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NOTES

OREGON V. ELSTAD: BOLDLY STEPPING BACKWARDS TO PRE-MIRANDA DAYS?

The self-incrimination clause of the fifth amendment protects criminal defendants against the adverse use of their own incriminating statements obtained through governmental coercion. The privilege against self-incrimination embodies a constitutional exclusionary rule guaranteeing the exclusion from evidence of all coerced testimony. The Supreme Court and commentators have, at various times, identified four general purposes of the privilege: (1) safeguarding the accusatory nature of the criminal justice system; (2) protecting the individual from the power of the govern-

1. The fifth amendment provides: “No person . . . shall be compelled in any criminal case to be a witness against himself . . . .” U.S. CONST. amend. V. For a detailed account of the history of the fifth amendment, see L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968).


5. See Garner v. United States, 424 U.S. 648, 655 (1976) (“[t]he fundamental purpose of the Fifth Amendment [is] the preservation of an adversary system of criminal justice”); Harris v. New York, 401 U.S. 222, 231 (1971) (Brennan, J., dissenting) (the objective of the privilege against self-incrimination is one of “safeguarding the integrity of our adversary system”); Murphy v. Waterfront Comm’n, 378 U.S. 52, 55 (1964) (the privilege against self-incrimination
ment;\(^6\) (3) ensuring the credibility of evidence;\(^7\) and (4) preserving the individual's right to privacy.\(^8\)

Although the self-incrimination clause requires exclusion of all testimony obtained directly through governmental coercion, the precise scope of the fifth amendment exclusionary rule is not entirely clear. In 1966, the Supreme Court, in *Miranda v. Arizona*,\(^9\) recognized that, under the fifth amendment, statements obtained from a suspect during custodial interrogation without the administration of prescribed warnings must be excluded from the prosecution's case-in-chief as the product of presumed coercion.\(^10\) The *Miranda* decision made clear that the fifth amendment exclusionary rule applies to any statements obtained directly from a custodial interrogation conducted without the requisite warnings. Whether derivative evidence or "fruit"\(^11\) of the initial *Miranda* violation must likewise be excluded, however, remained an open question. Although the Court has had the opportunity to decide the question on more than one occasion since *Miranda*,\(^12\) it has sidestepped an unequivocal resolution of the issue.

It was not until 1985, in *Oregon v. Elstad*,\(^13\) that the Supreme Court un-
dertook to address the question directly. Relying largely on the reasoning and dicta of case law subsequent to *Miranda*, the Court concluded that the "fruit of the poisonous tree" doctrine does not apply to uncoerced consecutive confessions separated only by the administration of the *Miranda* warnings.

James Elstad, an eighteen-year-old burglary suspect, made an incriminating statement to police officers in a custodial setting without having received the requisite *Miranda* warnings. After the officers transported Elstad to the police station and administered him the *Miranda* warnings, they resumed questioning him. At that point, Elstad executed a waiver of his rights and signed a written confession implicating himself in the burglary. Elstad also waived his right to a jury trial, and a county circuit court judge convicted him of first-degree burglary, having overruled his motion to suppress the written confession as tainted by the initial *Miranda* violation. The Court of Appeals of Oregon reversed the conviction, concluding that between Elstad's initial inadmissible statement and his subsequent written confession, there had not been an adequate break in the stream of events to dissipate the coercive effect of having let the "cat out of the bag" in the first confession. Thus, the appellate court held that Elstad's written confession, in addition to his unwarned admission, should have been excluded from evidence, and remanded the case for a new trial.

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14. Id. at 1288.
15. See id. at 1298. The phrase "fruit of the poisonous tree" was coined by Justice Frankfurter in *Nardone v. United States*, 308 U.S. 338, 341 (1939). The underlying doctrine is a judicially created concept generally associated with, although not limited to, the fourth amendment protection against unreasonable search and seizure. See, e.g., *Stone v. Powell*, 428 U.S. 465, 482 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976); *United States v. Calandra*, 414 U.S. 338, 348 (1974). The doctrine was first articulated in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), in which the Court stated, "[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. The doctrine thus excludes evidence derived from inadmissible sources as tainted by the primary illegality. In 1963, this concept was expanded to include confessions made by a defendant whose fourth amendment rights had been violated. See *Wong Sun v. United States*, 371 U.S. 471 (1963). The Supreme Court has identified a deterrence rationale for the fourth amendment exclusionary rule and the "fruit of the poisonous tree" doctrine. See, e.g., *Stone*, 428 U.S. at 486; *Janis*, 428 U.S. at 446-54; *Calandra*, 414 U.S. at 348.
16. *Elstad*, 105 S. Ct. at 1289. Although the police questioned Elstad in his home, the state conceded that he was in custody for purposes of *Miranda* at the time he made his incriminating statement. Id. at 1290.
17. Id. at 1289.
18. See id. at 1289-90.
denied the state's petition for review of the appellate court's decision.\textsuperscript{21}

The United States Supreme Court, in a six to three decision, reversed and held that there is no justification for presuming coercive impact on a second confession following an initial \textit{Miranda} violation where the defendant has made both statements voluntarily.\textsuperscript{22} In a strong dissenting opinion, Justice Brennan, joined by Justice Marshall, asserted that the majority underestimated the coercive effect of an initial admission made without the benefit of \textit{Miranda} warnings and was thus at odds with the \textit{Miranda} decision itself.\textsuperscript{23} Justice Stevens, in a separate dissenting opinion, contended that there is inherent coercion in a confession absent \textit{Miranda} warnings that increases the coercion presumed to exist in a subsequent custodial interrogation, thereby placing a heavier burden on the prosecution to overcome that presumption.\textsuperscript{24}

This Note will provide an overview of judicial interpretation and application of the self-incrimination clause of the fifth amendment. Particular emphasis will be placed on the values underlying the fifth amendment privilege and the degree to which they serve to shape case results. Additionally, the Court's gradual redefinition of those values, and the extent to which such redefinition has affected its interpretation of the self-incrimination clause, will be a primary area of focus. An analysis of \textit{Elstad} will suggest a return by the Supreme Court to a pre-\textit{Miranda}, case-by-case approach to the privilege against self-incrimination through a piecemeal, but determined, narrowing of the scope of the \textit{Miranda} doctrine. The Note will conclude that the \textit{Elstad} decision leaves \textit{Miranda} and the "fruit of the poisonous tree" doctrine effective only in situations involving actual coercion, as defined by the due process standard. The likely result will be inconsistent application of this standard by lower courts.

\section*{I. Development of Case Law Interpreting and Applying the Self-Incrimination Clause of the Fifth Amendment}

\subsection*{A. Pre-\textit{Miranda}: Coerced Confession Doctrine}

As early as the 1930's, coercive interrogation tactics used by police to extract confessions from criminal suspects posed a problem for state courts when considering the introduction of such compelled testimonial evidence.\textsuperscript{25}

\begin{thebibliography}{99}
\bibitem{21} See \textit{Elstad}, 105 S. Ct. at 1290.
\bibitem{22} \textit{Id.} at 1298. \textit{See infra} notes 152-83 and accompanying text.
\bibitem{23} \textit{Elstad}, 105 S. Ct. at 1302-06 (Brennan, J., dissenting). \textit{See infra} notes 184-205 and accompanying text.
\bibitem{24} \textit{Elstad}, 105 S. Ct. at 1324-25 (Stevens, J., dissenting). \textit{See infra} notes 206-12 and accompanying text.
\bibitem{25} See \textit{Gardner}, supra note 8, at 445; \textit{Stone}, supra note 5, at 101.
\end{thebibliography}
From 1936, when the Supreme Court first addressed this problem, until it decided *Miranda v. Arizona* in 1966, the test was one of fundamental fairness based on the due process clause of the fourteenth amendment.

In *Brown v. Mississippi*, the Court’s first state case involving a compelled confession, the Court developed a “coerced confession” doctrine to exclude incriminating statements obtained through police tactics that were “revolting to the sense of justice.” *Brown* concerned homicide convictions based upon confessions elicited by hanging and whipping the defendants. Under the coerced confession doctrine, a court was required to examine, on a case-by-case basis, the “totality of the circumstances” in order to determine whether the tactics used overbore the suspect’s free will and, therefore, amounted to coercion violative of due process. Because coerced confessions were generally of doubtful reliability, the Court’s goal in mandating their exclusion was one of obtaining trustworthy testimony. As this due process standard was applied in subsequent cases, its rationale, initially to exclude unreliable evidence, was slowly expanded to include preservation of an accusatorial criminal justice system and maintenance of fair police

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28. See, e.g., *Haynes v. Washington*, 373 U.S. 503 (1963); *Payne v. Arkansas*, 356 U.S. 560 (1958); *Ward v. Texas*, 316 U.S. 547 (1942); *White v. Texas*, 310 U.S. 530 (1940); *Chambers v. Florida*, 309 U.S. 227 (1940). It was not until 1964 that the fifth amendment was held applicable to the states. See *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). Thus, from 1936 until 1964, the states could only protect defendants against coerced confessions through application of the fourteenth amendment which provides that a state shall not deprive a person of, inter alia, liberty without “due process of law.” U.S. CONST. amend. XIV.
30. Id. at 286 (“[i]t would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process”). Subsequently, the Court first enunciated an objective test and then later a subjective test for determining whether admissions should be excluded from evidence as involuntary. Compare *Malinski v. New York*, 324 U.S. 401, 404 (1945) (objective standards should be applied to determine whether tactics used are violative of due process), and *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944) (certain tactics used to elicit confessions are inherently coercive without regard to an individual’s subjective characteristics), *with Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) (subjective test of voluntariness), and *Fikes v. Alabama*, 352 U.S. 191, 197-98 (1957) (individual’s subjective characteristics of weak will and mind taken into consideration in determining voluntariness of confession).
Gradually, the Court became aware that the coerced confession doctrine was ineffective in eliminating coercive interrogation tactics. Because application of the doctrine required an evaluation of all relevant aspects of each challenged confession, and because the Supreme Court was unable to articulate precise decisional standards, cases among the state courts achieved inconsistent results. Moreover, application of the due process standard by

35. As LaFave and Israel noted, "[w]hile it is fair to say that ensuring the reliability of confessions is a goal under the due process voluntariness standard, it is incorrect to define the standard in terms of that one objective." 1 W. LAFAVE & J. ISRAEL, supra note 33, at 442 (emphasis in original). See, e.g., Rogers v. Richmond, 365 U.S. 534, 540-41 (1961). The Court noted:

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

Id. In another case the Court stated, "[u]se of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency." Rochin v. California, 342 U.S. 165, 173 (1952). For a discussion of the rationales underlying the coerced confession doctrine, see generally Comment, The Coerced Confession Cases in Search of a Rationale, 31 U. CHI. L. REV. 313 (1964).

