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THE EFFECTS OF TUCKER ON THE "FRUITS" OF ILLEGALLY OBTAINED STATEMENTS

The present majority of Supreme Court Justices rejects a broad application of the exclusionary rule for evidence obtained in violation of the constitutional safeguards laid down by the Warren Court in *Miranda v. Arizona.* Since 1971, the Court has substantially modified the once seemingly inviolable principle that "no evidence obtained as a result of interrogation can be used" against a defendant unless the interrogation is preceded by adequate warnings and a subsequent waiver of the right to silence. Illegally obtained statements which bear directly on the guilt of the defendant are now admissible at trial for impeachment purposes notwithstanding that the *Miranda* warnings were defective or that the statements were elicited after the defendant had requested an attorney. The only requirement necessary for such admissibility is that the statements be made voluntarily.

Although the Court has been careful to point out that illegally obtained statements are not admissible in the prosecution's case in chief, *Michigan v. Tucker* has done much to erode even that principle. In *Tucker,* the Court found admissible the testimony of a witness whose identity was learned solely on the basis of a statement obtained from the defendant in violation of the guidelines set forth in *Miranda.* Despite the Court's statement that it was significant that the interrogation preceded *Miranda,* and notwithstanding its reiteration of the principle that the defendant's statements would not have been admissible in the prosecution's case in chief, the relative importance of *Tucker* to post-*Miranda* fifth amendment safeguards should not be underestimated. This comment will analyze the *Tucker* opinion and suggest that the Court's unprecedented treatment of the constitutional issues surrounding the *Miranda* warnings implies that *Tucker* is a harbinger of things to come.

I. THE CASE

The facts of *Tucker* provided an ideal setting for an opinion containing much broader language than was necessary to reverse the Sixth Circuit Court of Appeals. A 43-year-old woman was found by a co-worker raped and badly beaten. The co-worker had observed a dog on the vic-

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2 Id. at 479.
3 Harris v. New York, 401 U.S. 222 (1971). Harris was not informed of his right to appointed counsel.
5 The Court in Harris v. New York, 401 U.S. 222, 224 (1971), found that statements "voluntarily" made are admissible to impeach "provided of course that the trustworthiness of the evidence satisfies legal standards." This language was repeated in Oregon v. Haas, 420 U.S. 714, 722 (1975).
7 Id. at 447.
tim’s premises and since he knew she did not own one, he became suspicious. After seeing the dog again, he informed the police who followed the animal to the defendant’s residence. The defendant was arrested and given Miranda warnings with the exception of the warning that he had a right to appointed counsel if he could not afford one. 8

The defendant declined counsel and was interrogated by the police. He stated that he had been with Robert Henderson at the time of the rape, an alibi which proved to be his undoing. 9 When questioned, Henderson told the police he had indeed seen Tucker on the night of the crime, but that Tucker had left early. He also stated that he again saw the defendant on the following day and had observed some scratches on his face. Henderson told the officers that Tucker stated that he had gotten them from “some woman lived [sic] the next block over.” 10 Henderson subsequently testified for the prosecution and Tucker was convicted. After unsuccessful appeals to the Court of Appeals 11 and the Supreme Court of Michigan, 12 he applied for a writ of habeas corpus which was granted by the district court 13 and affirmed by the Sixth Circuit Court of Ap-

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8 This is a minimum requirement as proffered by the Court in Miranda:
   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 in-
digent — the person most often subjected to interrogation — the knowledge that
he too has a right to have counsel present.
384 U.S. 436, 473 (1966). The Court in Tucker did not discuss the importance of this
warning relative to the other Miranda warnings, nor did they confront the equal pro-
tection claim that might be argued in its absence.

9 Despite the fact that defendant’s alibi directly led to an important state witness, the
Court declined to interpret this as, in effect, defendant “accusing” himself:
   [T]he respondent did not accuse himself. The evidence which the prosecu-
tion successfully sought to introduce was not a confession of guilt by respon-
dent, or indeed even an exculpatory statement by respondent, but rather the
testimony of a third person who was subjected to no custodial pressures.
417 U.S. at 449.

This analytical approach begs the question, since any statements made by the de-
fendant which were useful to the police and prosecutor in gathering evidence against
the defendant should be considered within the fifth amendment protection against self-
incrimination. The Miranda decision clearly warrants this conclusion:
   The privilege against self-incrimination protects the individual from being
compelled to incriminate himself in any manner; it does not distinguish de-
grees of incrimination. Similarly, for precisely the same reason, no distinction
may be drawn between inculpatory statements and statements alleged to be
merely “exculpatory.” If a statement made were in fact truly exculpatory it
would, of course, never be used by the prosecution. In fact, statements merely
intended to be exculpatory by the defendant are often used to impeach his
testimony at trial . . . . In Escobedo itself, the defendant fully intended his ac-
cusation of another as the slayer to be exculpatory as to himself.

The issue of the admissibility of a defendant’s “exculpatory” statements con-
cededly was not before the Court. But the majority finding that the nature of
Tucker’s “alibi” was not at issue, since it was not used against him, was an
unjustified avoidance of the issue of exclusion of evidence derived from what
was clearly an “exculpatory” statement in the Miranda sense.

10 417 U.S. at 437.
The Supreme Court, in a stunning departure from both the standards set forth in *Miranda* and the rationale of *Wong Sun v. United States*, reversed.

