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Oregon v. Elstad: The Supreme Court Puts the Cat Back in the Bag

I. Introduction

In *Oregon v. Elstad,*[1] the seminal *Miranda v. Arizona*[2] decision was once again the subject of debate in the Supreme Court.[3] In *Miranda,* the Court found that inherent compulsion is present in all custodial interrogation, and the Court held that such compulsion must be counteracted with procedural safeguards to protect a defendant's fifth amendment privilege against self-incrimination.[4] A confession not preceded by such safeguards is presumed to be coerced and, therefore, must be excluded from evidence.[5]

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1. 105 S. Ct. 1285 (1985).
2. 384 U.S. 436 (1966).
3. Since *Miranda* was decided in 1966 it has been the subject of continuous judicial interpretation and scholarly criticism. *See, e.g.,* Minnesota v. Murphy, 465 U.S. 420 (1984) (reaffirming that Miranda warnings are prophylactic standards); Fletcher v. Weir, 455 U.S. 603 (1982) (post-arrest silence was used to impeach the credibility of defendant's exculpatory statements); Fare v. Michael C., 442 U.S. 707 (1979) (post-*Miranda* request for a probation officer does not invoke constitutional rights); Mincey v. Arizona, 437 U.S. 385 (1978) (voluntary statements taken in violation of *Miranda* can be used to impeach defendant's testimony at trial); Beckwith v. United States, 425 U.S. 341 (1976) (Miranda warnings are unnecessary in a noncustodial, coercive situation); United States v. Mandujano, 425 U.S. 564 (1976) (Miranda warnings need not be given to a grand jury witness); Oregon v. Hass, 420 U.S. 714 (1975) (statements taken in violation of *Miranda* used to impeach defendant on cross-examination); Michigan v. Tucker, 417 U.S. 433 (1974) (Miranda warnings are only prophylactic standards to protect the privilege); Harris v. New York, 401 U.S. 222 (1971) (statements taken in violation of *Miranda* can be used to impeach defendant's testimony); Orozco v. Texas, 394 U.S. 324 (1969) (interpreting the meaning of "in custody"); Mathis v. United States, 391 U.S. 1 (1968) (also interpreting the meaning of "in custody").

   For criticism of the *Miranda* decision, see generally Caplan, Miranda *Revisited,* 93 YALE L.J. 1375 (1984); Lederer, Miranda v. Arizona — *The Law Today,* 78 MIL. L. REV. 107 (1978); Robinson, *Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and Post-*Miranda *Questionnaires: A Construct of Police Capacity to Comply,* 1968 DUKE L.J. 425; Elsen & Rosett, *Protections for the Suspect Under* Miranda v. Arizona, 67 COLUM. L. REV. 645 (1967).
4. *Miranda,* 384 U.S. at 444, 478-79.
5. *Id.* at 444 ("[T]he prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.").

In *Oregon v. Elstad*, the Court had to determine whether the *Miranda* presumption of coercion extended to a situation where a defendant made two voluntary confessions, one in the absence of Miranda warnings, and the other after Miranda warnings were administered and waived by the defendant. The Court held that *Miranda* did not reach this situation[6] and that the second confession was admissible as evidence.[7]

Part II of this Note reviews the development of the exclusionary rule, the tainted fruit doctrine, and the growing distinction between *Miranda's* presumption of coercion and the actual voluntariness of a confession. Part III presents the facts, procedural history, and the opinion of the Supreme Court in *Oregon v. Elstad*. Part IV analyzes the Court's decision, its impact on prior doctrine and its potential for future application. Part V concludes that the Court was correct in denying the exclusion of the confession because the confession had not been taken in violation of the Constitution or of *Miranda*, and that its suppression would not serve the principles of the exclusionary rule.

II. Background

A. *Pre-*Miranda *Treatment of Confessions*

The earliest cases concerning exclusions of coerced confessions appeared in the 1930's and 1940's.[8] The fifth amendment privilege against self-incrimination was not applied expressly to state criminal prosecutions until 1964 in *Malloy v. Hogan*,[9] and the privilege did not extend to police interrogations until *Miranda v. Arizona*.[10] In both state and federal cases, coerced confessions were traditionally dealt with under a due process volun-

6. *Elstad*, 105 S. Ct. at 1292-93 ("Where an unwarned statement is preserved for use in situations that fall outside the sweep of the *Miranda* presumption, 'the primary criterion of admissibility [remains] the "old" due process voluntariness test.' ") (quoting Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 877 (1981)).

7. *Id.* at 1298. The Court remanded the case to determine if the second confession was voluntary based on a due process test.

8. *See, e.g.*, Ashcraft v. Tennessee, 322 U.S. 143 (1944); Ward v. Texas, 316 U.S. 547 (1942); Vernon v. Alabama, 313 U.S. 547 (1941) (per curiam); White v. Texas, 310 U.S. 530 (1940); Canty v. Alabama, 309 U.S. 629 (1940) (per curiam); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

9. 378 U.S. 1 (1964).

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

tariness test.[11]

Initially, the Court was concerned with physical coercion and excluded evidence derived through such methods on due process grounds.[12] The reasons for excluding testimony compelled by police brutality were twofold. First, inclusion of such testimony was not consistent with society's sense of justice and, second, physical coercion tended to make such evidence untrustworthy.[13] However, attention soon focused on psychological coercion rather than physical brutality.[14] The Court was concerned with the issue of whether the police officer's behavior overbore the defendant's will to resist.[15] The fact that the officer's conduct produced truthful statements was irrelevant.[16] The Court

11. *See generally*, Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449 (1964); Developments in the Law — Confessions, 79 HARV. L. REV. 935 (1966).

12. *But see* cases cited *supra* note 8.

13. White v. Texas, 310 U.S. 530, 531-33 (1940) (confession coerced by physical brutality); Brown v. Mississippi, 297 U.S. 278, 285 (1936) (involving brutal beating to extract confession).

14. *See, e.g.*, Leyra v. Denno, 347 U.S. 556 (1954) (a confession extracted through skillful and suggestive questioning, thrusts and promises, by a psychiatrist is inconsistent with due process); Watts v. Indiana, 338 U.S. 49 (1949) (it is a violation of due process to hold a defendant in solitary confinement with no place to sit or sleep except the floor, and interrogate him by relays of police officers, usually until long past midnight, for nearly one week); Chambers v. Florida, 309 U.S. 227 (1940) (a confession is compulsory if it is extracted as a result of repeated inquisitions, without friends or counselors present, and under circumstances calculated to inspire terror). *See generally* Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968) (analyzing effects of coercion on individual suspects).

15. Driver, *supra* note 14, at 43.

16. The Court was concerned only with striking confessions which were induced by police misconduct involving artifice and deception. In Lynumn v. Illinois, 372 U.S. 528 (1963), the defendant was charged with unlawful possession and sale of marijuana. The police falsely told defendant that she would lose public assistance and custody of her children unless she cooperated, in which case they would recommend leniency. As a result of this coercion, the defendant confessed. The confession was held inadmissable regardless of its trustworthiness. In Rogers v. Richmond, 365 U.S. 534 (1961), the defendant was charged with murder and then questioned by a team of three officers for six hours. When this did not elicit a confession, the police chief falsely told defendant he was going to take the defendant's wife, who was suffering from a debilitating disease, into custody. An hour later the police chief made a second threat concerning defendant's wife. A confession followed. The Court stated that it was irrelevant whether or not the confession was likely to be true. In Spano v. New York, 360 U.S. 315 (1959), a police officer tricked the accused, who was a childhood friend, into believing his job was in jeopardy. After eight hours of continuous questioning, the fatigued defendant confessed to murdering a man who stole money from him. The trustworthiness of the confession

identified psychologically coercive measures that precluded the voluntariness of confessions, such as repeated interrogations,[17] isolated detention,[18] prolonged periods of interrogation,[19] statements made when the accused was physically injured,[20] and the absence of warnings of one's constitutional rights.[21]

The Court's solution to the problem of psychological coercion was to exclude confessions where both the physical surroundings of interrogation and the manner of interrogation influenced suspects. The Court next addressed a subtler form of coercion, such as denying a particular suspect the knowledge that he has the right to remain silent and the right to consult counsel. In *Miranda v. Arizona*,[22] the Court held that the fifth amendment privilege against self-incrimination is applicable to an accused who is subjected to police interrogation.[23]

B. *The* Miranda *Court's Treatment of Confessions*

The *Miranda* Court considered four cases which had common salient features: each of the defendants was subjected to custodial interrogation, deprived of full warnings, held incom-

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was not a consideration.

17. Davis v. North Carolina, 384 U.S. 737, 752 (1966) ("The fact that each individual interrogation session was of relatively short duration does not mitigate the substantial coercive effect created by repeated interrogation in these surroundings over 16 days.").

18. *Id.* at 745-46.

19. Evidence of extended interrogation often results in a finding of involuntariness. *See* Culombe v. Connecticut, 367 U.S. 568 (1961); Fikes v. Alabama, 352 U.S. 191 (1957); Turner v. Pennsylvania, 338 U.S. 62 (1949).

20. In Mincey v. Arizona, 437 U.S. 385 (1978), the defendant was questioned in a hospital bed while in a weakened state; he was encumbered with tubes after being shot during a narcotics raid. Defendant's serious condition did not prevent a detective from interrogating him. "He was evidently confused and unable to think clearly about either the events of that afternoon or the circumstances of his interrogation .... He was ... 'at the complete mercy' [of the detective]." *Id.* at 398-99.

21. Haynes v. Washington, 373 U.S. 503, 510-11 (1963) (failure to effectively advise a defendant of his rights adds weight to the circumstances which make a confession involuntary).

22. 384 U.S. 436 (1966).

23. *Miranda*, 384 U.S. at 444, 478-79. *See also* Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968). For a history of the privilege against compelled self-incrimination, see L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968). *See also* E. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955); L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? (1959) (policy justifications for the adoption, extension, and contraction of the privilege).

municado, and questioned by police in a manner that elicited incriminating statements.[24] The Court found that all of the defendants had been held in a police dominated atmosphere and concluded that such an environment is inherently coercive.[25]

The *Miranda* Court set out four "fundamental" warnings which were required in order to counteract the inherent coerciveness of the custodial interrogation process: the right to remain silent, any statement may be used against an individual as evidence, an accused has the right to counsel present during questioning, and if the accused cannot afford an attorney one will be provided.[26] In addition, the Court held that Miranda warnings must be administered prior to "custodial interrogation"[27] so that the psychological pressures of custodial interroga-

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24. *Miranda*, 384 U.S. at 445.

25. *Id.* at 457.

26. The warnings were summarized by the Court as follows: "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444.

27. Custodial interrogation was defined by the Court as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. The following cases helped define custodial interrogation: Morales v. New York, 396 U.S. 102 (1969) (suspect cannot be taken into custody for a custodial interrogation on less than probable cause); Orozco v. Texas, 394 U.S. 324 (1969) (further defined custodial interrogation so as to include the compulsion which arises when police officers confront a defendant in his own bedroom rather than limiting the rule to the ostensibly coercive atmosphere of the stationhouse). The definition of custodial interrogation was broadened in Mathis v. United States, 391 U.S. 1 (1968), where an agent of the Internal Revenue Service questioned a penitentiary inmate concerning a criminal tax investigation while the inmate was serving time on an unrelated charge. The Court held that for a statement to be admissible when taken from a person who is interrogated while in custody, even if the accused is in custody for the purpose of the investigation of an unrelated offense, Miranda warnings must be given. *Id.* at 3-5.

In People v. Shivers, 21 N.Y.2d 118, 233 N.E.2d 836, 286 N.Y.S.2d 827 (1967), the definition of custodial interrogation was found flexible enough to include the deprivation of freedom of action that can occur when a suspect is questioned at gunpoint. Even in this nontraditional situation, if testimony was obtained absent warnings, it was inadmissible regardless of whether the statements were inculpatory or exculpatory. *See Miranda*, 384 U.S. at 477.

At one time it appeared that the *Miranda* decision would be extended to numerous other situations, but in recent years the Court has declined to so extend *Miranda*. In Beckwith v. United States, 425 U.S. 341 (1976), the Court held that a taxpayer is not in custody if he is interviewed during an Internal Revenue Service criminal investigation where the interview begins in the taxpayer's home and continues at his office.