36. As Justice Clark wrote:

[The practical result of this ad hoc approach is simply that when five Justices are sufficiently revolted by local police action a conviction is overturned and a guilty man may go free. . . . We may thus vindicate the abstract principle of due process, but we do not shape the conduct of local police one whit; unpredictable reversals on dissimilar fact situations are not likely to curb the zeal of those police and prosecutors who may be intent on racking up a high percentage of successful prosecutions.


37. See Grano, Voluntariness, Free Will, and the Law of Confessions, 65 Va. L. Rev. 859, 863 (1979). "The Court's general unwillingness to articulate the policies underlying volitional terminology explains the ambiguity of [the] voluntariness doctrine . . . . [T]he Court's failure in this regard accounts for the intolerable uncertainty that characterized the thirty-year reign of the due process voluntariness doctrine in the law of confessions." Id. "Judicial decisions speak in terms of the 'voluntariness' of a confession, but the term itself provides little guidance. To the extent 'voluntariness' has made a determination of the state of an individual's will the crucial question, it has not assisted analysis." Bator & Vorenberg, Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions, 66 Colum. L. Rev. 62, 72 (1966); see also Schulhofer, Confessions and the Court, 79 Mich. L. Rev. 865, 869 (1981) ("standard left police without needed guidance").
state courts hampered effective judicial review. By leaving state courts with an imprecise standard, the Supreme Court invited judges to employ their subjective preferences in the voluntariness evaluation. The end result was judicial validation and affirmation by state courts of confessions of questionable constitutionality.

The Supreme Court responded to the shortcomings of the coerced confession doctrine in 1964 with two decisions based on the sixth amendment guarantee of the right to counsel in criminal proceedings. Initially, in *Massiah v. United States*, the Court held that the right to counsel attaches at the post-indictment stage of a criminal proceeding, and that any incriminating statements made in the absence of counsel during that “critical” period must be excluded. However, because *Massiah* concerned only post-indictment confessions, it did not address the preindictment stage, during which the overwhelming majority of police interrogations take place. Accordingly, only five weeks after *Massiah*, the Court, in *Escobedo v. Illinois*, while still focusing on the sixth amendment, extended its holding in *Massiah* to include interrogations conducted in the preindictment phase of the proceeding. Although the Court explicitly limited its holding to the specific facts of the case, it intimated that the right to remain silent arose from the privilege against self-incrimination secured by the fifth amendment. In so

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41. *Id.* at 206. Prior to *Massiah*, access to counsel was considered under the coerced confession doctrine as one of the relevant criteria to be evaluated within the “totality of the circumstances.” See, e.g., *Crooker v. California*, 357 U.S. 433 (1958); *Cicenia v. Lagay*, 357 U.S. 504 (1958).
42. See Stone, *supra* note 5, at 103.
44. *Id.* at 490-91. Justice Goldberg, writing for the majority, noted that “no meaningful distinction can be drawn between interrogation of an accused before and after formal indictment.” *Id.* at 486.
45. See *id.* at 490-91. The *Escobedo* majority limited its holding to the following situation: [W]here, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent . . . no statement elicited by the police during the interrogation may be used against him at a criminal trial.

*Id.*
46. Justice Goldberg stated that “a system of criminal law enforcement which comes to depend on the ‘confession’ will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.” *Id.* at 488-89 (footnotes omitted).
doing, the Court laid the groundwork for its subsequent ruling based upon the fifth amendment.\textsuperscript{47}

\section*{B. Miranda v. Arizona: Demise of the Coerced Confession Doctrine}

Two years later in \textit{Miranda v. Arizona},\textsuperscript{48} the Court shifted its focus on the admissibility of incriminating statements from the sixth amendment to the fifth. The Court stated that it granted certiorari in \textit{Miranda} in order to afford persons subjected to custodial interrogation protection against self-incrimination, and to announce "concrete constitutional guidelines for law enforcement agencies and courts to follow."\textsuperscript{49} The Court proceeded to establish an absolute exclusionary rule based on the fifth amendment to be objectively applied to all statements obtained during custodial interrogation prior to the administration of prescribed warnings.\textsuperscript{50} As a prerequisite to the admission of a suspect's in-custody statements, the Court held that the government must establish that the warnings have been administered and that a knowing and voluntary waiver has been properly executed by the suspect.\textsuperscript{51}

Crucial to the Court's holding was its characterization of custodial police interrogations as inherently coercive.\textsuperscript{52} In reaching its conclusion, the Court reviewed various police interrogation manuals and other materials describing a multitude of psychological tactics used by interrogators to elicit confes-

\textsuperscript{47} \textit{Escobedo} is looked upon by commentators as the precursor to \textit{Miranda}. \textit{See}, e.g., \textit{Gardner}, \textit{supra} note 8, at 447 n.125.

\textsuperscript{48} 384 U.S. 436 (1966).

\textsuperscript{49} \textit{Id.} at 441-42.

\textsuperscript{50} \textit{Id.} at 444. Articulating its strict exclusionary rule, the Court stated:

[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. . . . Prior 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.

\textit{Id.}

\textsuperscript{51} See \textit{id.} at 444, 476, 479.

\textsuperscript{52} The Court asserted that "[u]nless 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." \textit{Id.} at 458. More to the point, the Court further noted that "[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under compulsion to speak." \textit{Id.} at 461. \textit{See} Dix, \textit{Mistake, Ignorance, Expectation of Benefit and the Modern Law of Confessions}. 1975 \textit{WASH. U.L.Q.} 275, 295 (stating that the Court's concern in \textit{Miranda} "was no longer focused upon blatant police misconduct, such as physical violence . . . [but instead was upon] more subtle influences, such as what [was] perceived as the inherently coercive nature of any custodial interrogation").
sions from criminal suspects during custodial interrogation. The Court recognized that psychological coercion was present in a custodial setting even in the absence of actual physical coercion. The now-familiar Miranda warnings were the result of the Court's effort to dispel the inherently coercive atmosphere of custodial interrogation and thereby protect fifth amendment rights.

Eschewing the case-by-case approach of the coerced confession doctrine, the Court sought to establish an absolute standard of admissibility to be applied to all statements obtained through custodial interrogation. Accordingly, the Court rejected a "balancing" test between "society's need for interrogation" and the individual's guaranteed privilege against self-incrimination—the approach previously employed by the Court under the due process standard. It asserted instead that the suspect's privilege "cannot be abridged." In addition, the Court dismissed, as mere speculation, evaluations based upon the subjective characteristics of a defendant, deeming such attributes as age, intelligence, and level of education irrelevant. Holding that all statements obtained in violation of its strictures were irrebuttably presumed to be the product of coercion and hence inadmissible, the Court set forth a "bright line" test to be applied in every such instance.

By its strict exclusionary rule, the Miranda Court sought to promote what it perceived as the primary values underlying the fifth amendment privilege against self-incrimination. Convinced that unduly coercive methods of custodial interrogation were prevalent, the Court advanced its exclusionary rule to protect the accusatory nature of the criminal justice system. Further-

53. See Miranda, 384 U.S. at 445-56.
54. See id. at 455. The Court found that the custodial "atmosphere carries its own badge of intimidation," id. at 457, and that "[e]ven without employing brutality, . . . the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." Id. at 455 (footnote omitted). In reference to the specific facts of the cases before it, the Court noted, "we might not find the defendants' statements to have been involuntary in traditional terms." Id. at 457.
55. See id. at 465. See also supra text accompanying note 49.
56. See supra note 32 and accompanying text.
57. See Miranda, 384 U.S. at 468. In this regard, the Court stated, "[t]he Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." Id. (emphasis added).
58. See id. at 479.
59. Id.
60. Id. at 468-69. "Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation." Id.
61. See id. at 444, 457-58, 461, 470. See also supra note 50 and accompanying text.
62. See Miranda, 384 U.S. at 460. "[O]ur accusatory system of criminal justice demands
more, in an effort to dissipate the coercive atmosphere of custodial interroga-
tions, the Court prescribed the *Miranda* warnings to safeguard the suspect's
dignity and free will, thereby enabling him to make an informed decision
whether to remain silent.  

The goals of deterring improper police conduct and obtaining reliable testi-
monial evidence, previously motivating the Court under the coerced con-
fession doctrine, were not seen by the *Miranda* Court as primary purposes
for protecting the privilege against self-incrimination. Although *Miranda*
recognized the need to deter illegal police behavior, it viewed that function
simply as a means of promoting the primary interests of the fifth amend-

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.” *Id.* (quoting Chambers v. Florida, 309 U.S. 227, 235-38 (1940)). See also Gardner,
*supra* note 8, at 453 (“requiring the police to inform suspects of their right to remain
silent, the *Miranda* Court sought to guarantee that the accusatorial safeguards were not ren-
dered meaningless by police interrogation practices”).

63. See *Miranda*, 384 U.S. at 460. “[T]he privilege is fulfilled only when the person is
guaranteed the right ‘to remain silent unless he chooses to speak in the unfettered exercise of
his own will.’” *Id.* (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)). See also Schrock, Welsh &
33-56 (1978); Dix, *supra* note 52, at 295-96. *But see* Goldberg, Escobedo and *Miranda Revis-
ted*, 18 AKRON L. REV. 177, 181 (1984), where Justice Arthur Goldberg states that the effi-
cacy of the *Miranda* warnings is a function of the profile of the suspect:

*Miranda* warnings, as experience teaches, have limited utility. Lay persons, in police
custody, simply cannot anticipate how what they agree to say will be used against
them later. Such suspects, more often than not, do not comprehend the significance
of a *Miranda* warning, because they lack the legal training or often even literacy
needed to understand the different ways statements can incriminate them.