To facilitate its analysis, the Court found it necessary to divide the question of the admissibility of Henderson’s testimony into two main issues: First, whether the police conduct actually violated the defendant’s fifth amendment privilege against self-incrimination, or whether it “violated only the prophylactic rules developed [by the Court] to protect that right”; and second, whether the testimony must be excluded in light of the violation involved.

The majority seemingly had little difficulty placing the *Miranda* warnings outside the scope of constitutional protections afforded by the fifth amendment. They reasoned that since *Miranda* was the first case to assert that the fifth amendment protection against self-incrimination required warnings in a police interrogation setting, the historical origins of the privilege must be considered to determine exactly what the fifth amendment commands.

Prior to *Miranda*, the test for admissibility of confessions obtained from a defendant during police interrogation centered on the “voluntariness” of the statements, based on the theory that an unreasonable or unfair interrogation procedure violated the due process clause of the fourteenth amendment. It was not until *Miranda* that the fifth amendment

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16 417 U.S. at 439.
17 The Court preceded its discussion of the fifth amendment as applied to the police interrogation setting with this kafkaesque observation:

> The importance of a right does not, by itself, determine its scope, and therefore we must continue to hark back to the historical origins of the privilege, particularly the evils at which it was to strike.

417 U.S. at 439-40.
18 The test for admissibility of confessions remained static from the earliest cases until the decision in *Miranda* and had been variously phrased by the Court: “In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any kind.” Wilson v. United States, 162 U.S. 613, 623 (1896), and repeated in Bram v. United States, 168 U.S. 532, 548 (1897), and Haynes v. Washington, 373 U.S. 503, 513 (1963). “[T]he question in each case is whether the defendant’s will was overborne at the time he confessed.” Lynumn v. Illinois, 372 U.S. 528, 534 (1963).

The factors considered in the determination of voluntariness, however, expanded with the Court’s recognition that police tactics of interrogation were becoming far more subtle than the beating of the defendant in Brown v. Mississippi, 297 U.S. 278 (1936). This perception culminated in the *Miranda* assertion that the “inherent coercion” of police interrogation cannot be overcome without adequate warnings. For a view of the numerous factors important to the issue of voluntariness see *Haynes v. Washington*, supra (defendant held incommunicado for sixteen hours and told he could not call his wife until he confessed); Payne v. Arkansas, 356 U.S. 560 (1958) (defendant, a dull nineteen-year-old with a fifth grade education); Leyra v. Denno, 347 U.S. 556 (1954) (tired defendant complained of sinus headache and police brought in a psychiatrist who elicited statements which were recorded and then introduced at trial); Haley v. Ohio, 332 U.S. 596 (1946) (fifteen-year-old found incapable of making voluntary statement without advice). See also Rogers v. Richmond, 365 U.S. 534 (1961); Fikes v. Alabama, 352 U.S. 191 (1957); Gallegos v. Nebraska, 342 U.S. 55 (1951); White v. Texas, 310 U.S. 530 (1940); Chambers v. Florida, 308 U.S. 227 (1940).
right against compulsory self-incrimination was made applicable to the area of police interrogation. In *Tucker*, the majority found that the *Miranda* decision itself recognized that the "procedural safeguards" prescribed therein were never intended to be considered rights protected by the fifth amendment. Therefore, they reasoned, the failure to give full *Miranda* warnings was not a per se violation of the defendant's constitutional rights, and as a consequence, any application of the exclusionary rule must be viewed in light of this "lesser" infringement upon the rights of the accused.

The separation of the *Miranda* warnings from the protections guaranteed under the fifth amendment also precluded the application of *Wong Sun* to the "fruits" of illegally obtained statements. Since *Wong Sun* involved an actual infringement of the defendant's constitutionally protected rights, the Court found that case not to be controlling because *Tucker* had already been determined to involve merely a departure from the "prophylactic" rules of *Miranda* rather than a per se violation of the defendant's constitutional privilege against self-incrimination. Consequently, the issue of exclusion of evidence derived from statements obtained in the absence of full *Miranda* warnings was to be examined "as a question of principle."

The Court set the stage for its inquiry into the purposes for the exclusionary rule with an interesting insight into the philosophical underpinnings of the *Tucker* rationale:

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of

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19 417 U.S. at 444, quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966), which denied that the Constitution required "any particular solution for the inherent compulsions of the interrogation process." Therefore, the *Tucker* Court maintained that no single element of the warnings, or for that matter, the warnings as a unit, is constitutionally mandated.

20 In *Wong Sun*, federal agents broke into the home of Toy and arrested him. Toy informed them that Yee had been selling drugs and the agents went to Yee's home. Yee turned over some heroin to them, stating that he had gotten it from Toy and Wong Sun, who was also arrested. Several days later, after being warned of his rights to silence and to an attorney, Wong Sun confessed to selling narcotics.

The Court first found the entry on to the premises and the subsequent arrest of Toy to be unlawful and that his statements were inadmissible as "fruits" of the unlawful acts. The Court further ruled the heroin seized at Yee's residence inadmissible; we need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

371 U.S. 471, 487, 488 (1963), quoting J. Maguire, Evidence of Guilt 221 (1959). The confession of Wong Sun, however, was found admissible since the Court felt that the connection between the arrest and the statement had "become so attenuated as to dissipate the taint." *Id.* at 491, quoting Nardone v. United States, 308 U.S. 338, 341 (1939).

