Michigan v. Tucker: A Warning About Miranda

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In *Miranda v. Arizona*,[1] the United States Supreme Court established a series of definitive guidelines to govern the admissibility at trial of statements elicited from a criminal suspect during police interrogation. That 1966 landmark decision provoked a wide range of responses[2] and precipitated a deluge of cases construing the broad dictates of the opinion. The mixed reaction which *Miranda* evoked can be attributed largely to the strict standards enunciated by the Court and to the significant impact that the new rules were expected to have on the criminal justice system.[3] To some, the decision represented a dramatic break from the past[4] and a departure from the normal functions of the judiciary.[5]

Uncertainty about *Miranda*'s breadth and durability was resolved somewhat by the Supreme Court in *Harris v. New York*.[6] The *Harris* Court permitted the prosecution's use of statements obtained in violation of *Miranda* to impeach the defendant's testimony at trial.[7] *Harris*

1. 384 U.S. 436 (1966).

2. *See, e.g.*, B. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 273-96 (1973); Graham, *What Is "Custodial Interrogation?": California's Anticipatory Application of Miranda v. Arizona*, 14 U.C.L.A.L. REV. 59 (1966); Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966).

3. For the thoughts, concerns, and viewpoints of commentators on the *Miranda* decision and its implication, see essays collected in *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 169 (1966) [hereinafter cited as *Some Views on Miranda*].

4. Graham, *supra* note 2, at 59; Hogan, *Some Views on Miranda, supra* note 3, at 169, 243; *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 91, 202 (1966). *But see* Edwards, *Some Views on Miranda, supra* note 3, at 169, 181-83; Kamisar, *supra* note 2, at 63, 66. Mr. Justice White, dissenting in *Miranda*, declared that the content of the majority opinion "has no significant support in the history of the privilege or in the language of the Fifth Amendment." 384 U.S. at 526.

5. Fraenkel, *Some Views on Miranda, supra* note 3, at 169, 249-50, 252.

6. 401 U.S. 222 (1971).

7. *Id.* at 226. The Supreme Court recently followed and perhaps extended *Harris* in Oregon v. Hass, 95 S. Ct. 1215 (1975). In conformity with *Harris*, the *Hass* Court held that inculpatory information provided by defendant during *Miranda*-violative interrogation was admissible for impeachment purposes. *Id.* at 1221.

bespoke the Burger Court's initial effort to read *Miranda* narrowly and to gradually dilute the broad policies manifested in that opinion.[8]

In the recent case of *Michigan v. Tucker*,[9] the Burger Court continued to evince a hostility to *Miranda* by further limiting the necessity of complying with *Miranda* standards. *Tucker* sanctioned the prosecution's use of evidence directly derived from a defendant's statements elicited by the police in violation of *Miranda*.[10] The Court's earlier decision in *Harris* provided authority for the assertion that a failure to fully comply with *Miranda's* requirements does not preclude all use of statements procured from the defendant.[11] Thus, the *Tucker* Court, by further circumscribing the scope of *Miranda's* protection, followed the path that *Harris* had taken. At best, *Tucker* indicates that the Court will be loath to extend the exclusionary rule to new situations and will continue its efforts to limit *Miranda*. At worst, *Tucker* has all but overruled *Miranda*.

This Note will discuss the ramifications of the Court's decision in *Tucker*. After a brief review of the pre-*Miranda* standards for admissibility of statements elicited during police interrogation, the effect and significance of *Miranda* will be examined, and the *Tucker* decision will be discussed. In subsequently analyzing the *Tucker* opinion, four separate hypotheses will be propounded, suggesting possible interpretations of that opinion, and the plausibility of each of these hypotheses will be critically assessed. Finally, the implications that *Tucker* holds for the future viability of *Miranda* and fifth amendment protection during custodial interrogation will be considered.

THE *Miranda* GUIDELINES AND THEIR APPLICATION IN *Michigan v. Tucker*

Prior to 1966, the problem of admitting in evidence a defendant's statements secured during custodial interrogation had been handled on a case-by-case basis. The primary issue in state cases such as *Tucker* was whether a confession elicited from a suspect had been made "voluntarily," in conformity with the due process clause of the fourteenth amendment of the Constitution.[12] Under this approach, the "totality of the cir-

8. For a critical examination of the *Harris* opinion, see Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971). Justice Douglas' regretful projections as to the impact of *Harris* are stated in Riddell v. Rhay, 404 U.S. 974 (Douglas, J., dissenting), *denying cert. to* 79 Wash. 2d 248, 484 P.2d 907 (1971).

9. 417 U.S. 433 (1974).

10. *Id.* at 450-52.

11. *Id.* at 451-52.

12. *See, e.g.*, Haynes v. Washington, 373 U.S. 503 (1963); Payne v. Arkansas, 356 U.S. 560 (1958); White v. Texas, 310 U.S. 530 (1940); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

cumstances" of the interrogation was assessed; if the police techniques were deemed unreasonable or shocking, or if the suspect clearly did not have an opportunity to make a rational and intelligent choice, the confession would not be admissible.[13] Although the flexibility of this test enabled courts to adjust to new fact situations, the voluntariness standard was plagued by its subjectivity.[14] The ability of courts to exercise discretion in myriad fact situations led to inconsistent results.[15] Determination of the voluntariness issue was reduced to an oath-swearing contest between the police and the accused, the former contending that the statement was freely and voluntarily given and the latter arguing that the confession was the product of coercive practices.[16] In such situations, courts usually accepted the officers' version of the interrogation.[17]

The Supreme Court introduced some principle in this area with the *Miranda* decision. *Miranda* held that the prosecution cannot use a suspect's statements obtained during custodial police interrogation unless the use of procedural safeguards necessary to secure the fifth amendment privilege against compulsory self-incrimination is demonstrated.[18] Under this mandate, in order for evidence obtained in custodial interrogation to be admissible, the suspect must be warned prior to any questioning that he has the right to remain silent, that any statement he does make may be used against him in court, and that he has a right to the presence of counsel, either retained or, if he is an indigent, appointed.[19] The defendant may waive these rights, but waiver must be knowing and intelligent, and the government bears a heavy burden of proof on this issue.[20] If the *Miranda* warnings are not properly given in their entirety and if no valid waiver can be shown, all statements made by the suspect "while in custody or otherwise deprived of his freedom of action in any significant way"[21] must be excluded from evidence at

13. Haynes v. Washington, 373 U.S. 503, 514-15 (1963); Kamisar, *supra* note 2, at 94-104; *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 961-83 (1966); Note, *Miranda and Its Progeny—Application and Limitation of the Warren Court's Legacy*, 21 SYRACUSE L. REV. 232, 232-37 (1969); *The Supreme Court, 1965 Term, supra* note 4, at 202-03.

14. Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579, 602 (1968); Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 133-34 (1967). *See also* Kamisar, *supra* note 2, at 94-104.

15. *See* Kamisar, *supra* note 2, at 94-104; Note, *supra* note 14, at 133-34.

16. *See* Elsen & Rosett, *Protections for the Suspect Under Miranda v. Arizona*, 67 COLUM. L. REV. 645, 649 (1967); Kamisar, *supra* note 2, at 103; Pye, *Some Views on Miranda, supra* note 3, at 169, 213.

17. *See* Elsen & Rosett, *supra* note 16, at 649; Kamisar, *supra* note 2, at 103; Pye, *Some Views on Miranda, supra* note 3, at 169, 213.

18. 384 U.S. 436, 444 (1966).

19. *Id.* at 444, 467-73, 479.

20. *Id.* at 475.

21. *Id.* at 445, 478; *see The Arizona Supreme Court 1967-68*, 10 ARIZ. L. REV. 148, 204-05 (1968).

trial.[22]

The basis of these guidelines was the fifth amendment privilege against self-incrimination.[23] The Court observed at length that the police station, or any police-dominated atmosphere, is inherently coercive.[24] Placed in an unfamiliar environment in the midst of hostile company, a person who is unaware of his rights or unsure whether or not to exercise them might succumb to police questioning, perhaps in the belief that he is actually helping himself.[25] Given the intimidation and subtle pressure inherent in this situation, one's will to resist talking might easily be undermined, and the privilege against compulsory self-incrimination would be rendered largely illusory.[26] To counteract this phenomenon, the *Miranda* Court required that warnings be given the suspect to inform and assure him of his constitutional rights.

Although the *Miranda* opinion emphasized the exclusionary consequence of failure to give sufficient warnings,[27] arguably the warnings themselves were given constitutional status.[28] That is to say, suspects in custody had to be given the warnings as a matter of constitutional right. The *Miranda* Court purported "to give concrete constitutional guidelines for law enforcement agencies and courts to follow"[29] and held "[t]he requirement of warnings and waiver of rights [to be] fundamental with respect to the Fifth Amendment privilege . . . ."[30] Thus, mere failure to comply with the *Miranda* requirements would constitute a violation of the defendant's fifth amendment rights as construed in *Miranda*.[31]

The considerations which prompted the *Miranda* decision received little attention by the Court in *Tucker*. Defendant Tucker was interrogated by police in connection with a rape. Prior to questioning Tucker, the police asked him whether he knew for what crime he had

22. 384 U.S. at 476, 479.

23. *Id.* at 467-79; Elsen & Rosett, *supra* note 16, at 664; Note, *supra* note 14, at 133; Comment, *The New Definition: A Fifth Amendment Right to Counsel*, 14 U.C.L.A.L. REV. 604, 605, 616 (1967). The fifth amendment to the United States Constitution provides in part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

24. 384 U.S. at 445-58, 467.

25. *Id.* at 451-52, 454.

26. *Id.* at 457-58, 467. *See* Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968).

27. 384 U.S. at 444, 476.

28. *Id.* at 490-91. *But see* Hampton v. Gilmore, 60 F.R.D. 71, 81 (E.D. Mo. 1973) ("The Constitution of the United States nowhere provides that an individual has the *right* to be *warned* of his constitutional rights . . . .").

