow"[320] to *Miranda* if the prosecution were permitted to use nontestimonial fruits of a *Miranda* violation at trial. Without the sanction of the poisonous tree doctrine, the police would have much to gain and little to lose by interrogating suspects without reading the *Miranda* warnings. *Miranda* would be rendered a mere "form of words."[321]

The Supreme Court's current thinking about *Miranda* appears to reflect a dislike of that landmark ruling and a preference for the days when the police interrogated suspects without advising them of their rights. What can explain such a departure from long-standing precedent? Perhaps, the Court is heeding the calls of those who seek to expedite convictions of suspected criminals.[322]

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compliance with right to counsel warnings may be used to impeach defendant's in-court testimony or in a later prosecution for perjury, false swearing or the making of a false official statement); *id.* at 304(b)(2) ("[E]vidence that was obtained as a result of an involuntary statement may be used when the evidence would have been obtained even if the involuntary statement had not been made.").

317 MIL. R. EVID. 304(a); United States v. Churnovic, 22 M.J. 401, 407 (C.M.A. 1986) (failing to give a suspect the warnings required by Article 31(b) of the U.C.M.J. renders inadmissible any statement that may result and any evidence derived therefrom). *See* United States v. Haynes, 27 C.M.R. 60, 62 (C.M.A. 1958).

318 MIL. R. EVID. 304(b)(3).

319 *Id.*

320 Oregon v. Elstad, 470 U.S. 298, 319 (1985) (Brennan, J., dissenting).

321 Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (Holmes, J.).

322 However, the great weight of empirical evidence (although dated) indicates that *Miranda* has not had a significant impact on the police's ability to obtain confessions. White, *supra* note 1, at 19 n.99 (collecting studies); *see, e.g.*, Richard Medalie, et al., *Custodial Police Interrogation in Our Nation's Capitol: The Attempt to Implement* Miranda, 66 MICH. L. REV 1347 (1968); *Special Project, Interrogation in New Haven, The Impact of Miranda*, 76 YALE L. J. 1519 (1967); *see also* CRIMINAL JUSTICE IN CRISIS 33 (A.B.A.

The Court's departure also may be a response to the significant rate of crime in this country [323]

Whatever the motive, the Supreme Court must not forget that the *Miranda* warnings play a very important role in our criminal justice system. The warnings are not simply a protection for the guilty; they are an essential safeguard for the innocent. The innocent include suspects who, like Jones in the opening example, can identify the existence or location of physical evidence in response to police questioning.

If *Miranda* is to have any continuing efficacy, the Supreme Court must send a very different message to federal and state courts. Nontestimonial evidence derived from statements in violation of *Miranda* must be suppressed as fruit of the poisonous tree. This will ensure that the police have every incentive to obey the law while enforcing the law For "in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."[324]

Special Comm. on Criminal Justice in a Free Society) (1988) ("Both the public and the legal profession must be made aware that *Miranda*, however controversial it has been, has little effect on society's ability to deal with crime today. Its demise would do little to decrease crime or to improve the effectiveness of prosecutions. There should also be wider recognition of *Miranda*'s virtues. Although it does little to impede the police in their investigations, *Miranda* has a very important symbolic value, reminding police officers of the limits of their authority over suspects. It has also helped to professionalize police departments and very likely to reduce the incidence of physically coerced confessions.").

Moreover, studies indicate that the "costs" of the exclusionary rule are not substantial. *See, e.g.*, Craig D. Uchida & Timothy S. Bynum, *Search Warrants, Motions to Suppress and "Lost Cases" The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY 1034, 1064 (1991); Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 621 (1983); Peter F Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585 (1983).

[323] U.S. Bureau of the Census, Statistical Abstract of the United States: 1991 (111th ed.) Washington, D.C. 1991 (crime rates for 1985–89).

[324] Spano v. New York, 360 U.S. 315, 320–21 (1959).