21 417 U.S. at 446.
human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.22

The Court then found three general purposes underlying the exclusionary rule in the fifth amendment context: first, deterrence of unlawful police conduct; second, protection of the courts from the introduction of untrustworthy evidence; and third, the requirement that the government must "shoulder the entire load" of producing evidence in a criminal prosecution.23

Citing fourth amendment cases for the proposition that the exclusionary rule is designed to "deter future unlawful police conduct"24 and is "calculated to prevent not to repair,"25 the Court found it convenient to attach this policy argument to the fifth amendment and found this element lacking in Tucker since it viewed deterrence as applicable only when the police have acted willfully, or at least negligently, thereby depriving the defendant of his rights. Here, the Court found the police had acted in good faith since they had asked the defendant if he wanted an attorney and he had declined. Thus, they in no way violated the principles of Escobedo v. Illinois,26 which was the controlling case at the time.

The Court easily dispensed with the considerations of trustworthiness and the requirement that the government produce evidence against the defendant without any assistance from him. It found the latter proposition subject to well recognized exceptions in the areas of search and seizure,27 and grand jury,28 in addition to voluntary statements accompanied by full Miranda warnings. Moreover, the majority questioned the independent validity of this argument as a justification for the exclusion of evidence. The problem of untrustworthy evidence was likewise not applicable since Tucker was not coerced, in the pre-Miranda sense, into making a statement and the testimony at issue was in fact that of a third party not subject to custodial pressures.

Finally, in weighing the interests of society in the effective prosecution of criminals and the need for admission of all relevant and trustworthy evidence versus the protection of the constitutional rights of the

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22 Id.
23 Id. at 446-49.
25 Id., quoting United States v. Elkins, 364 U.S. 206, 217 (1960). Little credence can be given to this statement. The fourth amendment exclusionary rule finds its vitality in the need to both prevent future unlawful government conduct and to repair past infringements on the constitutional rights of citizens.
26 378 U.S. 478 (1964). Escobedo stands for the proposition that an accused must be allowed to consult with counsel when he so requests.
27 The Court cited Schmerber v. California, 384 U.S. 757 (1966), which denied defendant's claim that the blood test to which he was forced to submit violated his fifth amendment right against self-incrimination.
28 See United States v. Dionisio, 410 U.S. 1 (1973), which held that a voice exemplar compelled by the grand jury did not violate the fourth amendment since inter alia one does not have a "reasonable expectation of privacy" vis-à-vis one's own voice.
accused, the Court found that to exclude Henderson's testimony merely because the police did not fully comply with the procedures prescribed in *Miranda* would unjustifiably upset the "balance" of interests.

II. Miranda as Prophylaxis: The Extent of Exclusion

The circular analysis used by the Court to justify placing the *Miranda* warnings outside the scope of constitutionally protected rights might be phrased in this manner: In order to find that *Miranda*-type warnings are rights incorporated into the fifth amendment, one must find such rights alluded to in the cases pre-dating that decision; finding no mention of warnings in the area of police interrogation, incorporation of the *Miranda* protections is impossible. Although the Court's interpretation of the pre-*Miranda* cases is quite accurate, it does not gainsay the necessity for the approach utilized by the Court in *Miranda*. Indeed the metaphysical exercise of separating the warnings from the fifth amendment directly contradicts that rationale in at least three ways. First, a primary contribution of the Court in *Miranda* was the recognition that police interrogation of any kind is "inherently coercive," a factor that cannot be overcome in the absence of warnings and an intelligent waiver. Thus, the voluntariness test was abandoned in *Miranda* and replaced with a "comprehensive and less subjective protection than the doctrine of previous cases." Second, the incorporation of *Miranda*-type warnings into the fifth amendment was essential to the holding in that case, as was pointed out by Justice Douglas in his dissent in *Tucker*. Third, the *Miranda* Court, while unwilling to set rigid guidelines vis-à-vis the warning procedure, clearly held that the "suggested" warnings were minimum standards which must be adhered to in the absence of an equivalent.

The minimum standards set by the Warren Court in *Miranda* are un-

29 The recognition of this fact appears throughout the *Miranda* opinion:
In these cases, we might not find the defendant's statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest . . . To be sure, the records do not evince overt physical coercion or patented psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly a product of free choice.

384 U.S. 436, 457 (1966). The conclusion compelled by this premise is obvious:
We have concluded that without proper safeguards the process of in-custody interrogation . . . contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.

Id. at 467 (emphasis added).


31 The Court is not free to prescribe preferred modes of interrogation absent a constitutional basis. We held the "requirement of warnings and waiver of rights [to be] fundamental with respect to the Fifth Amendment privilege," [384 U.S.] at 476, and without so holding we would have been powerless to reverse *Miranda*'s conviction.

Id. at 462-63 (first brackets in original).

32 *Miranda* v. Arizona, 384 U.S. 436, 467 (1966). This language directly follows the misleading quote used by Justice Rehnquist in *Tucker*. See note 19, supra.
equivocal and not susceptible to the cavalier treatment accorded them in the Tucker opinion unless one is willing to summarily preclude the application of Miranda to the fruits of illegally obtained statements — something the court did not ostensibly do.

