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FIFTH AMENDMENT

Michigan v. Tucker, 417 U.S. 433 (1974)

In *Michigan v. Tucker*,[1] the United States Supreme Court held that the testimony of a witness whose identity was revealed to the police during a custodial interrogation of the defendant conducted prior to the decision in *Miranda v. Arizona*[2] need not be excluded at trial even though the defendant was not apprised of his full *Miranda* warnings.[3]

Respondent was arrested for rape and brought to the police station for questioning. Before the actual interrogation began, the police told him of his right to remain silent, his right to counsel, and that anything he said could be used against him in a court of law.[4] The police failed, however, to advise respondent that he would be provided with a lawyer free of charge if he was indigent. After replying that he understood his rights and that he did not want a lawyer, the respondent offered the name of an alibi witness (Henderson) in response to police questioning about his activities on the night of the rape. But, when police contacted Henderson his statements seriously incriminated the respondent.[5]

Before respondent's trial commenced, *Miranda v. Arizona*[6] and *Johnson v. New Jersey*[7] were decided. The holding in *Johnson* made *Miranda* applicable to all defendants whose trials began after the decision in *Miranda*. Relying upon this, respondent made a pretrial motion to exclude both his testimony and that of Henderson. Respondent's appointed counsel argued that Henderson's testimony must be excluded because respondent had disclosed Henderson's identity without having received full *Miranda* warnings. The trial court rejected this argument and admitted Henderson's testimony, although respondent's statements were excluded in accordance with *Miranda*. Respondent was convicted, and the conviction was affirmed by both the Michigan court of

[1] 417 U.S. 433 (1974).

[2] 384 U.S. 436 (1966). Each defendant, while in police custody, was questioned by the authorities in an interrogation isolated from the outside world. None of the defendants was given a full and effective warning of his constitutional rights prior to being questioned. All made incriminating statements.

[3] The Court set out the *Miranda* warnings in its holding, as follows:

> [W]e hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. (1) He must be warned prior to any questioning that he has the right to remain silent, (2) that anything he says can be used against him in a court of law, (3) that he has the right to the presence of an attorney, and (4) that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Id. at 478–79 (numerals added).

[4] The warnings issued complied fully with the constitutional standards required by Escobedo v. Illinois, 378 U.S. 478 (1964). In *Escobedo*, the defendant had been taken into police custody for questioning about a murder. During the questioning, the police refused to permit the defendant to see his lawyer who was waiting outside. The defendant eventually made incriminating admissions. In reversing his conviction, the Supreme Court held that the failure of the police to allow the defendant to see his lawyer upon request constituted a denial of assistance of counsel in violation of the sixth and fourteenth amendments. The police in *Tucker* did inform the defendant of his right to have an attorney present if he so desired.

[5] Respondent had told the police that he had been with Henderson that night, but Henderson said respondent had left early. Henderson also told police that the following day he asked respondent about the scratches on his face and respondent told him that he had received them from a "widow woman" down the street (the victim was an unmarried woman living alone in respondent's neighborhood).

[6] 384 U.S. 436 (1966).

[7] 384 U.S. 719 (1966).

appeals[8] and by the Michigan supreme court.[9]

Respondent then obtained habeas corpus relief in federal district court[10] which held that evidence derived from a statement taken in violation of *Miranda* was inadmissible. The district court reasoned that since the respondent had not received his full *Miranda* warnings and the police had stipulated that Henderson's identity was learned only through respondent's answers, application of the exclusionary rule was necessary to protect respondent's fifth amendment right against compulsory self-incrimination. The Court of Appeals for the Sixth Circuit affirmed.[11]

In an eight-to-one decision, the Supreme Court reversed, with Mr. Justice Rehnquist speaking for the majority.[12] On appeal respondent argued that the privilege against compulsory self-incrimination as articulated in *Miranda* mandated the exclusion at trial of all evidence derived solely from statements made without full *Miranda* warnings.[13] The Court avoided a decision on this broad argument, but held that the fifth amendment does not require derivative evidence to be excluded even if obtained in an interrogation made without full *Miranda* warnings. The holding was limited, however, to statements taken during pre-*Miranda* interrogations.

The majority opinion employed a two-step analysis. First, the Court considered whether or not the respondent's right against compulsory self-incrimination had been directly abridged by the police. It concluded that the police conduct had only violated the prophylactic rules developed to protect that right. Second, it considered whether Henderson's testimony had to be excluded and concluded that it did not.

[8] 19 Mich. App. 320, 172 N.W.2d 712 (1969). The court held that *Miranda* did not apply to derivative evidence obtained before *Miranda* and apparently legal at that time, even if used after *Miranda*.

[9] 385 Mich. 594, 189 N.W.2d 290 (1971). The supreme court adopted the appellate court's opinion as its own.