*Id.* Further, Justice Goldberg is of the opinion that *Miranda* does not really offer substantial
protection to suspects because “we have no way of knowing what else the police may have
added after a *Miranda* warning.” *Id.*

64. See *supra* notes 33, 36 and accompanying text.

65. See *Miranda*, 384 U.S. at 460. As Justice Harlan noted in his dissent, “[t]he [*Miranda*
warnings] are not designed to guard against police brutality or other unmistakably banned
forms of coercion. Those who use third-degree tactics and deny them in court are equally able
and destined to lie as skillfully about warnings and waivers.” *Id.* at 505 (Harlan, J., dissent-
ing). See also Orozco v. Texas, 394 U.S. 324, 326 (1969) (implying that deterrence of police
misconduct is a secondary purpose of *Miranda*).

Because the *Miranda* Court did not explicitly articulate a deterrence goal as motivating its
decision, many commentators have concluded that it was, therefore, not an important value
being protected in the Court's fashioning of the fifth amendment safeguards. For a hypotheti-
cal illustrating that “deterrence of particular methods of interrogation was not a primary goal
of the *Miranda* Court,” see Gardner, *supra* note 8, at 454 n.167 (emphasis in original). See
also Berger, *supra* note 8, at 201, 203 (*Miranda* “focuses upon a broader interest in protecting
the accused's constitutional privilege rather than solely controlling state abuses”). *But see*
Sonenshein, *supra* note 39, at 415 (“the Court [in *Miranda*] intended by its exclusionary rule to
deter illegal police behavior”); George, *The Fruits of Miranda: Scope of the Exclusionary
Rule*, 39 U. COLO. L. REV. 478, 489 (1967) (“[t]he [*Miranda*] Court’s social objective is con-
trol of the police”).
ment. Regarding the coerced confession doctrine's rationale of ensuring credible evidence, the *Miranda* Court, except for cursory mention in a footnote, did not articulate this purpose as a value supporting its holding. Therefore, the result in *Miranda* may be explained on the basis of the Court's preference for those values perceived as inherent in the fifth amendment, safeguarding an accusatorial criminal justice system and preserving individual dignity and free will, over those previously identified as the rationales underlying the coerced confession doctrine, deterring illegal police behavior and obtaining reliable testimonial evidence.

The *Miranda* Court ascribed, as an indispensable protection of the fifth amendment privilege, a constitutional basis to its warnings mandate. The Court stated that "[t]he requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege . . ." Thus, the Court concluded that to comport with the requirements of the fifth amendment, the police must apprise a suspect in custody of his constitutional rights before they may interrogate him. In so concluding, the Court

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66. Those interests are the preservation of the accusatory nature of the criminal justice system and the protection of the individual's free will and dignity. See supra notes 62-63 and accompanying text. See also Gardner, supra note 8, at 454 ("the Court appeared to treat such deterrence only as a means to the end of protecting [the other] interests").

67. The Court mentioned only briefly in a footnote, "[i]nterrogation procedures may even give rise to a false confession." *Miranda*, 384 U.S. at 455 n.24. See Gardner, supra note 8, at 451 ("[t]he *Miranda* Court did not explicitly address . . . reliability of evidence, as a goal of the privilege").

68. See, e.g., Dershowitz & Ely, Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority, 80 Yale L.J. 1198, 1208-10 (1971) (the *Miranda* warnings are constitutionally based). But see Schrock, Welsh & Collins, supra note 63, at 1, 15-19 ("[m]uch of the present doctrinal confusion [surrounding the *Miranda* decision] is traceable to the *Miranda* opinion itself—to the Court's failure to make explicit the fifth amendment analysis underlying its holding").

69. *Miranda*, 384 U.S. at 476. Accordingly, statements obtained without full compliance with *Miranda* are prohibited by the Constitution. There exists considerable debate as to whether the Constitution prohibits only use of the illegally obtained statements or also prohibits the act of obtaining compelled statements. Compare Baxter v. Palmigiano, 425 U.S. 308, 316 (1976) (holding that inmate's silence at disciplinary proceeding could not be used against him), and Gardner, supra note 8, at 452 (use of compelled statements against an accused "is the gravamen of a violation of the fifth amendment privilege against self-incrimination"), and Ritchie, Compulsion That Violates the Fifth Amendment: The Burger Court's Definition, 61 Minn. L. Rev. 383, 413 (1977) (a constitutional violation occurs only when an incriminating statement is used in a criminal proceeding), with Stone, supra note 5, at 139-40 ("[t]he privilege guards not only against the use of statements elicited by compulsion, but also against the very act of compelling such statements whether or not they are ever actually used in a criminal case").

70. See *Miranda*, 384 U.S. at 478. "[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning . . . [p]rocedural safeguards must be employed to protect the privilege." *Id.* at 478-79 (emphasis added).
recognized that the fifth amendment protects individuals not only from actual compulsion as defined by the coerced confession doctrine, but also from compulsion presumed to exist as a function of the coercive nature of custodial interrogation.

Notwithstanding the *Miranda* Court’s determination to provide an objective, “bright line” standard for police agents and courts to follow, the precise scope of its exclusionary rule was not explicitly defined. Thus, whether, in addition to statements obtained in violation of its strictures, *Miranda* also mandated the exclusion of evidence derived from those statements was unclear. Seemingly supporting the interpretation of *Miranda’s* exclusionary rule as encompassing derivative evidence is the Court’s assertion that “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 [the defendant].” Although this unresolved derivative evidence issue was raised and argued by the parties three years after *Miranda* in *Orozko v.*

71. See supra notes 26-32 and accompanying text.
72. See *Miranda*, 384 U.S. at 467, 476. See also supra notes 52-55 and accompanying text.
73. See supra notes 49, 57 and accompanying text.
75. *Miranda*, 384 U.S. at 479 (emphasis added). Language in Justice Clark’s dissenting opinion supports this construction: “The Court . . . holds that failure to follow the new procedures requires inexorably the exclusion of any statement by the accused, as well as the fruits thereof.” *Id.* at 500 (Clark, J., dissenting) (emphasis added). Furthermore, Westover v. United States, 384 U.S. 494 (1966), one of the companion cases to *Miranda*, may lend support to application of the “fruit of the poisonous tree” doctrine to *Miranda* violations. In *Westover*, the challenged “fruit” of the illegal interrogation was a waiver. The defendant had been interrogated by police for fourteen hours without being advised of his rights. *Id.* at 496. Subsequently, he was questioned by the FBI, after being warned, regarding two crimes unrelated to that being investigated by the police. The defendant then signed a confession to the two crimes that were the subject of the FBI interrogation. *Id.* at 495. Notwithstanding administration of the warnings, the Court held the confessions inadmissible, reasoning that the FBI interrogators “were the beneficiaries of the pressure applied by the local in-custody interrogation.” *Id.* at 497. The Court went on to note that “[i]n these circumstances the giving of warnings alone was not sufficient to protect the privilege [against self-incrimination].” *Id.* It appears that the *Westover* Court treated the defective waiver as an inadmissible “fruit” of the prior illegal interrogation. See Pitler, supra note 74, at 612-13. See also Pye, *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 169, 216 (1966); Comment, supra note 74, at 330.
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Texas, the Court's opinion in that case did not address it, and the issue thus remained unsettled.

C. Miranda's Progeny: A Reinterpretation by the Burger Court

Leaving Miranda fully intact, subsequent decisions by the Warren Court involving Miranda related solely to its applicability in various factual contexts. With the appointment of Chief Justice Burger and three new Associate Justices between 1969 and 1971, however, the viewpoint of the Court changed significantly regarding Miranda's underlying principles and the general scope of the self-incrimination clause. A review of several subsequent decisions will demonstrate that the Court, as a basis for gradually narrowing the scope of the Miranda doctrine, emphasized values not deemed significant by the Miranda Court.

1. Impeachment Use Limitation

The first case narrowing the scope of Miranda arose in 1971. Harris v. New York presented the question whether a defendant's statement, made to the police absent complete Miranda warnings, could be used to impeach his credibility at trial. In Harris, the defendant was arrested for selling

77. See Comment, supra note 74, at 326 n.12.
78. The Court decided four cases involving Miranda before Chief Justice Warren's retirement in 1969: Jenkins v. Delaware, 395 U.S. 213 (1969) (held Miranda not applicable to retrials beginning after the date of that decision); Orozco v. Texas, 394 U.S. 324 (1969) (held Miranda applicable to interrogations conducted in suspect's home); Mathis v. United States, 391 U.S. 1 (1968) (held Miranda applicable to interrogation of suspect for a tax offense while he was imprisoned for another unrelated offense); Johnson v. New Jersey, 384 U.S. 719 (1966) (held Miranda applicable only to cases in which the trials commence after the date of that decision).
79. Warren Burger was appointed Chief Justice on June 23, 1969, replacing Chief Justice Earl Warren upon his retirement. Justice Harry Blackmun was appointed to the Court in 1969 and Justices Lewis Powell and William Rehnquist in 1971. These three Associate Justices replaced Abe Fortas, Hugo Black, and John Marshall Harlan, respectively. Together, these changes resulted in the replacement of two of the original five-member majority in Miranda.
80. See, e.g., Sonenshein, supra note 39, at 407; Stone, supra note 5, at 101; Gardner, supra note 8, at 455. But see Sonenshein, supra note 39, at 408, 447-62, where the author asserts that two recent Burger Court cases appear to revitalize Miranda inasmuch as they favored the defendant: (1) Edwards v. Arizona, 451 U.S. 477 (1981), holding that a confession obtained after the defendant had previously invoked his right to counsel but before counsel has been made available to him must be excluded under Miranda; and (2) Estelle v. Smith, 451 U.S. 454 (1981), holding that the fifth amendment prohibits use of psychiatric testimony, derived from the defendant's disclosures, at the penalty stage of a bifurcated capital trial, where the defendant was not first given Miranda warnings.
82. Id. at 222.
heroin to an undercover police officer. Harris made several incriminating statements during the interrogation, after having received all the *Miranda* warnings except that concerning the right to appointed counsel. Although Harris’ statements were not used by the prosecution in its case-in-chief in accordance with *Miranda,83* Chief Justice Burger, writing for the majority, held that statements obtained without benefit of the complete *Miranda* warnings could be used to impeach the defendant’s testimony.84