The disingenuous removal of the Miranda warnings from the purview of rights protected by the fifth amendment was used by the Court not only to minimize the overall gravity of a violation of these constitutional safeguards, but also to permit it to avoid any application of the "fruit of the poisonous tree" doctrine as delineated in Wong Sun. A careful analysis of this doctrine would have provided substantial arguments favorable to the conclusion that the testimony of Henderson was properly admitted; the Court, however, apparently wished to pursue a pioneering course unfettered by any of the language or reasoning of the "fruits of the poisonous tree" cases.33

Although a number of cases directly treat the issue of admissibility of evidence derived from illegally obtained statements, the closely analogous case of Smith and Bowden v. United States,34 decided shortly after Wong Sun, provides an appropriate centerpiece for this discussion since the majority opinion of the District of Columbia Court of Appeals

33 In addition to Wong Sun, several interpretations of the "fruits" doctrine have arisen and are worthy of mention. One group of cases requires the prosecution to show that the government had an "independent source" for the evidence sought to be suppressed. See, e.g., Nardone v. United States, 308 U.S. 338 (1939); Silverthorne v. United States, 251 U.S. 385 (1920); United States v. Barrow, 363 F.2d 62 (3d Cir. 1966), cert. denied, 385 U.S. 1001 (1967); Bynum v. United States, 274 F.2d 767 (D.C. Cir. 1960), cert. denied, 379 U.S. 908 (1964) (one of the few "easy" applications of this rule, since F.B.I. files provided a substitute on retrial for defendant's illegally obtained fingerprints); Commonwealth v. Nicholls, 207 Pa. Super. 410, 217 A.2d 768 (1966). The independent source test was also the basis of a dissent by Justice Powell, joined by the Chief Justice and Justices Blackmun and Rehnquist in United States v. Giordano, 416 U.S. 505 (1974), a wiretapping case.

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was authored by none other than present Chief Justice Warren Burger. While the court in that case affirmed the suppression of defendant's statements on the ground that they were illegally obtained,\textsuperscript{35} it considered the suppression of the testimony of an accomplice whose identity was learned during the course of the interrogation to be quite another matter. The court held that eyewitness testimony should generally not be suppressed merely because of the circumstances through which the existence and identity of the witness were brought to the attention of the police. It found a distinction between physical evidence when an object is obtained as a result of an inadmissible confession, and testimonial evidence when a witness is discovered through information obtained during the course of an unlawful interrogation, since the mere disclosure of the name of a witness by itself has no evidentiary value. Whereas an inanimate object speaks for itself, the testimony of a witness involves the element of free will which is normally sufficient to "purge the taint" of the initial illegality.\textsuperscript{36} Substantial emphasis was placed on the fact that the witness was at first reluctant to testify. In the court's estimation, the subsequent change of mind sufficiently "attenuated" the initial illegality of the police conduct,\textsuperscript{37} thus making the testimony admissible.

The factors considered by the court in \textit{Smith and Bowden}, if applied to the facts in \textit{Tucker}, would arguably support the admissibility of Henderson's testimony. He was contacted initially to confirm Tucker's alibi; he was not involved in the criminal act and hence might have come forward on his own, since, unlike the witnesses in \textit{Smith and Bowden}, he was not under the sort of pressure that would necessarily ac-

\textsuperscript{35} Defendants had been interrogated for several days before being brought before a magistrate, a violation of rule 5(a) of the Federal Rules of Criminal Procedure, which requires that an arrestee be brought before a magistrate without unnecessary delay. The McNabb-Mallory rule requires that a confession so obtained must be suppressed. \textit{See}, Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).

\textsuperscript{36} \textit{Smith and Bowden} v. United States, 324 F.2d 879, 881-82 (D.C. Cir. 1963).

\textsuperscript{37} The court further stated that to distinguish testimonial "fruits" from physical evidence was not precluded by the holding in \textit{Wong Sun} since that case involved the introduction of a prior utterance and not the future testimony of an eyewitness. \textit{Id.} at 882 n.3.

The subsequent opinion of \textit{Smith and Anderson} v. United States listed several factors to be considered in such a situation: that mere knowledge of the witness' identity might not guarantee testimony favorable to the prosecution; the witness might have eventually gone to the police anyway; and whether the witness' testimony had remained unchanged from the start. 344 F.2d 545, 547 (D.C. Cir. 1965), \textit{citing} McLindon v. United States, 329 F.2d 238, 241 n.2 (D.C. Cir. 1964).

Although the court found admissible the testimony of the two witnesses in this particular case, their holding was based on the same rationale — "the purging of the primary taint." The witnesses in \textit{Smith and Anderson} did not initially resist giving evidence nor did they fear prosecution. The court found that the record did not indicate that any of those involved "acted in such a significant manner as to break the chain from the illegal source to the testimony introduced. The road from the [illegal source] to the testimony may be long, but it is straight." 344 F.2d at 547, \textit{quoting in part} United States v. Tane, 329 F.2d 848, 853 (2d Cir. 1964). \textit{See also} Brown v. United States, 375 F.2d 310 (D.C. Cir. 1966), \textit{cert. denied}, 388 U.S. 915 (1967); Payne v. United States, 294 F.2d 723 (D.C. Cir.), \textit{cert. denied}, 368 U.S. 883 (1961).
company complicity in the crime. Yet any mention of this case is conspicuously absent.