[10] 352 F. Supp. 266 (E.D. Mich. 1972).

[11] 480 F.2d 927 (6th Cir. 1973), affirmed without an opinion.

[12] Justice Rehnquist was joined by Chief Justice Burger, and Justices Stewart, Blackmun, and Powell.

[13] Respondent's argument is essentially the "fruit of the poisonous tree" doctrine, used to exclude from trial evidence derived from illegally obtained evidence. *See* Wong Sun v. United States, 371 U.S. 471 (1963).

The majority initially examined the scope of the privilege against compulsory self-incrimination. Looking at the historical circumstances which gave rise to the privilege, the Court echoed prior cases by saying that the privilege "was aimed at a far reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality." [14] Although the Constitution itself speaks of the applicability of the privilege only in criminal cases,[15] the Court asserted that "[w]here there has been genuine compulsion of testimony, the right has been given broad scope." [16] The rationale for those broad holdings, the Court stated, was a concern for protecting the right at an early stage of the adversary proceedings so that its invocation would not be futile at a later stage. Recognizing the critical nature of custodial questioning, *Miranda* extended the privilege to police interrogations. To supplement and protect the privilege against compulsory self-incrimination during police interrogation, the Court provided a set of "prophylactic rules." [17] To enforce the *Miranda* warnings, the Court also supplied an exclusionary rule as a sanction for disregarding them.[18]

[14] 417 U.S. at 440, quoting from Ullman v. United States, 350 U.S. 422, 428 (1956).

[15] "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The fifth amendment was made applicable to the states through the fourteenth amendment in Malloy v. Hogan, 378 U.S. 1 (1964).

[16] 417 U.S. at 440. For examples of the broad scope of the privilege against compulsory self-incrimination the Court cited several cases. *See* In re Gault, 387 U.S. 1 (1967) (to juvenile proceedings); Watkins v. United States 354 U.S. 178 (1957) (to congressional investigations); McCarthy v. Arndstein, 266 U.S. 34 (1924) (during civil proceedings); Counselman v. Hitchcock, 142 U.S. 547 (1892) (the privilege is applicable before a grand jury).

[17] 417 U.S. at 439. This phrase was also used by the Court in Michigan v. Payne, 412 U.S. 47, 53 (1973), and by Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1030 (1974).

[18] If the warnings are considered not to be of constitutional stature, then the exclusionary rule would be necessary to enforce them. However, if the warnings are a part and parcel of the fifth amendment, then no exclusionary rule should be necessary to implement them. This is because the fifth amendment, by its own terms, demands compelled statements not be admitted. In this sense, the fifth amendment differs from the fourth amendment which does not deal directly with the exclusion of illegally seized evidence at trial, and

After re-examining the facts of the case, the Court determined that the police interrogation was dramatically unlike the historical practices at which the privilege against compulsory self-incrimination was aimed.[19] Also, respondent's statements were not "involuntary" as traditionally defined by the Supreme Court.[20] In light of those findings, the majority concluded that there was no genuine compulsion, and consequently no real infringement of respondent's fifth amendment rights in spite of the technical *Miranda* infraction. It said:

> 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 as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda*.[21]

Having characterized the case as one of a violation of the *Miranda* rules without an abridgment of the privilege against compulsory self-incrimination, the Court then distinguished the instant case from *Wong Sun v. United States*[22] which held that the fruits of a police search which actually infringed upon the defendant's fourth amendment rights had to be suppressed, the difference between the two cases being the gravity of the police illegality. Finding no other possible controlling precedents,[23] the Court then discussed the issue of the admissibility of Henderson's testimony as a matter of principle.

Starting from the premise that any sanction imposed upon police (and prosecuting attorneys) must serve a valid and useful purpose, the Court first considered the primary rationale offered in support of the fourth amendment exclusionary rule: deterrence.[24] The Court

must be supplemented by an exclusionary rule. *See* Note, *Admissibility of Unlawfully Obtained Statement for Impeachment Purposes*, 85 HARV. L. REV. 44, 49–50 (1971).

[19] *See* Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949). *But see* 8 J. WIGMORE, EVIDENCE 2251 (McNaughton rev. 1961) (Hereinafter cited as WIGMORE). It is curious to note that while Justice Rehnquist cites Wigmore in support of his assertion, Wigmore himself criticized the use of the Star Chamber example to explain the privilege against self-incrimination's history by saying "[t]he naked association of compulsory self-incrimination with the unpopular Star Chamber produces no valid conclusion." WIGMORE, at 312, n.5. Wigmore thought that not everything about the Star Chamber was bad, and that it had been very efficient at times.