Another narrow reading of *Miranda* was given in Oregon v. Mathiason, 429 U.S. 492

tion do not thwart the accused's right to silence.[28]

C. *Post-*Miranda *Treatment of Confessions*

Subsequent to the *Miranda* decision, the Court delineated the boundaries of *Miranda*. Guidelines were laid down to determine exactly what constitutes custodial interrogation,[29] how the accused can invoke his constitutional rights,[30] and what actions constitute waiver of such rights.[31]

The *Miranda* decision mandated broad rules concerning the

(1977), where a parolee was asked to come to the police station in connection with a burglary. When he arrived he was expressly told that he was not under arrest, but a police officer falsely informed him that his fingerprints were found at the scene of the crime. The fingerprint story induced a confession which was held admissible because the defendant came voluntarily to the police station; he was not deprived of his freedom of action and therefore he was not under custodial interrogation.

In Rhode Island v. Innis, 446 U.S. 291 (1980), a defendant who was suspected of murder was arrested, given his Miranda warnings, and after invoking his right to remain silent he was placed in a caged wagon with officers who had been instructed not to converse with the defendant. The officers initiated a conversation among themselves but within earshot of the defendant. They indicated how tragic it would be if a small child from the area were to find the murder weapon. This discussion played on the sympathies of the defendant who immediately told the officers of the whereabouts of the shotgun. The Court held that the statements and the shotgun were admissible because the defendant had not been interrogated — there must be questioning or the functional equivalent of questioning for an interrogation to take place. The Court found that there is subtle compulsion in all interrogation so it designed a test to determine when the interrogation evokes a measure of compulsion above that inherent in custody itself: for an interrogation to occur it must be established that a police officer should have known that his conduct was reasonably likely to elicit an incriminating response. *Id.* at 302-03. *See also* Brewer v. Williams, 430 U.S. 387 (1977).

See also Note, *The Meaning of "Interrogation" Under* Miranda v. Arizona: Rhode Island v. Innis, 12 TEX. TECH L. REV. 725 (1981); Note, *The United States Supreme Court Redefines Interrogation for* Miranda *Purposes* — Rhode Island v. Innis, 3 WHITTIER L. REV. 409 (1981).

28. *Miranda*, 384 U.S. at 444.

29. *See supra* note 27.

30. The *Miranda* Court said that for an accused to invoke his constitutional rights after he has been given his warnings, he need only indicate:

> in any manner, at any time prior to or during questioning, that he wishes to remain silent, [and consequently] the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.

Miranda, 384 U.S. at 473-74.

See infra notes 33-38 and accompanying text.

31. *See infra* notes 39-54 and accompanying text.

invocation and waiver of constitutional rights. These two areas have subsequently been treated as separate considerations warranting different degrees of scrutiny.[32]

1. *Invoking Constitutional Rights*

The question of whether a defendant has invoked his constitutional rights is more easily determined than the question of whether a defendant has waived his constitutional rights. The *Miranda* Court stated that a defendant invokes his right to remain silent if he "indicates in *any* manner" that he does not wish to be interrogated.[33] This statement has been interpreted to mean that the right to remain silent is immediately invoked upon an officer's rendering of an effective warning — a suspect need not affirmatively exercise his right to remain silent.[34]

Unlike the right to remain silent, a suspect's fifth amendment right to counsel[35] is not automatically invoked. This distinction stems from *Miranda* where the Court said that a suspect's "pre-interrogation request for a lawyer . . . affirmatively secures his right to have one."[36] The courts have interpreted this as requiring a suspect to exercise affirmatively his right to counsel in order to invoke the privilege.[37] Once a suspect expresses

32. *See generally* Lederer, *supra* note 3. *See infra* notes 33-54 and accompanying text.

33. *Miranda*, 384 U.S. at 473-74 (emphasis added).

34. *See* Michigan v. Mosley, 423 U.S. 96 (1975) (a defendant invoked his constitutional right to remain silent when he declined to discuss the robbery for which he was arrested).

Courts have had difficulty in determining whether a suspect has, in fact, completely or merely partially exercised his privilege to remain silent. *See* United States v. Marchildon, 519 F.2d 337, 343 (8th Cir. 1975) (defendant's negative response to police request to inform meant only that the suspect would not talk about his sources of supply, not that he wished to remain silent). *See also* Lederer, *supra* note 3, at 144.

35. *See* Lederer, *supra* note 3, at 144. *Miranda* raised both fifth and sixth amendment issues. The Court reasoned that the sixth amendment right to counsel was essential to a realistic exercise of the fifth amendment right against self-incrimination. *Miranda*, 384 U.S. at 469-71.

36. *Miranda*, 384 U.S. at 470.

37. *See* North Carolina v. Butler, 441 U.S. 369 (1979) (the defendant had not invoked his constitutional right when he expressly refused to sign a waiver card but said he would speak to the police officers; he neither expressed a desire to consult counsel nor made an attempt to terminate the interrogation); Fare v. Michael C., 442 U.S. 707 (1979) (defendant's request for his probation officer is not a per se invocation of his sixth amendment right to counsel under *Miranda* because a probation officer does not serve

his desire to consult counsel, interrogation should terminate until a lawyer is present or the suspect makes a valid waiver.[38]

2. *Waiving Constitutional Rights*

Since *Miranda*, the courts have struggled to determine what constitutes a valid waiver of one's fifth amendment rights.[39] A valid *Miranda* waiver presupposes that the suspect has been given the requisite procedural safeguards and that he understands his rights; indeed, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[40] *Miranda's* requirements concerning waiver were inexplicit.[41] Thus, in *Michigan v.*

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the same function in an adversarial system as an attorney); Edwards v. Arizona, 451 U.S. 477 (1981) (defendant invoked his constitutional right to consult counsel when he said he wanted to speak to an attorney).

38. *Miranda*, 384 U.S. at 474.

39. *See* Fare v. Michael C., 442 U.S. at 725 (1979) (defendant's waiver of rights was valid under a totality of the circumstances approach); *Mosley*, 423 U.S. at 103-04 (the Court applied the "scrupulously honored" standard for reinterrogation following an assertion of the right to remain silent); United States v. Thomas, 474 F.2d 110, 112 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973) (the court held that once a defendant retains an attorney or has counsel appointed, no statement made by him in the absence of that attorney is admissible unless there was notification and a reasonable opportunity for counsel to be present); United States v. Masullo, 489 F.2d 217, 223 (2d Cir. 1973) (expressing concern that the rule requiring presence of counsel would be applied only to those who actually have lawyers).

See generally Lederer, *supra* note 3, at 144-48. Note, *Reinforcing* Miranda — *Restricting Interrogation After a Request for Counsel*, 48 BROOKLYN L. REV. 593 (1982); Note, *Balancing the Right to Interrogate Against the Right to Counsel:* Edwards v. Arizona, 17 GONZ. L. REV. 697 (1982); Note, *Fifth Amendment, Confessions, Self-Incrimination — Does a Request for Counsel Prohibit a Subsequent Waiver of* Miranda *Prior to the Presence of Counsel?*, 23 WAYNE L. REV. 1321 (1977); Note, *Waiver of Rights in Police Interrogations:* Miranda *in the Lower Courts*, 36 U. CHI. L. REV. 413 (1969).

40. *Miranda*, 384 U.S. at 475. For criticism of this declaration, see Jacobs, Miranda: *The Right to Silence*, 11 TRIAL 69 (1975). This commentator discusses some inconsistencies in the *Miranda* opinion's requirement that a defendant waive his rights and waive them knowingly. This commentator further explains why *Miranda's* safeguards fail to dissolve the coercive atmosphere of the interrogation — the pressure to waive one's right to remain silent is no less compelling than the pressure to confess.

41. The *Miranda* Court stated that proving an accused had waived his constitutional rights requires the government to meet a "high standard of proof." *Miranda*, 384 U.S. at 475.

> [A]n express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a

Mosley[42] the Court corrected this vagueness. In *Mosley* the defendant declined to answer any questions involving the robberies for which he was arrested.[43] The police officer who had given Mosley his Miranda warnings properly ceased questioning him upon the invocation of his right to remain silent. However, less than three hours later, another detective re-administered the warnings to Mosley and questioned him about an unrelated murder.[44] During this second interrogation, Mosley made an incriminating statement and he was subsequently convicted of murder.[45]

The *Mosley* Court reiterated the *Miranda* principle that a suspect can counteract "the coercive pressures of the custodial setting"[46] if he is aware that he has the right to cut off questioning. The knowledge of one's right to remain silent would allow the suspect to flex some control over the content, length, and depth of the interrogation. In applying this principle, the *Mosley* Court noted that a confession taken during a second interrogation does not violate *Miranda* if the following factors are present: all questioning has ceased after the first interrogation, a significant period of time has passed with fresh warnings given, and the interrogation has been commenced on a different matter by a different interrogator.[47]

> waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. . . . Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated.

Id. at 475-76.

42. 423 U.S. 96 (1975).

43. *Id.* at 97.

44. *Id.* at 97-98.

45. *Id.* at 98-99.

46. *Id.* at 104.

47. *Id.* at 106. Justice White, a dissenter in *Miranda*, concurred in the result of *Mosley*. The Justice noted his belief that the Court was moving toward the test of voluntariness as to whether a properly informed defendant waived his right of silence. According to the Justice, the Court was looking beyond the presumption of compulsion laid down in *Miranda* to whether actual compulsion had been dissipated. This was a movement away from *Miranda* and a step toward the due process voluntariness inquiry *Miranda* sought to extinguish in determining when a defendant in custodial interrogation is acting voluntarily. *Id.* at 108 (White, J., concurring).

The *Miranda* Court stated that "[u]nless adequate protective devices are employed

In *North Carolina v. Butler*,[48] the Court created a case-by-case test to determine whether a defendant has waived his constitutional rights. The Court acknowledged that *Miranda* firmly stated that silence is insufficient to constitute a waiver; however, the *Butler* majority held that silence, accompanied by an understanding of one's rights and a course of conduct indicating waiver, may indeed constitute a waiver.[49] The *Butler* Court held that an express statement of waiver is not essential: "the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' "[50]

A valid waiver of the right to consult counsel was defined in *Edwards v. Arizona*[51] where Edwards had asserted both his right to remain silent and his right to counsel when police officers attempted to interrogate him. The next morning, however, the police officers who initially interrogated Edwards returned to speak with him. The officers were not accompanied by counsel, and Edwards, over his objection, was told he had to speak with the officers. It was during this second interrogation that Edwards implicated himself in the crime.[52]

The Court held that Edwards' admissions should be excluded because he did not knowingly and intelligently waive his rights.[53] Once an accused invokes his right to counsel, the accused must be the one to initiate further communications with the police to waive his constitutional rights — the fact that a suspect merely responds to further police questioning does not constitute a waiver; to waive his constitutional rights, Edwards

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to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." *Miranda*, 384 U.S. at 458.

48. 441 U.S. 369 (1979).

49. *Id.* at 373. Butler was advised of his *Miranda* rights. He read a waiver of rights form which he refused to sign; however, he said he fully understood his rights and that he would speak to the officers. He never asked for counsel nor tried to terminate the interrogation.

50. *Id.* at 374-75 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

51. 451 U.S. 477 (1981).

52. The Court, in determining the validity of a waiver, focused on whether the waiver was made knowingly and intelligently rather than on whether the statement was voluntary. *Id.* at 482-84.

53. *Id.* at 482.

had to be the one to initiate further communications with the police.[54]

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54. *Id.* at 484-85. In accordance with *Miranda*, the *Edwards* Court replaced the voluntariness inquiry with a presumption that a defendant does not relinquish the right he has invoked merely by answering additional questions put to him by the interrogator. *Id.* In so doing, the Court refused to displace *Miranda's* presumption of compulsion in the context of waiver of constitutional rights. However, a different result was reached where statements taken in violation of *Miranda* could discredit a defendant's testimony if he chose to take the stand. In Harris v. New York, 401 U.S. 222 (1971), the Court refused to extend *Miranda* to an area clearly intended to come within *Miranda's* grasp. *See generally* Kent, Harris v. New York: *The Death Knell of* Miranda *and* Walder?, 38 BROOKLYN L. REV. 357 (1971).

The *Harris* case and its progeny have distinguished *Miranda's* presumption of compulsion from the actual compulsion that may arise during custodial interrogation. *Accord*, Mincey v. Arizona, 437 U.S. 385 (1978) (prior inconsistent statements taken in violation of *Miranda* were admissible for purposes of impeachment but only if such statements were voluntary so as not to deny due process of law).

