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"CAT-OUT-OF-THE-BAG" & "BREAK-IN-THE-STREAM-OF-EVENTS": MASSACHUSETTS' REJECTION OF OREGON v. ELSTAD FOR SUPPRESSION OF WARNED STATEMENTS MADE AFTER A MIRANDA VIOLATION

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"CAT-OUT-OF-THE-BAG" & "BREAK-IN-THE-STREAM-OF-EVENTS": MASSACHUSETTS' REJECTION OF *OREGON v. ELSTAD* FOR SUPPRESSION OF WARNED STATEMENTS MADE AFTER A *MIRANDA* VIOLATION

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INTRODUCTION**

Central to our system of federalism is the concept that the United States Supreme Court stands as the final interpreter of the United States Constitution.[1] While

> a State is free *as a matter of its own law* to impose greater restrictions on police activity than those [the United States Supreme] Court holds to be necessary upon federal constitutional standards[2][,] . . . a State may not impose such greater restrictions as a matter of *federal constitutional law* when [the Supreme] Court

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** Parallel citations have been added to this article for the convenience of Massachusetts' practitioners.

1. *See* Welsh v. United States, 398 U.S. 333, 360 n.12 (1970) (Harlan, J., concurring) (stating that the United States Supreme Court, not the United States Congress, bears the paramount responsibility of construing the United States Constitution); Dixon v. Duffy, 344 U.S. 143, 145-46 (1952) (stating that the United States Supreme Court is the "ultimate arbiter" of this question: whether a state prisoner had been deprived of his federal constitutional rights, and adding that the Court will review a state court decision unless it rests upon an independent state ground); *see also* U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authorit[ies] . . . .").

2. Oregon v. Hass, 420 U.S. 714, 719 (1975) (citations omitted); *accord* Attorney General v. Colleton, 387 Mass. 790, 796, 444 N.E.2d 915, 919 (1982).

specifically refrains from imposing them.[3]

Principles of federalism dictate that, when the United States Supreme Court has defined the contours of law enforcement conduct, the several states must adhere to those precepts when applying federal law.[4]

Historically, the Supreme Court has recognized that the "state courts are the *ultimate expositors of state law* . . . except in extreme circumstances."[5] The Court has further realized that it is the "very essence of our federalism that the States should have the widest latitude in the administration of their own systems of criminal justice."[6] Nonetheless, the Court has long employed the Fourteenth Amendment of the United States Constitution to extend federal constitutional rights to defendants in state criminal cases.[7]

The Fourteenth Amendment has been the vehicle by which the Supreme Court has evaluated the voluntariness of confessions in

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3. *Hass*, 420 U.S. at 719 (footnote & citations omitted) (rejecting the defendant's contention that Oregon constitutional principles applied to the question which had been briefed and argued under the Fifth and Fourteenth Amendments to the United States Constitution); *accord* Fare v. Michael C., 442 U.S. 707, 717 (1979) (rejecting the California Supreme Court's extension of request for counsel to a juvenile's request for a probation officer during custodial interrogation).

4. *See, e.g.*, *Hass*, 420 U.S. at 719 (Hass argued that since Oregon's own law was more restrictive than federal law, the Supreme Court could not compel it to conform to federal law; since the case involved question of federal, not state law, the state court could not impose greater restrictions as a matter of federal constitutional law than those enunciated by the Supreme Court); Sibron v. New York, 392 U.S. 40, 60-61 (1968) (stating that while the State of New York is free to develop its own state law, it could not tread on protections enunciated in the Fourth Amendment to the United States Constitution).

5. Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) (emphasis added); *accord* Commonwealth v. Kostka, 370 Mass. 516, 530, 350 N.E.2d 444, 454 (1976).

6. Hoag v. New Jersey, 356 U.S. 464, 468 (1958), *overruled in part by* Ashe v. Swenson, 397 U.S. 436 (1970); *accord* Cicenia v. LaGay, 357 U.S. 504, 510 (1958), *overruled in part by* Escobedo v. Illinois, 378 U.S. 478 (1964). "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government . . . and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." Patterson v. New York, 432 U.S. 197, 201 (1977).

7. *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 787 (1969) (holding that the double jeopardy protections of the Fifth Amendment applied to the states through the Fourteenth Amendment); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (holding that the Fifth Amendment self-incrimination protections extended to the states via the Fourteenth Amendment); Gideon v. Wainwright, 372 U.S. 335, 342-43 (1963) (holding that the right to counsel under the Sixth Amendment extended to the states through the Fourteenth Amendment); Mapp v. Ohio, 367 U.S. 643, 656-67, 660 (1961) (the search and seizure protections found in the Fourth Amendment applied to the states through the Fourteenth Amendment).

state prosecutions,[8] and the Court has ruled that involuntary statements are inadmissible in evidence in state criminal trials.[9] Further, in *Miranda v. Arizona*,[10] the Court applied the self-incrimination protections found within the Fifth Amendment of the United States Constitution to the states, via the Fourteenth Amendment, and established a rule excluding from evidence statements taken in violation of the *Miranda* warnings.[11] If police officers obtain a statement without administering the *Miranda* warnings, a per se rule of exclusion bars the statement from evidence, for the statement presumably is tainted by the inherently coercive atmosphere of custodial interrogation.[12]

Some courts, including the Massachusetts Supreme Judicial Court ("SJC"), use federal tests for voluntariness—the "cat-out-of-the-bag" and the "break-in-the-stream-of-events" analyses[13]—to resolve the question of the admissibility in evidence of a properly warned statement after an initial *Miranda* violation, extending *Miranda*'s per se rule of exclusion to the latter statement.[14] These courts presume that the *Miranda* violation taints the later statement.[15]

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8. *See* Spano v. New York, 360 U.S. 315, 321 n.2, 320-22 (1959); Brown v. Mississippi, 297 U.S. 278, 279, 285-86 (1936); *see also infra* notes 38-43 and accompanying text.

9. *See, e.g.*, *Spano*, 360 U.S. at 321, 323-24 (the defendant's will was overborne by official pressure, his fatigue, and false sympathy; patent intent by police officers to extract a confession from him; statement suppressed, and conviction reversed); Ashcraft v. Tennessee, 322 U.S. 143, 153-54 (1944) (the defendant was held incommunicado for thirty-six hours, not allowed to sleep or rest, and questioned without any respite; statement should have been suppressed; conviction reversed).

10. 384 U.S. 436 (1966).

11. *See id.* at 467; *see also infra* notes 49-59 and accompanying text. The *Miranda* warnings include: the right to remain silent; the right to have counsel present at questioning; the right to have counsel appointed if the detainee cannot afford one; and the caveat that anything the detainee says can be used against him in court. *See Miranda*, 384 U.S. at 467-71.

12. *See* Oregon v. Elstad, 470 U.S. 298, 306-07 (1985); *Miranda*, 384 U.S. at 444.

13. *See infra* notes 60-72 and accompanying text. The "break-in-the-stream-of-events" test looks to whether there has been a break in the causal connection between the initial coercion, resulting in the first statement, and the second statement. *See Elstad*, 470 U.S. at 305-06; Taylor v. Alabama, 457 U.S. 687, 690 (1982). The "cat-out-of-the-bag" test considers whether the suspect believes that, by giving the first statement, he has spilled the proverbial beans and has no choice but to give a second statement. *See* United States v. Bayer, 331 U.S. 532, 540-41 (1947); Commonwealth v. Mahnke, 368 Mass. 662, 686, 335 N.E.2d 660, 675 (1975).

14. See *infra* notes 88-135 and accompanying text for the SJC's treatment of these issues.

15. *See Elstad*, 470 U.S. at 317-18 (noting that a "handful of courts" used Supreme Court precedents concerning coerced confessions on the question of *Miranda* violations); Commonwealth v. Smith, 412 Mass. 823, 829, 593 N.E.2d 1288, 1291-92

In *Oregon v. Elstad*,[16] however, the Supreme Court rejected the notion of a presumptive taint and explained that the "cat-out-of-the-bag" and the "break-in-the-stream-of-events" tests apply only to the question of voluntariness, not to the effect of an initial *Miranda* violation on the admissibility in evidence of a later, properly warned statement.[17] The Supreme Court limited *Miranda*'s presumption of taint to the initial unwarned statement, noting that the per se exclusionary rule bars the statement from evidence even if it is made voluntarily.[18] The *Elstad* Court declared that if the first, unwarned statement is voluntary, a second, properly warned statement is admissible in evidence if it, too, is voluntary.[19] The Court concluded that the proper administration of *Miranda* warnings should cure the condition which renders the first, voluntary statement inadmissible and allow admission in evidence of the second, warned statement.[20]

Even when the Supreme Court has spoken on a matter of federal constitutional law, as in *Elstad*, a state still can impose constrictions of its own design on police activity under its own state law.[21] In recent years, the Massachusetts SJC has turned repeatedly to the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts[22] when it has viewed federal constitutional rules as too restrictive of citizens' rights.[23] This resort to state constitutional

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(1992) (holding that an admission made in violation of *Miranda* is presumed to taint latter statements, and the provision of the *Miranda* warnings alone are insufficient to cure the taint); *see also infra* note 136 and cases cited therein.

16. 470 U.S. 298 (1985).

17. *See id.* at 318.

18. *See id.* at 307.

19. *See id.* at 317-18; *see also infra* notes 163-74 and accompanying text.

20. *See Elstad*, 470 U.S. at 310-11.

21. *See* Cooper v. California, 386 U.S. 58, 62-63 (1967); Commonwealth v. Kostka, 370 Mass. 516, 530, 350 N.E.2d 444, 454-55 (1976).

22. *See* MASS. CONST. part 1, art. 1-30 (composing the Declaration of Rights of the Inhabitants of the Commonwealth of Massachusetts).

23. *See, e.g.*, Commonwealth v. Martinez, 425 Mass. 382, 388, 681 N.E.2d 818, 823 (1997) (stating that the right to conflict-free counsel under Article Twelve of the Massachusetts Declaration of Rights does not require a showing of prejudice if an actual conflict exists, in contrast to the test under the Sixth Amendment to the United States Constitution recited in *Cuyler v. Sullivan*, 446 U.S. 335 (1980)); Commonwealth v. Amirault, 424 Mass. 618, 631, 677 N.E.2d 652, 662 (1997) (companion cases) (noting that the confrontation right under Article Twelve is more specific than that under the Sixth Amendment, requiring face-to-face confrontation between a criminal defendant and the witnesses at trial); Commonwealth v. Stoute, 422 Mass. 782, 785-86, 665 N.E.2d 93, 95-96 (1996) (rejecting *California v. Hodari D.*, 499 U.S. 621 (1991), and following *United States v. Mendenhall*, 446 U.S. 544 (1980), to determine what constitutes a seizure under Article Fourteen of the Massachusetts Declaration of Rights); Common-

protections is a trend which has been seized upon by other jurisdictions.[24] On occasion, the SJC also has turned to Massachusetts common law.[25] The self-incrimination prophylactics established in

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wealth v. Johnson, 420 Mass. 458, 462, 650 N.E.2d 1257, 1259-60 (1995) (holding that if out-of-court identification is unduly suggestive, it must be suppressed, and any other identifications are admissible only if the prosecution proves that they stem from an independent source; rejecting *Manson v. Brathwaite*, 432 U.S. 98 (1977), as the test under Article Twelve); Commonwealth v. Urena, 417 Mass. 692, 695-96, 632 N.E.2d 1200, 1202-03 (1994) (utilizing state test for ineffective assistance of counsel, as it deemed Article Twelve more protective of a criminal defendant than the Sixth Amendment); Jenkins v. Chief Justice, 416 Mass. 221, 232-33, 619 N.E.2d 324, 332 (1993) (holding that although under federal system pretrial detention of up to forty-eight hours is constitutional, per *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), no more than twenty-four hours is permitted under Article Fourteen); Opinions of the Justices, 412 Mass. 1201, 1210, 591 N.E.2d 1073, 1078 (1992) (stating that an arrestee's refusal to submit to a breath or blood-alcohol test is inadmissible in evidence under Article Twelve, although admissible under the Fifth Amendment, per *South Dakota v. Neville*, 459 U.S. 553 (1983)); Guiney v. Police Comm'r, 411 Mass. 328, 333-34, 582 N.E.2d 523, 526 (1991) (random urinalysis of police officers is contrary to Article Fourteen's protections against unreasonable searches, although not apparently a violation of the Fourth Amendment, under *Guiney v. Roache*, 873 F.2d 1557 (1st Cir. 1989)); Commonwealth v. Amendola, 406 Mass. 592, 600-01, 550 N.E.2d 121, 126 (1990) (rejecting *United States v. Salvucci*, 448 U.S. 83 (1980), and upholding automatic standing to challenge searches under Article Fourteen); Commonwealth v. Blood, 400 Mass. 61, 67-69, 507 N.E.2d 1029, 1032-33 (1987) (companion cases) (warrantless interception by law enforcement agents of conversation with one party's consent permitted under Fourth Amendment, per *United States v. Caceres*, 440 U.S. 741 (1979), but a warrant is required, even with one party's consent, under Article Fourteen); Commonwealth v. Upton, 394 Mass. 363, 374-75, 476 N.E.2d 548, 556-57 (1985) (rejection of federal totality of the circumstances test for probable cause enunciated in *Illinois v. Gates*, 462 U.S. 213 (1983), in favor of obsolete federal test set forth in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), under Article Fourteen). *See generally* Charles H. Baron, *The Supreme Judicial Court in its Fourth Century: Meeting the Challenge of the "New Constitutional Revolution,"* 77 MASS. L. REV. 35, 35-36, 38-43 (1992); Herbert P. Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 SUFFOLK U. L. REV. 887, 921-28 (1980).