Initially, Chief Justice Burger noted that Harris made no claim that his statements were “coerced” or otherwise “involuntary,” in traditional, pre-*Miranda* terms.85 Recognizing that *Miranda* contained language expressly prohibiting impeachment use of such statements,86 Chief Justice Burger dismissed the discussion in *Miranda* as mere dicta, “not at all necessary to the Court’s holding” and so not controlling.87 The Court then invoked its decision in *Walder v. United States,*88 a fourth amendment case holding that the exclusionary rule is not applicable to evidence used for impeachment purposes, and concluded that Harris’ statements could be used for impeachment purposes despite the defect in the *Miranda* warnings.89

The *Harris* Court further interpreted *Miranda*’s exclusionary rule as being founded solely upon a deterrence theory,90 a characterization that enabled

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83. *Id.* at 223-24.
84. *Id.* at 226.
85. *Id.* at 224. But, according to *Miranda,* statements obtained absent the requisite warnings are by definition coerced and, therefore, involuntary. See supra notes 52-55 and accompanying text. The unarticulated assumption of Chief Justice Burger’s statement is that there is a difference between coercion resulting from a *Miranda* violation and actual coercion in pre-*Miranda* terms—an assumption that was expressly rejected by the *Miranda* Court. See *Wingo,* supra note 74, at 232.
86. See *Miranda*, 384 U.S. at 476. “The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination.” *Id.* (emphasis added). More to the point, the *Miranda* Court continued, “statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial. . . . These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.” *Id.* at 477 (emphasis added).
87. *Harris*, 401 U.S. at 224. But see *Miranda*, 384 U.S. at 441-42 (the Court deliberately intended to address issues not specifically raised by the case). See also *Stone,* supra note 5, at 107. As one commentator remarked, “[t]he Burger Court misstated the meaning of *Miranda* by focusing on an unnecessary and arbitrary factual distinction. Then, the Court transformed this irrelevant factual distinction into a basis for artificially limiting [*Miranda*] to its facts.” Sonenshein, supra note 39, at 419.
89. *Harris*, 401 U.S. at 224-25, 226. For a criticism of the Court’s reliance on *Walder,* see *Stone,* supra note 5, at 108-11.
90. See *Harris*, 401 U.S. at 225. But see *id.* at 231 (Brennan, J., dissenting) (“[*t]he objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of our adversary system”). See also supra notes 64-66 and accompanying text.
the Court to narrow *Miranda*’s scope both in *Harris* and in subsequent cases. Applying the deterrence theory, the *Harris* Court reasoned that, because “sufficient deterrence flows when evidence in question is made unavailable to the prosecution[s] . . . case in chief,” there was no reason to exclude Harris’ statements for impeachment purposes.91 Thus, the *Harris* Court concluded, testimony should be excluded only if it would deter police from employing improper methods of interrogation. Such deterrence was sufficient in the instant case by the exclusion of Harris’ statements from the prosecution’s case-in-chief.92

2. **Reinterpreting Miranda’s Constitutional Basis**

Although the *Harris* Court did not specifically address the question of the admissibility of the “fruits” of a *Miranda* violation, its reliance on a deterrence theory of exclusion in *Miranda* contexts could provide the basis for admitting the “fruits” of the violation. The reasoning of *Harris* suggests that sufficient deterrence flows from the exclusion of the evidence obtained directly as a result of the violation, and that there is no reason to exclude the “fruits” as well. Indeed, this very issue was presented three years later in *Michigan v. Tucker*.93 Although the Court decided *Tucker* on narrower grounds, it strongly implied that the “fruit of the poisonous tree” doctrine does not apply to *Miranda* violations.94

In *Tucker*, as in *Harris*, the defendant was arrested and questioned by police without having been advised of his right to appointed counsel. During his interrogation for assault and rape, Tucker stated that at the time of the crime he had been with a Robert Henderson. Henderson, when contacted by the police, discredited Tucker’s alibi and subsequently testified against him at trial.95 The interrogation of Tucker occurred prior to the *Miranda* decision, but the trial took place afterwards.96 The issue confronting the Court was whether, in addition to Tucker’s exculpatory state-

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91. *Harris*, 401 U.S. at 225.
92. *See id.* But, according to the dissent and several commentators, the majority’s conclusion, rather than deterring police from violating *Miranda*, provides them an incentive for doing so. *See id.* at 232 (Brennan, J., dissenting) (majority’s holding undermines the objective of preserving an accusatorial criminal justice system and undercuts the deterrence rationale). *See also* Sonenshein, supra note 39, at 421 (the *Harris* conclusion “provides a clear incentive to the police to violate *Miranda*”); Stone, supra note 5, at 113 (“*Harris* . . . seems to carry at least the potential seriously to undercut the incentive of the police to comply with the dictates of *Miranda*”); Dershowitz & Ely, supra note 68, at 1218-21; Kent, *Harris v. New York: The Death Knell of Miranda and Walder?*, 38 BROOKLYN L. REV. 357, 360-61 (1971).
94. *Id.* at 447.
95. *Id.* at 436-37.
96. *Id.* at 435.
mements, the "fruit" of his statements (i.e., Henderson's testimony) must also be suppressed. Justice Rehnquist, writing for the majority, held Henderson's testimony admissible as part of the prosecution's case-in-chief.

Justice Rehnquist first considered whether the police violated Tucker's constitutional right against compulsory self-incrimination or whether they instead violated only the rules designed to protect that right. Recounting the language in *Miranda* that the Constitution does not mandate "adherence to any particular solution" to dissipate the inherently compelling atmosphere of custodial interrogations, Justice Rehnquist reasoned that the *Miranda* warnings were merely "procedural safeguards . . . not themselves rights protected by the Constitution." Further, comparing the *Tucker* facts with those traditionally involving actual coercion, Justice Rehnquist determined that Tucker's statements could not be characterized as involuntary. On that basis, he concluded that the police did not violate Tucker's constitutional privilege against self-incrimination. Rather, the police conduct "departed only from the prophylactic standards . . . laid down by this Court in *Miranda* to safeguard that privilege." Thus, the *Tucker* Court reaffirmed the *Harris* implication that only involuntary statements, as defined by traditional standards, violate the self-incrimination clause of the fifth amendment.

Having denied that the *Miranda* warnings are constitutionally required, Justice Rehnquist then considered whether Henderson's testimony must be suppressed as tainted "fruit" of Tucker's statements made in violation of

97. *Id.*
98. *Id.* at 452.
99. *Id.* at 439.
100. *Id.* at 444 (quoting *Miranda*, 384 U.S. at 467).
101. *Id.* Justice Rehnquist neglected, however, to note the *Miranda* Court's further statement that "unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the [enunciated] safeguards must be observed." *Miranda*, 384 U.S. at 467.
102. *Tucker*, 417 U.S. at 444-45. Justice Rehnquist stated: A comparison of the facts in this case with the historical circumstances underlying the privilege against compulsory self-incrimination strongly indicates that the police conduct here did not deprive respondent of his privilege against compulsory self-incrimination . . . Certainly no one could contend that the interrogation faced by respondent bore any resemblance to the historical practices at which the right against compulsory self-incrimination was aimed. *Id.* at 444. Thus, the *Tucker* Court ignored the *Miranda* premises that custodial interrogation is inherently compelling and that any statements obtained absent the requisite warnings must be presumed coerced, and hence, involuntary. See *supra* notes 52-55 and accompanying text.
104. *Id.* at 446.
105. See *Stone*, *supra* note 5, at 118; *Wingo*, *supra* note 74, at 233; *supra* note 85 and accompanying text.
He commenced by referring to the Court's holding in *Wong Sun v. United States,* that evidence obtained through statements made by a defendant whose fourth amendment rights had been violated must be suppressed as "fruit of the poisonous tree." However, Justice Rehnquist reasoned that, because *Miranda* violations are not *constitutional* violations, Tucker's constitutional rights were not abridged. Therefore, he concluded that *Wong Sun* was not applicable.

Finding "no controlling precedent," Justice Rehnquist set out to resolve the issue by balancing the government's interest in placing before the jury all pertinent and reliable evidence and society's interest in prosecuting guilty criminals against the deterrent effect of excluding Henderson's testimony. Noting that, in fourth amendment search and seizure situations, the "prime purpose" of the exclusionary rule is deterrence of future unlawful conduct by police, Justice Rehnquist suggested that this rationale, "[i]n a proper case," would also seem applicable in a fifth amendment context. He concluded that where, as here, the police act in "good faith," the deterrence goal in excluding evidence so obtained would not be furthered. On this reasoning then, as in *Harris,* Justice Rehnquist tipped the balance in favor of admitting Henderson's testimony, notwithstanding the fact that it was the clear "fruit" of a *Miranda* violation and that a balancing approach was explicitly rejected in *Miranda.*

Although Justice Rehnquist's analysis would seem to have resolved the question of whether evidence derived from statements obtained in violation of *Miranda* must be suppressed as "fruit of the poisonous tree," he expressly stated that he was not deciding that broad question. Justice Rehnquist

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106. *Tucker,* 417 U.S. at 439, 446.
110. *Id.* at 446, 450. Justice Rehnquist failed to note that the Court in *Miranda* expressly rejected such a "balancing" approach. *See supra* text accompanying note 58.
111. *Tucker,* 417 U.S. at 446-47.
113. *See Tucker,* 417 U.S. at 452. *See also supra* notes 58, 110 and accompanying text.
was able to sidestep that crucial issue, deeming it "significant" that the interrogation of Tucker preceded the decision in *Miranda.* Thus, after *Tucker*, the "fruit of the poisonous tree" doctrine's applicability to *Miranda* violations remained unclear. Even so, *Tucker* provided solid dicta for future resolution of the issue.