Justice Rehnquist's treatment of history is truncated at best. The Court in *Miranda* traced the privilege's history to contemporary times and said that the privilege had transcended itsorigins. 384 U.S. at 460. The Court perceived the privilege to be a substantive right protecting the inviolability of the individual from governmental intrusion, forcing the government in the accusatorial system to convict the individual with evidence secured by its own efforts. *Id.*

[20] *See* notes 48–57 and accompanying text *infra*.

[21] 417 U.S. at 444.

[22] 371 U.S. 471 (1963).

[23] This assertion constituted the point of departure for Justice Brennan in his separate opinion. He recognized the possibility that *Miranda* itself might have resolved the "fruits" question. There are, however, only a few references in that opinion which contemplate that position. First, there is the declaration of the sanction for disregarding the required warnings, or for failing to procure a knowing and intelligent waiver of rights: "But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant]." 384 U.S. at 479. There is also language in one of the dissents: "The Court further holds that failure to follow the new procedures requires inexorably the exclusion [at trial] of any statements by the accused, as well as the fruits thereof." *Id.* at 500 (Clark, J., dissenting).

Justice Rehnquist, on the other hand, observed that all the defendants in *Miranda* sought only to exclude their own statements, and therefore concluded that the "fruits" question remained open. This position is supported by a portion of Justice White's dissent in that case: "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 (White, J., dissenting).

Justice Rehnquist's position is stronger. Since none of the *Miranda* defendants argued for the exclusion of fruits, the broad language used by the majority in *Miranda* must be construed as dicta. The commentators seem to be in agreement with the *Tucker* majority. *See* George, *The Fruits of Miranda: Scope of the Exclusionary Rule*, 39 U. COLO. L. REV. 478 (1967).

[24] The exclusionary rule was introduced in Weeks v. United States, 232 U.S. 383 (1914), and applied to the states in Mapp v. Ohio, 367 U.S. 643 (1961).

While admittedly "deterrence" is a major purpose underlying the fourth amendment exclusionary rule, others have been mentioned. Justice Brennan, dissenting in a recent search and seizure case, said:

> The exclusionary rule, if not perfect, accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct —that the government would not profit from its lawless behavior, thus minimizing the risk

stated that "[t]he rule's prime purpose is to deter future unlawful police conduct . . . , [and] to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it." [25] By analogy, the Court applied the deterrence rationale to the fifth amendment exclusionary rule accompanying the privilege against compulsory self-incrimination. The Court then asserted that the deterrence rationale presupposes willful or negligent police conduct. But, where the police have acted in good faith, and not merely in ignorance of constitutional protections, the rational foundation for the rule disappears and there would be no deterrent effect. Since the police in the instant case had issued the warnings prior to *Miranda* and in accordance with *Escobedo v. Illinois,*[26] the Court concluded that it would serve no valid or useful purpose to exclude Henderson's testimony on this ground.

The Court also disposed of a second justification for the fifth amendment exclusionary rule: the untrustworthiness of the evidence obtained.[27] Conceding that coerced confessions cannot serve to advance the ends of justice and rehabilitation, the majority reiterated its finding of lack of compulsion. Also, the Court noted that it was Henderson's testimony which was challenged, and that he was under no custodial pressures. Additionally, his testimony was subjected to the normal impeachment process on cross-examination. Therefore, there was no reason to believe that Henderson's testimony was untrustworthy.

Finally, the Court disposed of a third justification for the fifth amendment exclusionary rule: the adversary system requires "the government in its contest with the individual to shoulder the entire load." [28] First voicing skepticism as to whether this third justification was really independent of the other two, the Court then rejected respondent's contention by stating that the government, within constitutional limitations, is not prohibited from requiring the defendant to work for the state.[29] It felt that the use of a witness discovered as a result of a defendant's "voluntary" statement did not subvert the adversary system.

The Court also placed considerable emphasis on the strong interest in presenting all available trustworthy evidence to the trier of fact. It relied heavily on *Harris v. New York.*[30] In *Harris,* the defendant was charged with selling heroin to an undercover agent on two separate occasions. While testifying on his own behalf, the defendant denied knowledge of the first transaction, and claimed that he had sold the officer only baking soda in the second. The prosecutor was allowed to impeach the defendant's credibility by reading to the jury portions of a contradictory statement which the defendant had "voluntarily" made immediately after his arrest. The statement had been taken in violation of *Miranda,* and was excluded from the prosecutor's case-in-chief. On appeal, the Supreme Court held that defendant's statements taken in violation of *Miranda* could be used to impeach his direct testimony at trial. Chief

of seriously undermining popular trust in government.

United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

The Court, however, discounted the "imperative of judicial integrity" as an assimilation of the specific rationales mentioned in the text. 417 U.S. at 450 n. 25.

[25] United States v. Calandra, 414 U.S. 338, 347 (1974).

[26] 378 U.S. 478 (1964).