24. *See, e.g.*, People v. Brisendine, 531 P.2d 1099, 1114 (Cal. 1975) (holding that full body search is permitted under state constitution only for the limited purpose of finding weapons, in contrast to *United States v. Robinson*, 414 U.S. 218 (1973)); State v. Santiago, 492 P.2d 657, 664 (Haw. 1971) (rejecting *Harris v. New York*, 401 U.S. 222 (1971), under state constitution); State v. Collins, 297 A.2d 620, 624 (Me. 1972) (although the United States Supreme Court in *Lego v. Twomey*, 404 U.S. 477 (1972), said that prosecution could establish voluntariness of a defendant's confession by a preponderance of the evidence, the Maine Supreme Judicial Court held that the standard was proof beyond a reasonable doubt under state constitution); *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498-502 (1977); Note, *Stepping into the Breach: Basing Defendants' Rights on State Rather than Federal Law*, 15 AM. CRIM. L. REV. 339, 340-65 (1978); Jefferey White, Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737, 738, 749-77 (1976).

25. *See* Commonwealth v. Tucceri, 412 Mass. 401, 408-09, 412-13, 589 N.E.2d

Miranda,[26] however, find their source exclusively in the Fifth Amendment,[27] not Massachusetts law, for the SJC has not adopted the *Miranda* warnings under either the state constitution or state common law.[28]

In *Commonwealth v. Smith*,[29] the SJC nonetheless departed from the United States Supreme Court's determination of the effect of a *Miranda* violation on a subsequent, warned confession, as enunciated in *Elstad*,[30] and applied the "cat-out-of-the-bag" and the "break-in-the-stream-of-events" analyses—explicitly rejected by *Elstad*[31]—to the question of a subsequent, warned statement's admissibility in evidence.[32] The court justified its adoption of the review standards as common-law adjuncts to the *Miranda* warnings.[33] It held:

1216, 1220-21, 1222-23 (1992) (creating a common-law test for granting a new trial when the defendant claims that the prosecution has withheld exculpatory evidence; test more protective of defendants than the federal test); Commonwealth v. Brusgulis, 398 Mass. 325, 332 n.14, 496 N.E.2d 652, 657 n.14 (1986) (state double jeopardy protections exist pursuant to the common law, not the constitution, and are more protective than federal protections).

26. See *infra* notes 49-59 and accompanying text for a discussion of the *Miranda* requisites, which mandate that law enforcement agents inform a person subjected to custodial interrogation that he has the right to remain silent, that he has a right to have an attorney present during questioning, that counsel will be appointed for him if he cannot afford an attorney, and that anything he says can be used against him in a court of law. *See* Miranda v. Arizona, 384 U.S. 436, 467-73 (1966). A statement made in violation of *Miranda* is subject to a per se rule of exclusion. *See id.* at 444.

27. In *Malloy v. Hogan*, 378 U.S. 1 (1964), the United States Supreme Court made the Fifth Amendment to the United States Constitution applicable to the states, via the Fourteenth Amendment to the United States Constitution. *See id.* at 6; *accord* Withrow v. Williams, 507 U.S. 680, 688-89 (1993). In *Miranda*, the Supreme Court extended the Fifth Amendment's safeguards against custodial interrogations to the states. *See Miranda*, 384 U.S. at 467; *accord* Commonwealth v. Miranda, 37 Mass. App. Ct. 939, 940, 641 N.E.2d 139, 140 (1994).

28. *See* Commonwealth v. Ghee, 414 Mass. 313, 318 n.5, 607 N.E.2d 1005, 1009 n.5 (1993) (declining to consider any state law question regarding the issue of adequacy of *Miranda* warnings given to the defendant, and noting that the court had not adopted the *Miranda* warnings under the state constitution); Commonwealth v. Snyder, 413 Mass. 521, 530-31, 597 N.E.2d 1363, 1368-69 (1992) (noting that the SJC has not adopted *Miranda*, or similar warnings under Article Twelve, because the *Miranda* warnings also furnish information about state constitutional rights).

29. 412 Mass. 823, 593 N.E.2d 1288 (1992).

30. 470 U.S. 298 (1985).

31. *See id.* at 304-06, 311.

32. *See Smith*, 412 Mass. at 837, 593 N.E.2d at 1296. The "break-in-the-stream-of-events" and the "cat-out-of-the-bag" analyses are discussed at *infra* notes 60-70 and the accompanying text.

33. *See Smith*, 412 Mass. at 837, 593 N.E.2d at 1296 (declaring that the court would follow *Commonwealth v. Haas*, 373 Mass. 545, 369 N.E.2d 692 (1977), as a common-law rule of evidence); *see also Snyder*, 413 Mass. at 531, 597 N.E.2d at 1368-69

> [W]here *Federal law requires the administration of Miranda warnings* to a person in custody, the admissibility of incriminatory statements obtained in the circumstances that appear here [,a second, properly warned statement after an initial statement in violation of *Miranda*,] will, as *[a] matter of State common law*, be governed by the principles stated in *Commonwealth v. Haas*.[34]

Yet, the SJC has never adopted the *Miranda* warnings themselves as a matter of state law.[35] The alternate analyses embraced in *Smith* as tests for admissibility therefore constitute an impermissible disregard for controlling federal authority defining the test for the admission in evidence of a subsequent, warned statement after an initial *Miranda* violation.[36] Where the Supreme Court has de-

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(citing *Smith*, the court noted that on occasion it had adopted "adjuncts" to the *Miranda* warnings under state common law); Commonwealth v. A Juvenile, 402 Mass. 275, 279, 521 N.E.2d 1368, 1371 (1988) (discussing the interested adult doctrine for admissibility of juveniles' confessions, a doctrine devised under the common law, which is an "adjunct" to the *Miranda* requisites). It is of interest to note that, at the time the SJC adopted the interested adult doctrine for juveniles, the United States Supreme Court had not applied the *Miranda* warnings to the custodial interrogation of minors. *See* Commonwealth v. A Juvenile, 389 Mass. 128, 130-31, 130 n.1, 132 n.2, 135, 449 N.E.2d 654, 655 & n.1, 656 n.2 (1983) (stating that *In re Gault*, 387 U.S. 1 (1967), which applied the Fifth Amendment's self-incrimination protections to juveniles in delinquency proceedings, *see id.* at 55, did not mandate that the *Miranda* warnings apply to juveniles; and noting that *Fare v. Michael C.*, 442 U.S. 707 (1979), assumed without deciding that the *Miranda* warnings are necessary for juveniles, *see id.* 707 n.4). Thus, the interested adult "adjunct" is not actually attached to the *Miranda* warnings. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 22 (2d ed. 1992) (defining adjunct as "[s]omething attached to another in a dependent or subordinate position"; synonym of appendage).

34. *Smith*, 412 Mass. at 824, 593 N.E.2d at 1289 (emphasis added) (citing *Commonwealth v. Haas*, 373 Mass. 545, 369 N.E.2d 692 (1977), which had employed both the "cat-out-of-the-bag" and the "break-in-the-stream-of-events" tests to the question of the effect of a *Miranda* violation on a later, properly warned statement). See *infra*, notes 184-225 and accompanying text for a detailed discussion of *Smith*.

35. *See* Commonwealth v. Ghee, 414 Mass. 313, 318 n.5, 607 N.E.2d 1005, 1009 n.5 (1993); *Snyder*, 413 Mass. at 530-31, 597 N.E.2d at 1368-69.

36. In one notable instance, the Massachusetts SJC did not fare well in reinterpreting federal constitutional precedent. In 1983, the court declined to follow *Illinois v. Gates*, 462 U.S. 213 (1983), to determine whether probable cause existed under the Fourth Amendment. *See* Commonwealth v. Upton, 390 Mass. 562, 566-69, 458 N.E.2d 717, 719-21 (1983). The United States Supreme Court reversed the *Upton* court, concluding that the SJC misunderstood *Gates* as a refinement, rather than a rejection, of the *Aguilar-Spinelli* test for probable cause. *See* Massachusetts v. Upton, 466 U.S. 727 (1984); *see also* Spinelli v. United States, 393 U.S. 410, 415 (1969); Aguilar v. Texas, 378 U.S. 108, 114 (1964). On remand, the SJC adopted the *Aguilar-Spinelli* test under Article Fourteen of the Massachusetts Declaration of Rights, which is the state constitutional protection against unreasonable searches and seizures. *See Upton*, 394 Mass. at 374-75, 476 N.E.2d at 556-57; *see also supra* note 23 (providing examples of cases where the SJC has provided the defendant more protection than warranted under the United

cided what test must be employed to determine the application of a federal exclusionary rule concerning a federal constitutional right, and where Massachusetts has not adopted the *Miranda* rights within its own law, the state cannot advance tests rejected by the Supreme Court, under its own law, to decide whether the federal exclusionary rule should apply.[37] Further, although it embraced the two tests as a matter of state common law, the *Smith* court provided no explicit elucidation of the common-law source for the two tests, nor any guidance as to why two tests are necessary and which analysis applies in a given case. Finally, in interpreting the tests, the court has moved from a subjective determination to an objective one, skewing the proper focus and possibly resulting in the suppression of wholly voluntary statements due to a purely technical *Miranda* violation.

In Part I, this article will discuss the origins of, and rationale for, the *Miranda* warnings, as well as the question of voluntariness of custodial statements. It will review the historical tests applied to voluntariness issues and violations of *Miranda* in Part II. It will

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States Constitution). By contrast, in *Commonwealth v. Gallarelli*, 399 Mass. 17, 502 N.E.2d 516 (1987), the court refused to adopt *United States v. Bagley*, 473 U.S. 667 (1985), concerning discovery requests, and instead adhered to Massachusetts precedent, which it viewed to possess "more prudent safeguards of defendants' rights." *Gallarelli*, 399 Mass. at 21 & n.5, 502 N.E.2d at 519 & n.5. The court later noted that it had not shown its hand in *Gallarelli*; in articulating further refinement of the state discovery test, the court in that case had not specified whether its approach, based on Massachusetts case law, was under the constitution or common law. *See* Commonwealth v. Tucceri, 412 Mass. 401, 408, 589 N.E.2d 1216, 1221 (1992). *Gallarelli* and *Tucceri*, however, are founded on a body of Massachusetts case law and therefore constitute state common-law tests concerning discovery. Indeed, the *Tucceri* court recognized that it had fashioned a common-law discovery rule: *See Tucceri*, 412 Mass. at 412-13, 589 N.E.2d at 1223; *see also* Lyons v. Howard, 250 F.2d 912, 915 (1st Cir. 1958), *rev'd on other grounds*, 360 U.S. 593 (1959) (federal common law is the body of decisional law developed by the federal courts); Commonwealth v. Aldoupolis, 390 Mass. 438, 446, 457 N.E.2d 268, 273 (1983) (companion cases) (noting that common-law precedent, in both the state's decisional law and reports of the King's Bench, allowed a trial judge to select a jury from a foreign venire when an impartial jury could not be selected from the county venire); BLACK'S LAW DICTIONARY 345-46 (4th ed. 1968) (common law stems "from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs . . ."; "[i]n a wider sense than any of the [preceding definitions], the 'common law' may designate all that part of the positive law, juristic theory, and ancient custom of any state or nation"). In both *Gallarelli* and *Tucceri*, the court adhered to established state case law, and in *Upton*, the court specifically adopted its own probable cause test under the state constitution. It is clear that, when deviating from a federal constitutional standard, the court, either expressly or impliedly, must establish an independent state constitutional or common-law ground. *See supra* notes 2-4, 21 and accompanying text. As noted above, *Miranda* is not part of the state constitutional or common-law scheme. *See supra* note 28 and accompanying text.