3. Impeachment Use Revisited

In *Oregon v. Hass,* the Court again considered the issue of impeachment use of statements obtained in violation of *Miranda*’s strictures. The result in that case appears to justify Justice Brennan's fear in *Harris* that that decision actually provides encouragement, rather than deterrence, for the police to violate *Miranda.* In *Hass,* the defendant was arrested in connection with the theft of several bicycles. After receiving the full *Miranda* warnings, Hass admitted to taking two of the bicycles, but claimed he had returned one. A police officer then placed Hass in the police car and started to drive to the location where Hass said he left the stolen bicycle. On the way, however, Hass stated that he wished to telephone his attorney. The police officer replied that Hass could contact his attorney when they reached the police station, and they continued on to the place where the theft had occurred. Hass then identified the garages from which the bicycles were taken and the place where he left one of them.

Justice Blackmun, writing for the majority in *Hass,* ruled in favor of admitting, for impeachment purposes, the evidence obtained after Hass had requested to contact his attorney. In so holding, he applied the identical balancing test used in *Harris* in order to achieve a like result. Justice

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115. Id.
117. See supra note 92. See also Gardner, supra note 8, at 456 n.176; Sonenshein, supra note 39, at 421; Stone, supra note 5, at 129.
119. Id. at 723-24.
120. See id. at 722-23. Relying exclusively on *Harris,* Justice Blackmun stated: We see no valid distinction to be made in the application of the principles of *Harris* to that case and to *Hass*’ case. . . .
   . . . Again, the impeaching material would provide valuable aid to the jury in assessing the defendant's credibility; again, "the benefits of this process should not be lost," . . .; and, again, making the deterrent-effect assumption, there is sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief. If all this sufficed for the result in *Harris,* it supports and demands a like result in *Hass*’ case. . . .
   . . . The effect of inadmissibility in the *Harris* case and in this case is the same: inadmissibility would pervert the constitutional right into a right to falsify free from the embarrassment of impeachment evidence from the defendant's own mouth.
Id. (quoting *Harris,* 401 U.S. at 225).
Blackmun conceded, however, that because the police officer in Hass, unlike in Harris and Tucker, seemingly acted in bad faith, the deterrence goal might not be well served by the admission of the evidence at issue.\textsuperscript{121} He nevertheless concluded that this "speculative possibility" of bad faith did not necessitate the reconsideration or narrowing of Harris, and declared that "the balance was struck in Harris, and we are not disposed to change it now."\textsuperscript{122}

For the next nine years, the Burger Court's concern with the Miranda doctrine centered primarily upon the interpretation of its requirements, rather than upon the question of admissibility of evidence stemming from a Miranda violation.\textsuperscript{123} Although some of these cases have arguably expanded the Miranda doctrine since Harris,\textsuperscript{124} none had any effect on the issue of admissibility of "fruits" derived from an initial violation of Miranda as part of the prosecution's case-in-chief.

4. "Public Safety" Exception

In 1984, the Supreme Court decided New York v. Quarles,\textsuperscript{125} again concerning the issue of admissibility in the wake of a Miranda violation. Quarles, however, unlike its predecessors Harris, Tucker, and Hass,\textsuperscript{126} involved the admissibility of the defendant's own statements as part of the prosecution's case-in-chief. At first glance, Quarles appeared to be controlled by the holding in Miranda that statements obtained absent the requisite warnings during custodial interrogation must be excluded from the

\begin{itemize}
\item \textsuperscript{121} Justice Blackmun stated, "[o]ne might concede that when proper Miranda warnings have been given, and the officer then continues interrogation after the suspect asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeaching material." \textit{Id.} at 723.
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} The Court, during that time, was engaged in deciding the following types of issues: (1) interpretation of "interrogation," see, e.g., Estelle v. Smith, 451 U.S. 454 (1981); Rhode Island v. Innis, 446 U.S. 291 (1980); (2) interpretation of "waiver," see, e.g., Fare v. Michael C., 442 U.S. 707 (1979); North Carolina v. Butler, 441 U.S. 369 (1979); (3) meaning of "custodial interrogation," see, e.g., Oregon v. Mathiason, 429 U.S. 492 (1977); Beckwith v. United States, 425 U.S. 341 (1976); (4) effect of invocation of right to remain silent, see, e.g., Doyle v. Ohio, 426 U.S. 610 (1976); Michigan v. Mosley, 423 U.S. 96 (1975).
\item \textsuperscript{124} See Sonenshein, supra note 39, at 447-62 (discussion of two cases in the 1980's that have revitalized Miranda).
\item \textsuperscript{125} 104 S. Ct. 2626 (1984).
\item \textsuperscript{126} Harris, 401 U.S. 222 (1971), and Hass, 420 U.S. 714 (1975), deal with the admissibility of evidence for impeachment purposes in cross-examination. See supra notes 81-92, 116-22 and accompanying text. Tucker, 417 U.S. 433 (1974), involves the exclusion of evidence derived from the defendant's inadmissible statements. See supra notes 93-115 and accompanying text.
\end{itemize}
prosecution's case-in-chief.\textsuperscript{127} However, the \textit{Quarles} case resulted in the first exception to \textit{Miranda}'s per se exclusionary rule.\textsuperscript{128}

In \textit{Quarles}, Officer Kraft, responding to the report of a rape by a man carrying a gun, entered an all-night supermarket in pursuit of the suspect. Quarles, upon seeing Kraft, fled to the rear of the store and down another aisle, momentarily out of Kraft's view. Kraft, chasing Quarles with his gun drawn, apprehended him. As three other police officers approached with their guns drawn, Kraft handcuffed and frisked Quarles. Noticing an empty shoulder holster, Kraft questioned him as to the location of the gun without first administering the \textit{Miranda} warnings.\textsuperscript{129} Quarles replied "the gun is over there," nodding toward some empty cartons nearby.\textsuperscript{130} Kraft then retrieved the loaded gun from one of the cartons and arrested Quarles. After administering the \textit{Miranda} warnings, Kraft continued questioning Quarles, eliciting from him an admission that he owned the gun.\textsuperscript{131} The lower courts, declining to recognize an exigency exception to \textit{Miranda}, held that the statement, "the gun is over there," must be suppressed in light of the \textit{Miranda} violation. The lower courts also suppressed the statements made subsequent to the warnings, ruling that they had been tainted by the initial \textit{Miranda} violation.\textsuperscript{132} The Supreme Court reversed, holding that despite the obvious \textit{Miranda} violation, the facts of the case mandated an exception to \textit{Miranda}'s warning requirement because the police questioning was motivated by a concern for public safety.\textsuperscript{133}

Justice Rehnquist, writing for the majority, began by discussing the fifth amendment's privilege against self-incrimination and its extension in \textit{Miranda} to persons subjected to custodial interrogation.\textsuperscript{134} Noting that the fifth amendment does not require exclusion of \textit{all} incriminating statements, he reaffirmed the majority position in \textit{Tucker} that the \textit{Miranda} warnings are merely measures to protect the fifth amendment privilege, rather than being actual constitutional rights.\textsuperscript{135} Asserting that there was no claim that Quarles' statements had been coerced in traditional terms,\textsuperscript{136} he concluded

\textsuperscript{127} \textit{Miranda}, 384 U.S. at 444.
\textsuperscript{128} \textit{Quarles}, 104 S. Ct. at 2634. The \textit{Quarles} Court adopted a "public safety" exception to \textit{Miranda}.
\textsuperscript{129} \textit{Id.} at 2629-30.
\textsuperscript{130} \textit{Id.} at 2630.
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{See id.}
\textsuperscript{133} \textit{Id.} at 2632. The Court held that "on these facts there is a 'public safety' exception to the requirement that \textit{Miranda} warnings be given before a suspect's answers may be admitted into evidence." \textit{Id.}
\textsuperscript{134} \textit{Id.} at 2630-31.
\textsuperscript{135} \textit{Id.} at 2631. \textit{See supra} notes 99-104 and accompanying text.
\textsuperscript{136} \textit{See} 104 S. Ct. at 2631. This statement by the majority implicitly assumes that the fifth
that the only issue before the Court was whether justification existed under the circumstances for Kraft's initial failure to administer the *Miranda* warnings. Although agreeing with the lower court's finding that Quarles was in custody at the time of the questioning, Justice Rehnquist summarily rejected any presumption of coercion flowing from the absence of the *Miranda* warnings.

Next, notwithstanding the *Miranda* Court's explicit rejection of a balancing test, Justice Rehnquist characterized that decision as the result of a cost/benefit balance in which the social cost of fewer convictions was outweighed by protection of the fifth amendment privilege. He reasoned that, in the instant case, the potential danger emanating from the existence of a concealed gun in a supermarket justified tipping the scales in the opposite direction. Thus, having concluded that an exigent circumstance existed in this case, Justice Rehnquist fashioned a "public safety" exception to the *Miranda* rule. Justifying application of a cost/benefit balancing approach to *Miranda*, he employed an analogy to the exclusionary rule of the fourth amendment, recollecting that an exigency exception has long been recognized by the Court in search and seizure contexts.
Justice Rehnquist conceded that the "public safety" ruling necessarily diminishes, to some extent, the desired clarity of the *Miranda* requirements. Recognizing the importance of maintaining a "workable rule" to guide police officers in their day-to-day experiences, Justice Rehnquist characterized the Court's ruling as a "narrow exception." He thus concluded that recognition of a "public safety" exception lessens the need for "on-the-scene balancing" by police officers because they possess the ability, as evidenced by the facts of the instant case, to recognize exigencies and to limit their questioning to securing the public's safety. As a result, Justice Rehnquist posited that the exception, rather than hindering police officers, will enable them instinctively to handle exigent situations posing a threat to public safety.