[27] The theory underlying this rationale is that an involuntary confession should be excluded because the suspect is likely to agree to anything in order to get his tormenters to cease. The courts want to hear no evidence that is probably unreliable because it interferes with the integrity of the fact-finding process. *See, e.g.,* Inbau, *Restrictions in the Law of Interrogation and Confessions,* 52 NW. U.L. REV. 77, 78 (1957); Inbau, *Legal Pitfalls to Avoid in Criminal Interrogation,* 40 J. CRIM. L.C. & P.S. 211, 212 (1949).

[28] WIGMORE, *supra* note 19, at 317.

[29] United States v. Dionisio, 410 U.S. 1 (1973) (requiring a potential defendant to submit a voice exemplar to a grand jury violates no constitutional right). Schmerber v. California, 384 U.S. 757 (1966) (taking of a blood sample from an unwilling suspect violates no constitutional right). These cases illustrate a limitation on the privilege against compulsory self-incrimination; identifiable physical characteristics are not protected by the fifth amendment. However, these cases have no applicability to *Tucker* since identifiable physical characteristics are not at issue.

[30] 401 U.S. 222 (1971). Legal commentators agree that *Harris* constituted the first judicial encroachment upon *Miranda. 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 (1971); Note, *Harris v. New York: The Retreat from Miranda,* 32 LA. L. REV. 650 (1972); Note, *Harris v. New York—A Retreat from Miranda,* 45 TEMP. L.Q. 118 (1971).

Justice Burger, writing for the majority, reasoned that the interest of preventing perjury and the need to assess defendant's credibility eclipsed the slight possibility that the police would be encouraged to forego the *Miranda* warnings. Applying the reasoning of *Harris* to *Tucker,* the Court concluded that the prosecution could make some use of defendant's statements and refused to exclude Henderson's testimony.

Justice Brennan wrote a separate opinion, concurring in the judgment of the Court.[31] He argued that *Johnson v. New Jersey* should be limited to only those cases in which the direct statements of an accused made during a pre-*Miranda* interrogation were introduced at his post-*Miranda* trial. Alternatively Justice Brennan urged that if *Miranda* was at all applicable to derivative evidence obtained from statements made without proper warnings having been issued,[32] it should be limited to fruits obtained as a result of post-*Miranda* interrogations. Justice Brennan reasoned that the application of a broad *Miranda* reading (including a prohibition on the use of fruits) to Tucker would place a substantial burden upon police officers to gather "untainted" evidence because of their justified reliance on the prior constitutional requirements, and would not measurably increase the "integrity of the fact-finding process." [33] Moreover, Justice Brennan observed, the element of unreliability is of less importance when the admissibility of fruits is at issue.

Justice White also wrote a separate opinion limiting his concurrence with the judgment of the Court. First he reiterated his view that *Miranda* was "ill-conceived and without warrant in the Constitution." [34] Then after agreeing with the majority that there were no controlling precedents on the issue of fruits, he argued that *Miranda* should not be extended to bar the testimony of witnesses even if they were identified solely through admissions themselves excludable under *Miranda.* He reasoned that any debatable deterrent benefit to be gained by excluding such testimony was "outweighed by the advantages of having relevant and probative testimony, not obtained by actual coercion, available at criminal trials to aid in the pursuit of truth." [35] He then qualified his position by suggesting that a different result might be reached if the fruits were derived from an involuntary confession.

Justice Douglas was the lone dissenter. His opinion was premised on a different reading of *Miranda,* where he was in the majority. Relying on an expansive interpretation of that case, he viewed the failure of the police to advise the indigent respondent of his right to a count-appointed counsel as an abridgment of respondent's fifth amendment right against compulsory self-incrimination.[36] Justice Douglas then argued for the exclusion of Henderson's testimony on the basis of a simple "fruit of the poisonous tree" analysis.[37] Seizing upon the police admission that the identity of the witness was learned only through the illegal interrogation, Justice Douglas concluded that the testimony had to be excluded.

Finally, Justice Douglas voiced his objections to the prospective application of *Miranda,* saying: "I disagree, as I disagreed in *Johnson,* that any defendant can be deprived of the full protection of the Fifth Amendment, as the Court has construed it in *Miranda,* based upon an arbitrary reference to the date of his interrogation or his trial." [38] Noting that Tucker was interrogated more than three years after Miranda was interrogated, he considered the denial of

[31] Justice Brennan was joined by Justice Marshall.

[32] *See* note 23 *supra.*

[33] 417 U.S. at 458.

[34] *Id.* at 460 (White, J., concurring).

[35] *Id.* at 461 (White, J., concurring).

[36] The majority in *Miranda* attached considerably more importance to the warning's absence than did Justice Rehnquist. Regarding the practical significance of the warning, it said:

> Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present. As with the warning of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.