29. 384 U.S. at 441-42. Similarly, Mr. Justice Clark, in dissent, recognized that "the Court fashions a *constitutional* rule that the police may engage in no custodial interrogation without additionally advising the accused that he has a right under the Fifth Amendment to the presence of counsel during interrogation and that, if he is without funds, counsel will be furnished him." *Id.* at 500 (emphasis added).

30. *Id.* at 476.

31. *Id.*

been arrested, whether he wanted an attorney, and whether he understood his constitutional rights. The defendant also was advised that he had the right to remain silent and that anything he said could later be used against him. The police did not inform him that counsel would be appointed if he could not afford counsel. The warning given by the police was therefore deficient by *Miranda* standards.[32]

During the interrogation, Tucker offered as an alibi that he had been with a friend named Henderson at the approximate time of the offense. The police, checking this alibi, located Henderson and questioned him. Instead of supporting Tucker's story, Henderson made statements that ultimately incriminated the defendant. The defendant's statement itself was excluded from trial in accordance with *Miranda*, but Henderson's damaging testimony was allowed, even though the prosecution stipulated that the witness' identity was discovered only through defendant's statement.[33]

Tucker was convicted of rape and sentenced to 20 to 40 years imprisonment. His conviction was affirmed by both the Michigan court of appeals[34] and the Michigan supreme court.[35] The federal district court granted his petition for a writ of habeas corpus,[36] stating that because he had not been fully apprised of his *Miranda* rights and because Henderson's identity had been learned only through defendant's answers, Henderson's testimony was tainted and could not be admitted.[37] The Court of Appeals for the Sixth Circuit affirmed.[38]

On writ of certiorari, the United States Supreme Court reversed, drawing a definite distinction between the fifth amendment's guarantee prohibiting compulsory self-incrimination and the "prophylactic" rules devised in *Miranda* to protect that constitutional right.[39] The Court maintained that the deficiency in the *Miranda* warnings given Tucker did not constitute an abridgment of his fifth amendment rights.[40] Referring to the *Miranda* warnings merely as "recommended 'procedural safeguards,' "[41] the Court noted that these "*suggested* safeguards were

32. It is significant to note that of the four *Miranda* warnings, the right to appointed counsel is the warning the omission of which is probably least inimical to fifth amendment protections.
33. 417 U.S. 433, 435-37 (1974).
34. People v. Tucker, 19 Mich. App. 320, 172 N.W.2d 712 (1969).
35. People v. Tucker, 385 Mich. 594, 189 N.W.2d 290 (1971).
36. Tucker v. Johnson, 352 F. Supp. 266, 270 (E.D. Mich. 1972).
37. *Id.* at 269. In reaching the conclusion that "testimonial fruits obtained from violations of Fifth Amendment rights should also be inadmissible," the federal district court applied the rationale of the fruit of the poisonous tree doctrine. *Id. See generally* discussion notes 50-51 *infra*.
38. Tucker v. Johnson, 480 F.2d 927 (6th Cir. 1973).
39. Michigan v. Tucker, 417 U.S. 433, 442-46 (1974).
40. *Id.* at 444-46.
41. *Id.* at 443.

not intended to 'create a constitutional straitjacket.' "[42] Moreover, according to the Court, "these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected."[43] Thus, in the *Tucker* Court's opinion, merely questioning the defendant without giving him full and adequate warnings did not automatically infringe his constitutional rights.

These principles enabled the *Tucker* majority to find a technical *Miranda* infraction without at the same time finding a constitutional infirmity. In supporting its conclusion that defendant's fifth amendment rights had not been infringed, the Court found that a comparison of the facts in the case with the historical background of the fifth amendment privilege indicated that defendant's constitutional rights had remained intact.[44] Related to this was the Court's finding that defendant's statement "could hardly be termed involuntary"[45] and its implied recognition that the warnings actually given to defendant would have been more than adequate under pre-*Miranda* standards.[46] In finding no constitu-

42. *Id.* at 444, *quoting* Miranda v. Arizona, 384 U.S. 436, 467 (1966) (emphasis added).

43. 417 U.S. at 444. Since the *Miranda* Court noted that "the Constitution [does not] necessarily require adherence to any particular solution for the inherent compulsions of the interrogation process, 384 U.S. 436, 467 (1966), it has been stated that "[t]he content of the particular remedial or prophylactic rule is thus a pragmatic decision rather than a constitutional fiat." Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1030 (1974). Nevertheless, the *Miranda* Court also made clear that if alternatives fully effective to serve the purposes of the *Miranda* warnings were not employed, the guidelines would have to be carefully observed. 384 U.S. at 467. No such alternatives were demonstrated by the government in *Tucker*. 417 U.S. at 463 (Douglas, J., dissenting).

44. 417 U.S. at 444-45.

45. *Id.* at 445. The *Tucker* Court's assertion that defendant's statement was not involuntary should not be confused with what the *Miranda* Court called "volunteered" statements. This term refers to statements obtained without interrogation, "given freely and voluntarily without any compelling influences . . . ." 384 U.S. at 478. The *Miranda* Court ruled that "[v]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Id.* Defendant's statement in *Tucker* cannot be classified as volunteered since it was made under what the *Miranda* Court would consider inherently coercive conditions, in particular, in response to custodial police interrogation without sufficient *Miranda* warnings or waiver. *Id.* at 478-79.

46. 417 U.S. at 444-45, 450-51. Although the interrogation occurred before *Miranda*, defendant's trial commenced after *Miranda*. Therefore, the standards enunciated in that case were applicable under the rule of Johnson v. New Jersey, 384 U.S. 719 (1966), which held *Miranda* applicable to all trials commencing after the date of the decision. *Id.* at 732-33. The fact that the officers' warnings to Tucker would have clearly sufficed under pre-*Miranda* standards presumably was made irrelevant by *Johnson*. Mr. Justice Brennan, in his concurrence to *Tucker*, contended that the *Miranda* decision itself required the exclusion of products of *Miranda*-violative interrogations, see discussion note 103 *infra*, but he then chose to "confine the reach of *Johnson v. New Jersey* to those cases in which the *direct statements* of an accused made during a pre-*Miranda* interrogation were introduced at his post-*Miranda* trial." 417 U.S. at 458. He then concluded that "[i]f *Miranda* is applicable at all to the fruits of statements made without proper warnings, . . . its effect [should be limited] to those cases in which the fruits were obtained as a result of post-*Miranda* interrogations." *Id.* This latter statement tends to drastically qualify his assertion that *Miranda* does mandate exclusion of

tional violation, the Court clearly departed from *Miranda*.[47]

Having concluded that the interrogation did not violate defendant's fifth amendment rights but instead only involved an "inadvertent disregard" of *Miranda's* prophylactic rules, the *Tucker* Court framed the issue as "how sweeping the *judicially* imposed consequences of this disregard shall be."[48] Immediately after posing this question, the Court noted that exclusion of defendant's actual statements at trial fully satisfied *Miranda's* mandate that "statements taken in violation of the *Miranda* principles must not be used to prove the prosecution's case at trial."[49] The Court thus suggested that exclusion of the defendant's statements per se was one of the required "consequences of this disregard," although the Court's basis for this requirement was now unclear. The Court also reasoned that in the absence of any constitutional infraction, the fruit of the poisonous tree doctrine[50] was inapplicable and

fruits. *Id.* at 459-60 n.5. Moreover, the propriety of later attaching qualifications to the *Johnson* decision is questionable since the opinion itself contained no such limitations. The *Johnson* Court merely ruled "that *Miranda* applies only to cases in which the trial began after the date of our decision one week ago." 384 U.S. at 721.

47. If *Miranda* were still intact, the Court's comparison of the *Tucker* facts with the historical circumstances surrounding the fifth amendment privilege would have been unnecessary since the new rules enunciated in *Miranda* represented dissatisfaction with, if not condemnation of, the old voluntariness test. See text accompanying notes 12-17 *supra*. Similarly, the Court's finding that defendant's statement was not involuntary under traditional principles would not have been a controlling factor in deciding whether defendant's constitutional rights had been impaired. The *Miranda* Court explicitly recognized that many statements taken in violation of the standards established therein would not be considered involuntary in common parlance. 384 U.S. at 457. Nevertheless, the Court pointed out that this would not detract from the requirement of giving the constitutionally-based warnings. *Id.* Finally, compliance with pre-*Miranda* standards by the officers in *Tucker* would not be important under *Miranda* in deciding whether defendant's constitutional rights were violated. *See* discussion note 46 *supra*.

48. 417 U.S. at 445 (emphasis added).

49. *Id.*

50. Under this doctrine, also referred to as the derivative evidence rule, the evidentiary "fruits" derived from evidence that has been obtained through illegal police activity are subject to exclusion from trial. Wong Sun v. United States, 371 U.S. 471 (1963); Nardone v. United States, 308 U.S. 338 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). Assuming that the primary evidence representing the "poisonous tree" is itself inadmissible, the question then becomes " 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " Wong Sun v. United States, 371 U.S. 471, 488 (1963), *quoting* J. MAGUIRE, EVIDENCE OF GUILT 221 (1959).