37. *See supra* notes 2-4, cases cited therein and the accompanying text.

examine, in Part III, the federal analysis established by *Elstad*. It will consider the post-*Elstad* Massachusetts twin tests, their efficacy, and their application in Part IV. In conclusion, the article will explain how the SJC legitimately could have established its own exclusionary rule under the state constitution, not the common law, and how the court has refashioned the two voluntariness tests away from consideration of the suspect's mental state to an objective test bordering on a per se rule of exclusion for all statements following an initial, technical *Miranda* violation. This rigid rule may be too exacting for law enforcement agents and society to bear, for it may result in the exclusion from evidence of wholly voluntary and reliable statements due to noncoercive missteps by police officers.

I. *MIRANDA*'S ORIGINS & REQUISITES

The United States Supreme Court, troubled by the coercive atmosphere present in state law enforcement agents' questioning of suspects,[38] employed the United States Constitution to provide protections to persons subjected to questioning by state police personnel.[39] As Chief Justice Earl Warren expounded:

> [W]e are forced to resolve a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement. . . . The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that 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.[40]

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38. *See* Fikes v. Alabama, 352 U.S. 191, 193-95 (1957) (incommunicado detention); Leyra v. Denno, 347 U.S. 556, 559-60 (1954) (psychiatric inducement); Watts v. Indiana, 338 U.S. 49, 52 (1949) (continuous questioning); Brown v. Mississippi, 297 U.S. 278, 281-83 (1936) (physical beating).

39. *See* Spano v. New York, 360 U.S. 315, 315, 321-24 (1959) (noting that case to be "another in the long line of cases presenting the question whether a confession was properly admitted into evidence under the Fourteenth Amendment"; the defendant was a foreign-born man with little education and a history of emotional instability, who had been questioned by "many" men for eight straight hours before he confessed; statement had to be suppressed); Thomas v. Arizona, 356 U.S. 390, 393-401 (1958) (examining under the Fourteenth Amendment the circumstances surrounding a confession; the defendant was lassoed with a rope and dragged toward a tree; the defendant confessed some twenty hours later and alleged no other physical or mental coercion).

40. *Spano*, 360 U.S. at 315, 320-21.

The Court had concerns not only with the inherent unreliability of a coerced confession, but with the unlawful conduct of police officers.

Beginning in 1936, the United States Supreme Court reviewed confessions in state cases under the Fourteenth Amendment to the United States Constitution, to determine whether the statements were coerced.[41] Coercion includes threats, violence, direct or implied promises, and any improper influence.[42] A coerced statement is deemed inadmissible in evidence; a confession extorted through torture or some other means of coercion offends principles of due process.[43]

In 1964, in *Massiah v. United States*,[44] the Court held that the right to counsel established by the Sixth Amendment to the United States Constitution applied to postindictment statements elicited by law enforcement agents in the absence of counsel.[45] Later that

41. *See, e.g., id.* at 321 nn.2 & 3, 321-23 (questioning begun in the evening, and did not conclude until the morning; persistent questions despite the suspect's refusal to speak on the advice of counsel; the police officers ignored the suspect's repeated requests to contact his attorney and compelled his childhood friend to make false statements designed to elicit a confession; the suspect was emotionally unstable, tense, and had been discharged from the military due to a psychiatric disorder); Ashcraft v. Tennessee, 322 U.S. 143, 145, 149-50, 152-53 (1944) (the defendant was brought into a room and placed under a light; the police officers quizzed him in "relays" over a thirty-six hour period; the Court concluded that the statement was "not voluntary but compelled"); *Brown*, 297 U.S. at 279, 282, 285-86, 287 (one defendant was hung twice from a tree, tied to a tree and whipped, released, again taken into custody, and whipped until he confessed; other defendants were stripped of their clothing and beaten with a leather strap with buckles on it; the defendants were told that they would be beaten until they confessed, and until they confessed in "correct" detail; the confessions were extracted by torture; convictions based in part on involuntary confessions offended due process and therefore were void); *see also* Withrow v. Williams, 507 U.S. 680, 688 (1993) (the Court noted the established practice, beginning with *Brown*, of reviewing coerced confessions in state cases under the Fourteenth Amendment in the thirty years prior to the application of the Fifth Amendment to states); Arizona v. Fulminante, 499 U.S. 279, 285-88 (1991) (citing the Supreme Court cases reviewing confessions in state cases for coerciveness under the Fourteenth Amendment).

42. *See* Hutto v. Ross, 429 U.S. 28, 30 (1976); Brady v. United States, 397 U.S. 742, 753 (1970); *see also* KENT B. SMITH, 30 MASSACHUSETTS PRACTICE: CRIMINAL PRACTICE & PROCEDURE § 366 (West 2d ed. 1983).

43. *See* Rogers v. Richmond, 365 U.S. 534, 540-41 (1961) (stating that it is a violation of due process to admit an involuntary statement into evidence, regardless of its truth or falsity; cannot coerce a defendant to prove the charge against him "out of his own mouth"); Chambers v. Florida, 309 U.S. 227, 240-41 (1940) (finding it offensive to due process and to civilization to use coerced statements obtained by secret inquisition against defendant at trial).

44. 377 U.S. 201 (1964).

45. *See id.* at 205-06. The Sixth Amendment was made applicable to the states in *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

year, in *Escobedo v. Illinois*,[46] the Court extended the Sixth Amendment right to counsel to preindictment custodial interrogations in certain circumstances.[47] In both *Massiah* and *Escobedo*, the Supreme Court viewed the presence and advice of counsel as important to offset the possibility of coercion in a custodial setting.[48]

Two years later, in *Miranda*, the Court expressly applied the Fifth Amendment's self-incrimination protections to the states.[49] Recognizing the coercion inherent in a custodial setting,[50] the *Miranda* Court mandated that a person in custody,[51] subjected to interrogation,[52] be informed "in clear and unequivocal terms that he

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46. 378 U.S. 478 (1964).

47. *See id.* at 490-91. The circumstances are: the investigation has focused on the suspect; he is in custody; statements are elicited during questioning; he requests and is denied counsel; and he has not been informed of his right to remain silent. *See id.* The Supreme Court later recognized *Escobedo* as a Fifth Amendment case. *See* Moran v. Burbine, 475 U.S. 412, 429 (1986); Kirby v. Illinois, 406 U.S. 682, 689 (1972); Johnson v. New Jersey, 384 U.S. 719, 729 (1966). The Sixth Amendment right to counsel attaches at the onset of adversarial criminal judicial proceedings against a defendant. *See Burbine*, 475 U.S. at 428; United States v. Gouveia, 467 U.S. 180, 187 (1984); *Kirby*, 406 U.S. at 689-90. The Sixth Amendment right to counsel does not extend to the preindictment stage. *See Gouveia*, 467 U.S. at 187; *Kirby*, 406 U.S. at 690.

48. *See Escobedo*, 378 U.S. at 488-91 (noting possibilities of abuse, including bullying, physical force, and torture, as well as the history of extorted confessions); *Massiah*, 377 U.S. at 204-06 (expressing concern over "secret interrogations" taking place absent the effective assistance of counsel).

49. *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966); *supra* notes 10-11 and the accompanying text.

50. *See Miranda*, 384 U.S. at 467 ("[I]nherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.").

51. *See id.* The Court held that the *Miranda* warnings are required whenever a person is questioned "while in custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444; *accord* Commonwealth v. McDonough, 400 Mass. 639, 655, 511 N.E.2d 551, 561 (1987). In determining whether a suspect is in custody for purposes of *Miranda*, the courts consider a number of factors, including the nature of the crime, the site of the interrogation, the status of the investigation at the time of questioning, the police officers' conduct toward the suspect, the suspect's reasonable belief as to his freedom of action, and his ability to leave the place of questioning. *See* Commonwealth v. Merritt, 14 Mass. App. Ct. 601, 604-05, 441 N.E.2d 532, 535-36 (1982); Commonwealth v. Doyle, 12 Mass. App. Ct. 786, 793, 429 N.E.2d 346, 350 (1981).

52. *See Miranda*, 384 U.S. at 467. Interrogation constitutes express questioning or its functional equivalent. *See* Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980); Commonwealth v. Rubio, 27 Mass. App. Ct. 506, 511, 540 N.E.2d 189, 192 (1989). Interrogation includes both words and actions, beyond those normally attendant to arrest and custody, which a police officer should know are reasonably likely to elicit an incriminating response from a suspect. *See Innis*, 446 U.S. at 302; *Rubio*, 27 Mass. App. Ct. at 512, 540 N.E.2d at 192. A reviewing court will look to both the suspect's perceptions and the police officers' intent in determining whether the police officers engaged in

has the right to remain silent,"[53] that if he chooses to speak, anything he says can and will be used against him in court,[54] that he has the right to have counsel present at questioning,[55] and that if he does not have or cannot afford an attorney, one will be appointed to represent him.[56] Once the detainee receives the *Miranda* warnings and asserts his right to remain silent, questioning must cease.[57] Similarly, if the detainee wishes the presence and advice of counsel, all questioning must abate until an attorney is present.[58] State-

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interrogation. *See Innis*, 446 U.S. at 301 n.7; *Rubio*, 27 Mass. App. Ct. at 512, 540 N.E.2d at 192-93.

53. *Miranda*, 384 U.S. at 467-68.

54. *See id.* at 469.

55. *See id.* The Court noted that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege . . . ." *Id.* The right to counsel in this context stems from a defendant's Fifth, not Sixth, Amendment interests. *See* United States v. Gouveia, 467 U.S. 180, 188 n.5 (1984); Commonwealth v. Stirk, 392 Mass. 909, 911, 467 N.E.2d 870, 872 (1984); *see also supra* note 47, cases cited therein and the accompanying text.

56. *See Miranda*, 384 U.S. at 472-73. The Court termed the *Miranda* warnings "procedural safeguards" of the self-incrimination privilege. *Id.* at 478-79. They are not part of the constitutional privilege itself, but are measures to insure that the right is protected. *See* New York v. Quarles, 467 U.S. 649, 654 (1984); Michigan v. Tucker, 417 U.S. 433, 444 (1974); *see also infra* notes 159-61 and accompanying text.

57. *See Miranda*, 384 U.S. at 473-74. The detainee also has the right to cut off questioning at any time. *See id.* If a defendant claims that he asserted his right to silence, the issue is whether the suspect's "'right to cut off questioning' was 'scrupulously honored.'" Michigan v. Mosley, 423 U.S. 96, 104 (1975) (quoting *Miranda*, 384 U.S. at 474, 479); *accord* Commonwealth v. Gallant, 381 Mass. 465, 468, 410 N.E.2d 704, 706 (1980) (companion cases); Commonwealth v. D'Entremont, 36 Mass. App. Ct. 474, 477, 632 N.E.2d 1239, 1241 (1994). But *Miranda* did not "create a per se proscription of indefinite duration upon any further questioning by any police officer on the subject, once the person in custody has indicated a desire to remain silent." *Mosley*, 423 U.S. at 102-03; *accord* United States v. Barone, 968 F.2d 1378, 1382-83 (1st Cir. 1992); *D'Entremont*, 36 Mass. App. Ct. at 477, 632 N.E.2d at 1241. The *Mosley* Court considered several factors in determining whether that defendant's right to cut off questioning had been scrupulously honored, including: whether, upon his assertion of his right, the law enforcement agents immediately ceased questioning him; whether a significant period of time elapsed before further questioning; and whether he received "fresh" *Miranda* warnings before further interrogation. *See Mosley*, 423 U.S. at 106; *see also* Jacobs v. Singletary, 952 F.2d 1282, 1293 (11th Cir. 1992). The hiatus of time does not control. *See Barone*, 968 F.2d at 1383; United States v. Hsu, 852 F.2d 407, 410 (9th Cir. 1988). Police officers must refrain from any coercive behavior during that interim. *See, e.g.*, United States v. Ramsey, 992 F.2d 301, 305 & n.5, 306 (11th Cir. 1993) (while twenty minutes elapsed, the police officers encouraged the defendant to talk); *Barone*, 968 F.2d at 1380, 1384 (after the defendant invoked his right to remain silent, the police officers repeatedly encouraged him to talk during a two-hour period); *Singletary*, 952 F.2d at 1293 (when the defendant asserted her right to remain silent, the police officers ignored her and continued with their questioning).