Although the wisdom of the holdings in these cases is undoubtedly subject to attack — especially for their misplaced emphasis on the "attenuation" evidenced by the conduct and position of the witness, rather than on an assessment of whether there was a direct, unattenuated causal connection between the illegal act and the identification and subsequent testimony of that witness\(^\text{38}\) — that is not the point. Whether one accepts or rejects the analyses of these cases, they demonstrate that the lower courts have invariably considered the application of Wong Sun fundamental to an analysis of the issues presented in the "tainted witness"\(^\text{39}\) situation as did the Michigan Court of Appeals\(^\text{40}\) and the United States district court\(^\text{41}\) in their Tucker opinions. Ironically, even the Supreme Court of Arizona relied on Smith and Bowden to affirm the conviction in the retrial of Ernest Miranda.\(^\text{42}\)

To concede that there is no controlling precedent with respect to a particular issue before the Court does not imply that the case presents a situation never before confronted in the history of American jurisprudence. By surgically removing the Miranda warnings from the penumbra of constitutionally protected rights, the Court has also succeeded in erasing the heretofore broad application of Wong Sun in but one sentence.

### III. OF GOOD FAITH, DETERRENCE AND TRUSTWORTHINESS

It cannot be asserted that the police acted in bad faith in the Tucker case,\(^\text{43}\) nor can it be denied that the deterrent function is an important consideration when justifying the exclusionary rules in both the fourth and fifth amendment contexts. The Court, however, refused to recognize that the exclusionary rule has been applied to all unlawful police conduct, whether it be done in good faith ignorance of the law as it existed

\(^\text{38}\) For a criticism of the analysis of the opinions in Smith and Bowden and Smith and Anderson see Ruffin, Out on a Limb of the Poisonous Tree: The Tainted Witness, 15 U.C.L.A.L. Rev. 32 (1967); Note, Fruit of the Poisonous Tree — A Plea for Relevant Criteria, 115 U. Pa. L. Rev. 1136 (1967).


\(^\text{43}\) The assertion of good faith on the part of the police finds support in the record of this case. The interrogation took place prior to Miranda, a fact which the Court termed significant, and did not parallel the situation in Escobedo v. Illinois, 378 U.S. 478 (1964), where the officers had refused to allow defendant to confer with his attorney. Tucker, the record noted, stated that he did not want an attorney, although it is unclear in the absence of the warning with respect to appointed counsel whether Tucker's statement meant that he waived his right to court appointed counsel or that he simply did not want an attorney because he could not afford one.
at the time of the act or as subsequently modified. The exclusionary rule is not grounded upon the desire to punish malicious police conduct. Rather, it is primarily intended to preserve the integrity of criminal proceedings by precluding the introduction of illegally obtained evidence, regardless of the intent of the procurer.\(^\text{45}\)

The majority in *Tucker* refused to attach any independent significance to the principle that the integrity of our judicial system ipso facto requires exclusion of all illegally obtained evidence. Instead, they considered this principle to be merely an “assimilation” of the other rationales discussed in the opinion. Although the exclusionary rule has been subject to criticism because it has heretofore been applied indiscriminately to suppress evidence regardless of whether the police acted in good faith,\(^\text{46}\) such criticism is ill-founded since it is difficult indeed to prove bad faith in a particular case. Thus, the Court in *Tucker* appears to have worked important changes in the law without adequate consideration of the ramifications attendant these alterations.

The deterrent value of excluding illegally obtained evidence becomes even less significant when the case involves the issue of the “fruits” of illegality. Once the primary illegality has been established, the sole issue should be whether the evidence subsequently obtained is so closely connected with the illegal act that it must be considered part and parcel of the evidence that has already been found subject to suppression. If good faith on the part of the police officers will permit the admission of evidence obtained solely as a result of illegal conduct, why not admit the evidence initially obtained in violation of the law. Any distinction is extremely artificial since the admission of the former is often more detrimental to the defendant than the latter as was evidenced by *Tucker*, where the testimony of Henderson was considerably more damaging than anything Tucker said to the police.\(^\text{47}\)

Moreover, some commentators have also distinguished the importance of the deterrent function in the fifth amendment context in light of the fundamental difference between the fourth and fifth amendment exclusions.

\(^{44}\) The police knew as little about *Miranda* warnings when they questioned Ernest Miranda as did the officers who questioned Thomas Tucker. Yet this did not prevent the Warren Court from reversing Miranda’s conviction on the basis of impermissible interrogation procedures.


\(^{46}\) See Chief Justice Burger’s dissenting opinion in the fourth amendment case, *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), in which he criticized the indiscriminate suppression of illegally obtained evidence in the absence of bad faith on the part of the police:

> Inadvertent errors of judgment that do not work any grave injustice will inevitably occur under the pressure of police work. These honest mistakes have been treated in the same way as deliberate and flagrant . . . violations . . .

*Id.* at 418.

\(^{47}\) The Court feebly argued in mitigation that the “damaging” statements themselves were not used against Tucker:

> Here respondent’s own statement, which might have helped the prosecution show respondent’s guilty conscience at trial, had already been excised from the prosecution’s case . . . .
The fourth amendment exclusionary rule is a court-created means of discouraging violations of the prohibition against "unreasonable searches and seizures," whereas the fifth amendment has a self-contained exclusionary rule, making it less susceptible to exception absent a sound constitutional basis. The deterrent rationale is itself a court-created justification for the exclusionary rule of the fourth amendment; the fifth amendment rule needs no such justification; to compare the two in the same manner as did the Tucker Court is highly inaccurate.