Under modern authority, the general rule that fruits of illicit police conduct should be excluded has been virtually engulfed by exceptions. Principal of these is the admission of the fruit of the primary illegality if the fruit was actually come upon through an "independent source." This exception applies in both the fourth and fifth amendment areas. See discussion note 51 *infra*. In the fourth amendment context, the fruit of the poisonous tree doctrine has been riddled by additional qualifications. For example, it may be said that the taint has been dissipated or that the causal chain is too attenuated to render the evidence inadmissible. Some courts have gone further and applied an "inevitable discovery" exception, stating that if the police would or could have discovered the evidence or witness anyway, it should not be excluded. Pitler, *supra* note 14, at 621-36. *See generally* Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483, 516-38 (1963); Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. CRIM. L.C. & P.S. 307 (1964). Finally, derivative evidence may be admitted in cases where, as in *Tucker*, the fruit is

therefore could not be utilized to exclude Henderson's testimony.[51]

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not tangible evidence but rather the testimony of a live witness who presumably testifies on his own accord. Some courts have found this distinction significant and have allowed such testimony, though arguably it could be considered the fruit of illegal police conduct. *See, e.g.*, Brown v. United States, 375 F.2d 310, 313-14 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 915 (1967); State v. Johnson, 291 Minn. 407, 411-12, 192 N.W.2d 87, 90-91 (1971); State v. Miranda, 104 Ariz. 174, 181-83, 450 P.2d 364, 371-73, *cert. denied*, 396 U.S. 868 (1969). *But see* United States v. Diaz, 427 F.2d 636, 638 (1st Cir. 1970); People v. Quicke, 71 Cal. 2d 502, 521-22, 455 P.2d 787, 798, 78 Cal. Rptr. 683, 694 (1969); Pitler, *supra* note 14, at 624; Note, 30 N.Y.U.L. REV. 1121, 1123 (1955). *See generally* Ruffin, *Out on a Limb of the Poisonous Tree: The Tainted Witness*, 15 U.C.L.A.L. REV. 32 (1967).

The Supreme Court recently indicated that these various exceptions may not be applied routinely to admit ostensibly tainted evidence. Brown v. Illinois, 95 S. Ct. 2254 (1975). Reaffirming the vitality of the fruit of the poisonous tree doctrine, the Court held that proper *Miranda* warnings do not automatically attenuate the taint of an unlawful arrest. *Id.* at 2261.

51. 417 U.S. at 445-46. The Court's brief reference to the fruit of the poisonous tree doctrine deviates from traditional notions of the fifth amendment's coverage. Reliance on the fruits doctrine is not necessary if a fifth amendment infraction is recognized. This is because the fifth amendment has been viewed as containing its own derivative evidence exclusionary rule. *See* People v. Robinson, 48 Mich. App. 253, 259-60, 210 N.W.2d 372, 376 (1973). That is, the fifth amendment itself has been held to require strict exclusion of any evidence, including derivative evidence, obtained in violation of it. *See* Kastigar v. United States, 406 U.S. 441, 444-45, 458-59 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964); Hoffman v. United States, 341 U.S. 479, 486 (1951); Counselman v. Hitchcock, 142 U.S. 547, 584-85 (1892). *See also* Dershowitz & Ely, *supra* note 8, at 1214-15; Pitler, *supra* note 14, at 619-20. Thus, since *Miranda* is founded on fifth amendment principles, the fruits of statements elicited without proper warnings, as well as the statements themselves, should be excluded automatically unless the secondary evidence was obtained from a truly independent source. *See* Davis v. Wainwright, 342 F. Supp. 39, 43-45, *aff'd mem.*, 469 F.2d 1405 (5th Cir. 1972); People v. Robinson, 48 Mich. App. 253, 259-60, 210 N.W.2d 372, 376 (1973). *See generally* Pitler, *supra* note 14, at 619-20.

Courts nevertheless have generally used language couched in terms of the fruit of the poisonous tree doctrine when admissibility of evidence possibly derived from *Miranda*-violative statements is at issue. *See, e.g.*, United States v. Cassell, 452 F.2d 533, 541 (7th Cir. 1971); United States v. Nagelberg, 434 F.2d 585, 587 (2d Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); United States v. Capps, 421 F.2d 1341, 1342 (9th Cir. 1970); People v. Peacock, 29 App. Div. 2d 762, 763, 287 N.Y.S.2d 166, 168 (1968); *cf.* United States v. Crocker, 510 F.2d 1129, 1138 (10th Cir. 1975). In so doing, courts often purport to justify admission of *Miranda* fruits under the independent source exception. *See, e.g.*, United States v. Nagelberg, 434 F.2d 585, 587 (2d Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); United States v. Diaz, 427 F.2d 636, 639 (1st Cir. 1970); United States v. Capps, 421 F.2d 1341, 1342 (9th Cir. 1970). This exception is also part and parcel of the fifth amendment's own strict rule of automatic exclusion. *See* Kastigar v. United States, 406 U.S. 441, 460 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 n.18 (1964); People v. Robinson, 48 Mich. App. 253, 259-60, 210 N.W.2d 372, 376 (1973). The commonality of this exception to fifth amendment and fruit of the poisonous tree doctrines may be the cause introducing fruit of the poisonous tree principles into the orbit of cases justifying the admission of evidence despite police conduct in violation of the fifth amendment. *See* Agius v. United States, 413 F.2d 915, 919-20 (5th Cir. 1969) (sufficient dissipation or purging of any taint arising from improper questioning rendered evidence admissible); State v. Miranda, 104 Ariz. 174, 181-83, 450 P.2d 364, 371-73, *cert. denied*, 396 U.S. 868 (1969) (attenuation of taint rationale utilized to admit evidence arguably linked to a *Miranda*-violative interrogation); "No Miranda Warnings for Ernest A. Miranda," 11 ARIZ. L. REV. 61, 85, 91-99 (1969). Since poisonous tree principles seemingly require a weaker showing of independent source than fifth amendment principles, continued confusion between the two principles may render courts more willing to recognize an independent source when the evidence at issue was derived from the context of a fifth amendment violation. *Compare* United States v. Nagelberg, 434 F.2d 585, 587 (2d Cir. 1970), *cert. denied*, 401 U.S. 939 (1971), [*and*] United States v. Diaz, 427 F.2d 636, 638-39 (1st Cir. 1970), *with* State v. Lekas, 201 Kan. 579, 588-89, 442 P.2d 11, 19-20 (1968), [*and*] People v. Robinson, 48 Mich. App. 253, 259-60, 210 N.W.2d 372, 376 (1973). Addition-

Noting that in this novel situation it was without precedent to guide it in determining the consequences of the disregard, the *Tucker* Court turned to the issue of whether the product of the *Miranda* violation should be excluded despite the lack of any constitutional violation.[52] The Court conducted an examination of general exclusionary rule principles and policies before concluding that Henderson's testimony need not be excluded.[53] In ruling that the evidence was properly admitted, the Court stressed several factors. First, it observed that the purposes and functions of the exclusionary rule would not be served in this particular case by disallowing the witness' testimony.[54] The deterrence rationale behind the exclusionary rule would not justify exclusion of Henderson's testimony since the police, justifiably relying on pre-*Miranda* law[55] at the time of the questioning, had clearly met those standards and had not acted negligently, willfully, or in bad faith.[56] Nor would the other primary function of the exclusionary rule—guaranteeing the trustworthiness of evidence at trial—block Henderson's testimony, according to the Court.[57] There was no reason to believe that Henderson's testimony was untrustworthy simply because defendant had not received full *Miranda* warnings. The Court also noted that no element of coercion was present in this case; nor was defendant really "compelled" to give evidence against himself.[58] Moreover, defendant did not accuse himself, but merely offered an alibi to the officers in the hope of establishing a basis for exoneration.[59] The Court concluded that a balancing of the interests involved, such as society's interest in effective prosecution of criminals and in making available to the jury all relevant and trustworthy evidence acquired in accordance with constitutional standards, weighed in favor of admitting the highly relevant testimony into evidence.[60]

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ally, poisonous tree principles recognize other exceptions which may be imported into fifth amendment doctrine by confusion. See discussion note 50 *supra*. This potential for relaxation of the strict fifth amendment exclusionary rule effectively erodes the constitutional foundation upon which *Miranda* was built.

To preserve *Miranda* and the fifth amendment's status, the various exceptions under the fruits doctrine should not justify admission of the secondary evidence if a "but for" relationship exists between a fifth amendment violation and the discovery of proffered evidence. It follows, then, that if the deficient *Miranda* warnings in *Tucker* had been held to violate defendant's fifth amendment rights, Henderson's testimony should not have been admitted since his identity was learned solely through Tucker's inadmissible statements.

52. 417 U.S. at 446.
53. *Id.* at 446-51.
54. *Id.*
55. *See* Escobedo v. Illinois, 378 U.S. 478 (1964).
56. 417 U.S. at 447-48.
57. *Id.* at 448-49.
58. *Id.* In so doing, the Court suggested a very narrow definition of the concept of self-incrimination. In contrast, see Kastigar v. United States, 406 U.S. 441, 444-45 (1972); United States v. Escandar, 465 F.2d 438, 441-42 (5th Cir. 1972).
59. 417 U.S. at 449.
60. *Id.* at 450-51.

Although the Court only once referred explicitly to its reasoning as a balancing process,[61] its entire analysis of the admissibility of Henderson's testimony, assuming it was holding that exclusion was not constitutionally compelled, may be viewed as an exercise in balancing.[62] Yet, balancing and many of the factors weighed by the Court in *Tucker* are inconsistent with unequivocal language in the *Miranda* opinion.[63] The Court ostensibly avoided this conflict, however, by taking a narrow view of *Miranda*, contending that *Miranda*, for whatever reason, required only exclusion of actual statements taken in violation of its guidelines and did not resolve the issue of derivative evidence.[64] Since that directive was complied with in *Tucker*, *Miranda* was not violated, according to the Court.[65] As a result, the *Tucker* Court, having only to engage in a general exclusionary rule analysis, was able to emphasize factors allegedly supporting admission of Henderson's testimony, even though *Miranda* clearly would preclude reliance on those same factors to justify admission of defendant's actual statements.

Although the result reached by the Court in its balancing process may be justified, troublesome questions that remain are why the Court suggested that a defendant's statements were to be strictly excluded and why the exclusionary rule was discussed at all since the Court found no constitutional infraction. Both questions are troubling, the former because *Miranda* was apparently all but expressly rejected by the Court, and the latter because federal courts may not impose rules of exclusion on state courts unless exclusion is necessary to protect a constitutional right.[66] The Supreme Court's ability to exclude evidence

61. *Id.* at 450.