58. *See Miranda*, 384 U.S. at 469. The *Miranda* right to counsel is distinct from the right to remain silent. *See* Arizona v. Roberson, 486 U.S. 675, 683 (1988) (right to remain silent different from request for counsel; law enforcement agents can never pro-

ments made in violation of *Miranda* are inadmissible in evidence at trial, for they are presumptively tainted.[59]

II. *MIRANDA* VERSUS VOLUNTARINESS

A. *Origins of "Cat-out-of-the-Bag" & "Break-in-the-Stream-of-Events" Tests*

Courts generally engage in a two-tier analysis on the question of the admissibility in evidence of a defendant's custodial statements: whether the defendant made a knowing and intelligent waiver of his *Miranda* rights, under the Fifth Amendment;[60] and whether he made the statements voluntarily, under the Fourteenth Amendment.[61] While interrelated, the two inquiries are distinct.[62] The courts generally consider the same factors on the dual questions of waiver and voluntariness, which include the suspect's conduct and characteristics, as well as the law enforcement agents'

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ceed with questioning without the presence of an attorney, if requested by the detainee); *Mosley*, 423 U.S. at 104 n.10 (*Miranda*'s discussion of right to counsel applied different procedural safeguards for that right); Commonwealth v. Brant, 380 Mass. 876, 882, 884, 406 N.E.2d 1021, 1026 (1980) (*Mosley* involved right to remain silent, not claim of denial of right to an attorney). If a suspect exercises his right to counsel, questioning must cease and cannot resume until an attorney is obtained for him, unless the suspect himself initiates further communication. *See* Edwards v. Arizona, 451 U.S. 477, 484-85 (1981); *D'Entremont*, 36 Mass. App. Ct. at 478, 632 N.E.2d at 1242. Unlike the right to remain silent, the right to counsel, once invoked, creates a per se proscription against further questioning initiated by law enforcement agents.

59. *See Miranda*, 384 U.S. at 444; Commonwealth v. Adams, 389 Mass. 265, 268, 450 N.E.2d 149, 151 (1983). If questioning proceeds without counsel, the government bears the "heavy burden" to prove that the detainee knowingly and intelligently waived his privilege against self-incrimination and his right to counsel. *Miranda*, 384 U.S. at 475. That burden is proof beyond a reasonable doubt. *See* Commonwealth v. Parker, 402 Mass. 333, 340, 522 N.E.2d 924, 928 (1988) (companion cases); Commonwealth v. Day, 387 Mass. 915, 921, 444 N.E.2d 384, 387 (1983). There is no distinction between confessions and admissions under *Miranda*. *See Miranda*, 384 U.S. at 476; Commonwealth v. Garcia, 379 Mass. 422, 431, 399 N.E.2d 460, 467 (1980). The exclusionary rule applies even if the statement is exculpatory. *See Miranda*, 384 U.S. at 477; Commonwealth v. Gil, 393 Mass. 204, 212, 471 N.E.2d 30, 37 (1984).

60. *See Parker*, 402 Mass. at 340, 522 N.E.2d at 928; *Day*, 387 Mass. at 920, 444 N.E.2d at 387. "The record must affirmatively indicate not merely that the suspect or the accused comprehended his rights but intentionally relinquished them." Commonwealth v. Williams, 378 Mass. 217, 225, 391 N.E.2d 1202, 1208 (1979); *accord* Brewer v. Williams, 430 U.S. 387, 404 (1977); Commonwealth v. Dustin, 373 Mass. 612, 615, 368 N.E.2d 1388, 1391 (1977).

61. *See* Jackson v. Denno, 378 U.S. 368, 376 (1964); Commonwealth v. Tavares, 385 Mass. 140, 145, 430 N.E.2d 1198, 1202.

62. *See* Commonwealth v. Williams, 388 Mass. 846, 852, 448 N.E.2d 1114, 1119 (1983); *Tavares*, 385 Mass. at 145, 430 N.E.2d at 1202; Commonwealth v. Garcia, 379 Mass. 422, 443-44, 399 N.E.2d 460, 473-74 (1980); *see also* SMITH *supra* note 42, § 365.

behavior.[63]

When assessing the voluntariness of confessions under the Fourteenth Amendment, the Supreme Court has historically considered whether a confession was the product of some earlier illegality.[64] For instance, if a suspect's first statement was the product of actual coercion, any subsequent statement, if part of the same stream of events, also was deemed to be coerced and therefore was suppressed.[65] Statements falling on the heels of a violation of the Fourth Amendment to the United States Constitution also were subject to suppression: "[A] confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events *break the causal connection* between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint.'"[66] "Break-in-the-stream-of-

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63. *See* Commonwealth v. Silva, 388 Mass. 495, 501, 447 N.E.2d 646, 651 (1983); Commonwealth v. Bradshaw, 385 Mass. 244, 267, 431 N.E.2d 880, 895 (1982). A defendant's age, education, experience, and drug or alcohol intake are all factors which the courts consider in assessing the voluntariness of the *Miranda* waiver and of the subsequent statement. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 225-26 (1973); Commonwealth v. Rodriguez, 425 Mass. 361, 366, 682 N.E.2d 591, 596 (1997); Commonwealth v. Selby, 420 Mass. 656, 664-65, 651 N.E.2d 843, 849 (1995); *Tavares*, 385 Mass. at 144-46, 430 N.E.2d at 1201-03; *see also* SMITH, *supra* note 42, § 371 and cases cited therein.

The first part of the test—judicial review—is constitutionally mandated. *See* Commonwealth v. Watkins, 425 Mass. 830, 835, 683 N.E.2d 653, 657 (1997); *Tavares*, 385 Mass. at 145, 430 N.E.2d at 1202. The second part—submission of the issue to the jury—is not constitutionally required. *See Watkins*, 425 Mass. at 835, 683 N.E.2d at 657; Commonwealth v. Cole, 380 Mass. 30, 40, 402 N.E.2d 55, 61 (1980). The prosecution must prove that the statement was made voluntarily beyond a reasonable doubt. *See Watkins*, 425 Mass. at 835, 683 N.E.2d at 657; *Tavares*, 385 Mass. 151-52, 430 N.E.2d at 1206.

64. *See* Darwin v. Connecticut, 391 U.S. 346, 349 (1968) (the defendant was held incommunicado for thirty to forty-eight hours, deprived of counsel, although his attorneys tried to gain access to him; no break in the stream of events between the time of subsequent confession and the coercive atmosphere that existed before); Beecher v. Alabama, 389 U.S. 35, 38 (1967) (no break in the stream of events from the point where the defendant was initially told, at gunpoint, to speak his guilt or be killed); Clewis v. Texas, 386 U.S. 707, 708, 710-11 (1967) (the first statement was made immediately after the arrest that was not supported by probable cause; the defendant was then subjected to prolonged, although intermittent, questioning; no break in the stream of events insulating later confession from "what had occurred before"); Reck v. Pate, 367 U.S. 433, 441, 444 (1961) (the defendant was held without food, counsel, family; he was physically weak and in pain; the coercive atmosphere surrounding the first statement led into the second); Leyra v. Denno, 347 U.S. 556, 561 (1954) (continuous coercive process).

65. *See infra* note 66 and cases cited therein.

66. Taylor v. Alabama, 457 U.S. 687, 690 (1982) (emphasis added) (quoting Brown v. Illinois, 422 U.S. 590, 602 (1975)); *accord* Oregon v. Elstad, 470 U.S. 298, 305-06 (1985); *see also* Wong Sun v. United States, 371 U.S. 471, 488 (1963) (stating the

events" thus became a metaphor for the voluntariness test.

The Court also employed another voluntariness metaphor, one it explained in *United States v. Bayer*.[67]

> [A]fter an accused has once *let the cat out of the bag* by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. *The secret is out for good*. In such a sense, a later confession may always be looked upon as a *fruit of the first*.[68]

The "cat-out-of-the-bag" test, as first formulated, was subjective:

> The cat-out-of-the-bag line of analysis requires the exclusion of a statement if, in giving the [subsequent] statement, *the defendant was motivated by the belief that*, after a *prior coerced statement, his effort to withhold further information would be futile and he had nothing to lose by repetition or amplification of the earlier statements. Such a statement would be inadmissible as the direct product of the earlier coerced statement*.[69]

Because they bore on the question of actual coercion, the "cat-out-of-the-bag" and the "break-in-the-stream-of-events" tests looked to the effect of the detainee's prior statement, or the conduct of the interrogation process, on his state of mind when he made the subsequent statement. But, as the *Bayer* Court noted: "[T]his Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed."[70] The two tests were not per se rules of exclusion. As shall be seen, however, the SJC departed from that subjective focus on the question of coercion and applied the tests to

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concept of the "fruit of the poisonous tree" exclusionary rule for Fourth Amendment violations).

67. 331 U.S. 532 (1947).

68. *Id.* at 540 (emphasis added).

69. Commonwealth v. Mahnke, 368 Mass. 662, 686, 335 N.E.2d 660, 675 (1975) (emphasis added) (a case in which private citizens interrogated the defendant; therefore *Miranda* did not apply); *accord* Commonwealth v. Watkins, 375 Mass. 472, 480, 379 N.E.2d 1040, 1045 (1978).

70. *Bayer*, 331 U.S. at 540-41 (upholding the admissibility of the defendant's second confession, made six months after the initial, involuntary one, but after being told that his confession could be used against him); *see also Mahnke*, 368 Mass. at 676, 682, 335 N.E.2d at 669, 673 (while the first confession was coerced, the second was not the product of intimidation existing at the time of the first statement, and the defendant did not think that his remarks would expose him to jeopardy).

Miranda violations absent the existence of actual coercive elements rendering the statements involuntary.

B. *Massachusetts' Application of the Tests Pre-*Elstad

Massachusetts initially applied the "cat-out-of-the-bag" and the "break-in-the-stream-of-events" tests to the question of voluntariness.[71] It later, like some other jurisdictions, extended the analyses to the question of the admissibility in evidence of a properly warned statement after an initial *Miranda* violation.[72]

The SJC properly utilized both tests on the question of voluntariness in *Commonwealth v. Mahnke*.[73] Defendant Mahnke, suspected of having murdered his girlfriend, was abducted and interrogated by her family members and friends.[74] Since the defendant was not held and questioned by police officers, the SJC, reviewing the admissibility of his statements at trial, rejected his contention of a *Miranda* violation.[75] The court noted that *Miranda* applies only to custodial questioning by law enforcement agents.[76]

Finding that *Miranda* did not mandate suppression, the *Mahnke* court turned to the Fourteenth Amendment question of voluntariness.[77] The court stated: "A conviction founded in whole or in part on statements which are the product of physical or psychological coercion deprives the defendant of his right to due process of law under the Fourteenth Amendment and, as a consequence, is invalid."[78] The court reviewed the totality of the circumstances to decide whether the government met its burden to prove voluntariness by a preponderance of the evidence.[79] The *Mahnke* court recognized that a finding that an initial statement was involuntary does not necessarily require suppression of any later statements.[80] "It is equally true . . . that the defendant may

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71. *See Mahnke*, 368 Mass. at 682-83, 335 N.E.2d at 673; Commonwealth v. White, 353 Mass. 409, 417, 232 N.E.2d 335, 341 (1967).

72. *See* Commonwealth v. Watkins, 375 Mass. 472, 482, 379 N.E.2d 1040, 1046-47 (1978); Commonwealth v. Haas, 373 Mass. 545, 554, 369 N.E.2d 692, 699 (1977); *see also* United States v. Lee, 699 F.2d 466, 468-69 (9th Cir. 1982); United States v. Nash, 563 F.2d 1166, 1169 (5th Cir. 1977).

73. 368 Mass. at 682-83, 335 N.E.2d at 673.

74. *See id.* at 699-71, 335 N.E.2d at 666-67.

75. *See id.* at 676, 335 N.E.2d at 669.

76. *See id.*, 335 N.E.2d at 669-70 (citing Miranda v. Arizona, 384 U.S. 436, 444 (1966)).

77. *See id.* at 679, 335 N.E.2d at 671.

78. *Id.*

79. *See id.* at 680, 335 N.E.2d at 672.

80. *See id.* at 681, 335 N.E.2d at 672-73.

have been under no compulsion at the time of the later statements and may have felt no effect of the earlier abuse at the time. The later statements, then, would be admissible."[81] An initial coercive atmosphere does not presumptively taint whatever occurs afterward.