Nevertheless, it seems irrelevant whether the deterrent rationale or a stronger fifth amendment argument is applied since the Miranda-type confrontation is "tailor-made for a sequential 'try it legally — if you fail try it illegally' approach," making the deterrent function of the exclusionary rule all the more necessary. In the typical search situation, the police must at the outset make an unalterable decision whether to conduct a search under questionable circumstances, a decision which will forever determine the admissibility of the seized evidence and often the "fruits" of that intrusion. On the other hand, in the typical interrogation setting, the police can give the warnings in full or in part.

49 Id. at 1214-15.
50 See Harrison v. United States, 392 U.S. 219 (1968), in which defendant took the stand in his first trial after three confessions were admitted into evidence. After his conviction was reversed on appeal, upon a finding that the confessions were illegally obtained, the prosecution on retrial offered into evidence damaging statements made by defendant at the first trial. Harrison was again convicted, but the Supreme Court reversed finding the former testimony inadmissible as "fruits" of the illegally obtained confession since it was precipitated by the need to rebut the inadmissible confessions. The Court specifically stated, however, that this decision was confined to the issue of the use of defendant's own prior statements and no analysis of the "fruit of the poisonous tree" doctrine was undertaken. Id. at 223 n.9.

A comment on Justice White's dissent in Harrison, however, criticized his reliance on the issue of deterrence in the determination of admissibility:

Therefore, Mr. Justice White seems mistaken in requiring a showing that the exclusion of Harrison's testimony will deter the police from obtaining future confessions in impermissible circumstances. The crucial issue in the fifth amendment context of Harrison is, rather, whether there exists a chain of coercion running from the original compelled admissions to subsequent testimony by the defendant such that the admission of this testimony would violate the defendant's right against coerced self-incrimination.


51 Although the opinions of the commentators are certainly not unanimous on this point, the deterrent value of excluding evidence obtained as a result of illegal interrogation should not be minimized:

[I]t is clear that if the police were permitted to utilize illegally obtained confessions for links and leads rather than being required to gather evidence independently, then the Miranda warnings would be of no value in protecting the privilege against self-incrimination. The requirement of a warning would be meaningless, for the police would be permitted to accomplish indirectly what they could not accomplish directly, and there would exist no incentive to warn.

Pitler, supra note 33, at 620.

For a commentary questioning the wisdom of extending the exclusionary rule this far for violation of "merely" the Miranda procedures, see H. FRIENDLY, BENCHMARKS 279 (1967).
and if the defendant requests counsel or is unwilling to talk, the officers might choose to continue the questioning in the hope of obtaining leads to witnesses, as in Tucker, or of eliciting statements which might later be useful should the defendant take the stand at trial, as was the case in Harris v. New York. While Tucker seemingly does not sanction such continued questioning, the tests of “good faith” and “deterrent value” are flexible enough to allow it because their application depends almost exclusively upon a judge’s pre-conceived, highly subjective notions of police motivations.

An additional factor which militates against placing decisive emphasis on the deterrent value of excluding derivative evidence may be found in the Miranda decision itself. Implicit in the warnings requirement is the necessity that the defendant know his rights. The fact that the police officer acted in good faith in no way aids an accused in ascertaining those rights and hence should not be controlling. Yet the Court completely ignored this factor in Tucker. In fact, Justice Rehnquist’s opinion even refused to affirmatively accept the deterrent value in excluding Tucker’s own statements to the police, blithely noting that:

[W]hatever deterrent effect on future police conduct the exclusion of those statements may have had, we do not believe it would be significantly augmented by excluding the testimony of the witness Henderson as well.

The overstated significance attached by the Court to the trustworthiness issue is misplaced in its analysis of the exclusionary rules, especially in the context of the admissibility of Henderson’s testimony. When the admission of physical evidence is at issue, there is no problem of trustworthiness; in the coerced statement situation, the viability of this consid-

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54 But see Michigan v. Mosley, 96 S. Ct. 321 (1975), quoting Miranda v. Arizona, 384 U.S. 436, 474, 479 (1966). Defendant was given full Miranda warnings and he exercised his right to silence. Several hours later another police officer, after again giving full warnings, attempted to question defendant regarding an “unrelated” matter. The Court upheld the admission of statements made during the second interrogation finding that Miranda did not create a per se rule with regard to resumption of questioning after a defendant had indicated a desire to remain silent. Rather, the test for admissibility is whether defendant’s right to cut off questioning had been “scrupulously honored.” The Court found that this right was honored since the police did not refuse to discontinue the initial interrogation nor did they make repeated efforts to “wear down his resistance and make him change his mind.” Id. at 327.
55 The Court analysis in Miranda is at least two-dimensional. First, warnings are necessary to combat the inherently coercive atmosphere of custodial interrogation. Second, since knowledge of one’s fifth amendment rights is essential for an intelligent and voluntary waiver, the warnings provide objective criteria for determining whether or not a proper waiver has been obtained. The Court noted that

[assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact.
384 U.S. at 468-69.
56 417 U.S. at 448. For an insight as to how at least one member of the Court views the deterrent effect of the exclusionary rules in general see Burger, Who Will Watch the Watchman?, 14 AM. U.L. REV. 1 (1966).
eration was dismissed even before *Miranda* was decided.\(^{57}\) In *Tucker*, the Court ignored this fact and then seemingly equated trustworthiness with voluntariness. After repeating that Tucker’s statements had already been found “voluntary” and therefore trustworthy, the Court noted that Henderson’s testimony was even more credible since he was not subjected to any custodial pressure. Thus, initially the Court wrongly applied the trustworthiness rationale to Tucker’s own statements and then, carrying an already tainted argument to its absurd extreme, applied the same rationale to the testimony of a witness whose trustworthiness and voluntariness were never in dispute.