In *Harris*, the Court held that *Miranda* did not bar the use of prior inconsistent statements taken in the absence of full warnings to impeach testimony at trial. The *Harris* Court had three major justifications for its holding. First, the Court said that the issue of whether unwarned statements can be used for purposes beyond the prosecution's case in chief was not necessary to *Miranda's* holding, so *Miranda* was not controlling on this issue in *Harris*. *Harris*, 401 U.S. at 224. Second, the benefits gained from discrediting a defendant's perjurious testimony are valuable while the cost of using an unwarned statement is only the "speculative possibility that impermissible police conduct will be encouraged thereby." *Id.* at 225. Third, the deterrent effect of the exclusionary rule is served when the presumptively coercive statement is barred from the prosecution's case in chief. *Id.* at 225. The Court was, in actuality, justifying its holding on an exclusionary rule that solely serves the purpose of deterring police misconduct. *See generally* Pelander, Michigan v. Tucker: *Warning About Miranda*, 17 ARIZ. L. REV. 188 (1975). But more importantly for the discussion here, the *Harris* Court began distinguishing between actual coercion and the inherent compulsion of *Miranda*.

> *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.

Id. at 224.

It should be noted that at least three states have disagreed with the *Harris* decision and have refused to apply it. *See*, State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971); Commonwealth v. Triplett, 462 Pa. 244, 341 A.2d 62 (1975); People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

Harris was reaffirmed in Oregon v. Hass, 420 U.S. 714 (1975), where the Court allowed inculpatory statements to be used to discredit the defendant even though they were presumptively coercive by *Miranda* standards and may have been actually coercive by due process standards. In *Hass*, the defendant was arrested and given his Miranda warnings. While being transported to the station, the defendant said he wanted to telephone a lawyer. A police officer told him that he could contact a lawyer as soon as they reached the station, but by that time the defendant had already made an incriminating

3. *Constitutional Mandate or Judicial Construct*

After *Miranda*, a new issue emerged for judicial debate: whether the procedural safeguards set out in *Miranda* were constitutionally mandated or judicially created. The *Miranda* Court held that they were constitutionally mandated, but subsequent decisions described them as "judicially created rules of evidence."[55]

In *New York v. Quarles*,[56] the Court made an actual exception to *Miranda*.[57] The Court held that where public safety is concerned, a breach of *Miranda* is not fatal to the admissibility of a confession.[58] The Court would not have made an exception to a constitutional requirement; therefore, such a decision presupposes that the Court was making an exception to a judicial construct. In the years prior to *Quarles*, the Court redefined the aim of *Miranda*, the justifications for the fifth amendment exclusionary rule, and how the exclusionary rule is to be applied.

After summarizing its holding that procedural safeguards must be employed to protect the rights of an individual who is interrogated while in custody, the *Miranda* Court stated that "[t]he whole thrust of our foregoing discussion demonstrates

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statement. The Court held that the statement was admissible, but solely for impeachment purposes. *Id.* at 722.

The Court, however, placed some limitations on the *Harris-Hass* trend of analysis. In Mincey v. Arizona, 437 U.S. 385 (1978), the Court said that presumptively coercive statements — those taken in violation of *Miranda* — could not be used for impeachment purposes if they were also involuntary by due process standards. The defendant's statements had to be "the product of a rational intellect and a free will." *Id.* at 398 (quoting Townsend v. Sain, 372 U.S. 293, 307 (1963)).

The *Mincey* Court made a distinction between statements that are presumptively coercive and those which actually violate the privilege against self-incrimination. *Mincey*, 437 U.S. at 397-98. While the waiver cases did not totally revive the use of due process standards in determining whether an accused waived his constitutional rights, the Court uses such standards in the context of impeachment.

55. *See* Michigan v. Tucker, 417 U.S. 433, 439 (1974) (the procedural safeguards of *Miranda* are only "prophylactic standards," so, if a police officer, in good faith, fails to comply with the warnings, his actions may run short of violating a suspect's constitutional rights); United States v. Calandra, 414 U.S. 338, 348 (1974) (in the fourth amendment context the exclusionary rule is a judicially created remedy designed to deter future police misconduct).

56. 467 U.S. 649 (1984).

57. *Id.* at 658 ("In recognizing a narrow exception to the *Miranda* rule in this case, we acknowledge that to some degree we lessen the desirable clarity of that rule.").

58. *Id.*

that *the Constitution has prescribed the rights of the individual* when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself."[59] However, in *Michigan v. Tucker*,[60] the Court declared that the warnings are "prophylactic rules" which were judicially created rather than constitutionally prescribed.[61]

The defendant in *Tucker* was arrested and questioned in connection with a rape.[62] The interrogation took place prior to the *Miranda* decision; however, because the trial was subsequent to *Miranda*, *Miranda* was held applicable.[63] Tucker was interrogated in accordance with *Escobedo v. Illinois*:[64] he was warned of all of his rights, except that he was not advised that if he could not afford counsel one would be appointed free of charge.[65] The defendant then told the police that he had been with his friend, Henderson, on the night of the crime.[66] When police questioned Henderson, his statements not only discredited Tucker's alibi, but they also incriminated Tucker.[67]

At a pre-trial hearing, Tucker sought to suppress any testimony Henderson might give at trial because Tucker revealed Henderson's identity in the absence of full Miranda warnings.[68] The Court stated that the goal of the exclusionary rule is to deter police misconduct and because the police misconduct here was an "inadvertent disregard"[69] for procedural safeguards, not themselves rights protected by the Constitution, exclusion would

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59. *Miranda*, 384 U.S. at 479 (emphasis added).

60. 417 U.S. 433 (1974).

61. *Id.* at 439.

62. *Id.* at 436.

63. *Id.* at 436-37.

64. 378 U.S. 478 (1964). In *Escobedo*, the defendant was not warned of his constitutional right to remain silent and was denied his request to consult with his attorney. *Id.* at 481. The Court recognized that when an officer uses his power to extract answers he will often go beyond the lawful bounds of such power to extract what he feels is the correct answer, a confession of guilt. Therefore, the *Escobedo* court placed some limitations on police conduct. *Id.* at 490-91.

65. *Tucker*, 417 U.S. at 438.

66. *Id.* at 436.

67. *Id.*

68. *Id.* at 437.

69. *Id.* at 445.

not serve a "valid and useful purpose."[70] The Court held that Henderson's testimony would be admissible because the actions of the police did not infringe on Tucker's privilege against self-incrimination.[71]

In *New York v. Quarles*, the Court did not reinterpret *Miranda*[72] nor claim that *Miranda's* requirements did not reach the particular situation.[73] Instead, the Court created an exception to the *Miranda* holding.[74] The Court held that the concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*.[75]

In *Quarles*, two police officers were on patrol when a woman informed them that she had just been raped. She then described her assailant[76] and told the officers that the man had run into a nearby supermarket.[77] When the police officers entered the store they noticed a man fitting the description given by the victim. The suspect, Quarles, upon seeing the officers, ran into the back of the store where he was stopped and frisked.[78] When one of the officers discovered that Quarles was wearing an empty shoulder holster, he quickly hand-cuffed him and, in the absence of

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70. *Id.* at 446.

71. *Id.* at 445-46. For criticism of the *Tucker* Court's characterization of the Miranda warnings as no more than "prophylactic rules" judicially created to safeguard the fifth amendment privilege against self-incrimination, see, Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 123-25; and Schrock, Welsh & Collins, *Interrogational Rights: Reflections on* Miranda v. Arizona, 52 S. CAL. L. REV. 1, 38-41 (1978).

72. Michigan v. Mosley, 423 U.S. 96 (1975); North Carolina v. Butler, 441 U.S. 369 (1979); and Edwards v. Arizona, 451 U.S. 477 (1981), are good examples of the new interpretations the Court was applying to *Miranda*. *See supra* notes 39-54 and accompanying text.

73. *See supra* note 27. *See also*, Fare v. Michael C., 442 U.S. 707 (1979) (a request for a probation officer is not a per se invocation of a defendant's rights when the defendant has already knowingly and voluntarily waived his constitutional rights); Beckwith v. United States, 425 U.S. 341 (1976) (the Court refused to extend *Miranda* to noncustodial circumstances); Minnesota v. Murphy, 465 U.S. 420 (1984) (refusal to extend *Miranda* requirements to interviews with probation officers).

74. *See* Note, New York v. Quarles: *Safety First?*, 5 PACE L. REV. 751, 766 (1985) (illustrating the conflict, created by the Court's exception, between the fifth amendment's protection against self-incrimination and a concern for public safety).

75. New York v. Quarles, 467 U.S. 649, 657 (1984).

76. *Id.* at 651. The assailant was described as a black male, wearing a dark jacket with the words "Big Ben" printed in yellow letters on the back. *Id.*

77. *Id.*

78. *Id.* at 652.

Miranda warnings, asked him where the gun was.[79] With a nod the defendant indicated that he had tossed the gun into some empty cartons. After the gun was retrieved the defendant was given his Miranda warnings, whereupon he said he would answer the officers' questions. It was in the course of this custodial interrogation that the defendant revealed that he owned the gun which had been found in the supermarket and subsequently admitted into evidence.[80]

In reaching this public safety exception to *Miranda*, the Court reaffirmed the *Tucker* pronouncement that the Miranda warnings were no more than prophylactic rules which were not themselves rights protected by the Constitution;[81] moreover, where public safety and the rules of *Miranda* clash, the Court held that public safety takes precedence.[82]

D. *An Evolving Exclusionary Rule*

1. *As Applied to the Fourth Amendment*

The exclusionary rule is a judicially created doctrine that secures the constitutional rights of citizens by excluding unconstitutionally seized evidence from a criminal proceeding.[83] The exclusionary rule first appeared in the fourth amendment context in *Weeks v. United States*[84] where the federal government, in a criminal trial, was barred from using evidence that had been seized in violation of the fourth amendment.[85] Forty-seven years later, in *Mapp v. Ohio*,[86] the exclusionary rule was applied to the

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79. *Id.*

80. *Id.*

81. *Id.* at 654. ("The prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected . . . .' Requiring *Miranda* warnings before custodial interrogation provides 'practical reinforcement' for the Fifth Amendment right.") (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

82. *Id.* at 656.

83. *See* Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & CRIMINOLOGY 143 (1978) (tracing the history and the rationales of the exclusionary rule and seeking to determine whether the rule requires exclusion in all instances of police violations of constitutional rights).

84. 232 U.S. 383 (1914).

85. *Id.* at 398.

86. 367 U.S. 643 (1961).

states through the fourteenth amendment.[87]

The principles which have been cited as the rationale for the exclusionary rule are numerous.[88] The principle rationale for the invocation of the rule is to preserve the constitutional rights of individuals.[89] Moreover, in *United States v. Calandra*,[90] the Court noted that the primary justification for the exclusionary rule was the deterrent effect that the exclusionary rule has on impermissible police conduct.[91]

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87. First, it was thought to be unfair to convict an individual on evidence illegally taken from him. *See generally* White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273, 1283-84 (1983).

Second, admitting tainted evidence is an additional infringement of a defendant's privacy. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920) (records the government obtained during an illegal search of corporate offices were held inadmissible).

Third, the government should not benefit from the misconduct of its own officials. *Id.* at 392.

Finally, the federal courts would become a part of the illegality by accepting unlawfully seized evidence and thereby continuing the unjust use. *See* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (using unlawfully seized evidence in court would virtually condone the illegality of the seizure).

For a brief discussion of the development of the exclusionary rule, see Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 590-645 (1983); and Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 367-82 (1981).

88. *See* Wasserstrom & Mertens, *The Exclusionary Rule on the Scaffold: But was it a Fair Trial?*, 22 AM. CRIM. L. REV. 85 (1984) (these authors present an in depth analysis of the exclusionary rule and the Court's recent good faith exception).

89. Weeks v. United States, 232 U.S. at 392.

90. 414 U.S. 338, 347 (1974).