The court then applied both the "break-in-the-stream-of-events" and "cat-out-of-the-bag" analyses to defendant Mahnke's statements.[82] The court concluded that, while the defendant's initial statements were the product of intimidation and violence, his later statements were made after all hostility ceased.[83] Thus, there had been a break in the stream of events.[84] Nor was the cat out of the bag, for the defendant did not believe that his earlier statements—wherein he described the victim's death as accidental—exposed him to serious adverse effects.[85] The *Mahnke* court concluded that the defendant's later statements were voluntary and, thus, properly admitted in evidence at his murder trial.[86] Notable is the court's application of both metaphors to assess the defendant's actual mental state on the question of coercion.

In later precedent, the SJC applied the "cat-out-of-the-bag" and the "break-in-the-stream-of-events" voluntariness analyses to warned statements which followed earlier statements made in violation of *Miranda*.[87] Without explanation, it shifted Fourteenth Amendment analysis into the question of the remedy for violations of the Fifth Amendment.

In *Commonwealth v. Haas*,[88] the court utilized both the "cat-out-of-the-bag" and the "break-in-the-stream-of-events" tests to determine the admissibility in evidence of the defendant's warned

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81. *Id.* at 682, 335 N.E.2d at 673.

82. *See id.* at 682-87, 335 N.E.2d at 673-77. The court distinguished the tests by noting that the "break-in-the-stream-of-events" analysis focuses on whether external constraints, either continuing or new, overbore the suspect's will, *id.* at 682, 335 N.E.2d at 673, while the "cat-out-of-the-bag" inquiry looks more specifically at the effect of the earlier statement on the suspect's will, *see id.* at 683, 335 N.E.2d at 673. The subsequent statement cannot "'merely [be] the product of [an] erroneous impression that the cat was already out of the bag.'" *Id.* at 687, 335 N.E.2d at 675 (quoting Darwin v. Connecticut, 391 U.S. 346, 351 (1968) (Harlan, J., concurring in part, dissenting in part)); *see also supra* notes 65-71 and accompanying text (discussing the tests).

83. *See Mahnke*, 368 Mass. at 683-84, 335 N.E.2d at 673-74.

84. *See id.* at 685, 335 N.E.2d at 674.

85. *See id.* at 687, 335 N.E.2d at 676.

86. *See id.* at 691, 335 N.E.2d at 678.

87. *See, e.g.*, Commonwealth v. Watkins, 375 Mass. 472, 480-81, 379 N.E.2d 1040, 1045-46 (1978).

88. 373 Mass. 545, 369 N.E.2d 692 (1977).

statement following an earlier *Miranda* violation.[89] Defendant Haas reported to work at 7:30 a.m. on June 23, 1973.[90] At approximately 10:15 a.m., the defendant told a colleague that he had received an anonymous telephone call informing him that his family had been "'taken care of.'"[91] The defendant contacted the police department and asked that someone check on his family's welfare.[92] A police officer went to the defendant's home, found the front door ajar with a key in the lock, entered the premises, and discovered the dead bodies of the defendant's wife and children.[93]

Subsequent police investigation determined that there was no sign of forced entry and little sign of physical disturbance.[94] The medical examiner concluded that the victims died between 3:00 a.m. and 5:00 a.m.[95] When the defendant called to inquire of his family's well-being, a police officer told him to come home.[96] The defendant arrived at home, and police officers transported him to the police station.[97] There, a police officer apprised the defendant of the fatalities and asked him when he departed for work that morning.[98] The defendant responded, "'I want to be helpful. I left between 6:15 and 6:30.'"[99] Police officers arrested the defendant and administered the *Miranda* warnings to him; he reiterated that he left for work at 6:30 a.m.[100] An inventory of the defendant's personal effects disclosed notes bearing the words "'gloves, overalls, bags, ether, mask.'"[101]

Charged with the murders of his wife and children, the defendant moved to suppress his statements and the physical evidence, asserting that he should have been advised of the *Miranda* warnings

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89. *See id.* at 554, 369 N.E.2d at 699.

90. *See id.* at 546, 369 N.E.2d at 695.

91. *Id.* at 547, 369 N.E.2d at 695. The defendant told his coworker that the caller said "'black and white don't mix.'" *Id.*, 369 N.E.2d at 695. The defendant was Caucasian; his wife was African-American. *See id.* at 547 n.1, 369 N.E.2d at 695 n.1.

92. *See id.* at 547, 369 N.E.2d at 695.

93. *See id.* Defendant's wife and children lay in their own beds, and their heads were covered with white plastic bags secured with adhesive tape. *See id.*

94. *See id.* Police officers found a sign, reading "'[b]lack and white don't mix'" in the master bedroom. *Id.*

95. *See id.* at 547-48, 369 N.E.2d at 696.

96. *See id.* at 548, 369 N.E.2d at 695.

97. *See id.*

98. *See id.*, 369 N.E.2d at 696.

99. *Id.*

100. *See id.* Defendant also said that he slept with his wife in the master bedroom the night before. *See id.*

101. *Id.*

at the outset of questioning.[102] The trial judge found that the defendant had not been subjected to custodial interrogation and denied the motion to suppress.[103]

On appeal from his convictions, the defendant claimed that his arrest was not supported by probable cause; therefore, his statements were the tainted fruit of that illegality.[104] The Commonwealth conceded that the police officers did not have probable cause to arrest the defendant, but contended that he was not in custody.[105] The SJC held that the defendant indeed was in custody and therefore should have been informed of the *Miranda* requisites before questioning.[106] The court concluded both that there was no break in the stream of events between the *Miranda* violation and the later, warned statement, and that the cat was out of the bag when the defendant disclosed the time that he left his home.[107] The court applied tests, formulated to assess the effect of an initial, actually coerced statement on the voluntariness of a subsequent statement, to a statement made after a technical *Miranda* violation but absent any actual coercion. The court, however, did not explain its reason for extending the voluntariness tests to the question of a *Miranda* violation, which resulted in the exclusion from evidence of apparently voluntary statements.[108]

Justice Robert Braucher, concurring, found that the exclusion from evidence of Haas's statements, due solely to a *Miranda* violation, was "unjust."[109] He questioned the benefit of applying the exclusionary rule to that case, where reliable, voluntary statements were barred from evidence to deter law enforcement misconduct in a matter wherein the police officers acted in good faith and did not mislead the defendant.[110] Justice Braucher called upon the United

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102. *See id.*

103. *See id.*

104. *See id.* at 551, 369 N.E.2d at 696 (the defendant relied on *Brown v. Illinois*, 422 U.S. 590 (1975), and *Wong Sun v. United States*, 371 U.S. 471 (1963), apparently attempting to invoke the Fourth Amendment "fruit of the poisonous tree" exclusionary rule, which bars the fruit of an unlawful arrest from admission into evidence unless some circumstance removes the initial taint).

105. *See Haas*, 373 Mass. at 551, 369 N.E.2d at 697.

106. *See id.* at 551-52, 369 N.E.2d at 698.

107. *See id.* at 554, 369 N.E.2d at 699 ("[T]he cat was out of the bag.... The effect of the tainted confession was not dissipated by the time of the next confession. A belated adequate warning could not put the cat back in the bag.") (quoting Gilpin v. United States, 415 F.2d 638, 642 (5th Cir. 1969)) (internal quotation marks omitted).

108. *See id.* at 549 n.4, 554 n.8, 369 N.E.2d at 696 n.4, 699 n.8.

109. *Id.* at 564, 369 N.E.2d at 705 (Braucher, J., concurring).

110. *See id.* at 565, 369 N.E.2d at 705 (Braucher, J., concurring).

States Supreme Court to rectify what he perceived to be a confused and arbitrary rule.[111]

While the *Haas* opinion discloses that the police officers knew the cat was out of the bag when the defendant told them what time he left for work, there is nothing in the decision demonstrating that the defendant also knew that he had made an incriminating admission, other than the occurrence of his formal arrest. No traditional coercive elements existed, as there was nothing demonstrating that Haas felt it futile to refuse to speak after making his first statement; nor was there any inkling of actual coercive forces prompting his first statement, made because he wished to "'be helpful.'"[112] Indeed, the SJC upheld the trial judge's finding that both statements were voluntary, deeming that conclusion "amply supported by the record."[113] Although the court did not expressly say so, it appears that the court assumed that the presumptive taint of the initial *Miranda* violation extended beyond that initial error to the second, properly warned statement. This constitutes a confusion of *Miranda*'s per se bar of statements taken in violation of its precepts with the traditional test of voluntariness, which did not presume that an initial act of coercion necessarily tainted what occurred afterward.

One year later, the court alluded to *Haas* in evaluating the admissibility of a defendant's statements in another murder case. Defendant Watkins came to Massachusetts from Kentucky and participated in the armed robbery, kidnapping, and murder of a motorist.[114] The defendant fled to Kentucky, where he later was discovered by law enforcement agents in an automobile matching the description of the victim's motor vehicle.[115] Police officers arrested the defendant, seized the automobile, searched it, and ascertained that it indeed belonged to the victim.[116] The law enforcement agents from Massachusetts then went to Kentucky, advised the defendant of the *Miranda* warnings, and questioned him.[117] After a few preliminary questions, the defendant requested counsel; the police officers, however, asked whether the defendant

111. *See id.* (Braucher, J., concurring).

112. *Id.* at 548, 369 N.E.2d at 696.

113. *Id.* at 549 n.4, 554 n.8, 369 N.E.2d at 696 n.4, 699 n.8.

114. *See* Commonwealth v. Watkins, 375 Mass. 472, 475, 379 N.E.2d 1040, 1043 (1978).

115. *See id.* at 477, 379 N.E.2d at 1044.

116. *See id.*

117. *See id.*

wanted an attorney or whether he wished to talk about statements that he had made to the Kentucky police officers.[118] The defendant agreed to speak, and admitted to being in Boston for several days.[119]

The defendant again requested an attorney, and the police officers allowed him to use the telephone.[120] The defendant did not call an attorney; rather, he contacted family members.[121] He then agreed to speak with the police officers and made admissions of the events culminating in the victim's death.[122]

During the defendant's trial, the trial judge conducted a voir dire concerning the admissibility in evidence of the defendant's statements and ruled that the defendant had not waived his right to counsel.[123] The trial judge concluded that the police officers should have terminated the interview when the defendant initially requested an attorney.[124] Finding a violation of the defendant's right to counsel, the trial judge suppressed all statements made by the defendant immediately after that point in questioning.[125] The trial judge, however, admitted into evidence those statements made by the defendant after he used the telephone, finding that his right to cut off questioning at that juncture had been scrupulously honored.[126] The trial judge also rejected the defendant's contentions that his *Miranda* waiver was not voluntary.[127]

Relying on *Haas* in his appeal from his convictions, the defendant alleged that the "cat-out-of-the-bag" theory applied, as his later statements to the police officers were the product of "his mistaken belief that he had irretrievably implicated himself by his earlier, and

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118. *See id.* at 477-78, 379 N.E.2d at 1044.

119. *See id.* at 478, 379 N.E.2d at 1044.

120. *See id.*

121. *See id.*

122. *See id.*

123. *See id.*

124. *See id.*, 379 N.E.2d at 1044-45.

125. *See id.*, 379 N.E.2d at 1045; *see also supra* notes 57-59 and accompanying text.

126. *See Watkins*, 375 Mass. at 479, 379 N.E.2d at 1045. The trial judge relied on *Michigan v. Mosley*, 423 U.S. 96 (1975). See *supra* note 57 for cases dealing with the issue of post-*Miranda* statements. Under *Mosley*, if a defendant asserts his right to remain silent, police officers can renew questioning if they immediately terminate the initial interview upon the defendant's election of his right, allow a significant period of time to elapse, and administer "fresh" *Miranda* warnings to him. *Mosley*, 423 U.S. at 106.

127. *See Watkins*, 375 Mass. at 479, 379 N.E.2d at 1045. The defendant alleged fear of reprisal, pain due to an automobile collision, and injury resultant from beatings by police officers. *See id.*

subsequently determined, illegal statements."[128] The SJC acknowledged that the analysis applied to the question whether a confession had actually been coerced.[129] The *Watkins* court, however, stated that the trial judge found, and the record disclosed, that the defendant's statements were voluntary and not the result of coercion.[130] The court noted that the *Haas* court only "peripherally employed" the "cat-out-of-the-bag" test, in conjunction with the "break-in-the-stream-of-events" test.[131] In *Haas*, "[p]roper police questioning, which elicited the defendant's later statements, was found to have followed the illegal interrogation closely *without* a discernible break in time or the stream of events 'sufficient to insulate the latter statements from the events which went before.'"[132] The court concluded that neither test availed defendant Watkins: his later statements substantially differed from his earlier remarks, and, thus, the cat was not out of the bag; and the second statements were made only after the defendant had been afforded an opportunity to confer with counsel, breaking the stream of events.[133]

In *Haas* and *Watkins*, the trial judges had found, and the SJC affirmed, that the defendants' statements were voluntary, despite the *Miranda* violations.[134] The court, however, did not articulate its rationale for extending traditional voluntariness analyses to *Miranda* questions in those cases. The court apparently concluded that a *Miranda* violation, creating a technical presumption of coercion, but not a finding of actual coercion, nonetheless impacted the voluntariness of the later, warned statement.[135] Yet, in deciding that the defendant's later statement must be suppressed, the *Haas*

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128. *Id.* at 480-81, 379 N.E.2d at 1046.