384 U.S. at 473.

[37] *See* note 13 *supra.*

[38] 417 U.S. at 464 (Douglas, J., dissenting).

Miranda to *Tucker* as "grossly invidious discrimination." [39]

The most apparent and immediate effect of *Michigan v. Tucker* is the further erosion of the *Miranda* rule.[40] In cases subsequent to *Miranda*,[41] the courts viewed *Miranda* as dictating a constitutionally required rule of exclusion for confessions or admissions obtained without the required warnings having been given prior to interrogation. The rationale offered was that police practices made the interrogation so inherently coercive[42] that the warnings were constitutionally necessary to protect the privilege and to dispel the atmosphere of coerciveness. If the warnings were not issued, then anything the defendant said was held ipso facto not to be truly voluntary, and hence "compelled" within the meaning of the fifth amendment. It is the equation between "a failure to warn" and "compulsion" which *Tucker* has explicitly altered by reducing the warnings to merely prophylactic rules, and by redefining what constitutes compelled testimony.

First, the Court diluted the warnings by narrowly construing *Miranda*. In support of its interpretation, the majority cited language indicating that the Court in *Miranda* felt that the Constitution did not require any specific solutions to the problems raised by police interrogations, and that "suggested safeguards were not intended to create a constitutional straightjacket . . . . " [43] It was this interpretation which met with opposition from Justice Douglas. He took a much broader view, and cited language in support of his position. In the *Miranda* opinion he found that the warnings were "fundamental with respect to the Fifth Amendment privilege," [44] and that they, or "other fully effective means" [45] of warning, had to be given. Justice Douglas found no equivalent warnings given in *Tucker*,[46] so he concluded, again in language from *Miranda*, that respondent's statements were "obtained under circumstances that did not meet the constitutional standards for the protection of the privilege [against self-incrimination]." [47]

Next, the majority defined the scope of the privilege against self—incrimination to encompass only "genuinely compelled" statements. Implicit in the opinion is the argument that if there is no genuine compulsion, the scope of the privilege should be closely circumscribed. There is no explicit definition given for what constitutes "genuine" compulsion other than occasional references to the Star Chamber and the Inquisition, but one can be inferred from the Court's analysis. In reviewing the facts, the Court determined that the respondent had not been genuinely compelled when he made his admissions in the police station.[48] In other words, his statements were truly voluntary in light of the totality of circumstances. On the basis of the peculiar factual situation presented to the Court, i.e., the police were acting in good faith when giving the incorrect warnings, the Court clearly abandoned *Miranda* for the

[39] *Id.* at 465 (Douglas, J., dissenting).

[40] *See* note 30 and accompanying text *supra*.

[41] *E.g.*, United States v. Jeffrey, 473 F.2d 268 (9th Cir. 1973) (statements taken at a custodial interrogation not prefaced by *Miranda* warnings held inadmissible); Brown v. Beto, 468 F.2d 1284 (5th Cir. 1972) (incriminating admissions made during a search held inadmissible because no *Miranda* warnings had been given); United States v. Cassell, 452 F.2d 533 (7th Cir. 1971) (both incriminating statements and a handwriting exemplar declared inadmissible because taken in violation of *Miranda*); United States v. Bekowies, 432 F.2d 8 (9th Cir. 1970) (statements taken from defendant by federal agents searching his apartment for a fugitive held inadmissible because the *Miranda* warnings had not been given); United States v. Lackey, 413 F.2d 655 (7th Cir. 1969) (interview conducted without *Miranda* warnings being given produced inadmissible statements); United States v. Kucinich, 404 F.2d 262, 266 (6th Cir. 1968) ("The gist of *Miranda* is that any statement of an accused while in custody is ipso facto involuntary unless he has been properly warned."); Wado v. Mancusi, 358 F. Supp. 103 (W.D.N.Y. 1973) (incriminating statements held inadmissible when made without receiving *Miranda* warnings even though defendant was in custody at the time for an entirely different crime). This list comprises only a small sample of the dozens of decisions which have applied *Miranda* as a per se constitutional rule.

[42] 384 U.S. at 445–58.

[43] *Id.* at 467.

[44] *Id.* at 476.

[45] *Id.* at 579.

[46] Of course, the police could not have anticipated *Miranda*.

[47] 384 U.S. at 491.