91. *Id.* at 347-48. The *Calandra* Court held that a witness cannot refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. The Court reached this conclusion after it determined that suppression of unlawful evidence is only one method of effectuating the fourth amendment, and the Court does not have to adopt every method that might deter police misconduct. *Id.* *See also* United States v. Janis, 428 U.S. 433, 446 (1976) (the "prime purpose of the [exclusionary] rule, if not the sole one, 'is to deter future unlawful police conduct.' "). Moreover, the Court distinguishes the fourth amendment exclusionary rule from the "direct command" of exclusion in the fifth amendment. Because the fourth amendment violation occurs at the time of the unlawful search and seizure, excluding the evidence in court can only serve as a partial remedy. This may not be the case in the fifth amendment context because the fifth amendment proscribes an individual from being "compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The fifth amendment violation occurs at the time it is used in court and, therefore, excluding such evidence can prevent the constitutional violation altogether. *See infra* note 94 and accompanying text.

The Court in *Calandra* also declared that the rule was a "judicial remedy" that should be "restricted to those areas where its remedial objectives are thought most efficaciously served."[92] Therefore, the rule is usually implicated only in situations where it serves such a deterrent effect.[93]

2. *As Applied to the Fifth Amendment*

Unlike the fourth amendment exclusionary rule, the fifth amendment exclusionary rule is constitutionally required.[94] In

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92. *Calandra*, 414 U.S. at 348.

93. United States v. Janis, 428 U.S. at 453 (illegally seized evidence was admissible in the prosecution's case in chief since excluding it would serve no deterrent purpose). *See also* Kamisar, *supra* note 87, at 597-606; Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than "An Empty Blessing,"* 62 JUDICATURE 337 (1979); Mathias, *The Exclusionary Rule Revisited*, 28 LOYOLA L. REV. 1 (1982); Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U. L. REV. 911, 935-36 (1979); Pitler, *"The Fruits of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579, 581-89 (1968).

At what point the exclusionary rule is implicated is determined by a cost-benefit analysis. *See Calandra*, 414 U.S. at 348. The cost-benefit analysis is a balancing test which weighs the costs of applying the exclusionary rule against the benefits of suppressing the illegally obtained evidence. Some of the costs of imposing the exclusionary rule which have been cited by the Court include: impeding the accusatorial and investigative functions of a grand jury or trier of fact, wasting time on what may prove to be a tangential issue, converting the grand jury into a preliminary trial on the merits, and societal disrespect due to indiscriminate application of the rule. *Id.* at 349-50.

The benefits cited for imposing the exclusionary rule are not nearly as numerous as the costs. In fact, the Court said that the exclusionary rule is a device used to effectuate the fourth amendment and the Court does not have to adopt every method that may deter impermissible police conduct. *Id.* at 348.

Recently in United States v. Leon, 104 S. Ct. 3405 (1984), the Court applied this balancing test and concluded that there is a good faith exception to the warrant requirement; the Court concluded that illegally seized evidence was admissible since the police acted in good faith when they relied on an invalid warrant. *Id.* at 3416. Now the Court is not only predicating exclusion on police misconduct, it is also saying that the benefit of deterrence must outweigh the cost of exclusion. *See* Note, Nix v. Williams: *Conjecture Enters the Exclusionary Rule*, 5 PACE L. REV. 657, 659-61 (1985) (discussing the origin and justifications for the exclusionary rule).

94. Brown v. Illinois, 422 U.S. 590, 601 (1975). *See* Henkin, *The Supreme Court, 1967 Term — Forward: On Drawing Lines*, 82 HARV. L. REV. 63, 222 (1968).

> Under the fourth amendment, the essence of the constitutional wrong lies in the initial invasion of person or property; the exclusionary rule, as originally conceived, was a means of deterring this invasion. It is for this reason that the attenuation limitation arose in the fourth amendment context. As the causal chain between a wrongful act by the police and subsequent evidence becomes more attenuated, it becomes less likely that an intent to secure the evidence motivated the police action or that its exclusion would deter similar action in the future.

Miranda, this doctrine was strictly imposed when statements were taken in the absence of the prescribed warnings or their functional equivalent.[95] Just as the original fourth amendment exclusionary rule was based on numerous rationales before *Calandra* transformed it into a deterrent-based rule,[96] the *Miranda* exclusionary rule also rested on a variety of principles which justified exclusion: to counter inherent compulsion,[97] to protect the defendant's human dignity,[98] to ensure that the defendant's statements are the product of free choice,[99] to preserve the accusatorial system,[100] to protect the individual's right of privacy,[101]

> On the other hand, the gravamen of a constitutional wrong under the fifth amendment is the use of a defendant's coerced testimony against him in a criminal proceeding, not the mere act of compelling him to speak; the fifth amendment exclusionary rule is an essential element of the constitutional right, not just a means of enforcing the right.

Id.

95. *See Miranda*, 384 U.S. at 444 ("[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."). *See also id.* at 479 ("But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.").

96. *See supra* note 91 and accompanying text.

97. *See Miranda*, 384 U.S. at 455-56 ("[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.").

98. *Id.* at 457 ("This [interrogation] atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity."). *See also* L. Levy, *supra* note 23, at 432 ("While deeply committed to perpetuating a system that minimized the possibilities of convicting the innocent, [the Framers] were not less concerned about the humanity that the fundamental law should show even to the offender.").

99. *Miranda*, 384 U.S. at 458 ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.") *See also* Friendly, *supra* note 23, at 723 (The "great purpose [of the self-incrimination clause is the] protection of the lone individual against the all-powerful state.").

100. *Miranda*, 384 U.S. at 460 ("[O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.") *See also* Garner v. United States, 424 U.S. 648, 655 (1976) ("[T]he fundamental purpose of the Fifth Amendment — the preservation of an adversary system of criminal justice.").

101. *See* Tehan v. United States *ex rel.* Shoft, 382 U.S. 406, 416 ("That privilege . . . stands as a protection of . . . the right of each individual to be let alone."); Berger, *The Unprivileged Status of the Fifth Amendment Privilege*, 15 AM. CRIM. L. REV. 191, 213 (1978) ("human dignity" and "individual privacy" should be equally protected by the privilege against self-incrimination).

and to ensure the reliability of evidence.[102] Moreover, the *Miranda* exclusionary rule was aimed at the notion of police misconduct.[103] The *Miranda* Court did not say that the primary function of exclusion was to deter police misconduct,[104] but the Court concluded that deterrence would be the natural result of applying the procedural safeguards.[105]

Just as the fourth amendment exclusionary rule was transformed into a deterrent-based rule,[106] the *Miranda* exclusionary rule underwent a similar transformation. In *Harris v. New York*,[107] the Court held that a statement taken in the absence of full Miranda warnings is admissible for impeachment purposes because the deterrent effect of excluding the statement was "speculative."[108] The Court recognized "deterrence" as the only principle underlying the fifth amendment exclusionary rule.[109] Moreover, the Court imposed a balancing test and determined that the cost of admitting unlawfully obtained statements did

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102. *See In re* Gault, 387 U.S. 1, 47 (1967) ("The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth."); Sunderland, *Self-Incrimination and Constitutional Principle:* Miranda v. Arizona *and Beyond*, 15 WAKE FOREST L. REV. 171, 187 ("Various forms of coercion may force an individual to admit practically anything" and this would result in "testimonially untrustworthy" evidence.).

103. See *Miranda*, 384 U.S. at 445-58, where the Court describes current police practices and the need to employ safeguards to protect the individuals who are subjected to the compulsion which is inherent in the interrogation environment. *See also supra* notes 95-99.

104. *See* George, *The Fruits of* Miranda: *Scope of the Exclusionary Rule*, 39 U. COLO. L. REV. 478, 489 (1967) (*Miranda's* "theoretical basis" is to protect the privilege against self-incrimination, but "the Court's social objective is control of the police."); Comment, *Exclusion of Confessions Obtained Without* Miranda *Warnings in Civil Tax Fraud Proceedings*, 73 COLUM. L. REV. 1288, 1307 (1973) ("Deterrence [of abusive police interrogations] was essential, in *Miranda's* view, to preserve fifth amendment protection.").

105. *See* Gardner, *The Emerging Good Faith Exception to the* Miranda *Rule*, 35 HASTINGS L. J. 429, 449 (1984) ("The Court reviewed police interrogation manuals and other sources documenting police interrogation practices, and concluded that warnings were necessary to deter widespread police misconduct . . . ."); Berger, *supra* note 101, at 201 ("[T]he self-incrimination privilege [culminating in *Miranda*] . . . focuses upon a broader interest in protecting the accused's constitutional privilege rather than solely controlling state abuses.").

106. *See supra* note 91.

107. 401 U.S. 222 (1971). *See supra* note 54.

108. *Harris*, 401 U.S. at 225.

109. *Id.* at 224-25.

not outweigh the benefit of discrediting the defendant's perjurious testimony.[110]

What the *Harris* Court successfully created by developing this balancing analysis is an exclusionary rule which is triggered when the cost of deterring police misconduct is so great that it outweighs any benefit that could be derived from the use of the unlawfully obtained testimony for impeachment purposes.[111]

3. *The Tainted Fruit Doctrine*

When unlawfully obtained evidence leads to secondary evidence, the secondary evidence is known as derivative evidence.[112] The derivative evidence doctrine, also known as the "tainted fruit of the poisonous tree" doctrine, requires that all secondary evidence obtained through the exploitation of a constitutional violation be deemed inadmissible.[113]

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110. *Id.* at 225. The Court believed that the benefit in discrediting the defendant's perjurious testimony was of "valuable aid to the jury" especially since the possibility that exclusion would deter police misconduct was "speculative" and, moreover, any deterrent effect the exclusionary rule may have is served "when the evidence in question is made unavailable to the prosecution in its case in chief." *Id. See supra* note 93.

111. *See* Wasserstrom & Mertens, *supra* note 88, at 91-92 n.52 ("*Harris* proceeded on the assumption that the weights on *both* pans of the cost-benefit scale are different when the prosecution seeks to introduce statements obtained through a *Miranda* violation to impeach a testifying defendant.").

The *Harris* Court's use of evidence where its exclusion would serve no deterrent purpose, appears to be in direct contradiction to *Miranda's* declaration that "the prosecution may not use statements . . . unless it demonstrates the use of procedural safeguards effective to secure the privileges against self-incrimination." *Miranda*, 384 U.S. at 444. *Miranda* does not qualify the prosecution's "use" of the evidence as use in its case in chief. Nevertheless, where the exclusionary rule should have been triggered automatically from the violation of *Miranda*, it is now triggered when the Court's deterrent-effect theory justifies exclusion. *See* Keefe, *Confessions, Admissions and the Recent Curtailment of the Fifth Amendment Protection*, 51 CONN. B. J. 266, 274 (1977) ("*Harris* appears to repudiate the philosophical approach adopted by the Warren Court that a per se violation of a constitutional principle must be automatically punished by the invocation of the exclusionary sanction.").

112. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 487-88 (1963). Derivative evidence: "[e]vidence which is derived or spawned from other illegally obtained evidence is inadmissible because of the primary taint." BLACK'S LAW DICTIONARY 399 (5th ed. 1979). *See also* Annot., 43 A.L.R.3d 385, 389 (1972) ("The fruit of the poisonous tree doctrine has been regarded as a rule prohibiting the government from using in any manner prejudicial to the accused information derived from facts learned as a result of the unlawful acts of its agent.").

113. *Wong Sun*, 371 U.S. at 488. (Evidence is only "fruit of the poisonous tree" if it "has been come at by exploitation of that illegality" rather than "by means sufficiently

a. *When is "Fruit" Tainted?*

The "fruit of the poisonous tree" doctrine does not only extend to derivative physical evidence; the rule also extends to confessions.[114] Accordingly, a confession may be excluded as tainted fruit of an earlier illegality even if the confession itself complies with the precepts of *Miranda*.[115]

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distinguishable to be purged of the primary taint.") (quoting J. MAGUIRE, EVIDENCE OF GUILT 221 (1959)). In the context of the fourth amendment, the derivative evidence rule began with Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). This is the case which marks the inception of the "fruit of the poisonous tree" doctrine. *See* Johnson, *The Return of the "Christian Burial Speech" Case*, 32 EMORY L. J. 351, 363 n.56 (1983). In *Silverthorne Lumber*, corporate offices were unlawfully searched and records were unlawfully seized. *Silverthorne Lumber*, 251 U.S. at 390-91. The company made a motion for the records to be returned since the search and corresponding seizure were wholly unauthorized. *Id.* The motion was granted, but shortly thereafter a grand jury issued a subpoena duces tecum for production of the same records which had been illegally seized. *Id.* at 391.