129. *See id.* at 481, 379 N.E.2d at 1046.

130. *See id.*

131. *Id.*

132. *Id.* at 481-82, 379 N.E.2d at 1046 (quoting Commonwealth v. Haas, 373 Mass. 545, 554, 369 N.E.2d 692, 699 (1977)). The *Watkins* court apparently interpreted *Haas* as a "break-in-the-stream-of-events" case, not a "cat-out-of-the-bag" case.

133. *See id.* at 482, 379 N.E.2d at 1046-47. Finally, the court concluded that the *Mosley* requisites had been satisfied. *See id.* at 483-84, 379 N.E.2d at 1047-48; *see also* Edwards v. Arizona, 451 U.S. 477, 485-86 (1981) (distinguishing the right to counsel from the right to remain silent but declining to create a per se ban on further questioning once a defendant has requested counsel). The SJC analogized the right to remain silent, discussed in *Mosley*, to the right to counsel. *See Watkins*, 375 Mass. at 483-84, 379 N.E.2d at 1047-48.

134. *See Watkins*, 375 Mass. at 481, 379 N.E.2d at 1046; *Haas*, 373 Mass. at 549 n.4, 554 n.8, 369 N.E.2d at 696 n.4, 699 n.8.

135. Other jurisdictions have also employed this analysis to assess the impact of *Miranda* violations on later, warned statements. *See, e.g.*, United States v. Lee, 699 F.2d 466, 468-69 (9th Cir. 1982); United States v. Nash, 563 F.2d 1166, 1169 (5th Cir.

court did not expressly find that the defendant's will had been overborne by any knowledge that his initial, unwarned statement inculpated him. No actual compulsion of either statement manifested itself in the record. Even under a traditional voluntariness analysis, an initial coercive act does not taint all that comes after it.[136] To require its suppression under a traditional voluntariness test, the second statement must be a product of the first. As no traditional element of involuntariness presented itself in *Haas*, the application of the "break-in-the-stream-of-events" and "cat-out-of-the-bag" tests in that case should not necessarily have mandated suppression of the defendant's second statement. By joining the traditional voluntariness tests with *Miranda*'s per se rule of exclusion, the SJC had fashioned a test which could bar from evidence voluntary properly warned statements.

III. *ELSTAD*

In *Elstad*, the United States Supreme Court squarely faced the question "whether an initial failure of law enforcement officers to administer the warnings required by *Miranda v. Arizona* . . ., without more, 'taints' subsequent admissions made after a suspect has been fully advised of and has waived his *Miranda* rights."[137] Defendant Elstad, age eighteen, was suspected of burglarizing a neighbor's house.[138] Police officers went to his home bearing a warrant for his arrest and spoke with his mother, who led them to the defendant's room.[139] The police officers asked the defendant, clad in shorts, to dress and proceed to the living room.[140] One police officer then spoke to the defendant's mother in the kitchen, explaining that they had a warrant to arrest her son.[141]

The second police officer remained with the defendant, asked him whether he knew the reason for the visit, and inquired whether he knew the victim.[142] The defendant said yes, noting that he heard that there had been a robbery at the neighbor's home.[143] The po-

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1977); *see also infra* note 200 and accompanying text (stating that the police may not intentionally withhold *Miranda* warnings until the suspect has incriminated himself).

136. *See* United States v. Bayer, 331 U.S. 532, 540-41 (1947); Commonwealth v. Mahnke, 368 Mass. 662, 682, 335 N.E.2d 660, 673 (1975).

137. Oregon v. Elstad, 470 U.S. 298, 300 (1984) (citation omitted).

138. *See id.*

139. *See id.*

140. *See id.*

141. *See id.* at 300-01.

142. *See id.* at 301.

143. *See id.*

lice officer told the defendant that he suspected his involvement in the crime, and the defendant responded, "Yes, I was there."[144]

The police officers then took the defendant to their cruiser; the defendant's father arrived home, and the police officers told him that the defendant was a burglary suspect.[145] The defendant's father, very agitated, said, "'I told you that you were going to get into trouble. You wouldn't listen to me. You never learn.'"[146]

Police officers interrogated the defendant at the police station approximately one hour later, after administering the *Miranda* warnings to him.[147] The defendant acknowledged that he understood the rights, agreed to speak with the police officers, and gave an incriminating statement.[148]

At the trial for the burglary charge, the defendant alleged that the cat had been let out of the bag; he also said that the confession was the fruit of the poisonous tree.[149] The trial judge excluded the defendant's initial statement that he had been present at the crime scene, because the defendant had not received the *Miranda* warnings.[150] He, however, found that the second statement, uttered at the police station, was voluntarily made after receipt of the warnings and allowed it into evidence.[151]

On appeal before the Oregon Court of Appeals, the government conceded that the defendant had been in custody in his home, necessitating the *Miranda* warnings and requiring suppression of that statement.[152] The appellate court found that the subsequent warned statement did not follow a break in the stream of events, mandating reversal of the defendant's conviction.[153] The Oregon Supreme Court declined further review, and the case came before the United States Supreme Court on a writ of certiorari.[154]

The *Elstad* Court reviewed the evolution of *Miranda*, noting

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144. *Id.* (internal quotation marks omitted).

145. *See id.*

146. *Id.*

147. *See id.*

148. *See id.*

149. *See id.* at 302 (citing Wong Sun v. United States, 371 U.S. 471 (1963)); *see also* United States v. Bayer, 331 U.S. 532, 540 (1947) ("[A]fter an accused has once let the cat out of the bag[,] . . . [h]e can never get the cat back in the bag.").

150. *See Elstad*, 470 U.S. at 302.

151. *See id.*

152. *See id.*; *see also* State v. Elstad, 658 P.2d 552 (1983), *rev'd sub nom.* Oregon v. Elstad, 470 U.S. 298 (1985).

153. *See Elstad*, 658 P.2d at 554. The court found that the cat was out of the bag. *See id.* at 555.

154. *See Elstad*, 470 U.S. at 303 n.3.

that, before that decision, the admissibility of a confession turned on the Fourteenth Amendment question of voluntariness.[155] As *Miranda* created a presumption that custodial statements made without the warnings were coerced, due to the inherent coerciveness of custodial interrogation, it "required suppression of many statements that would have been admissible under traditional due process analysis . . . ."[156] Therefore, a voluntary statement, if the product of a custodial interrogation in violation of *Miranda*, must be suppressed under the Fifth Amendment even though it would be admissible under the Fourteenth Amendment.

The Court rejected the fruit of the poisonous tree analysis, finding it applicable only to violations of the Fourth Amendment.[157] In contrast, while the *Miranda* presumption of coerciveness is irrebuttable as per the statement obtained in violation of its precepts, its fruits need not be "discarded as inherently tainted."[158] The Court explained that the warnings are not themselves part of the Fifth Amendment, but serve only to protect a suspect's self-incrimination right.[159]

> The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. . . . The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony. Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.[160]

The Court concluded that, absent actual coercion, a *Miranda* violation need not bar the admission in evidence of a subsequent, prop-

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155. *See id.* at 303; *see also supra* notes 41-43, 64-70 and accompanying text.

156. *Elstad*, 470 U.S. at 303.

157. *See id.* at 305-06; *see also supra* note 66 and accompanying text.

158. *Elstad*, 470 U.S. at 307.

159. *See id.* at 305. The "'fruit of the poisonous tree' [test] assumes . . . a constitutional violation." *Id.* The Fourth Amendment exclusionary rule thus exists to deter unlawful searches, regardless of their fruits. *See id.* at 306. The exclusionary rule in the Fifth Amendment, however, is distinct from the one under the Fourth Amendment. *See id.* "Where a Fourth Amendment violation 'taints' the confession, a finding of voluntariness for the purposes of the Fifth Amendment is merely a threshold requirement in determining whether the confession was . . . caused by the Fourth Amendment violation." *Id.* (citing Taylor v. Alabama, 457 U.S. 687, 690 (1982)).

160. *Id.* at 306-07.

erly warned statement.[161]

Justice Sandra Day O'Connor, writing for the majority, noted that:

> the task of defining "custody" is a slippery one, and "policemen investigating serious crimes [cannot realistically be expected to] make no errors whatsoever." . . . If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. *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 indeterminate 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*.[162]

A police officer's error in judgment is not tantamount to deliberate coercion, which offends due process and renders the reliability of the detainee's statement suspect. The Court decided that a second, properly warned statement need not be subject to automatic exclusion: "[T]here is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. The relevant inquiry is whether, *in fact*, the second statement was also voluntarily made."[163] In rejecting the concept of a presumptive taint, the Supreme Court thus returned the focus to the suspect's actual mental state.

The *Elstad* Court declared the "cat-out-of-the-bag" and "break-in-the-stream-of-events" metaphors inapt, as they apply to the question of voluntariness, not the technical coercion implicit in a *Miranda* violation.[164] The metaphoric tests should be employed to assess the voluntariness of later statements made after an initial, involuntary one.

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161. *See id.* at 308-09. The Court extended *Michigan v. Tucker*, 414 U.S. 433 (1974), which declined to suppress the testimony of a witness whose identity was discovered through a statement made in violation of *Miranda*, *see id.* at 445-46, to a defendant's own voluntary statement after a noncoercive *Miranda* violation, *see Elstad*, 470 U.S. at 308-09.

162. *Elstad*, 470 U.S. at 309 (emphasis added) (citation omitted) (alteration in original) (quoting *Tucker*, 417 U.S. at 446).

163. *Id.* at 318 (emphasis added).

164. *See id.* at 310-12.

Considering the "break-in-the-stream-of-events" analysis, the Court noted that, "of the courts that have considered whether a properly warned confession must be suppressed because it was preceded by an unwarned but clearly voluntary admission, the majority have explicitly or implicitly recognized that [the] requirement of a break in the stream of events is inapposite."[165] The Court concluded that administration of the *Miranda* warnings will cure the error, for "[t]he warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will.'"[166] That is, the invocation of the *Miranda* warnings should be sufficient to terminate the taint of the initial *Miranda* violation.

As for the "cat-out-of-the-bag" analysis, the Court held that its application to *Miranda* breaches would "disable" law enforcement, where the cat's emergence from the bag was due to the suspect's own act, not any actual law enforcement coercion.[167] It stated:

> This Court has never held that the psychological impact of *voluntary* disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver. . . . [A]dopt[ion of] this expansive view of Fifth Amendment compulsion, effectively *immunizes a suspect* who responds to pre-*Miranda* warning questions from the consequences of his subsequent informed waiver of the privilege of remaining silent.[168]

The Court accurately repositioned the "cat-out-of-the-bag" question into the context of coercion by law enforcement agents.[169]

The Court concluded that an initial, voluntary statement made in violation of *Miranda* must be suppressed, but the admissibility of a subsequent, warned confession hinges upon the question whether it also was voluntarily made.[170] The Court said:

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165. *Id.* at 310 & n.2. Interestingly, the Court cited *Commonwealth v. White*, 353 Mass. 409, 232 N.E.2d 335 (1967), as one such decision. In *White*, the SJC had rejected the defendant's suggestion that one illegally obtained statement presumptively tainted any subsequent statement, noting that the question of the admissibility in evidence of the subsequent statement turns on the question whether the defendant made it voluntarily. *See id.* at 417, 232 N.E.2d at 341. The *Haas* court did not cite *White*.

166. *Elstad*, 470 U.S. at 311 (quoting Wong Sun v. United States, 371 U.S. 471, 486 (1963)).

167. *Id.*; *see also supra* notes 69-70.

168. *Elstad*, 470 U.S. at 312 (emphasis added).

169. *See supra* notes 69-70 and accompanying text (providing examples of cases involving voluntary statements by the defendant, and statements obtained through coercion by private citizens).

170. *See Elstad*, 470 U.S. at 317-18.