62. *See* United States v. Acosta, 501 F.2d 1330, 1334 n.2 (5th Cir. 1974). The *Tucker* Court was not without precedent in engaging in such balancing. Three years before *Tucker*, the Court, in Harris v. New York, 401 U.S. 222 (1971), had implicitly balanced the usefulness of the defendant's statement in exposing his perjury against the deterrent effect of exclusion. *Id.* at 225-26. *See* Romanelli v. Commissioner, 466 F.2d 872, 878-79 (7th Cir. 1972); 40 U. CIN. L. REV. 350, 354 (1971).

63. For example, the *Tucker* Court's assertion that the defendant was not coerced or literally compelled to speak would not be relevant under *Miranda*. The *Miranda* Court declared that interrogation is inherently coercive and that the warnings are a constitutional necessity for neutralizing this atmosphere. 384 U.S. at 457, 461, 467. Language in *Miranda* would also seem to undercut any reliance on the fact that defendant's statement was in the form of an alibi rather than a confession. The *Miranda* Court specifically stated that exculpatory statements could not be distinguished from inculpatory ones. *Id.* at 477. Finally, the mere fact that evidence is trustworthy does not automatically transform it into admissible evidence if it was procured illegally or can be directly traced to an illegal source. *See* Jackson v. Denno, 378 U.S. 368, 376 (1964); Rogers v. Richmond, 365 U.S. 534, 540-41 (1961).

64. *See* 417 U.S. at 445, 452 n.26; discussion note 103 *infra*.

65. 417 U.S. at 445.

66. Mapp v. Ohio, 367 U.S. 643, 678 (1961) (Harlan, J., dissenting); McNabb v. United States, 318 U.S. 332, 340 (1943); *see* Michigan v. Tucker, 417 U.S. 433, 462 (1974) (Douglas, J., dissenting) ("The Court is not free to prescribe preferred modes of interrogation absent a constitutional basis."); United States v. Navarro, 441 F.2d 409, 411 (5th Cir. 1971) (state not bound by federal procedural rules unless they embody constitutional imperatives).

under its general supervisory powers is limited to the federal court system.[67] Since *Tucker* was a state case, once the Court decided that defendant's constitutional rights were not infringed, it had no power to exclude Henderson's testimony under general exclusionary rule principles.

ANALYSIS OF *Tucker*: FOUR HYPOTHESES

Tucker's complexity and lack of clarity make interpretation of the Court's opinion difficult. To aid in an analysis of the case, four separate interpretations of the Court's opinion will be hypothesized. Although these alternative interpretations are not reconcilable, they do serve as a useful framework for assessing the potential import of *Tucker*. A brief overview of each interpretation will be useful before beginning analysis.

The first interpretation views the *Tucker* Court as holding that fifth amendment rights under *Miranda* are violated only when the defendant's *statements*, obtained without adequate warnings, are actually introduced at trial. Under this approach, exclusion of *Miranda*-violative statements is constitutionally required, but no constitutional violation arises merely from an officer's failure to give sufficient warnings to an interrogated suspect or from introducing evidence *derived* from the inadmissible statements elicited from him. Under this interpretation, Tucker's fifth amendment rights were not abridged since none of his actual statements were admitted at trial.

A second interpretation of *Tucker* is that the *Miranda* warnings themselves are constitutionally required, but that evidence obtained as a result of an unconstitutional interrogation may or may not be excluded at trial. According to this view, although fifth amendment rights are violated when warnings are inadequate, exclusion of all evidence secured as a result of that violation is no longer a *constitutionally*-required remedy. Instead, the fifth amendment exclusionary rule is now discretionary, and noncompliance with *Miranda* is just one factor in determining whether exclusion will be judicially imposed.

The third interpretation maintains that a *Miranda* deficiency is just one factor in a "totality of the circumstances" determination of whether a suspect's fifth amendment rights have been violated. Failure to fully comply with the guidelines will not automatically taint an interrogation as unconstitutional. If consideration of all of the circumstances reveals a fifth amendment infraction, however, exclusion of all evidence obtained as a result of the violation is *constitutionally* required.

67. McNabb v. United States, 318 U.S. 332, 340-41 (1943); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 938 (1965).

Finally, a fourth interpretation of *Tucker* again views noncompliance with *Miranda* as only one factor in determining, under a "totality of the circumstances" test, whether fifth amendment rights have been violated. Even if a fifth amendment infraction is recognized after the Court's preliminary analysis, however, exclusion of evidence obtained as a result of the violation is not *constitutionally* required. Instead, as under the second hypothesis, application of a judicially-imposed, discretionary exclusionary rule determines whether the evidence must be barred from use at trial; noncompliance with *Miranda* is just one factor in this determination. Thus, under this approach, satisfaction of the *Miranda* requirements is merely one factor taken into account at both stages of the Court's inquiry—whether fifth amendment rights were violated and, if they were, whether exclusion is appropriate in the particular instance. Now that the four interpretations have been outlined, the foundation exists for critical analysis.

The first interpretation, briefly restated, contends that constitutional rights under *Miranda* are not abridged until the defendant's statements taken in violation of *Miranda* principles are introduced at trial in the government's case. The mere fact that statements are elicited from a suspect without full *Miranda* warnings is not, in and of itself, a constitutional violation. Exclusion of *Miranda*-violative statements, however, is constitutionally required. Since defendant's statements in *Tucker* were not introduced at trial, there was no initial constitutional violation justifying exclusion of Henderson's testimony.

Several considerations support adoption of this view. The *Tucker* Court emphasized the fact that defendant's actual statements were not introduced at trial.[68] By stressing that fact, the Court may have been suggesting that had such statements been admitted, defendant's fifth amendment rights would have been violated. In addition, the Court's express finding that defendant's fifth amendment rights had not been infringed leaves room for the inference that constitutional rights under *Miranda* are violated, if at all, only when statements are introduced, rather than at the time of the interrogation conducted without a proper recital of warnings.[69]

68. 417 U.S. at 445, 447-48, 451, 452.

69. The question of when a fifth amendment violation occurs under *Miranda* has not been a widely litigated issue in the criminal context. For a discussion of civil suits involving this issue, see text & notes 73-74 *infra*. This is because in most cases the actual statements taken in violation of *Miranda* are at issue rather than the products of those statements. Such statements are either admitted or excluded, depending upon whether the *Miranda* guidelines were complied with. If the statements are admitted, it has presumably been found that the standards were satisfied. Thus, no violation of any type occurred at the time of the questioning, nor will one arise when those statements are introduced at trial. Conversely, if a *Miranda* infirmity is found, the court will normally exclude such statements. In that case, the question of when the constitutional vio-

Supporting this interpretation is the view of some lower courts that, in the criminal context, fifth amendment rights under *Miranda* are not violated merely because a suspect is interrogated without having first received adequate warnings.[70] According to these lower courts, the *Miranda* guidelines were formulated to safeguard the fifth amendment privilege against compulsory self-incrimination, and "that privilege is not violated when the information elicited from an unwarned suspect is not used against him."[71] *Miranda* thus is viewed as merely setting forth constitutional prerequisites for the admission of evidence.[72] Similarly, the majority view in tort suits brought under the Civil Rights Act of 1871[73] to redress official misconduct comports with this approach. Under that view, a *Miranda* violation does not give rise per se to a claim for violation of constitutional rights.[74]

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lation arose or will arise is irrelevant. That is, in the case of the defendant's own statements, evidence may be excluded either on the basis that the suspect's rights were infringed at the time of the interrogation or on the basis that the introduction of the statement at trial would constitute the illegality which would violate the suspect's constitutional rights. *See* Note, *Standing to Object to the Admission of Evidence Obtained in Violation of Another's Fifth and Sixth Amendment Rights: People v. Varnum*, 15 U.C.L.A.L. REV. 1060, 1067-68 (1968). Thus, it is not necessary to determine when the constitutional violation occurs.

70. People v. Varnum, 66 Cal. 2d 808, 812, 427 P.2d 772, 775, 59 Cal. Rptr. 108, 111-12 (1967), *cert. denied*, 390 U.S. 529 (1968); People v. Wong, 35 Cal. App. 3d 812, 824-25, 111 Cal. Rptr. 314, 324 (Ct. App. 1974) (dictum); People v. Miller, 252 Cal. App. 2d 877, 883, 60 Cal. Rptr. 791, 795 (Ct. App. 1967) (dictum); People v. Denham, 41 Ill. 2d 1, 4-5, 241 N.E.2d 415, 418 (1968), *cert. denied*, 394 U.S. 1006 (1969); *see* Allen v. United States, 384 F.2d 926, 927 (5th Cir. 1967) (dictum); Dimmick v. State, 473 P.2d 616, 619-20 (Alas. 1970); State v. Phinis, 199 Kan. 472, 480, 430 P.2d 251, 258 (1967), *overruled in part*, State v. Milow, 199 Kan. 576, 433 P.2d 538 (1967). *Varnum* held that one's fifth amendment rights are not violated until evidence obtained through an *Escobedo* or *Miranda* violation is actually introduced at trial against the person who had been questioned without receiving proper warnings. The court stated that a fourth amendment violation, on the other hand, occurs at the time of the illegal search and seizure. 66 Cal. 2d at 812, 427 P.2d at 775, 59 Cal. Rptr. at 111. For discussion of *Varnum*, see Note, *supra* note 69.

71. People v. Varnum, 66 Cal. 2d 808, 812, 427 P.2d 772, 775, 59 Cal. Rptr. 108, 111 (1967), *cert. denied*, 390 U.S. 529 (1968). These principles apply so long as the police do not resort to actual physical or psychological coercion, in which case an interrogation would violate due process and would be unconstitutional ab initio. People v. Varnum, *supra* at 812-13, 427 P.2d at 776, 59 Cal. Rptr. at 112; Dimmick v. State, 473 P.2d 616, 619-20 (Alas. 1970). *See also* Duncan v. Nelson, 466 F.2d 939 (7th Cir.), *cert. denied*, 409 U.S. 894 (1972).