In holding that the company need not comply with the subpoena, the Court declared that: "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.* at 392. In stating that any evidence which could be traced to the initial illegality is inadmissible, the Court first found a substantial relationship between the issuance of the subpoena and the fourth amendment violation. *Id.* Thus, the Court extended the reach of the exclusionary rule so that it applies to both the original evidence which was illegally obtained and the new evidence that may be derived from the original evidence. *Id.* The Court did, however, note that derivative evidence does not become "sacred and inaccessible" since it may be discovered through an "independent source." *Id.* Discussion of the "independent source" doctrine is beyond the scope of this article but for an analysis of its development and relation to the "inevitable discovery" rule, see generally Note, Nix v. Williams: *Conjecture Enters the Exclusionary Rule*, 5 PACE L. REV. 657 (1985).

Silverthorne Lumber was reaffirmed in Nardone v. United States, 308 U.S. 338 (1939). Writing for the Court, Justice Frankfurter stated that "[t]o forbid the direct use of methods [for acquiring evidence] but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' " *Id.* at 340. This statement foreshadowed the deterrent principle that would inevitably be the justification of the "fruit of the poisonous tree" doctrine.

114. *Wong Sun*, 371 U.S. at 488. *See infra* note 115.

115. *See* Brown v. Illinois, 422 U.S. 590 (1975); *see also* Wong Sun v. United States, 371 U.S. 471 (1963); Fahy v. Connecticut, 375 U.S. 85 (1963). In *Fahy*, the defendant made a confession following an unlawful search and seizure of his car. As a result of the confession, the defendant was convicted for wilfully injuring a public building in violation of a Connecticut statute. The Supreme Court reversed the conviction and held that the confession was inadmissible as a fruit of the unlawful search and seizure, and that the defendant should be given the opportunity "to show that his admissions were induced by being confronted with the illegally seized evidence." *Id.* at 91.

Brown and *Wong Sun* explain the development of the derivative evidence rule and how that rule conformed to the deterrence theory. In *Wong Sun*, federal narcotics agents

In *Brown v. Illinois*,[116] the Court held that in assessing whether a confession is the product of exploitation of an earlier illegality, the following should be considered: 1) the temporal proximity between the illegality and the confession; 2) the presence of intervening factors; 3) the purpose and flagrancy of the misconduct; and 4) whether Miranda warnings were given.[117] The voluntariness of the statement is a threshhold prerequisite to determining exploitation by one of these four factors, because an involuntary statement would not be an exploitation but a violation in itself.[118] Moreover, the prosecution has the burden of proving admissibility.[119]

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forced their way into the home of James Wah Toy. *Wong Sun*, 371 U.S. at 473-74. In response to an accusation that Toy had been selling narcotics, Toy told the agents that he had not sold any drugs, but that one Johnny Yee had been selling heroin. *Id.* at 474. The agents went immediately to Yee's house where they briefly interrogated him. Yee surrendered approximately one ounce of heroin and told the police he had bought it a few days earlier from Toy and Wong Sun. *Id.* The agents then went to a multifamily dwelling, described by Toy, and arrested Wong Sun. *Id.* Both Toy and Wong Sun were arraigned and then released on their own recognizance. *Id.* A few days later, both men made incriminating statements. *Id.* at 476.

The Court found that Toy's arrest was illegal because it lacked probable cause; moreover, the Court held that Toy's declarations were inadmissible because they were the fruits of the illegal arrest. *Id.* at 485-88. In arriving at this decision, the Court noted that a confession is no less a "fruit of the poisonous tree" than the material evidence that has traditionally been derived from an unlawful search or seizure. The Court saw no reason to omit application of the exclusionary rule merely because a distinction can be drawn between verbal fruits and more tangible fruits. *Id.* at 485-86. "The policies underlying the exclusionary rule [do not] invite any logical distinction between physical and verbal evidence . . . . [T]he danger of relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction." *Id.* at 486.

Following this conclusion, the *Wong Sun* Court excluded the narcotics taken from Yee because they were the tainted fruit of Toy's inadmissible declaration. The Court then laid down the formula for determining when certain evidence is tainted fruit since all evidence is not "fruit of the poisonous tree" merely because it would not have been discovered except for the government's unlawful conduct. *Id.* at 487. Derivative evidence is to be considered tainted fruit when it "has been come at by exploitation of [an official] illegality" rather than "by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488 (quoting J. MAGUIRE, EVIDENCE OF GUILT 221 (1959)). Unfortunately, the Court gives very little direction for applying this exploitation formula. In fact, the Court describes the surrounding circumstances and then concludes that "it is unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Id.* at 486.

116. 422 U.S. 590 (1975).

117. *Id.* at 603-04.

118. *Id.* at 604.

119. *Id.*

In *Brown*, two detectives made a warrantless entry into the defendant's apartment while he was out.[120] The entry was followed by an equally unlawful search and when the defendant arrived home he was arrested at gunpoint.[121] The detectives took the defendant to an interrogation room at the police station, gave him his Miranda warnings, and obtained a confession less than two hours after his arrest.[122]

At the trial, the state attempted to show that giving the defendant his Miranda warnings was sufficient to attenuate the taint of the unlawful arrest from the subsequent confession.[123] The Court said that accepting the state's argument would weaken the effectiveness of the exclusionary rule and would invite, rather than deter, police misconduct.[124] A police officer could undertake any course of misconduct with impunity if merely administering the Miranda warnings would cure previous constitutional violations.[125]

The Court concluded that the question of attenuation must be made on a case-by-case basis and that the absence or delay in administering Miranda warnings is only one of the factors to be considered.[126] The Court held that the causal chain between the illegal arrest and the subsequent confession had not been sufficiently attenuated and, therefore, the defendant's confession was not "an act of free will to purge the primary taint."[127] The Court reached this conclusion because there were no significant intervening factors — less than two hours had elapsed between the illegal arrest and the confession, and the manner of the arrest was flagrantly improper.[128]

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120. *Id.* at 593.

121. *Id.* at 592.

122. *Id.* at 592-95.

123. *Id.* at 602.

124. *Id.*

125. *Id.* at 602-03. To explain the danger of this proposition, the *Brown* Court stated:

> Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all" . . . .

126. *Id.* at 603. *See supra* text accompanying note 133.

127. *Id.* at 602 (quoting *Wong Sun*, 371 U.S. at 486).

128. *Id.* at 604-05.

In *United States v. Ceccolini*,[129] the Court held that there had been sufficient attenuation between the illegal search and the challenged testimony.[130] In *Ceccolini*, a police officer was engaged in conversation with his friend Hennessey, an employee of a flower shop.[131] The officer casually picked up an envelope stuffed with money and policy slips that was sitting by the cash register.[132] Without revealing what he had found, he asked Hennessey who the owner of the envelope was. Hennessey told the officer that it belonged to the defendant.[133] The Court subsequently held that the search of the envelope was illegal. Nonetheless, Hennessey's testimony was admissible because there was a substantial lapse of time — many months — between the illegal search and the actual testimony. Furthermore, the Court found that the actual testimony and the officer's conduct were not flagrant or willful.[134] In addition, the Court held that suppression of Hennessey's testimony would not serve the deterrent effect of the exclusionary rule.[135] A cost-benefit analysis was then applied to the situation and the Court concluded that the cost of permanently silencing Hennessey's testimony far outweighed any benefit that would be derived from exclusion.[136]

b. *The "Cat Out of the Bag" Rationale*

The "cat out of the bag" rationale emerged in the context of consecutive confessions.[137] It was recognized that an initial confession creates a psychological impact on the defendant that cannot be separated from a later statement.[138] In such a situation, the "later confession may always be looked upon as a fruit of the first."[139]

129. 435 U.S. 268 (1978).

130. *Id.* at 279-80. For the factors to be considered in an attenuation analysis, *see supra* text accompanying note 117.

131. United States v. Ceccolini, 435 U.S. 268, 269-70 (1978).

132. *Id.* at 270.

133. *Id.*

134. *Id.* at 279-80.

135. *Id.* at 280.

136. *Id.*

137. United States v. Bayer, 331 U.S. 532 (1947).

138. *Id.* at 540-41.

139. *Id.* at 540. The Court held that:

After an accused has once let the cat out of the bag by confessing, no matter

In *United States v. Bayer*[140] the Supreme Court enunciated the "cat out of the bag" rationale. In *Bayer*, the defendant, an army officer, was convicted of conspiracy to defraud the government.[141] The defendant's first statement was inadmissible as a result of improper detention and coercive pressure.[142] When the defendant made a second confession six months later, the only coercive pressure on the defendant was that he could not leave the military base to which he was assigned without securing permission.[143] The court of appeals, in reversing the conviction, held that the second confession was "patently the fruit of the earlier one."[144] The court of appeals based its holding on the reasoning of *Silverthorne Lumber Co. v. United States*[145] and *Nardone v. United States*.[146] In *Silverthorne Lumber* the Court held that illegally obtained evidence shall not be used for any purpose:[147] any evidence that can be traced to the initial illegality is also inadmissible. Therefore, the exclusionary rule applies to both the original evidence that was illegally obtained as well as the secondary evidence derived from the original evidence.[148] The *Nardone* Court reaffirmed *Silverthorne Lumber's* ban of both the direct and indirect use of illegally obtained evidence.[149] However, both of these cases dealt with derivative physical evidence rather than confessions,[150] and thus, the *Bayer* Court stated that because these cases did not deal with confessions they were not controlling.[151]

The Supreme Court in *Bayer*, while reversing the court of

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what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as the fruit of the first.

140. 331 U.S. 532 (1947).

141. *Id.* at 533.

142. *Id.* at 539-40.

143. *Id.* at 540.

144. United States v. Bayer, 156 F.2d 964, 968-69 (2d Cir. 1946), *rev'd*, 331 U.S. 532 (1947).

145. 251 U.S. 385 (1920).

146. 308 U.S. 338 (1939).

147. *Silverthorne Lumber*, 251 U.S. at 392.

148. *Id.*

149. Nardone v. United States, 308 U.S. 338, 340-41 (1939).

150. *See supra* note 113.

151. *Bayer*, 331 U.S. at 541.

appeals, maintained its focus on the effect of the coercive circumstances that rendered the first statement inadmissible so that it could determine if the coercion had carried over to invalidate the subsequent confession.[152] The Court found that the coercion had not carried over because the coercive circumstances which led the defendant to confess the first time had been removed.[153] The Court recognized that if the unlawful circumstances have been fully removed, an initial statement which lets the "cat out of the bag" does not, in and of itself, render a later statement inadmissible.[154] The Court made it clear that the effect of the fact that the "cat" is "out of the bag" cannot be negated; however, the taint created by having once confessed can be dissipated.[155]

III. The Decision: *Oregon v. Elstad*

A. *Facts*

On the afternoon of December 17, 1981, Officers Burke and McAllister arrived at the home of Michael Elstad with an arrest warrant charging Elstad with the burglary of a neighbor's house.[156] Elstad's mother admitted the officers and showed them to the bedroom where Elstad, wearing only a pair of shorts, was listening to his stereo.[157] At the officers' request, he dressed and accompanied them into the living room.[158] Officer McAllister asked Mrs. Elstad to step into the kitchen where he informed her that they had a warrant for her son's arrest.[159]

Officer Burke, sitting with Elstad in the living room, asked Elstad if he knew why the officers were there.[160] Elstad said he did not. Burke then asked if he knew a person by the name of Gross. Elstad said he did, and added that he had heard there was a robbery at the Gross house. The officer then stated that he believed Elstad was there. Elstad responded, "Yes, I was

152. *Id.* at 540.
153. *Id.*
154. *Id.* at 540-41.
155. *Id.* at 540.
156. Oregon v. Elstad, 105 S. Ct. 1285, 1289 (1985).
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*

there."[161]

Elstad was brought to Officer McAllister's office at the police station.[162] Officers Burke and McAllister joined him approximately one hour later.[163] Elstad was then read his Miranda rights for the first time. He was then asked if he understood his rights. He answered affirmatively and added that he wanted to speak. He signed a constitutional right waiver card, gave a full statement which was read back to him for corrections, and then he signed a typed version of the confession.[164] The statement implicated Elstad in the robbery. Elstad admitted that he showed several acquaintances around the Gross premises and gave them information about the premises. Elstad also revealed that he was paid for this information and revealed the names of the individuals who paid him.[165]

Elstad, Burke, and McAllister were the only persons present at the time Elstad made his confession; however, Elstad conceded that he was not subjected to threats or compulsion and Elstad stated that the officers made no promises during the interrogation.[166]

B. *The Decision*

1. *The Lower Courts*

Elstad waived his right to a jury trial and made a timely motion to suppress evidence of his statements to the police.[167] The motion was denied and he was tried and convicted in the Circuit Court for Polk County, Oregon.[168] The court did not admit the statements Elstad made prior to being given Miranda warnings, but it did allow the written confession in evidence, holding that the confession was given freely, voluntarily, and

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161. *Id.*

162. *Id.*

163. State v. Elstad, 61 Or. App. 673, 675, 658 P.2d 552, 553, *petition denied,* 295 Or. 617, 670 P.2d 1033 (1983), *rev'd,* Oregon v. Elstad, 105 S. Ct. 1285 (1985). Before returning to the police station, the officers responded to a possible crime and a third officer who met them at the scene transported Elstad to the police station.