Justice Marshall, joined by Justices Brennan and Stevens, dissented, arguing that, in addition to Quarles' statements, the gun should also have been excluded. Justice Marshall contended that, under the rule of *Wong Sun*, the gun should be suppressed as evidence derived directly from the illegal source of Quarles' statements before the *Miranda* warnings. Noting that the Court had recently applied the *Wong Sun* rule to fifth amendment violations, he argued that the lower court was correct in ruling that the gun was inadmissible as the "tainted fruit" of the illegal interrogation.

is satisfied by a showing of reasonableness, see, e.g., Mincey v. Arizona, 437 U.S. 385, 394 (1978); Fisher v. United States, 425 U.S. 391, 400 (1976). Second, the fourth amendment exclusionary rule is judicially imposed in order to deter violations of fourth amendment rights. See United States v. Calandra, 414 U.S. 338, 348 (1974). In contrast, however, the fifth amendment exclusionary rule does not embody either one of these principles. See supra notes 62-66, 68-70 and accompanying text.

In addition, although not explicitly emphasized by Justice Rehnquist, traces of the deterrence rationale adopted in *Harris* offer justification for the majority's cost/benefit approach in creating a "public safety" exception.

143. *Quarles*, 104 S. Ct. at 2633.
144. *Id.*
145. *Id.* In the Court's words, "[t]he exception will not be difficult for police officers to apply because in each case it will be circumscribed by the exigency which justifies it. We think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." *Id.*
146. *See id.*
147. *Id.* at 2649 (Marshall, J., dissenting).
151. See *Quarles*, 104 S. Ct. at 2649-50 (Marshall, J., dissenting). However, Justice Marshall noted that in light of the Court's recent discussion in *Nix v. Williams*, 104 S. Ct. 2501, 2508 (1984), construing *Wong Sun* as permitting the introduction of "tainted" evidence that would have been inevitably discovered by the government, the gun might be deemed admissible by the lower court. Because this decision was announced after the lower court's ruling in
By way of summary, under the coerced confession doctrine that preceded *Miranda*, the Court employed a case-by-case, balancing approach to determine the admissibility of alleged coerced confessions. The *Miranda* Court rejected the coerced confession doctrine, and established an objective standard to be applied to all statements obtained during custodial interrogations conducted without the prior administration of prescribed warnings. Subsequently, the Court gradually began narrowing the *Miranda* doctrine by attributing to that decision values not deemed significant by the *Miranda* Court, employing a balancing approach explicitly rejected in *Miranda*, and questioning the constitutional basis for the *Miranda* warnings.

After sidestepping, for roughly twenty-five years, the derivative evidence issue involving *Miranda* violations, the Supreme Court in 1985 finally undertook to resolve this issue, particularly as it applies in a successive confession context. It is against this background of Supreme Court case law—the pre-*Miranda* and *Miranda* decisions, the Burger Court's treatment of post-*Miranda* cases, and the charges of dissenters and commentators—that the reasoning and impact of this recent decision must be analyzed.

II. OREGON v. ELSTAD: ADMITTING THE "FRUITS" OF A MIRANDA VIOLATION IN A CONSECUTIVE CONFESSION CONTEXT

A. Announcement of a New Rule

In *Oregon v. Elstad*, the Supreme Court for the first time resolved the issue of whether the self-incrimination clause of the fifth amendment mandates exclusion of a suspect's confession, made after proper *Miranda* warnings, as tainted evidence derived from a prior, unwarned admission. Justice O'Connor, writing for the majority, held that a suspect who gives an unwarned confession in uncoerced, albeit custodial, surroundings may subsequently give a valid confession under the fifth amendment after properly receiving the *Miranda* warnings. Although the majority purported to recognize *Miranda*’s presumption of coercion in a custodial interrogation setting absent the requisite warnings, an analysis of *Elstad* demonstrates that it reinterpreted and limited that presumption through a narrow reading of the fifth amendment.

Relying heavily on the Court's prior decision in *Michigan v. Tucker*, he therefore would have remanded this issue to be reconsidered in view of *Nix v. Williams*. *Quarles*, 104 S. Ct. at 2649-50 (Marshall, J., dissenting).

153. *id.* at 1290.
154. *id.* at 1298.
155. 417 U.S. 433 (1974); see supra notes 93-115 and accompanying text.
Justice O'Connor concluded that the Wong Sun "fruit of the poisonous tree" doctrine does not apply to a second voluntary confession where the initial confession was obtained without Miranda warnings.\(^{156}\) Noting that application of the "fruit" doctrine requires the suppression of evidence derived from a constitutional violation, Justice O'Connor recalled the Court's decisions in Tucker and Quarles,\(^{157}\) depriving the Miranda warnings of a constitutional basis.\(^{158}\) She distinguished "procedural" violations of Miranda from fourth amendment violations, "which have traditionally mandated a broad application of the 'fruits' doctrine," and asserted that, because there was no violation of Elstad's constitutional rights, the Wong Sun "fruits" doctrine was inapposite.\(^{159}\)

Justice O'Connor interpreted the language of the fifth amendment as requiring the exclusion only of actually "compelled testimony" from the prosecution's case-in-chief.\(^{160}\) While acknowledging that Miranda mandates that failure to administer the requisite warnings results in an irrebuttable presumption of compulsion, she reasoned that such presumption "does not require that [subsequent] statements and their fruits be discarded as inherently tainted."\(^{161}\) Thus, she maintained, although Elstad's initial unwarned admission must be suppressed under Miranda, his subsequent statement is not governed by the Miranda presumption.\(^{162}\)

Justice O'Connor then turned to the rationale in Tucker to determine whether exclusion of Elstad's written confession would further the values underlying the fifth amendment.\(^{163}\) Identifying the fifth amendment purposes supporting admission of the witness' testimony in Tucker as deterring police misconduct and ensuring reliable evidence, she posited that "this reasoning applies with equal force" to Elstad's written confession.\(^{164}\) Accordingly, applying the Tucker rationale to the instant case, she concluded that, absent any actual coercion or "improper tactics," the dual rationales of deterrence and trustworthiness would not be furthered by excluding Elstad's

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\(^{156}\) Elstad, 105 S. Ct. at 1291-93.

\(^{157}\) 104 S. Ct. 2626 (1984); see supra notes 99-104, 135 and accompanying text.

\(^{158}\) Elstad, 105 S. Ct. at 1291-92.

\(^{159}\) Id. at 1292-93.

\(^{160}\) Id. at 1292 (emphasis in original).

\(^{161}\) Id.

\(^{162}\) Id. at 1292-93.

\(^{163}\) Id. at 1293.

\(^{164}\) Id. Justice O'Connor asserted this to be true even though the evidence in question was the defendant's "own voluntary testimony" rather than a "witness," as in Tucker, or a physical piece of evidence. Id. But see supra notes 64-67 and accompanying text (deterrence and trustworthiness were not viewed as primary purposes of the fifth amendment privilege by the Miranda Court).
written confession.\textsuperscript{165}

Having decided that Elstad's written confession, absent actual coercion, could not be excluded as tainted by his prior unwarned admission, Justice O'Connor undertook to determine its admissibility based on whether it was "knowingly and voluntarily made."\textsuperscript{166} In resolving that question, she pointed out that the \textit{Miranda} presumption of coercion does not necessarily assume that actual coercion has taken place.\textsuperscript{167} She concluded that where there is no coercion in fact, "a careful and thorough administration of \textit{Miranda} warnings serves to cure the condition that rendered the unwarned statement inadmissible."\textsuperscript{168} She asserted that proper administration of the requisite warnings serves to apprise the suspect adequately of the knowledge necessary to enable him to make an informed decision as to whether to remain silent.\textsuperscript{169} Therefore, Justice O'Connor concluded that any statements subsequently made should "ordinarily" be viewed as voluntary.\textsuperscript{170}

Turning to the lower court's reliance on \textit{United States v. Bayer}\textsuperscript{171} as the basis for its finding that the coercive psychological impact of initially having "let the cat out of the bag" tainted Elstad's second confession, Justice O'Connor asserted that the lower court's adoption of this expansive interpretation of coercion under the fifth amendment was unwarranted.\textsuperscript{172} This broad interpretation, she stated, has the effect of insulating a suspect, who made prior unwarned statements, from the use of any statements made subsequent to an informed waiver of his privilege to remain silent. She reasoned that such insulation significantly increases the cost of law enforcement while providing little additional protection of the suspect's fifth amendment inter-

\begin{itemize}
\item \textsuperscript{165} \textit{Elstad}, 105 S. Ct. at 1293.
\item \textsuperscript{166} \textit{Id.} at 1294.
\item \textsuperscript{167} \textit{Id.} The Court noted that "failure of police to administer \textit{Miranda} warnings does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised." \textit{Id.} (citing \textit{Miranda}, 384 U.S. at 457).
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} \textit{Id.} In the Court's words, "[t]he warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will.'" \textit{Id.}
\item \textsuperscript{170} \textit{Id.} \textit{See supra note 169.}
\item \textsuperscript{171} 331 U.S. 532 (1947). The \textit{Bayer} Court stated, with respect to successive confessions:
  
  Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed. \textit{Id.} at 540-41.
\item \textsuperscript{172} \textit{Elstad}, 105 S. Ct. at 1295.
\end{itemize}
est against the adverse use of his own compelled testimony.\footnote{173} Thus, Justice O'Connor concluded that where neither confession is actually coerced, "little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder." \footnote{174}

By concluding that an unwarned confession, absent actual coercion or improper tactics, does not justify a presumption of compulsion,\footnote{175} Justice O'Connor fashioned a distinction between the specific consequences emanating from actual coercion and the less certain consequences emanating from voluntary admission of a "guilty secret" in answer to an uncoerced, albeit unwarned, question.\footnote{176} Characterizing Elstad's confession as of the latter type, she identified "the causal connection between any psychological disadvantage" stemming from Elstad's initial admission and his second confession as "speculative and attenuated at best."\footnote{177} Therefore, she concluded that the confession at issue was voluntary.\footnote{178}