> subsequent administration of the *Miranda* warnings to a suspect who has given a voluntary but unwarned statement *ordinarily should suffice to remove the conditions that precluded admission of the earlier statement*. In such circumstances, the finder of fact *may reasonably conclude that the suspect made a rational and intelligent choice* whether to waive or invoke his rights.[171]

The admissibility of the second statement is decided by reviewing the totality of the circumstances: "[T]he finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative."[172]

Examining the totality of circumstances surrounding Elstad's questioning, the Court deemed "the causal connection between any psychological disadvantage created by [Elstad's first] admission and his ultimate decision to cooperate . . . *speculative and attenuated at best*."[173] Elstad's second statement, wholly voluntary, was admissible in evidence against him.[174] The *Elstad* Court thus separated the Fifth Amendment *Miranda* exclusionary rule from the Fourteenth Amendment tests for voluntariness, as blended by *Haas* and *Watkins*.

Justice William J. Brennan, Jr., in a dissent to which Justice Thurgood Marshall joined, proclaimed that *Elstad* delivered a "potentially crippling blow" to *Miranda*.[175] He protested the denuding of the "'fruit of the poisonous tree'" test.[176] Justice Brennan's concerns may pose some credence. If review of the voluntariness of the second, properly warned statement after an initial *Miranda* violation does not allow consideration of the first statement's impact on the suspect's decision to make the second, then the "totality of the circumstances" are not examined. Indeed, other courts have summarily rejected the defendants' "cat-out-of-the-bag" claims, citing *Elstad*.[177] But the second statement may be the fruit of the *Mi-*

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171. *Id.* at 314 (emphasis added).
172. *Id.* at 318.
173. *Id.* at 313-14 (emphasis added).
174. *See id.* at 318.
175. *Id.* at 319 (Brennan, J., dissenting).
176. *Id.* (Brennan, J., dissenting).
177. *See, e.g.*, Bryant v. Vose, 785 F.2d 364, 367 n.3 (1st Cir. 1986) (the defendant claimed that his second statement was a fruit of the first, but, as the defendant did not claim that second confession was elicited under pressure, and the record disclosed no such pressure, the second statement was admissible in evidence); Martin v. Wainwright, 770 F.2d 918, 928-29 (11th Cir. 1985) (as the police officers did not use "physical vio-

randa violation if the suspect believes that, in making the first statement, he has "spilled the beans" and therefore has nothing to lose by continuing to speak. By making the exclusive source of the first statement the suspect's own guilty conscience, and by ignoring the import of the first, unwarned statement on the suspect's frame of mind in making the second, warned one, the *Elstad* Court arguably begs the question of voluntariness.[178]

Further, Justice Brennan suggested that police officers might withhold provision of the *Miranda* warnings until they gain a confession and only then belatedly administer the *Miranda* warnings.[179] In *United States v. Carter*,[180] however, the United States Court of Appeals for the Eighth Circuit faced such a scenario and found that *Elstad* "did not go so far as to fashion a rule permitting this sort of end run around *Miranda*."[181] The law enforcement agents in *Carter* clearly knew that the defendant was in custody; their failure to administer the *Miranda* warning therefore could not be interpreted as a good-faith mistake.[182] The *Carter* court concluded that the defendant's second statement must be suppressed.[183] *Elstad* thus does not allow police officers to ignore, or manipulate, *Miranda*.

IV. MASSACHUSETTS' DEFECTION FROM *ELSTAD*

The SJC considered *Elstad*'s application in *Commonwealth v. Smith*.[184] Like Justice Brennan, the SJC apparently was troubled by *Elstad*.

Defendant Smith and his friend Duclos were suspected of having executed Duclos's parents by rifle fire.[185] Duclos and his mother had quarreled over the proceeds of an insurance policy, and Smith had disliked the woman since she prevented him from taking

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lence" or "other deliberate means" to elicit the first, unwarned statement, the failure to timely give the *Miranda* warnings did not "automatically require the exclusion of the [later, warned] confession").

178. Indeed, finding police officers "ill-equipped to pinch-hit for counsel," the Court declared that the suspect need not be apprised that the first statement must be suppressed due to the *Miranda* violation, when electing whether to waive his self-incrimination rights. *Elstad*, 470 U.S. at 316. The Court noted that it "has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." *Id.*

179. *See id.* at 318 n.5 (Brennan, J., dissenting).

180. 884 F.2d 368 (8th Cir. 1989).

181. *Id.* at 373.

182. *See id.*

183. *See id.* at 375.

184. 412 Mass. 823, 829, 593 N.E.2d 1288, 1291 (1992).

185. *See id.* at 824-25, 593 N.E.2d at 1289.

a gun and shooting his own mother.[186]

Duclos reported the fatal shootings to his grandmother, who summoned the police department.[187] Police officers found the victims' bodies and asked Duclos to come to the police station.[188] Duclos complied and initially named the defendant as an alibi witness, contending that the two had been "'four-wheeling'" in his truck at the time of the murders.[189] After a police officer spotted blood spatters on Duclos's socks, Duclos acknowledged his involvement in the crime, but said that the defendant Smith fired the fatal shots.[190]

Armed with Duclos' admissions, the police officers questioned defendant Smith at the police station without administering the *Miranda* warnings to him.[191] The defendant confirmed Duclos's initial alibi that the two had been "'4 wheeling.'"[192] One police officer ultimately administered the *Miranda* warnings to the defendant, told the defendant that he did not believe him, and informed him that Duclos had implicated him in the murders.[193] The defendant then admitted his participation in the effort to conceal the crime, denied that he fired the fatal shots, and impliedly claimed that Duclos had killed his own parents.[194]

The trial judge suppressed the defendant's initial statements, finding a *Miranda* violation, but allowed the later, warned admissions into evidence.[195] On appeal from his first-degree murder convictions, the defendant challenged that ruling.[196]

The SJC flatly rejected *Elstad* and instead followed a line of pre-*Elstad* precedent perceiving a presumptive taint of an initial *Miranda* violation on later, warned statements.[197] The court traced

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186. *See id.* at 824-25, 824 n.1, 593 N.E.2d at 1289 & n.1.
187. *See id.* at 825, 593 N.E.2d at 1289.
188. *See id.*
189. *Id.* at 826, 593 N.E.2d at 1290.
190. *See id.*
191. *See id.* at 827, 593 N.E.2d at 1290.
192. *See id.*, 593 N.E.2d at 1291.
193. *See id.* at 828, 593 N.E.2d at 1291.
194. *See id.*
195. *See id.* at 829, 593 N.E.2d at 1291.
196. *See id.* at 825, 593 N.E.2d at 1289.
197. *See id.* at 829-30, 593 N.E.2d at 1291-92. Those cases, which included *Haas* as well as decisions of some other federal and state courts, were decided before *Elstad*, and therefore were not controlling or persuasive authority. While other jurisdictions previously applied the Fourteenth Amendment voluntariness tests to determine whether a *Miranda* violation should result in the suppression of later statements, *see, e.g.*, United States v. Lee, 699 F.2d 466, 468-69 (9th Cir. 1982); United States v. Nash, 563 F.2d 1166, 1169 (5th Cir. 1977), the *Elstad* Court corrected that error. *See Elstad*,

the history of federal constitutional law prior to *Elstad* and contended that a *Miranda* violation presumptively tainted any subsequent confession by an accused.[198] The court focused on both the "break-in-the-stream-of-events" and "cat-out-of-the-bag" tests.[199] The *Smith* court explained that the presumed taint

> was intended to deter law enforcement officials from circumventing the *Miranda* requirements by using the warnings strategically—first questioning a suspect without benefit of the warnings, and then, having obtained an incriminating response or having otherwise benefited from the coercive atmosphere, by giving the *Miranda* warnings and questioning the suspect again in order to obtain an admissible statement.[200]

The court concluded that the "presumption of taint is also consistent with the constitutional principle that the government bears the burden to show that a defendant's custodial statement was freely willed."[201] The SJC held to its view that an initial *Miranda* breach affects the voluntariness of any later statement.[202] This holding is in complete conflict with *Elstad*.

The court then discussed the "break-in-the-stream-of-events" and the "cat-out-of-the-bag" tests, explaining that the first test looked to whether external constraints, old or new, overbore the defendant's will, while the latter test looked to whether the subsequent statement was a product of the suspect's conclusion that he had let the secret out for good in his earlier statement.[203] The court alluded to *Haas* and *Watkins*, saying that defendant Haas had let the cat out of the bag during initial questioning and his later, warned statement followed so closely on the illegal interrogation that there had been no break in the chain of events, and noting that defendant Watkins had not made an inculpatory statement in his

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470 U.S. 298, 317-18 (1985). That other courts previously applied the Fourteenth Amendment tests to *Miranda* violations demonstrates that Massachusetts was not alone in its misinterpretation of federal precedent before *Elstad*, but nonetheless gives no validity to the SJC's rejection of *Elstad* once the Supreme Court had clarified the distinction between *Miranda* and voluntariness questions.

198. *See Smith*, 412 Mass. at 829, 593 N.E.2d at 1291-92.

199. *See id.* at 830, 593 N.E.2d at 1292.

200. *Id.* at 829, 593 N.E.2d at 1292. *But see* United States v. Carter, 884 F.2d 368, 373, 375 (8th Cir. 1989) (concluding that *Elstad* did not allow police officers to intentionally withhold the *Miranda* warnings until a suspect incriminated himself, only then to administer them).

201. *Smith*, 412 Mass. at 829-30, 593 N.E.2d at 1292.

202. *See id.* at 830, 593 N.E.2d at 1292 (quoting Commonwealth v. Mahnke, 368 Mass. 662, 682, 335 N.E.2d 660, 673 (1975)).

203. *See id.* at 830-31, 593 N.E.2d at 1292.

first interrogation, so the cat was not out of the bag, and his second statement had been temporally removed from the initial questioning.[204]

The court then turned to *Elstad*, which had rejected the notion of the presumptive taint.[205] The trial judge had concluded that Smith was not subjected to any pressure, was not under the influence of alcohol or drugs, and was willing to speak with the police officers.[206] The court concluded: "This evidence supports the judge's ultimate finding that the defendant's statements were *voluntary* and, therefore, that his *second statement would be admissible as a matter of present Federal constitutional law*."[207] Under *Elstad*, this should have ended the court's inquiry.

But the *Smith* court, as the defendant urged, applied *Haas* to the case. Although the trial judge had not applied the "break-in-the-stream-of-events" test, the *Smith* court concluded that no break had occurred, as the defendant was subjected to a single, continuous interrogation.[208] Further, although the trial judge concluded that the "cat-out-of-the-bag" test, as in *Watkins*, did not apply because the defendant had not implicated himself in his first statement, the court deemed that holding "clearly erroneous," for the defendant let the proverbial cat out of the bag by reciting Duclos's alibi, which the police officers then knew to be false.[209] As in *Haas*, however, it appears that, while the police officers knew that the defendant made a fatal slip, the defendant did not.[210] He was unaware that the cat was out of the bag; therefore, the second statement was not triggered by the first. To the contrary, the court said that the "defendant may have believed, mistakenly, that his

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204. *See id.* at 831, 593 N.E.2d at 1292-93.

205. *See id.* at 832, 593 N.E.2d at 1293.

206. *See id.*

207. *Id.* (emphasis added).

208. *See id.*

209. *Id.* at 835, 593 N.E.2d at 1295. The court, however, rejected the prosecution's contention that the case was akin to *Watkins*, because Smith's initial statement—a false alibi planned with Duclos—exhibited consciousness of guilt and, thus, was much more inculpatory than Watkins's statements. *See id.* at 834 & n.10, 593 N.E.2d at 1294 & n.10. The court said that "[t]he first statement, if available to the prosecution, would have constituted strong evidence of consciousness of guilt." *Id.* at 834, 593 N.E.2d at 1294. The first statement, however, was not available to the Commonwealth because it was made absent provision of the *Miranda* warnings and therefore was suppressed. *See id.* at 829, 593 N.E.2d at 1291. There is no evidence demonstrating that the defendant knew he had inculpated himself with the first statement; to the contrary, the appellate court mentioned the interrogating police officer's omission of the details of Duclos's statement when he questioned the defendant. *See id.* at 828 n.6, 593 N.E.2d at 1291 n.6.