The ease with which the Court dispensed with the issues presented in *Tucker* is epitomized by their final justification for the result. In a textbook example of the misapplication of a misleading statement, the Court quoted *Harris*:

> [S]ome comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court’s holding and cannot be regarded as controlling. *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution’s case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.\(^{58}\)

Notwithstanding the statement’s erroneous suggestion that *Miranda* is subject to several possible interpretations on this issue, which it is not,\(^{59}\) the statement itself supports only the proposition that *Miranda* does not command that evidence excluded in the prosecution’s case in chief be excluded for all purposes.\(^{60}\) In *Tucker*, the evidence “derived” from the

\(^{57}\) See Rogers v. Richmond, 365 U.S. 534 (1961). Although this case was decided on due process grounds, Justice Frankfurter’s opinion made it clear that trustworthiness is irrelevant to a determination of voluntariness.

To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees.

*Id.* at 541.


\(^{59}\) Dershowitz and Ely, supra note 48, at 1209.

\(^{60}\) This critical point was noted by the district court in *Tucker v. Johnson*:

> Thus, whatever threads have been made on the collateral uses of *Miranda*, it
defendant’s statement was used in the prosecution’s case in chief. To analogize these quite dissimilar situations simply by saying that they “believe that this reasoning is equally applicable here”61 hardly substitutes for telling us why it is applicable.62

IV. A RETURN TO VOLUNTARINESS?

Ironically, the Burger Court has created its own exclusionary rule for the “fruits” of statements obtained with less than full Miranda warnings, if the premise that Miranda itself did not decide that issue is accepted. In “balancing” the interests of society in the effective prosecution of criminals and the need for admission of all relevant and trustworthy evidence versus the protection of constitutional rights, the former will no doubt prevail since the Court maintains that the Miranda warnings are not constitutionally mandated and are therefore not inviolable. Unfortunately, the product of this analysis is a rule which will never warrant exclusion solely on the basis of defective warnings. In the face of defective warnings, if the facts of a particular case exhibit lack of

is nevertheless clear from Harris that what the prosecution does on its case in chief will still be carefully scrutinized.


61 417 U.S. at 452.

62 The cursory treatment of the subtle issues presented in Tucker is unfortunately not the first time the Court has disposed of grave questions of fifth amendment violations with less than sound analysis. In Harris v. New York, 401 U.S. 222 (1971), the Court relied on Walder v. United States, 347 U.S. 62 (1954), in holding that illegally obtained statements of the defendant may be used to impeach his testimony, while completely ignoring what should have been the controlling case, Agnello v. United States, 269 U.S. 20 (1925). The differences between the situation in Walder and that in Harris were crucial. First, Walder was a fourth amendment case allowing impeachment of defendant’s testimony by use of physical evidence secured illegally, whereas in Harris the illegally elicited statements of the defendant presented a significant problem of trustworthiness. Second, and more importantly, Walder’s testimony was impeached on a collateral matter. He stated at trial that he had never seen heroin before and the prosecutor confronted him with the fact that officers had illegally seized some heroin in his possession several years before. In Harris, the impeachment evidence went directly to the guilt of the defendant since it related to certain “exculpatory” statements made by Harris at the time of his arrest for the particular crime at issue. How did Chief Justice Burger resolve the critical distinctions? “We are not persuaded that there is a difference in principle that warrants a result different from that reached by the court in Walder.” 401 U.S. at 225.

Moreover, in Tucker, the contrived and easily refuted “issues” of trustworthiness and of the government’s burden to discover evidence without compelling the assistance of the defendant, closely parallel the superficiality of a large part of the Court’s “analysis” in Harris. First, the majority opined that Harris’ right to testify in his own defense did not imply a right to commit perjury. Therefore, prior inconsistent statements must be admissible to preclude that possibility. Not only is this a statement that no one would dispute, but more importantly it unjustifiably presumes that defendant’s out of court, illegally obtained statements to the police are true and that his trial testimony is likely to be perjurious. A second justification offered by the Court in Harris for admission on cross examination of illegally obtained statements is that the statements would be admissible if they had been made to a third person. This fatuous argument is so obviously irrelevant that it merits no further comment.

The misplaced emphasis on irrelevant issues both in Tucker and in Harris does not lend itself to sound judicial resolution of any important constitutional question and more importantly makes the Court’s sincerity subject to grave doubt. See Dershowitz
good faith by the police, the statements obtained will more likely than not be “coerced” in the pre-Miranda sense, hence the evidence derived therefrom will be excluded. On the other hand, if good faith is shown, the rule as formulated by the Court will allow the statement to be construed as voluntary and the evidence derived therefrom to be admitted. Thus, the Court has succeeded in formulating an exclusionary rule which completely vitiates the Miranda rationale.