72. 384 U.S. 436, 476 (1966) ("The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant."). *See* Brulay v. United States, 383 F.2d 345, 349 n.5 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967); Roach v. Bennett, 260 Iowa 103, 107, 148 N.W.2d 488, 491 (1967) (dictum); State v. Crothers, 278 So. 2d 12, 16 (La.), *cert. denied*, 414 U.S. 1096 (1973); State v. Silvacarvalho, 180 Neb. 755, 758, 145 N.W.2d 447, 449 (1966) (dictum); Terpstra v. Niagara Fire Ins. Co., 26 N.Y.2d 70, 74-75, 256 N.E.2d 536, 538, 308 N.Y.S.2d 378, 381-82 (1970).

73. 42 U.S.C. § 1983 (1970).

74. *See, e.g.*, Thornton v. Buchmann, 392 F.2d 870, 874 (7th Cir. 1968); Hampton v. Gilmore, 60 F.R.D. 71, 81 (E.D. Mo.), *aff'd mem.*, 486 F.2d 1407 (8th Cir. 1973); Ransom v. City of Philadelphia, 311 F. Supp. 973, 974 (E.D. Pa. 1970); Allen v. Eicher, 295 F. Supp. 1184, 1185-86 (D. Md. 1969); Ambrek v. Clark, 287 F. Supp. 208, 210 (E.D. Pa. 1968). The court in *Ambrek*, for example, stated that:

> The sole import for failure to [give adequate *Miranda* warnings] is to preclude

Although these factors render the first interpretation viable, several countervailing considerations counsel its rejection. This interpretation maintains that the *Tucker* Court suggested that introduction of *Miranda*-violative statements would constitute a fifth amendment violation; however, the Court never expressly made such an assertion. Although the Court expressly recognized that defendant's statements had been excluded in conformity with *Miranda*,[75] it never stated that exclusion of those statements would have been *constitutionally* required. Similarly, this interpretation accords to the *Miranda* warnings a measure of constitutional indispensability, although the *Tucker* Court expressly rejected this treatment of the warnings.[76]

Also at variance with the first interpretation is the notion that fifth amendment rights may be infringed during interrogation itself when statements are improperly elicited from the suspect.[77] In accordance with this view, some courts have suggested that the actions of the interrogating officers and the techniques used by them in extracting information from the suspect may, without more, infringe fifth amendment rights.[78] Indeed, the *Tucker* Court itself suggested that it was the police officers' *conduct* which was subject to scrutiny in determining whether fifth amendment rights had been violated.[79]

The *Miranda* opinion also suggests that fifth amendment rights may be violated at the time of questioning.[80] To be sure, the Court

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the admissibility in a subsequent criminal proceeding of evidence and statements obtained from the accused . . . .

Consequently, unless evidence so obtained were used against the [suspect] in a criminal proceeding, there has been no deprivation of any rights, privileges or immunities secured by the Constitution or laws of the United States, which is a requisite for stating a cause of action under the Civil Rights Acts. . . . But the mere failure to warn . . . does not create a cause of action.

Id.

The cases brought under the Civil Rights Act are perhaps distinguishable, in that they involved civil suits for damages rather than criminal proceedings. In the civil actions, courts would naturally be loath to award damages unless evidence secured from a *Miranda*-violative interrogation was actually used at a criminal trial against the civil plaintiff. Courts would be leery of opening the floodgates to frivolous tort claims when no actual injury has resulted.

75. 417 U.S. at 445, 447-48, 451.

76. *See* text accompanying notes 40-42 *supra.*

77. *See* United States v. Pate, 240 F. Supp. 696, 707 (N.D. Ill. 1965), *aff'd*, 359 F.2d 749 (7th Cir. 1966); Law v. State, 21 Md. App. 13, —, 318 A.2d 859, 873 (1974); *cf.* Napolitano v. Ward, 457 F.2d 279, 283 (7th Cir.), *cert. denied*, 409 U.S. 1037 (1972); Davis v. Wainwright, 342 F. Supp. 39, 43 (M.D. Fla. 1971), *aff'd mem.*, 469 F.2d 1405 (5th Cir. 1972). *But see The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 222 (1968) ("the gravamen of a constitutional wrong under the fifth amendment is the use of a defendant's coerced testimony against him in a criminal proceeding, not the mere act of compelling him to speak . . . .").

78. *See* Grant v. Wainwright, 496 F.2d 1043, 1047-48 (5th Cir. 1974); Law v. State, 21 Md. App. 13, —, 318 A.2d 859, 873 (1974); *cf.* United States v. Dickerson, 413 F.2d 1111, 1114 (7th Cir. 1969).

79. 417 U.S. at 445-46 ("the police *conduct* at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination . . . ." (emphasis added)).

80. 384 U.S. 436, 477 (1966). In interpreting *Miranda*, one commentator noted:

spoke generally in terms of disallowing the introduction of *Miranda*-violative statements at trial,[81] but that mandate might conceivably be viewed as the necessary means to protect a constitutional right and not the constitutional right itself.[82] Under this approach, the constitutional standards enunciated in *Miranda* are transgressed at the time of interrogation by the failure to give full and adequate warnings.[83] Application of the exclusionary rule, although constitutionally necessary, is merely the remedy to ensure that violation of these constitutional rights will not be exploited at trial.[84] This line of argument tends to rebut the first interpretation's view that constitutional rights under *Miranda* are violated only at trial. It also is inconsistent, however, with another reason given for rejecting the first interpretation;[85] that is, treating *Miranda* as a constitutional principle at all runs counter to the *Tucker* Court's express refusal to grant the guidelines constitutional status.[86]

Another problem with the first interpretation is that it distinguishes primary evidence from derivative evidence in determining whether a fifth amendment infraction would arise upon its introduction. The *Tucker* Court drew such a distinction when it suggested that defendant's actual statements could not have been constitutionally introduced,[87] but then, nevertheless, allowed the introduction of evidence derived from those statements. Previous Supreme Court decisions would not countenance this distinction. Cases delineating the scope of

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"The court has laid down simple and precise requirements which, if not observed by the police, will result in a holding that the privilege against self-incrimination was violated." Note, *supra* note 14, at 133.

81. 384 U.S. at 444, 476.

82. *See* Michigan v. Tucker, 417 U.S. 433, 465-66 (1974) (Douglas, J., dissenting); Dimmick v. State, 473 P.2d 616, 629 (Alas. 1970) (Connor, J., concurring and dissenting); People v. Varnum, 66 Cal. 2d 808, 817-19, 427 P.2d 772, 778-80, 59 Cal. Rptr. 108, 114-16 (1967), *cert. denied*, 390 U.S. 529 (1968) (Peters, J., concurring and dissenting).

83. Justice Peters, in his separate opinion in People v. Varnum, 66 Cal. 2d 808, 817, 427 P.2d 772, 778-79, 59 Cal. Rptr. 108, 114-15 (1967), *cert. denied*, 390 U.S. 529 (1968), explains this theory in the clearest manner:

> Improper interrogation, without the requisite warnings, violated the Fifth and Sixth Amendment rights of the witness. It is "unlawful" to interrogate a suspect without giving him the required warnings from the very moment of the first question. The right of privacy recognized in *Escobedo* and *Miranda* has been violated the moment interrogation starts. The fact that the most important sanction imposed for violating that right of privacy is inadmissibility of the confession into evidence, and that the defendant cannot complain in his criminal trial unless the confession is introduced, does not make the interrogation lawful. . . . The one thing made crystal clear by *Escobedo* and certainly by the explanation of that case in *Miranda* is that it is unlawful to interrogate without giving the required warnings.

84. *See* Kastigar v. United States, 406 U.S. 441, 470-71 (1972) (Marshall, J., dissenting); Mattox v. Carson, 424 F.2d 202, 204 (5th Cir.), *cert. denied*, 400 U.S. 822 (1970) (dictum); Note, *supra* note 69, at 1071; *cf.* Davis v. Wainwright, 342 F. Supp. 39, 43 (M.D. Fla. 1971), *aff'd mem.*, 469 F.2d 1405 (5th Cir. 1972).

85. *See* text accompanying notes 75-76 *supra*.

86. *See* text accompanying notes 41-43 *supra*.

87. 417 U.S. at 445, 447-48, 451.

the fifth amendment privilege have recognized that use of derivative evidence is just as incriminatory as use of primary evidence; therefore, the use at trial of derivative evidence is precluded if introduction of its source, the primary evidence, would violate the fifth amendment.[88] Following the rationale of these authorities, if introduction of *Miranda*-violative statements would infringe fifth amendment rights—as it would under the first interpretation—then so too would the introduction of any evidence derived from those statements.[89] Arguably, *Tucker* may be viewed as repudiating sub silentio these prior Supreme Court cases, but this would leave without explanation an apparently insensible distinction.[90]

Another troublesome aspect of the *Tucker* opinion, and one which the first hypothesis leaves unexplained, is the Court's discussion of the exclusionary rule even though it concluded that no constitutional rights had been violated. As already noted, once the Court decided that defendant's fifth amendment rights had not been abridged, it had no power to determine whether the evidence should be excluded in this state case.[91] Therefore, under the first hypothesis, the Court's discussion of possible nonconstitutional exclusion can only be viewed as erroneous dictum.

A final reason compelling rejection of the first hypothesis as a realistic interpretation of *Tucker* is the fact that distinguishing statements from derivative evidence for the purposes of determining when fifth amendment rights are deemed violated and when evidence must be excluded would, in effect, be giving police a license and indeed an incentive to violate *Miranda* and the fifth amendment. If the police are permitted to utilize the various leads that may result from a *Miranda* or fifth amendment violation, the efficacy of the fifth amendment privilege will be vitiated.[92] Police could interrogate without giving the *Miranda* warnings in the hope of eliciting statements from which they could discover evidence to be used against the defendant at trial. So

88. Lefkowitz v. Turley, 414 U.S. 70, 78, 84 (1973); Kastigar v. United States, 406 U.S. 441, 459-60 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964); Hoffman v. United States, 341 U.S. 479, 486 (1951); Counselman v. Hitchcock, 142 U.S. 547, 564, 586 (1892).