[48] The respondent had been asked whether he understood the charges against him, warned of his right to remain silent, told that anything he said could be used against him, and asked whether he wanted an attorney. From this the majority concluded that respondent's statements were not coerced from him because the interrogation was unlike the historical abuses at which the privilege was originally aimed.

moment in favor of the much maligned "voluntariness" test.[49]

If it were certain that this holding would be confined to its facts, then the discredited "voluntariness" test would remain a faint specter in the night. But, the tenor of the majority opinion and Justice White's concurring opinion suggests a return to this test which was discarded in *Miranda* as being inadequate to preserve the privilege against compulsory self-incrimination. A reversion to the "voluntariness" test, based upon the due process clause of the fourteenth amendment, would not be welcomed. The application of the "voluntariness" test was a function of the subjective perceptions of each judge. Whether, in light of the "totality of the circumstances," [50] the particular conduct of the police amounted to coercion was generally controlled by two factors: (1) the personal characteristics of the defendant[51] and (2) the pressures applied by the police during interrogation.[52] The first factor necessarily concerned the vagaries of the human mind, and the second often devolved into a "swearing contest" between the defendant and the police over what took place in an interrogation room isolated from the court.[53]

The primary difficulty with the "voluntariness" test was its inability to provide consistent guidelines to remove excessive subjectivity. Justice Harlan, dissenting in *Miranda,* insisted that the pre-*Miranda* cases illustrated "a workable and effective means of dealing with confessions in a judicial manner" [54] and that "the court has developed an elaborate, sophisticated, and sensitive approach to admissibility." [55] But, an excessively sensitive approach ceases to have meaningful predictive value.[56]

Part of the problem was caused by the Supreme Court's own failure to support the "voluntariness" test with a single rationale. Some commentators[57] have argued that the Court excluded confessions because they were untrustworthy.[58] However, these decisions conflict with those cases where the reliability of the excluded confession was demonstrated.[59] Others have argued that the Court excluded confessions to deter improper police conduct.[60] But, if the purpose of excluding coerced confessions under the "voluntariness" test was to deter improper police conduct, then there should have been some definite guidelines for the police to follow. Justice Clark, himself a proponent of the "voluntariness" test, said of the deterrence rationale: "In a case-by-case approach, the conduct of local police is not

[49] The "voluntariness" test has been a fertile ground for legal criticism. For an expanded discussion of the arguments which appear in the test, see generally, 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); Miller & Kessel, *The Confession Confusion,* 49 MARQ. L. REV. 715 (1966); Comment, *The Coerced Confessions Cases in Search of a Rationale,* 31 U. CHI. L. REV. 313 (1964).

[50] Fikes v. Alabama, 352 U.S. 191, 197 (1957).

[51] The question is "whether the defendant's will was overborne at the time he confessed." Haynes v. Washington, 373 U.S. 504, 513 (1963). If the defendant's will is "overborne," then an involuntary state of mind exists. An involuntary state of mind is produced when the pressures exerted to extract a confession surpass the resistance of a person confessing. The ability of a person to resist is a function of age, intelligence, etc.

[52] *See* Ritz, *Twenty-five Years of State Criminal Confessions Cases in the U.S. Supreme Court,* 19 WASH. & LEE L. REV. 35, 39–43 (1962).

[53] The defendant usually lost out in a "swearing contest" because of the superior credibility of the police in the eyes of the trial court. This aspect of the "voluntariness" test prompted Kamisar to say that "[o]nly one with an extravagant faith in the actual operation of the 'totality of the circumstances' test could fail to see that the safeguards provided by the old test were largely 'illusory.'" Kamisar, *supra* note 49, at 62.

[54] 384 U.S. at 506 (Harlan, J., dissenting).

[55] *Id.* at 508 (Harlan, J., dissenting).

[56] *See* Culombe v. Connecticut, 367 U.S. 568 (1961); Haynes v. Washington, 373 U.S. 503 (1963). In both cases the Court held the confession to have been involuntarily given, but there was a vigorous dissent in each case. Certainly the dissents challenge the workability of Justice Harlan's "voluntariness" test.

[57] *See* McCormick, *The Scope of Privilege in the Law of Evidence,* 16 TEX. L. REV. 447, 452–53 (1938); Mueller, *The Law Relating to Police Interrogation Privileges and Limitations,* 52 J. CRIM. L.C. & P.S. 2 (1961).

[58] *E.g.,* Brown v. Mississippi, 297 U.S. 278 (1936) (a confession was obtained by torture).

[59] *See, e.g.,* Haynes v. Washington, 373 U.S. 503, 518 (1963) ("substantial independent evidence tending to demonstrate the guilt"); Blackburn v. Alabama, 361 U.S. 199, 206 (1960) ("other evidence establishes guilt or corroborates the confession").

[60] *See, e.g.,* Allen, *Due Process and State Criminal Procedures: Another Look,* 48 NW. U.L. REV. 16, 23–25 (1953); Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury,* 21 U. CHI. L. REV. 317, 343–44 (1954); Way, *The Supreme Court and State Coerced Confessions,* 12 J. PUB. L. 53, 55 (1963).

shaped; unpredictable reversals on dissimilar fact situations are not likely to curb the zeal of the [police and prosecutors]. . . ." [61] In the absence of the formulation of some new test of "voluntariness," the *Tucker* decision signals a return to these confusions of the old "voluntariness" test.