As a final matter, Justice O'Connor addressed the effect of the Court's holding on the \textit{Miranda} decision.\footnote{179} Declaring that "[t]he Court today in no way retreats from the bright line rule of \textit{Miranda}," she maintained that the strictures of \textit{Miranda} and the fifth amendment privilege against self-incrimination are fully satisfied in this case by the exclusion of Elstad's initial statement from the prosecution's case-in-chief.\footnote{180} Further, asserting that the values underlying \textit{Miranda} and the fifth amendment privilege would not be furthered by imputing taint to statements made after a knowing and voluntary waiver, Justice O'Connor eschewed the announcement of a rigid rule pertaining to consecutive confessions.\footnote{181} Rather than presuming the existence of coercion in cases in which the suspect's initial admission was voluntary but unwarned, Justice O'Connor stated that the question of admissibility of a subsequent statement must be determined as a function of

\footnote{173}{\textit{Id.} But see \textit{Miranda}, 384 U.S. at 479, where the Court expressly rejected a balancing approach. \textit{See also supra} notes 58, 110, 139 and accompanying text.} 
\footnote{174}{\textit{Id.} at 1295.} 
\footnote{175}{\textit{Id. at 1296.} Justice O'Connor concluded 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." \textit{Id.}} 
\footnote{176}{\textit{Id. at 1295.} In the Court's words: There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a "guilty secret" freely given in response to an unwarned but noncoercive question, as in this case. \textit{Id.}} 
\footnote{177}{\textit{Id. at 1296.}} 
\footnote{178}{\textit{Id.}} 
\footnote{179}{\textit{Id. at 1296.}} 
\footnote{180}{\textit{Id.}} 
\footnote{181}{\textit{Id.}}
whether that statement was voluntarily made as well. She thus urged courts to assess the question of voluntariness in light of all the relevant facts surrounding the situation.

Justice Brennan, in a lengthy dissent joined by Justice Marshall, criticized the majority's decision as “deliver[ing] a potentially crippling blow to Miranda” by depriving Miranda violations of the “fruit of the poisonous tree” remedy. Specifically, Justice Brennan found fault with two conclusions reached by the majority. First, he criticized the majority’s adoption of a new ruling, that administration of the Miranda warnings serves automatically to dissipate any taint resulting from a prior uncoerced confession, as one that misrepresents prior Supreme Court decisions and “altogether ignores the practical realities of custodial interrogation that have led nearly every lower court to reject [the majority’s] simplistic reasoning.” Further, he attacked as “startling and unprecedented” the majority’s conclusion that suppression of the “fruits” of a Miranda violation is not mandated either by the fifth amendment or by the judicial policy of deterrence.

Regarding the effect that an unwarned admission of guilt should be presumed to have on a subsequent warned confession, Justice Brennan recounted the lower court's reliance on the Bayer “cat out of the bag” presumption and criticized the fact that the majority’s new rule presumes no causation between an unwarned confession and a later, warned confession. He suggested that the Court's claim that such a ruling was in accordance with lower court treatment of this issue is erroneous, noting that most such courts have rejected the majority’s approach. He argued that the majority’s assertion that recognition of the “cat out of the bag” presumption renders subsequent statements irretrievably lost to the factfinder contradicts Supreme Court precedent on the issue. Justice Brennan declared

182. Id. Justice O’Connor determined that “[t]he relevant inquiry is whether, in fact, the second statement was also voluntarily made.” Id.

183. Id. In Justice O’Connor’s words, “the finder of facts must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative.” Id.

184. Id. at 1299 (Brennan, J., dissenting).

185. Id.

186. Id.

187. Id. at 1300. See supra note 171.

188. Elstad, 105 S. Ct. at 1300-01. Justice Brennan cited some 46 lower federal and state courts that have confronted this issue and have concluded “that subsequent confessions are presumptively tainted by a first confession taken in violation of Miranda and that Miranda warnings alone cannot dissipate the taint.” Id. at 1300-01 & nn.3, 4, 6.

189. Id. at 1302. See, e.g., Darwin v. Connecticut, 391 U.S. 346, 349 (1968) (subsequent confessions may be admitted if the prosecution can show that “[c]onsidering the ‘totality of the circumstances,’” there existed a “‘break in the stream of events’ . . . ‘sufficient to insulate’”

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that the reasoning in Supreme Court precedents in this area "reflect an understanding of the realities of police interrogation," completely ignored by the majority.190 Citing and quoting from a multitude of interrogation guides and manuals used by interrogators, Justice Brennan noted the many and varied psychological methods by which full confessions are elicited after an initial admission is made by the suspect.191 He concluded that the majority's dismissal of the "cat out of the bag" presumption was wholly without merit.192

Justice Brennan further argued that the proper approach, applied by most lower courts in the past, is to presume that a subsequent confession has been tainted by a previous admission made without the Miranda warnings until the prosecution demonstrates that the later confession is sufficiently attenuated from the first so as to be free of its coercive effects.193 Asserting that the relevant inquiry in each case is whether the subsequent statement was sufficiently "purged" of the taint resulting from the initial illegality, Justice Brennan criticized the majority's outright rejection of this "sensitive inquiry" and its conclusion that, after the Miranda warnings are given, subse-

the later confession from the coercive effect of the earlier one) (citations omitted); United States v. Bayer, 331 U.S. 532, 540-41 (1947) ("this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed"). Justice Brennan noted in Elstad that such statements are not per se inadmissible, but that the Court has held that admissibility is a question of whether the prosecution can show that the subsequent statement was made independently of the first. Elstad, 105 S. Ct. at 1302-03.

190. Elstad, 105 S. Ct. at 1303.

191. See id. at 1303-04. The manuals instruct interrogators first to secure an incriminating admission from a suspect as a psychological tool for subsequently inducing a full confession. Id. Cf. Miranda, 384 U.S. at 445-56 (the Court relied upon similar manuals to justify its characterization of the nature of custodial interrogations as inherently coercive). See also supra text accompanying notes 52-54.

192. Elstad, 105 S. Ct. at 1304-06. Justice Brennan stated that, as a result of the Court's rejection of the "cat out of the bag" presumption:

Expert interrogators and experienced lower-court judges will be startled, to say the least, to learn that the connection between multiple confessions is "speculative" and that a subsequent rendition of Miranda warnings "ordinarily" enables the accused in these circumstances to exercise his "free will" and to make a "rational and intelligent choice whether to waive or invoke his rights."

Id. at 1305-06 (quoting the majority opinion, id. at 1294, 1296).

Justice Brennan declared that the majority's holding "marks an evisceration of the established fruit of the poisonous tree doctrine," but conceded that it leaves lower courts sufficient latitude to "combat obvious flouting by authorities of the privilege against self-incrimination." Id. at 1313. He argued that the majority failed to acknowledge that a Miranda 'violation "is obviously itself an 'improper tactic' " commonly employed precisely for the purpose of compelling a subsequent confession. Id. at 1311 (emphasis in original).

193. Id. at 1307.
quent statements must generally be deemed acts of free will.\footnote{Id.} In Justice Brennan’s view, the \textit{Miranda} warnings simply do not convey to an individual the necessary information to enable him to make an informed decision whether to make a subsequent statement.\footnote{Id. at 1308. Justice Brennan asserted:

Where an accused believes that it is futile to resist because the authorities already have elicited an admission of guilt, the mere rendition of \textit{Miranda} warnings does not convey the information most critical at that point to ensuring his informed and voluntary decision to speak again: that the earlier confession may not be admissible and thus that he need not speak out of any feeling that he already has sealed his fate. \textit{Id.}}

Turning next to the majority’s assertion that neither the fifth amendment nor its deterrence goal mandates exclusion of “fruits” of a \textit{Miranda} violation, Justice Brennan pointed to the language in \textit{Miranda} specifically identifying the fifth amendment as the source of that decision.\footnote{Id. at 1313 (citing \textit{Miranda}, 384 U.S. at 467).} He then labeled as erroneous those portions of the Court’s subsequent decisions in \textit{Tucker} and \textit{Quarles} that suggested that the \textit{Miranda} warnings are not themselves constitutional rights.\footnote{Id. at 1314.} He maintained that if such assertions are true, then \textit{Miranda} must have been “an exercise of supervisory authority over interrogation practices,” a power the Supreme Court does not possess.\footnote{Id.}

In further support of his position, he referred to the \textit{Tucker} Court’s reliance upon the statement in \textit{Miranda} that the Constitution does not “necessarily require[ ] adherence to any particular solution.”\footnote{Id. at 1313 (citing \textit{Miranda}, 384 U.S. at 467).} He pointed out that in so relying, \textit{Tucker} neglected \textit{Miranda}’s further assertion that although the specific warnings enunciated in \textit{Miranda} may not be constitutionally required, warnings of at least equal effectiveness are mandated by the Constitution.\footnote{Id.}

Justice Brennan sharply criticized the majority for its conclusion that exclusion of Elstad’s second confession would not further the deterrence goal.\footnote{Id. at 1318. Justice Brennan maintained that “[i]f the police acted in an objectively unreasonable manner, . . . \textit{Tucker’s} ‘reasoning’ instead requires suppression of Elstad’s subsequent statement.” \textit{Id.}} First, he labelled the Court’s reliance on \textit{Tucker} as a gross mischaracterization, noting that \textit{Tucker} invited “application of the derivative-evidence rule” in cases in which the authorities acted unreasonably.\footnote{Id. at 1317-19. Sec-
ond, he accused the majority of failing to consider that by admitting Elstad's written confession into evidence, the Court threatens to encourage the authorities to "accomplish indirectly what they could not accomplish directly." 203

Finally, Justice Brennan criticized the majority's contention that the self-incrimination clause prohibits only testimony that has been actually compelled. 204 Contending that the fifth amendment prohibits derivative evidence as well, he noted that the majority's assertion encourages violation of the self-incrimination clause by seemingly permitting the authorities to use an illegally obtained confession to obtain other admissible evidence. 205