210. *See id.* at 835, 593 N.E.2d at 1294-95.

statement was exculpatory."[211] Since the police officers knew that the defendant had incriminated himself, the court held that they were obligated to create a break in the chain of events to insulate the defendant's statement from the earlier illegality.[212] The court, therefore, declared Smith's second statement inadmissible in evidence.[213]

As a "common-law rule of evidence," the *Smith* court concluded that it "shall, in a situation where Federal law requires *Miranda* protections, continue to follow the principles set forth in *Commonwealth v. Haas*."[214] The court also resurrected the concept of presumptive taint eliminated by *Elstad*.[215] The court considered its rule a boon to criminal trials, for it would eliminate "fact-bound inquiries into the voluntariness of confessions, where police officers are generally more credible witnesses than criminal defendants."[216] Yet, as Justice Braucher noted in his *Haas* concurrence, application of a rigid exclusionary rule, without regard for the particular facts of the case, can result in arbitrary rulings.[217] Further, the court implicitly rejected *Elstad*'s call for a review of the totality of the circumstances to determine whether the second, warned statement is voluntary. This per se rule of exclusion also is a departure from *Bayer* and *Mahnke*, which focused on the question whether, in light of the circumstances, the second statement was tainted by the first.[218] Finally, Smith's statements were found to be voluntary, making their suppression from evidence akin to a per se rule of exclusion.[219]

In a footnote, the SJC acknowledged that the "cat-out-of-the-bag" and the "break-in-the-stream-of-events" tests are distinct, but declined to discuss their relationship.[220] The court also rejected the prosecution's contention that, since the defendant had not incriminated himself in his first statement, the "break-in-the-stream-of-events" test did not require suppression.[221] It posited that the test

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211. *Id.* at 835, 593 N.E.2d at 1295.
212. *See id.*
213. *See id.*
214. *Id.* at 837, 593 N.E.2d at 1296.
215. *See id.* at 836, 593 N.E.2d at 1295.
216. *Id.* at 837, 593 N.E.2d at 1296.
217. *See* Commonwealth v. Haas, 373 Mass. 545, 564-65, 369 N.E.2d 692-705 (1977).
218. *See* United States v. Bayer, 331 U.S. 532, 540-41 (1947); Commonwealth v. Mahnke, 368 Mass. 662, 676, 686, 335 N.E.2d 666, 669, 675 (1975).
219. *See Smith*, 373 Mass. at 832, 593 N.E.2d at 1293.
220. *See id.* at 833-34, 833 n.9, 593 N.E.2d at 1293-94, 1293 n.9.
221. *See id.* at 835, 593 N.E.2d at 1294-95.

could require suppression of a later, incriminating statement in some instances, suggesting that a technical violation of *Miranda*, absent coercion or an incriminating statement, might create a per se rule of exclusion for all subsequent statements.[222] This is precisely the immunity that *Elstad* tried to prevent.[223]

The *Smith* court then adopted *Haas* as "a common-law rule of evidence."[224] The SJC, however, neglected to adopt the *Miranda* warnings themselves under the state law. Further, the protection against self-incrimination has no history in Massachusetts common law, but exists in Article Twelve of the Massachusetts Declaration of Rights.[225] The court's application of tests rejected by the Supreme Court to determine the consequences of a violation of the federal *Miranda* warnings thus was not a legitimate exercise of its power to create and define state law. Rather, it was an affront to the concept of federalism.[226] Justice Joseph R. Nolan, dissenting, spoke plainly and succinctly:

> The rule of . . . *Elstad* . . . should be followed. There, the United States Supreme Court correctly left to the fact finder the only crucial question, whether the suspect made a rational and intelligent choice either to waive or invoke his rights after *Miranda* warnings had been given. I dissent.[227]

In his view, as the Supreme Court had established a rule, the SJC was bound to apply it to the facts of the case before it.

If provision of the *Miranda* warnings, creatures of federal constitutional law, are required under federal constitutional analysis,

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222. The defendant, eighteen years of age, had left high school without graduating. *See id.* at 824, 593 N.E.2d at 1289. The court contrasted the interrogating police officer's eighteen years of experience with the defendant's age. *See id.* at 827 n.4, 593 N.E.2d at 1290 n.4. Unlike the *Elstad* Court, it is apparent that the *Smith* court focused on the police officer's state of mind. Although the *Smith* court noted the danger of police officers manipulating the timing of *Miranda* warnings in order to procure an inculpatory statement, *see id.* at 829, 593 N.E.2d at 1292, the court did not expressly find that the law enforcement agents here had so manipulated Smith. Had the court made such a finding, it could have suppressed the statements under *United States v. Carter*, 884 F.2d 368, 373, 375 (8th Cir. 1989), without rejecting *Elstad* and fashioning a state rule.

223. *See* Oregon v. Elstad, 470 U.S. 298, 312 (1985).

224. *Smith*, 412 Mass. at 837, 593 N.E.2d at 1296.

225. *See* MASS. CONST. art. XII ("No subject shall be . . . compelled to accuse, or furnish evidence against himself . . . ."); Commonwealth v. Zevitas, 418 Mass. 677, 682, 639 N.E.2d 1076, 1078 (1994); Opinions of the Justices, 412 Mass. 1201, 1206, 591 N.E.2d 1073, 1075 (1992).

226. *See supra* notes 3-4.

227. *Smith*, 412 Mass. at 838, 593 N.E.2d at 1296 (Nolan, J., dissenting) (citation omitted).

then the SJC cannot apply a state-devised test for exclusion of evidence produced after the *Miranda* violation, but must apply the federal test. The Supreme Court devised an exclusionary rule in *Miranda* and defined its scope in *Elstad*. The legal justification for the SJC's devising of its own rule under state "common law" is highly suspect. The state court simply flouted the Supreme Court's authority.

While *Elstad* raises some concerns, it is a decision of the United States Supreme Court. The SJC has not adopted the *Miranda* warnings as part of Article Twelve.[228] If, as is apparent, the court did not approve of *Elstad*'s rejection of the "cat-out-of-the-bag" and the "break-in-the-stream-of-events" tests, it nonetheless should not have devised a state common-law rule of exclusion to replace that enunciated by the *Elstad* Court. Rather, the court should have embraced the *Miranda* warnings under Article Twelve. It then would be free to devise a state exclusionary rule for a state constitutional violation. That rule then would rest wholly within state law and would be completely legitimate.

Since *Smith*, the SJC has adhered to its two-test stance without explaining why two tests are necessary and which applies to a given case.[229] The court also has continued in its application of the "cat-out-of-the-bag" test without examining the impact of an initial, unwarned statement on the defendant's actual state of mind when electing to make a subsequent statement upon receipt of the *Miranda* warnings.[230] This eliminates the traditional finding of actual

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228. *See supra* note 29 and the accompanying text.

229. *See* Commonwealth v. Torres, 424 Mass. 792, 799-800, 800 n.8, 678 N.E.2d 847, 852 & n.8 (1997) (reciting tests and noting, without explaining, that the question whether one or both applies is determined by the facts of the case); Commonwealth v. Damiano, 422 Mass. 10, 13, 660 N.E.2d 660, 662 (1996) (briefly reciting both tests and affirming trial judge's conclusion that both tests were satisfied); Commonwealth v. Prater, 420 Mass. 569, 580-84, 580 n.10, 651 N.E.2d 833, 840-42, 840 n.10 (1995) (holding that either or both tests apply, depending on the facts of the case); Commonwealth v. Osachuk, 418 Mass. 229, 235-37, 635 N.E.2d 1192, 1195-96 (1994) (applying both tests and concluding that the cat was out of the bag and that there was no break in the stream of events).

230. *See Damiano*, 422 Mass. at 11, 13, 660 N.E.2d at 662 (where a cabdriver was found dead in the middle of a highway and the defendant had been observed running about, scantily clad, and acting irrationally, the court found that the initial *Miranda* violation required suppression of the second, warned statement; the court concluded that the unwarned statement was incriminating as it placed the defendant at the homicide scene, but the court did not expressly examine the impact of the first statement on the defendant's state of mind when making the second); *Osachuk*, 418 Mass. at 236-37, 635 N.E.2d at 1196-97 (focusing on the incriminating nature of the defendant's initial, unwarned statement, not his state of mind). *But see Prater*, 420 Mass. at 583, 651

coercion from the test. Further, the court's suggestion that a *Miranda* violation that does not produce an incriminating statement might require suppression of a later, warned statement if there is no break in the stream of events hints of the per se rule of exclusion which the *Elstad* Court took measures to guard against. Apart from its arbitrariness, the court's undermining of the concept of federalism is particularly troubling, since the court has available, and has not hesitated to employ in other cases,[231] the state constitution.[232]

CONCLUSION

Regardless of one's opinion as to the soundness of the United States Supreme Court's reasoning in *Elstad*, the decision nonethe-

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N.E.2d at 842 ("'A principal reason why a suspect might make a second or third confession is simply that . . . he might think he has *little to lose* by repetition.'") (quoting Darwin v. Connecticut, 391 U.S. 346, 350-51 (1968) (Harlan, J., concurring in part, dissenting in part) (alteration in original)); Commonwealth v. Mahnke, 368 Mass. 662, 687, 335 N.E.2d 660, 675-76 (1975) (finding no cat out of the bag because the defendant did not feel that he had damned himself by his earlier statement).

231. See *supra* note 23 and cases cited for examples.

232. Also unsettling is the court's failure to articulate the basis within state law for its new rule. The court has acted arbitrarily on other occasions, often adopting a rejected federal test in the wake of a new federal decision. *See, e.g.*, Commonwealth v. Stoute, 422 Mass. 782, 785-89, 665 N.E.2d 93, 95-98 (1992) (rejecting *California v. Hodari D.*, 499 U.S. 621 (1991), as the definition for a "stop," and adopting *Terry v. Ohio*, 392 U.S. 1 (1968), and *United States v. Mendenhall*, 446 U.S. 544 (1980), tests no longer viable after *Hodari D.*, under Article Fourteen); Commonwealth v. Amendola, 406 Mass. 592, 599-600, 599 n.3, 550 N.E.2d 121, 125 & n.3 (1990) (noting only that Article Fourteen of the state constitution sometimes confers more protections than does the Fourth Amendment, the court decided that the United States Supreme Court's reasoning in *Jones v. United States*, 362 U.S. 257 (1960), was more compelling than that in *United States v. Salvucci*, 448 U.S. 83 (1980), which had overruled *Jones*'s automatic standing rule as no longer necessary, and adopted a rule of automatic standing under Article Fourteen). The court's predilection for resurrecting outmoded federal law has left criminal practitioners and the state's intermediate Massachusetts Appeals Court in limbo, requiring practitioners and the intermediate court to apply both old and new federal analyses to a settled federal question in anticipation of the SJC's possible deviation from the Supreme Court. *See, e.g.*, Commonwealth v. Johnson, 420 Mass. 458, 462-66, 650 N.E.2d 1257, 1259-62 (1995) (stating that for nearly twenty years, Appeals Court followed *Manson v. Brathwaite*, 432 U.S. 98 (1977), on the question of undue suggestiveness of identification procedures, while the SJC adhered to *Commonwealth v. Botelho*, 369 Mass. 860, 343 N.E.2d 876 (1976)). In *Johnson*, the SJC finally embraced *Botelho* under Article Twelve of the state constitution); Commonwealth v. Harkess, 35 Mass. App. Ct. 26, 629 & n.1, 624 N.E.2d 581, 584 & n.1 (1993) (applying both *Terry-Mendenhall* and *Hodari D.* analyses, while noting that it was up to the SJC to determine what was the proper test under Article Fourteen). As the SJC often does not explain the historical basis for finding state constitutional or common-law rules more protective than federal tests, practitioners and lower courts must divine whether, and how, the court will depart from federal law.

less is a statement from the nation's highest Court concerning a principle of federal constitutional law and its application. The Massachusetts SJC, dissatisfied with the *Elstad* rule, was free as a matter of state constitutional or common law to adopt the *Miranda* warnings and to administer any test of its own devising to assess the consequences of their violation. Since the state self-incrimination right exists within Article Twelve, the state constitution would have been the proper vehicle for adoption of the *Miranda* warnings. Instead, the court created common-law "adjuncts" to *Miranda* without adopting the whole to which they attach.

Further, when applying Fourteenth Amendment voluntariness tests, which focus on actual coercion, to a *Miranda*, Fifth Amendment violation, the SJC has removed the analyses' subjective component. If there is no break in the stream of events, even if a suspect has not incriminated himself, later, properly warned statements nonetheless may be suppressed. Similarly, if the police officers know, but the suspect is unaware, that the suspect has incriminated himself, then the cat is out of the bag. As the *Elstad* Court noted, requiring suppression of voluntary statements because of police officers' technical missteps, without any overbearing of the defendant's will, extends *Miranda* beyond the contemplated parameters of the Fifth Amendment exclusionary rule.