In the instant case the defendant's own statements were excluded, so it is arguable that the precedential value of this decision is strictly limited to testimonial fruits. But, since the Court held that the defendant's fifth amendment rights had not been violated, there is no *constitutional* reason for excluding a defendant's own admissions in future cases. As a probable consequence of *Tucker,* cases analogous to previously decided cases such as *Commonwealth v. Singleton* [62] and *Biggerstaff v. State* [63] will be decided contrarily. In *Singleton,* the police told the defendant the proper *Miranda* warnings except that he was advised that anything he said could be used "for or against" him. The entire confession was stricken as violative of *Miranda.* In *Biggerstaff,* the defendant had been given his warnings, but had been told he was entitled to a lawyer "at any time." The court held the warning to be insufficient to inform the defendant of his right to counsel during questioning. Thus, prosecutors will now cite *Tucker* for the proposition that a defendant, interrogated in violation of *Miranda,* who otherwise makes a voluntary statement, should not be accorded the benefits of the exclusionary rule to block the use of an incriminating statement in the state's case-in-chief.

The most disturbing aspect of *Tucker* is the emphasis the majority opinion and two concurring opinions place on the "pursuit of truth" goal of a trial. All three opinions mention the reliability of Henderson's testimony as the critical factor in admitting it. However, to admit Henderson's testimony on the basis of its reliability and ignore its source loses sight of the fundamentally accusatory nature of our legal system. The essential mainstay of the accusatorial system is the privilege against compulsory self-incrimination.[64] In *Tehan v. Shott* [65] the Court said that "the basic purposes that lie behind the privilege do not relate to protecting the innocent from conviction . . . " [66] and that the privilege ". . . is not an adjunct to the ascertainment of truth." [67] It exists not to protect the innocent but those who wish to rely on the presumption of innocence.[68] The privilege, then, is a ground rule in the adversary system forcing "the government in its contest with the individual to shoulder the entire load." [69] When the privilege or its exclusionary rule is invoked, police misconduct or the reliability of the information obtained is not at issue. The central focus is on the procedural fairness to that particular defendant. So, invoking the *Miranda* rule to protect a privilege which is "not an adjunct to the ascertainment of truth" obviously conflicts with the majority's "pursuit of truth." The majority resolves the conflict by discounting any subversion of the adversary system.[70] But, to allow Henderson's testimony would arguably defeat the vitality of *Miranda* and deprive the defendant of one of his defenses at trial. If the police are assured that there will be no sanction imposed upon their misconduct, they may be encouraged to disregard the *Miranda* warnings more frequently and flagrantly.

The decision in *Tucker* still leaves the criminal lawyer without a definitive ruling on the admissibility of derivative evidence obtained by police from a post-*Miranda* interrogation. By embracing a non-constitutional interpretation of *Miranda,* the Court has avoided the complex problems plaguing lower courts on this issue. The tendency in the cases has been to vote for exclusion of third party testimony when the primary illegality arose under the fourth

[61] Irvine v. California, 347 U.S. 128, 138 (1954) (Clark, J., concurring).
[62] 439 Pa. 185, 266 A.2d 753 (1970).
[63] 491 P.2d 345 (Okla. Crim. 1971).
[64] Harris v. New York, 401 U.S. 222, 231 (1971) (Brennan, J., dissenting).
[65] 382 U.S. 406 (1966) (holding that Griffin v. California, 380 U.S. 609 (1965), prohibiting prosecutors and judges from commenting negatively on the defendant's failure to testify in a state criminal trial, was only prospective).
[66] 382 U.S. at 415.
[67] *Id.* at 416.
[68] *See* Schaefer, *Police Interrogation and the Privilege Against Self-Incrimination,* 61 Nw. U.L. Rev. 506 (1966).
[69] Wigmore, *supra* note 19, at 317.
[70] 417 U.S. at 450.

amendment,[71] but to admit it otherwise.[72] Prior to *Tucker,* however, the courts were forced to rationally distinguish their holdings from the "fruit of the poisonous tree" doctrine of *Silverthorne Lumber Co., Inc. v. United States,*[73] which held that derivative evidence could not be used at all unless obtained from an independent source. Rather than require the police to show that the witness' identity or testimony in fact came from an independent source, a "personality" test was employed: a witness' testimony is not to be excluded automatically even if derived from a tainted source because, unlike physical evidence, the "attributes of will, perception, memory, and volition"[74] combine to make his expected statement unpredictable, and therefore not directly derived from the primary illegality. Although the Court in *Tucker* was certainly aware of this test,[75] it chose instead to base its holding on the independent reliability of Henderson's testimony. That may have been a prudent decision on the Court's part for the "personality" test seems unworkable.[76] Establishing or breaking a causal link between the original tainted evidence and the third party's ultimate testimony by probing the human mind for exertions of "free will" is probably too elusive a task for a court to effectively handle. Its use generally would result in confusion and frustration for both courts and police.