89. Even the cases which have held that constitutional rights under *Miranda* are violated only when evidence is introduced, rather than earlier at the time of the faulty interrogation, see cases cited notes 70, 74 *supra*, did not distinguish the defendant's statements from derivative evidence for purposes of determining a fifth amendment infraction.

90. The Court's brief suggestion that the fruit of the poisonous tree doctrine would have applied if a constitutional violation had been found, 417 U.S. at 445-46, may indicate a repudiation of prior cases. *See* discussion notes 50-51 *supra*.

91. *See* text accompanying notes 66-67 *supra*.

92. Pitler, *supra* note 14, at 620; *see* Nedrud, *The New Fifth Amendment Redefined*, 2 NAT'L DISTRICT ATTORNEYS ASS'N J. 112, 114 (1966); *cf.* People v. Chirico, 61 Misc. 2d 157, 162, 305 N.Y.S.2d 237, 242 (Fulton County Ct. 1969) (dictum).

long as the statements themselves are excluded, the prosecution would benefit from its wrong. This clearly circumvents the fifth amendment.

The second interpretation of *Tucker* views the Court as holding that the *Miranda* warnings themselves are constitutionally required, but that the exclusion of evidence obtained without those warnings is not constitutionally required. Rather, the requirement of exclusion is a matter of judicial discretion in protection of fifth amendment rights. Noncompliance with *Miranda* is only one factor to be considered in determining whether exclusion should be required when a fifth amendment violation is found. Since this discretion is to be exercised in protection of the fifth amendment, the Supreme Court may determine, as a matter of judicial policy, how that discretion is to be exercised by lower courts.[93] That is, the Court may establish judicial rules to govern the application of this discretionary exclusionary rule. Under these judicially-imposed rules, exclusion of certain evidence may be strictly required, not because of any constitutional mandate, but rather because of limitations imposed by the Court. Thus, although the exclusionary rule is totally discretionary in the sense that exclusion is not constitutionally compelled, exclusion may still be judicially required.

This approach may be illustrated and supported by examining the exclusionary rule utilized by courts to preclude the prosecution's use of evidence obtained in violation of the fourth amendment. Although that amendment contains no language specifically mandating exclusion of evidence secured through an illegal search and seizure, the Court has ordered exclusion of such evidence as a necessary means of implementing the constitutional provision and deterring its violation.[94] The fourth amendment exclusionary rule is simply designed to deter violations of the basic right of privacy.[95] It is not a personal right to the exclusion of evidence, but only a means of regulating official misconduct.[96] When a

93. *See* United States v. Calandra, 414 U.S. 338, 347-48 (1974); *cf.* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 395-97 (1971) (authorizing damage action for violation of fourth amendment rights by federal officers, though conceding this remedy for such violations is not required by the fourth amendment).

94. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914). *See generally* McKay, *Mapp v. Ohio, The Exclusionary Rule and the Right of Privacy*, 15 ARIZ. L. REV. 327 (1973); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

95. United States v. Calandra, 414 U.S. 338, 347-48 (1974); Mapp v. Ohio, 367 U.S. 643, 656 (1961); Elkins v. United States, 364 U.S. 206, 217 (1960); *Developments in the Law—Confessions, supra* note 13, at 1028 n.21. Considerations of judicial integrity also have been cited in support of the exclusionary rule. *See* United States v. Peltier, 95 S. Ct. 2313, 2317-18 (1975); Elkins v. United States, 364 U.S. 206, 222-23 (1960).

96. United States v. Calandra, 414 U.S. 338, 348 (1974); McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 690 (1972). *But see* Mapp v. Ohio, 367 U.S. 643, 648-49, 655-57 (1961) (four justices contending that the fourth amendment per se commands exclusion of evidence obtained in violation of the rights it prescribes); *The Supreme Court, 1967 Term, supra* note 77, at 217-18.

fourth amendment violation has occurred, a court has some discretion in determining whether exclusion facilitates the deterrence rationale.[97] The various exceptions to the fruit of the poisonous tree doctrine allow for such discretion.[98] The general view today is that exclusion of evidence secured in violation of fourth amendment rights is required not by constitutional direction, but rather by judicial decision.[99]

Under the second interpretation, *Tucker* is viewed as holding that the judicially-imposed exclusionary rule of the fifth amendment requires exclusion of a defendant's *Miranda*-violative *statements* because of the explicit judicial mandate in *Miranda*—and referred to in *Tucker*—prohibiting the use at trial of statements elicited without proper warnings. Thus, if the *Miranda* warnings are disregarded, one of "the judicially imposed consequences of this disregard shall be" exclusion of statements obtained. Such statements must be excluded, not to comply with the Constitution, but rather with the judicially-imposed requirement of *Miranda*.

The fruits of *Miranda*-violative statements, on the other hand, are treated differently under this interpretation. In contrast to the clear requirement that statements be excluded to satisfy the judicial mandate of *Miranda*, it is generally agreed that *Miranda* is not conclusive as to the admissibility of the derivative products of *Miranda* violations.[100]

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97. *See* United States v. Calandra, 414 U.S. 338, 349-52 (1974); McGowan, *supra* note 96, at 691. *But see* United States v. Acosta, 501 F.2d 1330, 1334-35 n.2 (5th Cir. 1974). In *Acosta*, the court, in response to the dissent's contention that application of the judge-made remedy of exclusion was not necessary in the fourth amendment context where the police had not acted willfully or negligently, flatly declared that the exclusionary rule could not be balanced against the deterrent effect that exclusion of the illegally seized evidence might have on police misconduct in a particular case. The *Acosta* court further asserted that neither *Calandra* nor *Tucker* authorized such a balancing process. Finally, the court noted that the good faith of the officers could not justify admission of unconstitutionally-obtained evidence and that the Supreme Court had not modified the exclusionary rule. This latter proposition is debatable, however, in light of *Calandra* and *Tucker*.

The Supreme Court, in the context of a recent retroactivity decision, implicitly revealed the *Acosta* court's misconceptions of the current trend in the law. In United States v. Peltier, 95 S. Ct. 2313 (1975), the Court suggested that the good faith of the individual officer and his lack of actual or constructive knowledge of the illegality of his actions are proper factors for consideration by courts in determining whether the deterrence rationale would be served by exclusion in a particular case. The Court thus indicated that the absence of any potential deterrent effect on the specific officer involved in the particular case may justify refusal to exclude relevant, albeit illegally obtained, evidence. *See id.* at 2317-18.

98. *See* discussion note 50 *supra*. In addition, the Supreme Court, in United States v. Peltier, 95 S. Ct. 2313 (1975), seemingly expanded the scope of this discretion by suggesting the appropriateness of looking to various subjective factors purportedly bearing on the issue of deterrence. *See* discussion note 97 *supra*.

99. United States v. Calandra, 414 U.S. 338, 347-48 (1974); *see* Coolidge v. New Hampshire, 403 U.S. 443, 496-99 (1971) (Black, J., concurring and dissenting); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411-24 (1971) (Burger, C.J., dissenting); Kaplan, *supra* note 43, at 1030-31.

100. George, *The Fruits of Miranda: Scope of the Exclusionary Rule*, 39 U. COLO. L. REV. 478, 486-90 (1967); Pitler, *supra* note 14, at 601, 612; Pye, *Some Views on*

Though *Miranda* could be viewed as requiring exclusion of products as well as statements,[101] the opinion's language, 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 him,"[102] probably should not be taken literally. As *Tucker* noted, the issue of derivative evidence was not specifically raised in the case,[103] and *Miranda* presumably left the derivative evidence issue to be decided by the lower courts in subsequent cases.[104] Consequently, under this second view of *Tucker*, when the admissibility of the products of *Miranda*-violative statements is at issue, the need for exclusion of this derivative evidence is left to the discretion of lower courts without any stringent limitations imposed by the Supreme Court. In resolving this issue, a court applying the second interpretation would consider a *Miranda* deficiency as only one factor in determining whether exclusion of the products is necessary.[105]

Miranda, supra note 3, at 169, 216; Note, *Fruits of the Illegally Obtained Confession*, 4 WILLAMETTE L.J. 269 (1966).

101. *See* Michigan v. Tucker, 417 U.S. 433, 459-60 n.5 (1974) (Brennan, J., concurring); *Id.* at 463-64 (Douglas, J., dissenting).

102. 384 U.S. 436, 479 (1966) (emphasis added). Similarly, Mr. Justice Clark, in his separate *Miranda* opinion stated: "The Court further holds that failure to follow the new procedures requires inexorably the exclusion of any statement by the accused, *as well as the fruits thereof*." *Id.* at 500 (emphasis added). In contrast, Mr. Justice White, in dissent, seemed to anticipate *Tucker* when he said, "Today's decision leaves open such questions as whether . . . nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation . . . ." *Id.* at 545.

103. The *Tucker* Court observed that: "No defendant in *Miranda* sought to block evidence of the type challenged in this case, and the holding of *Miranda*, even if made fully retroactive, would not therefore resolve the question of whether Henderson's testimony must also be excluded at trial." 417 U.S. at 452 n.26. If this narrow view of *Miranda* is accepted, then no judicially-imposed rule exists circumscribing lower court discretion when ruling on the admissibility of illegally obtained derivative evidence. The different treatment which the second interpretation accords to *Miranda*-violative statements as opposed to derivative products would therefore be permissible. On the other hand, Mr. Justice Brennan, in his concurrence to *Tucker*, apparently believed that *Miranda* had in fact resolved the fruits issue: "[The majority] argues that *Miranda* did not decide the question of the admissibility of fruits . . . . But . . . *Miranda* requires the exclusion of fruits . . . . [E]xclusion is necessary to give full effect to the purposes and policies underlying the *Miranda* rules and to its holding . . . ." *Id.* at 459-60 n.5. Mr. Justice Douglas, in dissent, also seems to have taken this position: "[The witness'] testimony must be excluded to comply with *Miranda*'s mandate that '*no* evidence obtained as a result of interrogation not preceded by adequate warnings can be used against' an accused." *Id.* at 464. Thus, the question whether *Miranda* required exclusion of derivative evidence may be closer in the eyes of these Supreme Court justices than in those of a majority of the commentators. *See* authorities cited note 100 *supra*.