The remaining question that must be asked is whether the Tucker opinion may be interpreted as the first step in the Court’s plan to reinstitute the “totality of the circumstances — voluntariness” test as the criterion for admissibility of a defendant’s own statements. True, in Tucker, the Court emphasized the requirement that “statements taken in violation of the Miranda principles must not be used to prove the prosecution’s case at trial”, yet the criteria considered by the majority in their determination of the admissibility of derivative evidence, coupled with the strained argument utilized to separate the warnings from the Constitution, indicate that Tucker is at least intended to give notice of a relaxation of the heretofore strict Miranda mandate. Whereas Harris v. New York and Oregon v. Haas did much to undermine Miranda as applied in the cross-examination context, neither case presented an overview of the Court’s philosophy toward the fifth amendment exclusionary rule as did Tucker. In view of these cases, the possibility of a return to the pre-Miranda test should not be discounted. At the very least, Tucker presents the probability that a number of lower courts will “misinterpret” the opinion as permitting the application of the voluntariness test to the admissibility of a defendant’s own statements.

The Court gave no guidance with regard to the practical application of the “good faith” test. See text accompanying notes 44-46 supra.

See text accompanying notes 18-20 supra.


It appears that the majority considered Tucker applicable to the admissibility of a defendant’s own statements. This is the only plausible explanation for the Court’s remand of Pennsylvania v. Romberger, 417 U.S. 964 (1974), remanding 454 Pa. 279, 312 A.2d 353 (1973). In Romberger, the Supreme Court of Pennsylvania had reversed appellant’s conviction on the ground that statements made by the defendant to the police should not have been admitted because they were not preceded by the Miranda warnings. Although the interrogation took place before Miranda, the trial commenced subsequent to that decision and the Court correctly held that Johnson v. New Jersey, 384 U.S. 719 (1966) required exclusion of those statements (Johnson gives retroactive effect to the Miranda decision in just such a situation). The Court nonetheless vacated judgment and remanded the case for consideration in light of Tucker with no mention of Johnson. The Court has sub silentio overruled the Johnson decision and with it any retroactive effect of Miranda that may have survived Tucker. See also State v. Statewright, 300 So. 2d 674 (Fla. 1974), an interesting case which interpreted Tucker as giving retroactive application to violations of constitutional rights only, thus finding Miranda inapplicable in the same situation as Johnson and Romberger.

This has already occurred in several cases decided since Tucker. In United States v. Crocker, 510 F.2d 1129 (10th Cir. 1975), the court of appeals found that the F.B.I. had fully complied with the Miranda requirements. Defendant’s additional contention that the district court had erroneously applied the “totality of the circumstances” test of 18 U.S.C. § 3501 (1970) was also rejected. This statute was a congressional attempt to
V. Conclusion

No one would assert that the often unprecedented opinions of the Warren Era are worthy of unquestioned obedience. The mores and philosophy of the society in which we live sometimes seem to change with the seasons, and the Burger Court opinions are as much a reflection of that rapid change as were its predecessors’ frequent breaks with the “past.” Unquestionably, the Burger Court decisions with respect to fifth amendment rights have molded radical changes in a law which many had grown to accept as sacrosanct. But the demise of the Warren perspective toward the safeguards afforded by the fifth amendment should not be the primary focus of its elegy. What should be lamented is the Court’s seeming reluctance to replace the old rules with something more than glib truisms and vague generalities which present no lucid guidance either to law enforcement officials or to the courts which must now attempt to apply them to the specifics of a criminal prosecution.

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reverse Miranda and reinstitute the voluntariness test, providing specific factors to be considered in the determination — the presence of Miranda warnings included. 18 U.S.C. § 3501(b). The statute specifically provides, however, that “[t]he presence or absence of any . . . factors . . . need not be conclusive on the issue of voluntariness . . . .” Id.

The court, noting that the Supreme Court in Tucker found it significant that defendant’s own statements were not introduced at trial, nevertheless misconstrued the application of the “fruits” doctrine in that decision:

[T]he Court recognized that Henderson’s trial testimony had a devastating effect inasmuch as it completely contradicted Tucker’s alibi defense, i.e., that at the time of the rape he was away from the scene in the company of Henderson, and further implicated Tucker by reason of remarks allegedly made to Henderson by Tucker directly related to the crime. We observe that if each of the Miranda warnings are constitutionally mandated under any and all circumstances, certainly the Court would have been hard pressed in permitting the admission of Henderson’s testimony under the “fruit of the poisonous tree” doctrine.

510 F.2d at 1138.

Several other lower courts have utilized the Tucker tests of good faith and voluntariness to support the introduction of defendant’s own statements taken without full compliance with Miranda. In Cranford v. Rodriguez, 512 F.2d 860 (10th Cir. 1975), the court found a good faith effort on the part of the police to comply with Miranda although they had failed to inform the defendant that counsel would be provided if requested. In this case, counsel was not immediately available and the court noted that this fact does not compel the police to cease all questioning.

Although neither of these cases rely exclusively on Tucker to support the admissibility of these statements, they are indicative that lower courts are finding the broad generalities of Tucker highly useful to justify admissibility in extremely sensitive situations. Thus, the Court has indirectly encouraged the rebirth of the vague language and analysis of the voluntariness test, seasoned to taste with Miranda and “good faith.” See also Tilson v. Rose, 392 F. Supp. 809 (E.D. Tenn. 1974); State v. Hudson, 325 A.2d 56 (Me. 1974). For a discussion of section 3501 see Gandara, Admissibility of Confessions in Federal Prosecutions: Implementation of Section 3501 By Law Enforcement Officials and the Courts, 63 Geo. L.J. 305, 306-07 (1974).