164. *Elstad,* 105 S. Ct. at 1289.

165. *Id.*

166. *Id.*

167. *Id.*

168. State v. Elstad, 61 Or. App. at 675, 658 P.2d at 553.

knowingly.[169]

Following his conviction of burglary in the first degree, Elstad appealed to the Oregon Court of Appeals which reversed the circuit court and remanded the case for a new trial.[170] The court of appeals found that when Elstad made the statement, "I was there,"[171] he made the statement while in custody without the benefit of Miranda warnings; therefore, it was an unconstitutionally obtained statement.[172] The court added that to make the subsequent confession admissible, the coercive impact of the first admission must have been dissipated so that the defendant did not feel that he had let the "cat out of the bag."[173] The fact that there was no actual compulsion was irrelevant.[174]

The state then petitioned for reconsideration or review. The Oregon Court of Appeals denied reconsideration, and the Oregon Supreme Court denied review.[175] The state applied to the Supreme Court of the United States for *certiorari*, and the Court granted the state's application.[176]

2. *The Supreme Court Opinions*

a. *The Majority Opinion*

Justice O'Connor, writing for the Court in a six-to-three decision,[177] held that the fifth amendment's privilege against self-incrimination does not require the suppression of a confession made after proper Miranda warnings and a valid waiver of rights, where the suspect had made an earlier voluntary admission in response to an officer's unwarned questions.[178] The majority opinion focused on the fact that there was no "actual" coercion compelling Elstad to make his initial confession.[179]

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169. *Elstad,* 105 S. Ct. at 1290.
170. State v. Elstad, 61 Or. App. at 678, 658 P.2d at 555.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 677, 658 P.2d at 554.
175. *Elstad,* 105 S. Ct. at 1290.
176. Oregon v. Elstad, 465 U.S. 1078 (1984).
177. Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, and White joined Justice O'Connor in the Court's opinion.
178. *Elstad,* 105 S. Ct. at 1298.
179. *Id.*

The Court stated that under *Miranda* a suspect who is subjected to custodial interrogation must be apprised of his constitutional rights prior to questioning so that his privilege against self-incrimination is adequately safeguarded.[180] If the requisite procedural safeguards or their equivalent are not administered, then there is an *irrebuttable* presumption of compulsion and, therefore, the suspect's unwarned response is inadmissible.[181] The Court applied this reasoning so that Elstad's initial unwarned statement, "I was there," was held inadmissible.[182] However, the analysis applied to Elstad's second confession was different.[183]

The Court described how the *Miranda* exclusionary rule should be applied to an initial statement. The rule can be triggered by a violation that does not reach constitutional magnitude.[184] Justice O'Connor explained that the *Miranda* exclusionary rule has a wider effect than the fifth amendment itself: the fifth amendment only forbids the use of *compelled* testimony in the prosecution's case in chief; *Miranda*, on the other hand, held that any statement taken in the absence of the prescribed warnings is *presumptively compelled.*[185] The exclusionary rule, therefore, may be used when there has merely been an infringement of *Miranda.*[186]

After making its distinction between the fifth amendment exclusionary rule and the *Miranda* exclusionary rule, the Court adopted the *Tucker-Quarles* rationale[187] that the Miranda warnings are only prophylactic measures to protect the privilege against self-incrimination; they are not constitutional rights in

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180. *Id.*

181. *Id.* at 1290 ("The State conceded that Elstad had been in custody when he made his statement, 'I was there,' and accordingly agreed that this statement was inadmissible as having been given without the prescribed *Miranda* warning.").

182. *Id.* at 1298.

183. *Id.* ("[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.").

184. *Id.* at 1292.

185. *Id.*

186. *Id.* ("*Miranda's* preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.").

187. *See supra* notes 55-82 and accompanying text.

and of themselves.[188] Relying on this theoretical foundation, the Court noted that where a non-coerced statement taken in violation of *Miranda* is followed by a statement taken in compliance with *Miranda*, there has been no constitutional violation.[189] Only *Miranda* has been violated. Therefore, the fruits doctrine does not apply because this doctrine only applies where there has been a *constitutional* violation.[190]

The Court then borrowed the *Tucker* principle that the exclusionary rule has a dual purpose — to deter impermissible police conduct and to ensure the trustworthiness of evidence.[191] When this dual purpose is not served by exclusion, the evidence should not be suppressed.[192] While the alleged "fruit" dealt with in *Tucker* was the testimony of a witness whose identity was revealed in the defendant's unwarned statement, Justice O'Connor stated that the term "fruit" also encompasses a defendant's own incriminating testimony.[193] The Court then concluded that the "absence of any coercion or improper tactics undercuts the twin rationales" of the exclusionary rule.[194] In other words, when there has been no actual coercion, there is no problem with deterring police misconduct or assuring the trustworthiness of evidence. Therefore, a confession like Elstad's second statement need not be suppressed, even though it followed on the heels of an unwarned statement, because the unwarned statement involved no actual compulsion.[195]

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188. *Elstad,* 105 S. Ct. at 1292-93.

189. *Id.* The Court noted that, "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." *Id.* at 1296. The Court also stated that, "[i]f 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." *Id.* at 1293.

190. *Id.* at 1293 (The Court made a parallel to *Tucker* and stated, "[s]ince there was no actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed.").

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* The court stated that:

> 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

Justice O'Connor noted that any compulsion arising from an *answer* to the initial unwarned questions is distinct from the coercive nature of the unwarned questions themselves.[196] The Justice contended that the court of appeals' focus on the compulsion created by the defendant's own answer was misplaced.[197] The Court stated that the coercive impact of the *answer* was not *Miranda's* concern. The statements must have been obtained from the defendant through actually or presumptively coercive methods to be inadmissible.[198] Indeed, the Court acknowledged that even a voluntary disclosure may have a coercive effect, but such "voluntary disclosure of a guilty secret [does not qualify] as state compulsion."[199]

The Court then bolstered its premise that the proper focus is on the official questioning by reaffirming the "cat out of the bag" rationale that was enunciated in *United States v. Bayer*.[200] The Court interpreted this rationale to mean that once the defendant lets the "cat out of the bag" the coercive effect that such disclosure has on a later confession can be dissipated with time.[201] The Court reasoned that this interpretation would prevent a suspect from indefinitely immunizing himself from the consequences of a subsequent waiver by merely responding to pre-warned questions.[202] In addition, the Court remarked that in Elstad's case the ultimate effect of any psychological disadvantage created by a defendant's own statement is "speculative and attenuated at best."[203] Because there are numerous factors which motivate defendants to confess, the Court refused to suppress an uncoerced statement on a theory as weak as the "cat out of the bag."[204]

The last issue facing the Court was the validity of Elstad's

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investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.

Id.

196. *Id.* at 1294.
197. *Id.*
198. *Id.*
199. *Id.* at 1295.
200. *Id.* at 1294-95.
201. *Id.* at 1295.
202. *Id.*
203. *Id.* at 1295-96.
204. *Id.* at 1296.

waiver of his rights. Elstad argued that he was unaware that his initial confession could not be used against him.[205] He claimed that this lack of knowledge rendered him incapable of giving a fully informed waiver. The Court rejected this argument, stating that the voluntariness of a defendant's waiver is not jeopardized by the fact that he does not have a "full and complete appreciation of all of the consequences flowing from the nature and the quality of the evidence in the case."[206]

The Court briefly addressed the officers' failure to administer the Miranda warnings at the time Elstad was first taken into custody.[207] The Court stated that the police officer may not have given the warnings because either he was confused as to whether his short discussion with Elstad constituted "custodial interrogation" or because he did not want to alarm Elstad's mother.[208] The Court then concluded that "[w]hatever the reason for [his] oversight, the incident had none of the earmarks of coercion."[209]

The Court remanded the case for an inquiry into the circumstances of the custodial interrogation and the actions of the police to determine whether Elstad's post-*Miranda* statement was voluntary.[210]

b. *Justice Brennan's Dissent*

Justice Brennan's dissent, in which Justice Marshall joined, presents a strong stance in opposition to the majority. First, Justice Brennan declared that the Court rejected the "cat out of the bag" rationale when it reasoned that there is a "speculative" causal connection between a statement taken in violation of *Miranda* and the defendant's subsequent decision to make a post-warning admission.[211] Brennan stated that the "common-sense approach"[212] would be to consider the subsequent confession as having been presumptively tainted by the initial confession if

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205. *Id.* at 1297.
206. *Id.* at 1298.
207. *Id.* at 1297.
208. *Id.*
209. *Id.*
210. *Id.* at 1298.
211. *Id.* at 1300.
212. *Id.* at 1301.

the initial confession had been taken in violation of *Miranda*.[213] He stated that this approach has been accepted by the majority of state courts.[214]

Justice Brennan noted the difficulty that the public might have in trying to understand the Court's pronouncement that a statement taken in violation of *Miranda* can be both totally voluntary and irrebuttably presumed to have been coerced.[215] Insisting that the untainted confession presumptively taints the post-*Miranda* confession, Justice Brennan also acknowledged that the presumption could be rebutted.[216] He stated that if the prosecutor could show that the taint of the first confession was so attenuated that the later confession was not produced by the existence of the first, then the later confession would be admissible.[217] Justice Brennan then restated the four factors set forth in *Brown v. Illinois* to determine whether the illegal confession tainted the challenged confession: "the strength of the causal connection between the illegal action and the challenged evidence, their proximity in time and place, the presence of intervening factors, and the 'purpose and flagrancy of the official misconduct.' "[218] Justice Brennan reasoned that the Court replaced this four-part inquiry with the rationale that when Miranda warnings follow an illegal confession, attenuation can result from an individual's exercise of his free will in choosing to confess for a second time.[219] The focus of Justice Brennan's dissent was the Court's use of this abstract notion of free will and the premise that Miranda warnings alone are a sufficient intervening factor to purge the taint of the pre-warned statement.[220]

Justice Brennan applauded the Court's declaration that a statement taken in the absence of Miranda warnings is presumptively coerced for fifth amendment purposes.[221] The Justice stated that this reaffirmation of *Miranda* will repair what he

213. *Id.*
214. *Id.* at 1300.
215. *Id.* at 1316.
216. *Id.* at 1300.
217. *Id.* at 1307.
218. *Id.*
219. *Id.* at 1307-08.
220. *Id.* at 1307-13.
221. *Id.* at 1314.

perceives as the damage that has resulted from the recent opinions of *Tucker* and *Quarles*. He stated that these cases set forth "inaccurate assertions"[222] concerning *Miranda*. Nonetheless, the Justice disagreed with the Court's treatment of evidence that has been proximately derived from such an illegal confession.[223] In fact, Justice Brennan stated that "[t]he Court simply has not confronted the basic premise of the derivative-evidence rule . . . ."[224] To give *Miranda* its full meaning, the Justice said the derivative evidence rule should be used to exclude evidence that was discovered as a direct result of the first illegally obtained confession.[225] This exclusion will, in Justice Brennan's view, provide the meaningful deterrence that is the purpose of the fifth amendment exclusionary rule. He did not agree with the Court that excluding only the initial unwarned statement will provide sufficient deterrence of police misconduct.[226]

Justice Brennan concluded his dissent by describing the Court's analysis of the police officers' failure to administer Miranda warnings to Elstad. He declared that "[r]ather than acknowledg[ing] that the police in this case clearly broke the law, the Court bends over backwards to suggest why the officers may have been justified in failing to obey *Miranda*."[227] As he dealt with each of the Court's justifications for the *Elstad* opinion, Justice Brennan clearly expressed his dissatisfaction with the Court's application of the principles enunciated in *Miranda*.