104. Prior to *Tucker*, the closest the Supreme Court had come to deciding whether the products of an unlawfully obtained confession were subject to exclusion was in Harrison v. United States, 392 U.S. 219 (1968). In *Harrison*, the derivative evidence rule was applied to exclude the defendant's incriminating testimony made at a prior trial. That testimony was the product of three confessions that had been wrongfully introduced at the prior trial. The Court ruled that the prior testimony had been made in response to the introduction of the inadmissible confessions and therefore could not be used by the government in the later case. A footnote in the *Harrison* opinion, however, left open the question of what would happen "when the trial testimony of a witness other than the accused is challenged as 'the evidentiary product of the poisonous tree.'" *Id.* at 223 n.9. This was essentially the situation presented in *Tucker*.

105. If the judicial exclusionary rule is viewed as being completely discretionary with

The second interpretation tends to explain several facets of the *Tucker* opinion and to that extent is supportable. As noted, the *Tucker* Court indicated that introduction of defendant's actual statements would have violated *Miranda*.[106] If the Court was implying by this language that introduction of *Miranda*-violative statements results in a fifth amendment violation, this would support the second interpretation's view that *Miranda* still has some constitutional viability, despite the Court's express language. Even if the language is not read this broadly, and it need not be, it nevertheless tends to support the position that exclusion of statements would still be required as a *judicially*-imposed directive under *Miranda*. Of particular significance in this regard is the fact that the Court's recognition that introduction of defendant's actual statements would have violated *Miranda* immediately followed the Court's inquiry as to how sweeping the consequences of the disregard of *Miranda* should be.[107] Moreover, this inquiry directly followed the *Tucker* Court's finding that no fifth amendment violation had occurred.[108] The implication, therefore, is that the Court was discussing nonconstitutional exclusion. Also noteworthy as indicating that exclusion is not constitutionally compelled is the Court's protracted discussion of factors to be weighed in deciding whether exclusion is necessary.[109]

In further support of the second interpretation is the *Tucker* Court's discussion of the exclusionary rule. The discussion in a state case suggests that, despite its express language, the Court still felt constitutional rights had been violated.[110] This, in turn, implies that *Miranda* is still of constitutional significance. Conversely, the second interpretation explains the *Tucker* Court's discussion of the exclusionary rule. Since under this interpretation the *Miranda* warnings are constitutionally required, the officers' failure in *Tucker* to fully comply with *Miranda* resulted in a constitutional violation, which would authorize federal exclusion of certain evidence in a state case.[111]

Despite its facial consistency with some aspects of the *Tucker* opinion, the second interpretation has several glaring weaknesses which sug-

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respect to both *Miranda*-violative statements and evidence derived therefrom, noncompliance with the *Miranda* guidelines would be only one factor in ruling on the admissibility of the statements themselves, as well as of the derivative evidence. This would contradict the *Tucker* Court's suggestion that exclusion of defendant's statements was necessary at least as a judicial directive, if not as a constitutional requirement, under *Miranda*. 417 U.S. at 445, 447-48, 451, 452. In addition, adoption of such a theory would totally emasculate *Miranda* and probably would necessitate an express overruling of the case.

106. *Id.*
107. *Id.* at 445.
108. *Id.* at 444-45.
109. Id. at 446-50.
110. *See* text accompanying notes 66-67 *supra.*
111. *Id.*

gest its rejection. First, this interpretation of *Tucker* completely ignores the Court's express refusal to grant the *Miranda* warnings constitutional status.[112] Similarly, under the second interpretation, a constitutional violation would arise at the time a suspect is interrogated without first receiving the constitutionally-required warnings. This is clearly inconsistent with the *Tucker* Court's holding that defendant's constitutional rights were not abridged despite inadequate *Miranda* warnings. The Court's refusal to equate the warnings with constitutional standards and its refusal to recognize any constitutional violation in this instance also undermine the second interpretation's explanation of the Court's exclusionary rule discussion.

Finally, a major obstacle prevents acceptance of the second interpretation's contention that the Court is not *constitutionally* required to exclude evidence derived, either directly or indirectly, from an initial fifth amendment infraction. An established line of Supreme Court cases has recognized a constitutionally-compelled rule of automatic exclusion barring use of evidence, primary and derivative, obtained in violation of the fifth amendment.[113] The fifth amendment has been said to contain its own exclusionary rule which is essential to protect the right not to be a witness against one's self.[114] Because the fifth amendment privilege operates to exclude derivative evidence per se, as well as the primary product of the illegality,[115] only a "but for" test of causation need be satisfied in order to exclude such fruits.[116] Acceptance of the second hypothesis as a valid interpretation of *Tucker* would represent a sub silentio repudiation of this line of authority.[117]

Because the second interpretation is contradicted by *Tucker* itself, as well as by clear precedent, it appears to be an unreasonable construction of the opinion. It is very unlikely, therefore, that such a theory will emerge from the case in subsequent opinions by the Court.

The third interpretation maintains that failure to abide by *Miranda* standards is just one factor to be taken into account under a "totality of

112. *See* text accompanying notes 41-43 *supra.*

113. *See, e.g.*, Lefkowitz v. Turley, 414 U.S. 70, 78, 84 (1973); Kastigar v. United States, 406 U.S. 441, 459-60 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964); Hoffman v. United States, 341 U.S. 479, 486 (1951); Counselman v. Hitchcock, 142 U.S. 547, 564, 586 (1892).

114. Coolidge v. New Hampshire, 403 U.S. 443, 497-98 (1971) (Black, J., concurring and dissenting); People v. Robinson, 48 Mich. App. 253, 256, 210 N.W.2d 372, 374 (1973); Dershowitz & Ely, *supra* note 8, at 1214. *See* Davis v. Wainwright, 342 F. Supp. 39, 43 (M.D. Fla. 1971), *aff'd mem.*, 469 F.2d 1405 (5th Cir. 1972); Comment, *Scope of Taint Under the Exclusionary Rule of the Fifth Amendment Privilege Against Self-Incrimination*, 114 U. PA. L. REV. 570, 574-75 (1966).

115. *See* discussion note 51 *supra.*

116. Pitler, *supra* note 14, at 620.

117. The *Tucker* Court's brief reference to the applicability of the fruit of the poisonous tree doctrine in the fifth amendment context does, however, suggest a repudiation of this line of cases. 417 U.S. at 445. *See generally* discussion note 51 *supra.*

the circumstances" analysis in determining whether fifth amendment rights have been violated. If a fifth amendment infraction is found, however, this interpretation *constitutionally* requires automatic exclusion of *all* evidence obtained as a result of that violation.

Several reasons support adoption of this interpretation. First, it is consistent with the *Tucker* Court's language rejecting the *Miranda* guidelines as constitutional requirements. Similarly, although the Court indicated that introduction of defendant's statements would have violated *Miranda*, the Court never expressly committed itself to the position that introduction of *Miranda*-violative statements necessarily would have established a constitutional infraction.[118] This third interpretation also has the advantage of not requiring the tacit repudiation of those cases declaring that all evidence procured in violation of the fifth amendment is subject to automatic exclusion.[119] The strict fifth amendment exclusionary rule would therefore be preserved under this theory.

The major deficiency of the third interpretation is that it does not adequately explain the Court's discussion of the exclusionary rule in a state case after it had decided that Tucker's constitutional rights had remained intact.[120] In addition, the interpretation does not explain the Court's suggestion that the fifth amendment exclusionary rule is discretionary.[121] The third approach nevertheless is a very plausible interpretation of *Tucker's* holding. It is consistent with the treatment given the *Miranda* standards by the *Tucker* Court; both the Court and this interpretation view the warnings as a judicial recommendation rather than a constitutional mandate. This view is also consistent with the authority which establishes a broad rule of automatic exclusion as a part and parcel of the fifth amendment privilege. It thus obviates imputing to the Court the intention to overrule prior decisions on issues never specifically addressed in *Tucker*.

The final interpretation of *Tucker*, like the third, views noncompliance with *Miranda* as only one factor considered by the Court in determining whether fifth amendment rights have been abridged. This fourth

118. On the other hand, the third interpretation would be undermined somewhat if the Court was implicitly suggesting, despite its explicit language, that fifth amendment rights would have been violated upon introduction of such statements. This ploy might have been used by the Court in order to leave the door open for completely divesting *Miranda* of any constitutional significance in the future, without having to explain or refute inconsistent language in prior decisions such as *Tucker*.

119. *See* cases cited note 113 *supra*.

120. The Court's exclusionary rule discussion, though technically erroneous dictum, might have been inserted to indicate to *federal* courts that *Miranda* would simply be a factor in future supervisory exclusion. *See* McNabb v. United States, 318 U.S. 332 (1943).

121. *See* text accompanying notes 106-09 *supra*. Consider also the Court's suggestion that the fruit of the poisonous tree doctrine applies in the context of a fifth amendment violation. 417 U.S. 445-46.

interpretation, however, unlike the third, maintains that exclusion of evidence is discretionary even if a fifth amendment violation is found. This discretionary exclusionary rule parallels that under the second hypothesis. *Miranda*-violative *statements* must be excluded in order to comply with the judicially-imposed exclusionary rule which *Miranda* would be viewed as having announced. When the *products* of the statements are at issue, however, exclusion is not strictly required under the judicial rule. A *Miranda* violation would be a relevant, but not necessarily a controlling, factor in deciding whether the products should be excluded.