However, it is now likely that when the Supreme Court is unavoidably confronted with the broad "fruits" question, it will resolve the issue in favor of admission, except where the evidence was derived from an involuntary confession. In the absence of a violation of the fifth amendment, society's interest in presenting the trier of fact with all relevant and trustworthy evidence will outweigh the purposes served by excluding it. This is the thrust of Justice White's concurrence in *Tucker,* and is a balancing test which will probably be adopted in the future.[77]

In conclusion, *Michigan v. Tucker* represents a retreat from *Miranda.* Following *Harris, Tucker* has encroached upon the broad prohibitions issued in *Miranda* against the use of a defendant's inadmissible statements for any purpose. This has been accomplished by the destruction of the equation between a failure to advise the defendant of his constitutional rights prior to the interrogation and the ipso facto involuntariness of anything the defendant says during the interrogation. The

[71] Smith v. United States, 344 F.2d 545 (D.C. Cir. 1965), *after prior remand,* 355 F.2d 270 (D.C. Cir. 1964) (witnesses discovered from leads resulting from an illegal search were not permitted to testify); People v. Albea, 2 Ill. 2d 317, 118 N.E.2d 277 (1954) (exclusion of testimony of a witness discovered after police illegally entered a doctor's office); People v. Martin, 382 Ill. 192, 46 N.E.2d 997 (1942) (exclusion of a witness discovered through the unlawful seizure and examination of private papers).

[72] Smith & Bowden v. United States, 324 F.2d 879 (D.C. Cir. 1963), *cert. denied,* 377 U.S. 954 (1964) (the testimony of a witness whose identity was learned only through a confession violating the *McNabb-Mallory* rule was not excluded). *Contra,* United States v. Cassell, 452 F.2d 533 (7th Cir. 1971) (a handwriting exemplar obtained as a result of an interview conducted in violation of *Miranda* was excluded at trial). A useful distinction can be drawn between these cases and those cited in note 71 *supra*: A violation of the fourth amendment is more likely to lead to the exclusion of derivative evidence than a violation of either *Miranda* or *McNabb-Mallory.* Even before *Tucker,* there was a judicial unwillingness to recognize either of these rules as being of truly fifth amendment stature. Therefore, the protection of the "fruit of the poisonous tree" doctrine extends further where fundamental rights, such as the prohibition against unreasonable searches and seizures, are at stake.

[73] 251 U.S. 385 (1920).

[74] 324 F.2d at 881.

[75] Mr. Chief Justice Burger wrote the opinion in Smith & Bowden v. United States, 324 F.2d 879 (D.C. Cir. 1963).

[76] *See* Ruffin, *Out on a Limb of the Poisonous Tree: The Tainted Witness,* 15 U.C.L.A.L. REV. 32 (1967). Ruffin offers a good general discussion of the entire subject of "tainted witnesses."

[77] The Supreme Court in *Tucker* may be laying the foundation for a general alteration of the principles governing exclusionary rules because this logic applies equally well by analogy to search and seizure cases. It suggests a definite retreat from a liberal use of the fourth amendment exclusionary rule to a more limited one, confined to cases where the police have acted outrageously. Under such an interpretation, the exclusion of evidence in cases of technical police error, such as a defective warrant, would fail to have any deterrent effect. If the sanction is ineffective, then there is no valid purpose served in denying admission of the evidence. This reasoning, however, ignores the other rationales for the fourth amendment exclusionary rule mentioned in note 24 *supra.* There is more involved than just deterring police and giving the public reliable evidence so that truth may be attained. The balance in the criminal adversary system between fairness to the individual and fairness to the state is also at stake.

result is that a technical violation of *Miranda* is now no longer viewed as sufficient to establish an infringement of the fifth amendment because it reaches only the "prophylactic rules" and not the constitutional right itself. While *Tucker* was not concerned with the admissibility of defendant's own statements, it is a harbinger for change in that area also. Since the *Miranda* rules were held to be only prophylactic, and not of constitutional stature, the tenor of the opinion suggests that future defendants may be required to show more than a simple violation of *Miranda* to deprive the prosecutor of the use of their own incriminating statements. Regarding the issue of "fruits," the Court limited its holding to the admission of third party testimony derived from a pre-*Miranda* interrogation. In considering the conflicting policy justifications for admission and exclusion, the Court tipped the balance in favor of the "pursuit of truth" and downgraded the importance of "procedural fairness." If the Court strikes this balance more frequently in future cases, it would mark a portentous shift in the ground rules under which our criminal adversary system operates.