c. *Justice Stevens' Dissent*

In his dissent, Justice Stevens stated that he believed the Court intended a narrow holding to be applied only where the unwarned, illegal confession though presumptively coercive under *Miranda*, is voluntary, and where the second confession is not a product of the first.[228] However, Justice Stevens had two basic contentions with respect to the Court's holding. First, he stated that the premises set forth by the Court will be difficult

222. *Id.*
223. *Id.* at 1314-15.
224. *Id.* at 1319.
225. *Id.*
226. *Id.* at 1320.
227. *Id.*
228. *Id.* at 1322.

to define and to apply in future cases because of the Court's distinction between "actual coercion" and "irrebuttably presumed coercion."[229] Justice Stevens reasoned that the *Miranda* Court ruled that a presumption of coercion arises whenever a suspect is subjected to custodial interrogation, and the Court could not, therefore, divide coercive aspects of the custodial environment into varying degrees of coercion.[230] *Miranda* specifically set up an *irrebuttable* presumption to "avoid the kind of fact-bound inquiry that [the *Elstad*] decision will surely engender."[231]

The second contention concerns the Court's treatment of whether or not there was a constitutional violation.[232] Justice Stevens stated that the Court should have acknowledged the protection afforded an accused by the fifth amendment. Instead, the use of such evidence directly taints the constitutional protection of the fifth amendment.[233]

IV. Analysis

Oregon v. Elstad is not an exception to *Miranda.* However, the case does represent a curtailment of the reach of the *Miranda* decision. The Court tried to reconcile *Miranda's* presumption of inherent compulsion with a confession that has all of the trappings of voluntariness; in fact, it is a confession marked only by one flaw: it was preceded by a statement taken in violation of *Miranda.* The Court reconciled the conflicts between voluntary and presumptively coerced statements by relying on the distinction it had previously drawn between a violation of *Miranda* and a violation of the fifth amendment privilege against self-incrimination.[234]

The majority readily acknowledged that Elstad's initial statement, taken in the absence of Miranda warnings, was not admissible.[235] The Court did not intend to dilute the immediate goal of *Miranda*: the exclusion of statements taken in custodial interrogation which deny a defendant's right against compulsory

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229. *Id.* at 1324.
230. *Id.*
231. *Id.*
232. *Id.* at 1325-26.
233. *Id.* at 1326.
234. Oregon v. Elstad, 105 S. Ct. 1285, 1292. *See also supra* notes 54 and 111.
235. *Id.* at 1298.

self-incrimination.[236] The fact that *Miranda* set up an irrebuttable presumption of coercion was accepted.[237] But the Court held that the *Miranda* presumption of coercion is not strong enough to taint a subsequent confession that had been preceded by proper warnings.[238] This decision limits *Miranda* so that its power of exclusion extends only to statements that are given in response to unwarned questions.

Basing its rationale on *Tucker*[239] and *Quarles*,[240] the majority stated that Miranda warnings are not themselves constitutional rights, and that the warnings have a broader sweep than the fifth amendment privilege itself.[241] The Court's reasoning that a confession must be involuntary before it violates the fifth amendment does not recognize *Miranda's* concern for the inherent coercion of custodial interrogation. However, this reasoning and the Court's apparent dismissal of the concerns of *Miranda* are an extension of the rationale developed in the *Harris* line of cases.[242]

In *Harris*, the presumptively coerced statement was excluded from the prosecution's case in chief; however, it was admitted into evidence to impeach the defendant's testimony.[243] In *Elstad*, the Court also did not allow the presumptively tainted statement to be used in the prosecution's case in chief[244] but the Court did allow a second confession to be used.[245] The Court de-

236. Miranda v. Arizona, 384 U.S. 436, 467, 478-79 (1966).

237. *Elstad*, 105 S. Ct. at 1292 ("[T]he *Miranda* presumption . . . [is] irrebuttable for purposes of the prosecution's case in chief . . . .").

238. *Id.* at 1308 (Brennan, J., dissenting) ("We have *always* rejected, until today, the notion that 'individual will' alone presumptively serves to insulate a person's actions from the taint of earlier official illegality. . . . Nor have we ever allowed *Miranda* warnings alone to serve talismanically to purge the taint of prior illegalities." (emphasis in orginal)).

239. Michigan v. Tucker, 417 U.S. 434, 444 (1974) ("[T]hese procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.").

240. New York v. Quarles, 467 U.S. 649, 655 (1984).

241. *Elstad*, 105 S. Ct. at 1292.

242. Harris v. New York, 401 U.S. 222 (1971); Oregon v. Hass, 420 U.S. 714 (1975); Mincey v. Arizona, 437 U.S. 385 (1978). *See supra* note 54.

243. *Harris*, 401 U.S. at 224 ("It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes . . . .").

244. *Elstad*, 105 S. Ct. at 1298.

245. *Id.*

clared that as in *Harris* the use the prosecution wanted to make of the defendant's statement fell outside the reach of *Miranda* because *Miranda* was only concerned with excluding presumptively tainted statements from the prosecution's case in chief.[246] The *Harris* Court explained that when a situation falls beyond *Miranda's* reach, the due process voluntariness test must be applied to determine whether the statement is admissible.[247]

Relying on *Harris*, the *Elstad* Court promulgated a foundation upon which it could limit *Miranda's* bright-line rule and resurrect the due process voluntariness test. Yet, it could be argued that when the *Miranda* Court determined that custodial interrogation is inherently coercive, *Miranda* took the due process voluntariness inquiry out of the hands of the courts. *Miranda's* bright-line rule was the result of that Court's concern that the potentiality for compulsion is always present in custodial interrogation and it would be difficult, and sometimes impossible, to determine if such compulsion violated a suspect's fifth amendment rights.[248]

By reinstating the due process inquiry, the Court also reinstated problems of judicial economy and inaccurate decisions. Without the aid of a bright-line rule, determining whether there has been compulsion is a time-consuming task.[249] In addition, the decisions that will set forth the factors which constitute compulsion will be as varied as the pre-*Miranda* decisions which struggled to determine when police conduct reached the point of compulsion.[250]

Without overruling *Miranda*, *Elstad* sets forth a pre-*Miranda* method of dealing with derivative evidence. The Court distinguished between the actual compulsion which violates the fifth amendment and the presumption of compulsion which vio-

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246. *Id.* at 1292-93.

247. *Id.* ("Where an unwarned statement is preserved for use in situations that fall outside the sweep of the *Miranda* presumption, 'the primary criterion of admissibility [remains] the "old" due process voluntariness test.' ") (quoting Schulhofer, *Confession and The Court,* 79 MICH. L. REV. 865, 877 (1981)).

248. *Miranda*, 384 U.S. at 457.

249. *See The Supreme Court, 1983 Term — Leading Cases,* 98 HARV. L. REV. 87, 146 (1984) ("Fifth amendment 'voluntariness' . . . remains a metaphysically indeterminate legal concept . . . .").

250. *See supra* notes 12-23 and accompanying text.

lates *Miranda.*[251] Yet the Court leaves intact all of the safeguards which apply to the initial confession, thereby allowing lower courts to decide whether admitting a second confession would violate a constitutional right.[252] The Court is concerned with evidence that is one step removed from the constitutional illegality. It looks at this derivative evidence in light of *Miranda's* goals of achieving judicial economy and accurate, predictable decisions. The Court's holding reveals that it did not believe that *Miranda's* goals were strong enough to silence permanently a confession that has been taken in full compliance with the fifth amendment.

Nevertheless, stating that the second confession was taken in full compliance with the fifth amendment creates an inconsistency that overrules *Miranda* by implication. In his dissent, Justice Stevens noted that if the Miranda warnings are not part of the fifth amendment privilege, then the *Miranda* Court had no authority to impose the *Miranda* requirements on the states through the fourteenth amendment.[253] Yet, the *Elstad* Court simultaneously retains some aspects of *Miranda* while declaring that the Miranda warnings are not constitutional rights.[254]

A. *The Consequence of Not Finding a Constitutional Violation*

The Court does not apply the traditional fourth amendment "tainted fruits" analysis to the facts of this case.[255] The Court stated that in order to suppress Elstad's second confession as "fruits," it must have been found to be the result of a constitutional violation.[256] Because the Court found that the initial interrogation only violated *Miranda* and not the fifth amendment,[257] it concluded that the fourth amendment "tainted fruit"

251. *Elstad,* 105 S. Ct. at 1298 ("[T]here is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary.").

252. *Id.*

253. *Elstad,* 105 S. Ct. at 1325-26.

254. *Id.*

255. *Id.* at 1293.

256. *Id.*

257. *Id.* at 1292.

precedents were not controlling.[258] Moreover, the Court does not try to draw an analogy between the fourth and fifth amendments, which would allow the fourth amendment precedents to provide guidelines for the fifth amendment situation. Instead, the Court differentiates the fourth and fifth amendments by distinguishing fourth and fifth amendment violations.[259]

The Court states that "a Fourth Amendment violation 'taints' the confession"[260] that is derived from the unlawful search or seizure. To find that such a "taint" has been dissipated, there must have been a "sufficient break in events to undermine the inference that the confession was caused by the Fourth Amendment violation."[261] The Court must apply the four factors set forth in *Brown* to determine when this attenuation occurs.[262] Therefore, determining whether the confession, which is the fruit of a fourth amendment violation, has been given in compliance with *Miranda* is only a "threshhold requirement."[263] Beyond this, the prosecution must show that the confession has not been tainted by the unlawful search or seizure.[264]

The Court's analysis of the fifth amendment situation is quite different. By explaining that the purpose of the exclusionary rule — deterrence of impermissible police conduct — is not served by excluding a confession that involves no actual coercion,[265] the Court eliminated the need to apply *Brown's* four-factor test to determine if there had been sufficient attenuation between the initial illegality and the subsequent statement. Then, relying on the premise that there has been no constitutional violation, the Court declared that the giving of Miranda warnings would effectively cure the error because the error was procedural.[266] Justice Brennan, in his dissent, described this as an "*automatically* dissipated" taint[267] and declared that the

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258. *Id.* at 1293.

259. *Id.* at 1291-94.

260. *Id.* at 1292.

261. *Id.*

262. Brown v. Illinois, 422 U.S. 590, 603-04 (1975). *See supra* notes 116-18 and accompanying text.

263. *Brown*, 422 U.S. at 604. *See supra* notes 116-18 and accompanying text.

264. *Brown*, 422 U.S. at 603-04. *See supra* notes 116-19 and accompanying text.

265. *Elstad*, 105 S. Ct. at 1293.

266. *Id.* at 1293-94.

267. *Id.* at 1299 (emphasis in original).

Court has never "allowed *Miranda* warnings alone to serve talismanically to purge the taint of prior illegalities."[268] However, Justice Brennan's argument is only applicable where there has been an initial constitutional violation. When *Brown v. Illinois* held that the giving of Miranda warnings is not, in itself, a sufficient intervening factor to dissipate the taint,[269] it was concerned with the taint of a constitutional violation, not the breach of a "prophylactic standard." Nonetheless, one can clearly see the danger in the Court's distinction. If the police are only deterred from violating constitutional rights instead of procedural safeguards, it is hard to envision how such safeguards will adequately protect constitutional rights.

It is inconsistent to say that excluding the fruit of a fourth amendment violation will deter police misconduct, yet excluding the fruit of a *Miranda* violation will not. However, the *Elstad* decision implies such a rule. Nevertheless, this new rule can be justified by the fact that the Court is declining to create a new breed of exclusionary rule. If the Court in *Elstad* had excluded the second confession where there was no constitutional violation, it would have been applying the exclusionary rule to evidence obtained from the violation of *Miranda's* judicially created requirements. The exclusionary rule only prohibits the prosecution from using evidence in the case in chief that has been obtained through a governmental violation of the suspect's constitutionally protected rights or through an exploitation of such violation.[270] Without a constitutional violation the exclusionary rule is inapplicable.

In reaching its conclusion, the Court reinforces the theory that the fifth amendment privilege is not implicated from the *taking* of self-incriminating statements.[271] Rather, it is when such statements are used in a criminal trial that the privilege can be invoked.[272] In other words, the constitutional violation does not occur when a compelled statement is taken from a defendant, but when such statements are used to incriminate the

268. *Id.* at 1308.