The considerations noted under the third approach as supporting the interpretation of a totality of the circumstances test for determining whether fifth amendment rights were violated[122] also support this final interpretation. For example, the *Tucker* Court's express rejection of *Miranda* as a constitutional requirement is consistent with this approach. Similarly, the reasons given under the second approach for the interpretation of a discretionary exclusionary rule also apply to this interpretation.[123]

This interpretation is subject to the same criticisms that plagued the second. It fails to explain the Court's discussion of possible discretionary exclusion in *Tucker*, this being a state case in which the Court expressly held that defendant's constitutional rights had not been infringed. In addition, this interpretation's discretionary exclusion rule runs afoul of prior authorities constitutionally mandating exclusion of all evidence, primary and derivative, obtained in violation of the fifth amendment.[124] In view of the emerging Supreme Court hostility toward exclusionary rules,[125] however, it is conceivable that the Court is moving toward abandonment of those rules, even in the fifth amend-

122. *See* text p. 209 *supra*.

123. *See* text accompanying notes 106-09 *supra*.

124. *See* cases cited note 113 *supra*. However, the suggested applicability of the fruit of the poisonous tree doctrine to the fifth amendment may have been a tacit repudiation of those cases by *Tucker*. See 417 U.S. at 445-46. *See generally* discussion note 51 *supra*.

125. Recent Burger Court incursions into the fourth amendment exclusionary rule may illuminate the Court's treatment of the fifth amendment rule in *Tucker*. *See* United States v. Peltier, 95 S. Ct. 2313, 2324-30 (1975) (Brennan, J., dissenting); McKay, *supra* note 94, at 336-41; Voorsanger, *United States v. Robinson, Gustafson v. Florida, and United States v. Calandra: Death Knell of the Exclusionary Rule?*, 1 HASTINGS CONST. L.Q. 179 (1974). Chief Justice Burger has been particularly outspoken on restricting *Miranda*'s scope and limiting the effects of, if not totally abandoning, the exclusionary rule. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411-24 (1971) (Burger, C.J., dissenting); Frazier v. United States, 419 F.2d 1161, 1171-76 (D.C. Cir. 1969) (Burger, J., concurring and dissenting); Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964). *But see* Brown v. Illinois, 95 S. Ct. 2254 (1975) (recognizing the viability of the fruit of the poisonous tree doctrine, the Court applied the fourth amendment exclusionary rule to exclude confessions obtained after an unlawful arrest).

ment context, and that the Court's protracted discussion of discretionary exclusion in the absence of a constitutional violation was intended to adumbrate this eventuality.

CONCLUSION

Since the Supreme Court's opinion in *Tucker* is so equivocal, conclusive interpretation of the case is impossible. The outer limits of the Court's holding may, however, be stated. At best, *Miranda* warnings and the fifth amendment exclusionary rule are still constitutionally required but, for whatever reasons, do not bar introduction of evidence derived from *Miranda*-violative statements elicited prior to the date *Miranda* was decided. At worst, *Miranda* is merely a factor in a totality of the circumstances test for determining voluntariness and a factor in a fifth amendment exclusionary rule which is no longer constitutionally mandated. Regardless of how broadly *Tucker* is read and regardless of which interpretation of the opinion emerges as a rule of decision in future cases, it is important to note that the ultimate essence of *Miranda* has been preserved. Custodial interrogation continues to be recognized as inherently compulsory in nature.[126] Nothing in *Tucker* repudiates this fundamental premise underlying *Miranda*, and to prevent complete eradication of *Miranda*, it is imperative that, at the very least, this principle survive.

Despite *Tucker's* ambiguity, the implications of the decision are substantial. Its effect already is noticeable in lower court cases, where courts have begun to adopt the *Tucker* approach in justifying admission of arguably tainted evidence.[127] This approach, whether confined by the

126. *See* United States v. Hale, 95 S. Ct. 2133, 2137 (1975). The Supreme Court recently implied, however, that custodial interrogation, despite its inherent coerciveness, is not necessarily compulsory for fifth amendment purposes. Oregon v. Hass, 95 S. Ct. 1215, 1221 (1975).

127. In subsequent cases, several courts have read *Tucker* as foreshadowing a trend toward relaxation of the *Miranda* standards. The Supreme Court of Maine has decided that a trial court's failure to exclude *Miranda*-violative admissions made by the defendant while being frisked by officers pursuant to Terry v. Ohio, 392 U.S. 1 (1968), did not constitute plain error requiring reversal. State v. Hudson, 325 A.2d 56 (Me. 1974). The court, in dictum, drew a distinction between involuntary statements and those elicited without adequate *Miranda* warnings and, citing *Tucker*, stated that not all deviations from the prophylactic rules of *Miranda* are fatal. The lack of bad faith on the part of the police officers also was noted. *Id.* at 63. Finally, comparing *Hudson* to *Tucker*, the Maine court asserted that both cases revealed "an absence of compulsory self-incrimination and of unlawful police tactics of the type against which the demands of *Miranda* were aimed." *Id.* Although the court indicated that defendant's statements would have been excluded had proper and timely objection been made, *id.* at 62, the court's approach exemplifies the view advanced by *Tucker* that the *Miranda* standards are elastic guidelines rather than rigid constitutional rules. *See also* United States v. Castellana, 500 F.2d 325 (5th Cir.) (en banc), *rev'g in part* 488 F.2d 65 (5th Cir. 1974).

In situations more analogous to *Tucker*, courts have also adopted the *Tucker* rationale in admitting evidence derived from *Miranda*-violative interrogations. In Hayes v. Cady,

Burger Court to the fruits of *Miranda* violations or ultimately extended to the suspect's actual statements, by overruling *Miranda*,[128] veers from the protection that *Miranda* was meant to secure for the fifth amendment privilege and reverts to the type of ad hoc decisionmaking that was condemned by the Warren Court. Yet this approach is unsurprising. The decision in *Harris v. New York*[129] foreshadowed this movement by

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500 F.2d 1212, 1214-15 (7th Cir. 1974), the court expressly followed *Tucker* by refusing to exclude from defendant's post-*Miranda* trial products arguably traceable to statements made by defendant, without proper warnings, in a pre-*Miranda* interrogation.

At least one state court has read *Tucker* more broadly, authorizing admission at defendant's post-*Miranda* trial of *Miranda*-violative *statements* obtained in a pre-*Miranda* interrogation. State v. Statewright, 300 So. 2d 674 (Fla. 1974). Despite recognizing that *Miranda* had been violated, the *Statewright* court reiterated the *Tucker* view that the guidelines are only prophylactic, procedural safeguards. *Id.* at 678. Purporting to follow *Tucker*, the court observed that the accused had not been coerced or compelled to testify against himself and that the police had acted in complete good faith. *Id.* at 677. Since the "inadvertent failure to utter a supplemental single 'magic phase' " was only a procedural slip which "did not violate the underlying constitutional rights," the court asserted that the functions of the exclusionary rule would not be served by exclusion. *Id.* at 677-78. Finally, conducting a balancing test similar to that used in *Tucker*, the court concluded that in this instance, and in accordance with the rationale of *Tucker*, no error was committed in admitting defendant's statements at trial. *Id.* at 678.

Perhaps the clearest illustration to date of *Tucker*'s effect in the lower courts is United States v. Crocker, 510 F.2d 1129 (10th Cir. 1975). The defendant in *Crocker* alleged as error the trial court's application of the guidelines of 18 U.S.C. § 3501 (1970), which was enacted in 1968 to offset the harmful effects that Congress believed would result from the *Miranda* decision. This statute provides in part that failure to fully comply with *Miranda* need not be conclusive on the issue of the voluntariness of a confession or self-incriminating statement, but rather should be considered as simply a factor in a "totality of the circumstances" determination whether such evidence is admissible in a federal criminal prosecution. Noting that the Supreme Court has not specifically ruled on the constitutionality of section 3501, the *Crocker* court asserted that *Tucker* in effect adopted the relevant provisions and upheld the validity of the statute. 510 F.2d at 1137. Thus, the *Crocker* court construed *Tucker* as an implicit approval or revival of the totality of the circumstances test, compliance with *Miranda* being merely a factor in this determination. This interpretation of *Tucker* parallels the third interpretation suggested in this Note. See text pp. 208-09 *supra*.

128. The Supreme Court may already have implicitly expanded *Tucker*. Just one week after *Tucker* was decided, the Court vacated and remanded to the Supreme Court of Pennsylvania a case for further consideration in light of *Tucker*. Pennsylvania v. Romberger, 417 U.S. 964 (1974). In this case, the state court had reversed defendant's conviction for first degree murder because of error in admitting at defendant's post-*Miranda* trial his signed confession elicited during a pre-*Miranda* interrogation conducted without sufficient warnings. Commonwealth v. Romberger, 454 Pa. 279, 312 A.2d 353 (1973). By disposing of the case in this manner, the Supreme Court suggested that *Tucker* would authorize admission of the defendant's *statements*. This approach, at the very least, represents the total demise of Johnson v. New Jersey, 384 U.S. 719 (1966). See discussion note 46 *supra*. It may also be indicative of the Court's willingness to eventually dispense with *Miranda* altogether.

The Supreme Court, following the precedent of Harris v. New York, 401 U.S. 222 (1971), also has confirmed that the traditional voluntariness test will continue to be applied in determining whether *Miranda*-violative statements are admissible in evidence at trial for impeachment purposes, the *Miranda* deficiency being at most only a factor in this determination. Oregon v. Hass, 95 S. Ct. 1215, 1221 (1975). Additionally, the Supreme Court has granted certiorari in a case where the Ohio supreme court held that testimony as to statements made by the defendant in response to custodial questioning by his parole officer, who failed to advise defendant of his *Miranda* rights, was inadmissible at trial. Ohio v. Gallagher, 95 S. Ct. 1445 (1975) (No. 74-492), *granting cert. to* State v. Gallagher, 38 Ohio St. 2d 291, 313 N.E.2d 396 (1974). This case may present an opportunity for the Court to further circumscribe *Miranda*'s scope.

129. 401 U.S. 222 (1971).

resolving one issue of *Miranda's* coverage in favor of the prosecution. The decisions in *Harris* and now *Tucker* represent the process by which the substance of the interrogation rules can be undermined without the necessity of formally overruling a recent landmark decision.