Justice Stevens, in a comparatively brief dissent, criticized the Court's holding as conflicting with Supreme Court precedent, imparting "confusion and uncertainty" to the criminal justice system, and belittling the privilege against self-incrimination. 206 Notwithstanding his assertion that the majority narrowly confined its holding to situations similar to the facts in the case, Justice Stevens took issue with its conclusions that Elstad's initial confession was not coerced and that his constitutional rights were not violated in the initial questioning. 207

Echoing Justice Brennan, Justice Stevens criticized as untenable the Court's attempt to differentiate between actual coercion and the Miranda presumption of coercion. 208 He argued that, because the Miranda presumption necessarily assumes the existence of a coercive atmosphere and because the Court in Miranda was motivated by a desire to avoid a case-by-case examination of facts, a distinction between actual and presumed coercion cannot stand. 209 Further, he asserted that an illegal initial confession without Miranda warnings tends to strengthen, rather than weaken, the presumption of coercion present in a subsequent interrogation. 210

Justice Stevens' strongest attack on the majority opinion was directed at the conclusion that the case involved no constitutional violation. He argued that the Court's authority in Miranda must have necessarily emanated from the Constitution, lest it have been "nothing more than an illegitimate exercise of raw judicial power." 211 Consequently, Justice Stevens concluded, the Court's assertion that Miranda is not constitutionally based is "either disin-
genuine or completely lawless."\(^{212}\)

**B. Elstad’s Effect on the Miranda Doctrine**

Although the *Elstad* decision adhered to the basic holding of *Miranda* mandating the exclusion of an accused’s statements obtained absent the requisite warnings, the Court’s interpretation departs from the underlying values of both *Miranda* and the fifth amendment. Moreover, the Court’s conclusion signals its desire to return to a pre-*Miranda* case-by-case inquiry into the specific facts of each case, precisely the evil that *Miranda* sought to eradicate in self-incrimination cases.

While the *Elstad* decision is basically consistent with the Court’s recent interpretations of *Miranda*, it is in conflict with the principles on which *Miranda* is based. The majority in *Elstad* relied upon the Burger Court’s earlier decisions undercutting the constitutional basis of the *Miranda* warnings,\(^{213}\) but failed to offer a substitute basis for the *Miranda* Court’s authority, an issue raised by both dissents.\(^{214}\) It is axiomatic that the Supreme Court does not possess the authority to regulate methods of criminal procedure within a state.\(^{215}\) Thus, if the majority’s position that the *Miranda* warnings are not mandated by the Constitution is accepted, then the question of an alternative source of authority remains uncertain.

Justice O’Connor’s characterization of Elstad’s written confession as a voluntary disclosure\(^{216}\) is inconsistent with the principles underlying *Miranda*. The majority’s conclusion that a subsequent statement made after a *Miranda* violation is ordinarily to be considered voluntary,\(^{217}\) leaves *Miranda* effective only in cases involving actual coercion as defined in pre-*Miranda* terms.\(^{218}\) To apply the “fruit of the poisonous tree” doctrine solely to those situations involving a clear violation of due process, as the majority suggests,\(^{219}\) ignores what the Court in *Miranda* specifically recognized: that custodial interrogation absent the requisite warnings is by definition involu-

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212. *Id.* at 1325.
213. *See id.* at 1291-92; *see also supra* notes 99-104, 135 and accompanying text.
214. *See supra* notes 196-200, 211-12 and accompanying text.
215. As Justice Douglas observed in his *Tucker* dissent, “[t]he Court is not free to prescribe preferred modes of interrogation absent a constitutional basis.” *Tucker*, 417 U.S. at 462 (Douglas, J., dissenting).
216. *See Elstad*, 105 S. Ct. at 1294-96, 1298; *see also supra* notes 166-70 and accompanying text.
217. *Elstad*, 105 S. Ct. at 1296. “A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.” *Id.*
218. *See supra* note 85 and accompanying text; *supra* text accompanying note 105.
219. *See Elstad*, 105 S. Ct. at 1291-93; *see also supra* notes 155-59 and accompanying text.
It stands to reason that, by virtue of the presumed involuntariness of the initial admission, a second statement must be deemed tainted unless the suspect is made aware of the inadmissibility of his initial statement. The information conveyed in the *Miranda* warnings is devoid of this critical element. Justice O'Connor's argument that the subsequent administration of the *Miranda* warnings serves to apprise a suspect of the information he needs to make a rational choice whether to speak further is, as Justice Brennan noted in his dissent, weakened.

Furthermore, the majority disregards the fifth amendment values underlying the Court's decision in *Miranda* of preserving the accusatory nature of the criminal justice system and protecting the individual's ability to make a rational and free choice. The majority instead interprets the *Miranda* exclusionary rule as founded entirely on a theory of deterrence, the justification enunciated for the exclusionary rule under the fourth amendment. The fourth amendment exclusionary rule was designed primarily as a means of discouraging police from engaging in unlawful searches and seizures by excluding the evidence so derived, and thus removing any incentive to violate the amendment. The fifth amendment is, on the other hand, itself an exclusionary rule, requiring suppression of all involuntary confessions in order to preserve the accusatory nature of the criminal justice system and to protect individual free will and dignity.

Moreover, the result the majority reaches, far from deterring improper police behavior, may provide an incentive for the police to violate *Miranda*. To admit fruits of a *Miranda* violation, even while suppressing the primary evidence, may encourage police officers to violate *Miranda*, obtain an excludable confession, administer the *Miranda* warnings, and then ask the suspect to reconfirm his confession. As Justice Brennan asserted, this is the result the majority's conclusion may invite. In order to deter police mis-

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220. See *Miranda*, 384 U.S. at 455-56, 461, 467; see also supra notes 52-55 and accompanying text.
221. See *Elstad*, 105 S. Ct. at 1294, 1296; see also supra note 169 and accompanying text.
222. See *Elstad*, 105 S. Ct. at 1308 (Brennan, J., dissenting); see also supra notes 193-95 and accompanying text.
223. See supra notes 62-63 and accompanying text.
224. See *Elstad*, 105 S. Ct. at 1293; see also supra notes 163-65 and accompanying text.
225. See supra notes 15, 142.
226. See supra notes 15, 142.
227. See supra notes 3, 62-63 and accompanying text.
228. See *Elstad*, 105 S. Ct. at 1299, 1318-19 (Brennan, J., dissenting). "If violations of constitutional rights may not be remedied through the well-established rules respecting derivative evidence, as the Court has held today, there is a critical danger that the rights will be rendered nothing more than a mere 'form of words.'" *Id.* at 1299 (quoting Silverthorne Lum-
conduct and further the fifth amendment goals of adversariness and protection of individual rights, all evidence obtained through the violation of Miranda, primary as well as derivative, should be excluded.

A final effect of Elstad is to undercut the Miranda Court's insistence on a "bright line" rule and its explicit rejection of a balancing test for determining violations of the fifth amendment.229 The Elstad majority concluded that, rather than apply a rigid rule, the factfinder "must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements."230 To require the lower courts to review the unique facts of each case before a finding of exclusion is warranted is to return to the problems associated with the case-by-case "totality of the circumstances" analysis of the pre-Miranda days.231 It was precisely this vagueness and inconsistency in application that the Miranda Court sought to eradicate.232 The Elstad majority now, in further modifying the Miranda rationale, places once again upon the defendant the burden of demonstrating actual coercion, as defined by a due process standard, before the fruits of Miranda violations will be suppressed. Consequently, the end result is likely to be inconsistent ad hoc decisions, thereby placing the defendant's fifth amendment privilege against self-incrimination in jeopardy. In order to ensure preservation of the privilege, the Court must fulfill its responsibility to articulate reasonably explicit and workable standards for future application by lower courts. The Elstad majority has failed to meet this obligation.

In effect, Elstad ignores the fifth amendment values and premises upon which the Court in Miranda based its decision. Although the Court reaffirmed Miranda's holding that statements obtained in violation of its strictures be excluded from the prosecution's case-in-chief, the majority's new rule suggests the Court's desire to return to a due process standard of actual coercion for the exclusion of relevant evidence.233

ber Co. v. United States, 251 U.S. 385, 392 (1920)). See also Miranda, 384 U.S. at 466. "[A]ll the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police." Id. (quoting Mapp v. Ohio, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)).

229. See supra notes 56-61 and accompanying text.
230. Elstad, 105 S. Ct. at 1298; see supra notes 179-83 and accompanying text.
231. See supra notes 36-39 and accompanying text.
232. See supra notes 56-61 and accompanying text.
233. On August 25, 1985, in an interview with David Brinkley, United States Attorney General Edwin Meese III stated in reference to the Miranda decision,
III. CONCLUSION

The Oregon v. Elstad decision exemplifies the way in which constitutional law may change to mirror the temper of the Court. In deciding fifth amendment questions, courts necessarily confront a tension between the public interest in the protection of society against crime and the preservation of individual liberties. By shifting the emphasis more in favor of obtaining convictions and placing a lesser value upon preserving the accusatory system and constitutional liberties under the fifth amendment, the present majority is reflecting its increased concern with the successful prosecution of criminals.

Despite the Court's legitimate concern with effective criminal prosecutions, this shift in emphasis is inconsistent with Miranda and costly in terms of individual constitutional rights. In Elstad, the Supreme Court revitalized the case-by-case, "totality of the circumstances" analysis under the coerced confession doctrine, previously laid to rest in Miranda, as it pertains to consecutive confessions. Its ruling that "fruits" of Miranda violations be excluded only when derived from actually compelled confessions represents a continuing trend by the Court to limit the protection afforded by the Miranda doctrine. This narrow view of the fifth amendment undermines the spirit and express values of Miranda and opens the way to the admission of coerced statements into evidence.

Bettie E. Goldman

I think the idea that police cannot ask questions of the person who knows the most about the crime is an infamous decision. I think it's a wrong decision.

I think if a person doesn't want to answer, that's their right. But you've had time after time all these ridiculous situations in which police are precluded from asking the one person who knows the most about the crime.

Wash. Post, Aug. 26, 1985, at A6, cols. 1-2. In criticizing the Miranda decision further, Mr. Meese accused the Supreme Court of "inventing new law." Id. at A6, col. 1.