269. Brown v. Illinois, 422 U.S. at 603.

270. *See supra* notes 83-111 and accompanying text. *See also* Weeks v. United States, 232 U.S. 383, 392 (1914).

271. *See supra* note 94 and accompanying text.

272. *Id.*

defendant. The Court upheld this rationale by excluding the statement taken in response to pre-warned questioning. Because the state never tried to admit this statement,[273] Elstad's fifth amendment privilege was never violated; in fact, his fifth amendment privilege was not even presumptively violated. Consequently, because the Court concludes that Elstad's constitutional rights were not violated, the exclusionary rule cannot be invoked to strike down his second confession.

Of course, if the Court had found that the failure to give Miranda warnings does itself violate the fifth amendment, there would be no problem in extending an exclusionary rule to the derivative evidence of a *Miranda* violation. It is true that this solution would exclude many statements that are truly voluntary under due process standards. Moreover, as the Court pointed out, *Miranda* already excludes many statements that are "otherwise voluntary within the meaning of the Fifth Amendment."[274] The *Elstad* Court did recognize the merit in the *Miranda* presumption, but just how far should the Court go in excluding statements that do not infringe on the defendant's constitutional privilege against self-incrimination?

B. *The Court Puts the Cat Back in the Bag*

1. *Finding a Causal Relationship Between the Illegality and the Subsequent Confession*

After concluding that a procedural *Miranda* violation does not taint a subsequent voluntary and warned statement,[275] the Court looked at the effect the first statement had on the second statement.[276] This is an entirely different analysis from the one the Court conducted in determining whether a presumption of coercion can actually taint a subsequent confession that was preceded by proper Miranda warnings. Here, the Court is concerned with the psychological impact that the prior confession had on the defendant's decision to make a second confession.[277] Instead of looking at the prior questioning, the court focused on

273. *Elstad*, 105 S. Ct. at 1290.
274. *Id.* at 1292.
275. *Id.* at 1293.
276. *Id.* at 1294-96.
277. *Id.* at 1298.

the prior answer.[278]

The Court's application of the "cat out of the bag" analysis is inconsistent with the previous application of that rationale.[279] The majority's argument is based on the premise that the causal relationship between the unwarned confession and the subsequent confession is "speculative" and "attenuated."[280] Such a declaration seems to contravene common sense and case law. For example, the Court cites *Bayer* to support its contention that there can be dissipation where consecutive confessions are concerned.[281] However, to show such attenuation the Court relied on the giving of Miranda warnings as the sole intervening factor to dissipate the taint. In fact, there were no substantial dissipating factors: there was no significant change in the time between confessions, and the change in locale to the police station only made the atmosphere more coercive for the defendant. Thus, by declaring that the causal relationship between the two confessions was "speculative," the Court denied that there was a taint. In so doing, the Court saved itself from the difficult task of describing the factors which it claims led to the dissipation of taint between Elstad's confessions.[282]

Nonetheless, if we view the Court's analysis in terms of the end it was trying to reach — to prevent highly probative voluntary statements from being irretrievably lost — it appears that the Court may not have been implying that an initial voluntary confession has no effect on a subsequent statement, but that the effect it does have does not warrant the suppression of both statements. Because the initial confession breached a procedural requirement without infringing on the constitutional privilege, the Court reasoned that once the procedures are administered any proclivity the defendant has toward confessing is based on the same factors which might lead any suspect to confess:[283] anxiety, remorse, hope for lenient treatment, lack of concern about the consequences, etc. The Court's sole concern is that a defend-

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278. *Id.*

279. *See, e.g.*, United States v. Bayer, 331 U.S. 532, 539-41 (1947); United States v. Ceccolini, 435 U.S. 268, 277-78 (1978).

280. *Elstad*, 105 S. Ct. at 1296.

281. *Id.* at 1294-95.

282. *Id.* at 1295-96.

283. *Id.* at 1296.

ant's confession is not the result of a denial of his privilege against self-incrimination.[284]

The Oregon Court of Appeals applied the "cat out of the bag" analysis as if it were a literal metaphor, a type of but-for test.[285] That court suppressed the second confession solely on the basis that Elstad had already confessed, so the "cat" was "out of the bag."[286] But this determination frustrates the "cat out of the bag" rationale as it was originally conceived.

In *United States v. Bayer*, the Supreme Court declared that a causal nexus may exist between an induced initial confession and a subsequent confession because of the psychological consequence of having once confessed.[287] Yet the *Bayer* Court said that a presumed psychological disadvantage does not "perpetually [disable] the confessor from making a usable" confession.[288] The *Bayer* Court posits this psychological impact so that the second confession is considered a "tainted fruit" unless traditional principles of attenuation can be applied to dissipate the taint. As previously noted, the flaw in the *Elstad* Court's reasoning was the declaration that the administration of Miranda warnings can itself dissipate the taint of a statement previously taken in the absence of such warnings.

In addition, the *Elstad* Court never refers to the second confession as being a "fruit" of the first. *Elstad* cites *Bayer* which set up the psychological nexus as a given. In *Bayer* the Court noted that with consecutive confessions, "a later confession always may be looked upon as a fruit of the first."[289] The *Elstad* Court makes a single reference to the subsequent statement as being an "alleged 'fruit' of a noncoercive *Miranda* violation."[290] That is the only indication that the Court acknowledged that the second statement could be a fruit. The *Elstad* Court never considered the second statement to be a "fruit" of the first. The Court believed that the statements were separate and concluded that in determining the admissibility of the sec-

284. *Id.*
285. State v. Elstad, 61 Or. App. at 678, 658 P.2d at 555.
286. *Id.*
287. *Bayer*, 331 U.S. at 540.
288. *Id.* at 540-41.
289. *Id.* at 540.
290. *Elstad*, 105 S. Ct. at 1293 (emphasis added).

ond confession the issue is whether it comports with due process and *Miranda*.[291]

By analyzing the second statement as a separate confession rather than a "fruit" of the first, the Court is able to argue that any psychological effect the first confession had on the second was not state compulsion.[292] This conclusion reveals why the Court was so careful in its delineation of what was a fruit. If compulsion is created by the defendant's own actions, the fifth amendment is not violated.

2. *Dissipating the Effect of the Psychological Impact*

The problem with the "cat out of the bag" analysis is the fact that the psychological disadvantage of having once confessed cannot be negated.[293] No matter how much time passes or how the circumstances have changed, the cat can never be put back in the bag. Because the Court chose not to create a per se rule of inadmissibility in the context of consecutive confessions, where the first confession has been only presumptively coerced, it must look to circumstances which dissipate the prior *illegality*. Indeed, this is what the *Elstad* Court has done. It looked to the prior illegality because it could not negate the psychological effect.

The Court's interpretation of the "cat out of the bag" rationale required it to focus on the fact that the illegality in the instant case created a mere presumption of compulsion.[294] If the *Bayer* Court had set forth a rule requiring that the Court focus on the psychological effect, it would not matter whether the coercion was deliberate on the part of the police or presumptively present in the atmosphere surrounding the interrogation. Indeed, the only pertinent fact would be that the defendant made a previous confession which must have had a psychological impact on the defendant so that it led him to make a second confession. While this seems like a common-sense approach to a consecutive confession situation, it was not the approach taken

291. *Id.* at 1298.
292. *Id.* at 1295.
293. *Bayer*, 331 U.S. at 540.
294. *Elstad*, 105 S. Ct. at 1296.

by the *Bayer* Court.[295] Relying on *Bayer*, *Elstad* holds that the psychological effect of having once confessed can be dissipated.[296]

Because a *Miranda* violation does not, in and of itself, reach constitutional dimensions, the prior illegality is only a presumption.[297] Consequently, it is easier to dissipate a presumed taint rather than the taint of a flagrant constitutional violation. This is what the Court concluded in *Elstad* when it determined that an unwarned yet uncoerced statement cannot taint a subsequent voluntary, warned statement.[298]

However, the Court's analysis leaves no room for considering the strength of the impact on the defendant who makes an original confession which literally throws the "cat out of the bag," as opposed to a situation where the defendant merely intimates his involvement. The fact that a suspect may feel he has sealed his fate to a greater degree than someone like Elstad, who gave a bare first admission, is irrelevant to the Court. The Court merely tells us that in this particular instance, "the causal connection between any psychological disadvantage created by [Elstad's] admission and his ultimate decision to cooperate is speculative and attenuated at best."[299] Because there was nothing flagrant about the first confession the Court never reaches this issue. Consequently, the Court gives no guidance for the application of its holding.

C. *More Problems with Custodial Interrogation*

Another aspect of *Elstad* that compromises the decision's ability to afford guidance to lower courts is the Court's attitude toward the problems of custodial interrogation. This flaw in the Court's reasoning is made quite apparent in Justice Brennan's dissent.[300]

The Court goes out of its way to explain the police officers' failure to administer the Miranda warnings before Elstad was

295. *See supra* notes 137-55.
296. *Elstad*, 105 S. Ct. at 1295.
297. *Miranda*, 384 U.S. at 457-58.
298. *Elstad*, 105 S. Ct. at 1298.
299. *Id.* at 1296.
300. *Id.* at 1320-21.

initially interrogated.[301] Both the State and the officers themselves conceded that Elstad was in custody when they sat down in the living room before the interrogation began.[302] In such a situation, the failure to give Elstad his Miranda warnings was a disregard of one of the fundamental aspects of custodial interrogation.

The majority's closing discussion of the *Miranda* decision implies that *Miranda* set forth unrealistic goals. The Court states that "a breach of *Miranda* procedures may not be identified as such until long after full *Miranda* warnings are administered and a valid confession obtained."[303] The Court continues by stating that determining when custodial interrogation begins can be "murky" and "difficult" so that police officers have a hard time deciding when to administer Miranda warnings.[304]

Following the *Miranda* decision the Court spent several years defining custodial interrogation,[305] and to say that *Miranda's* most basic precept — giving warnings during custodial interrogation — is virtually unworkable is to undercut *Miranda's* strength in the few areas that it maintains applicability. The *Elstad* Court unjustifiably and unnecessarily went too far in its characterization of *Miranda.*

V. Conclusion

The Supreme Court's decision to refuse to extend *Miranda's* reach to consecutive, though voluntary, confessions is neither surprising nor unjustified. While the Court in *Elstad* does not guard the fifth amendment as the *Miranda* Court anticipated, it also has not deprived *Miranda* of all of its meaning. In *Elstad,* the Court retained *Miranda's* presumption: if a statement is taken without procedural safeguards, it is presumed to be coerced for purposes of admissibility in the prosecution's case in chief. The Court then pushed *Miranda* aside and formulated an analysis to apply to the fruits of a "voluntary" confession taken in violation of the *Miranda* procedures. The initial state-

301. *Id.* at 1296-97.
302. *Id.* at 1297.
303. *Id.*
304. *Id.*
305. *See supra* note 27.

ment is still considered presumptively coerced and, therefore, inadmissible, but the statement which follows cannot be tainted if there has been no constitutional violation to carry over into the fruit. Thus, the second statement's admissibility must be determined based on the voluntariness of that statement itself.

In carrying its distinction between actual and presumptive coercion into the province of consecutive confessions, the Court raises unanswered questions: is the Court actually altering carefully developed doctrines, or is the Court merely interpreting *Miranda* as it has since Warren Burger became Chief Justice in 1969? The latter description is the fair interpretation of this case. The Court is merely taking the dichotomy it created between actual and presumptive coercion and applying it to an area that was not addressed by the *Miranda* Court. However, *Oregon v. Elstad* is more than a recital of recent interpretations of *Miranda*. By severing the umbilical cord that appeared to exist between a *Miranda* violation and a fifth amendment violation, the Court can easily displace *Miranda's* perpetual adherence to the constitutional privilege. Therefore, *Miranda* stands as a guard over statements taken in the absence of procedural safeguards while the fifth amendment bars admission of any evidence which would deprive a defendant of his privilege against self-incrimination. Consequently, the constitutional privilege moves forward to prevent the admission of all tainted evidence and its tainted fruit, and *Miranda* lags behind to make sure all admissible confessions have complied with its prescribed warnings.

Hopefully, the formula enunciated by the Court will prove to be a predictable, workable analysis that does not compromise the immediate goal of the *Miranda* decision, but such a hope seems fleeting. Serious doubts will surround the application of the fifth amendment until the Court ceases to pay lip service to the *Miranda* decision and either reaffirms it or overrules it.

Gail Matthews Kambic