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On the 'Fruits' of Miranda Violations, Coerced Confessions, and Compelled Testimony

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RESPONSE

ON THE "FRUITS" OF MIRANDA VIOLATIONS, COERCED CONFESSIONS, AND COMPELLED TESTIMONY

Yale Kamisar*

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* Clarence Darrow Distinguished University Professor of Law, University of Michigan. A.B. 1950, New York University; LL.B. 1954, Columbia; LL.D. 1978, John Jay College of Criminal Justice, CUNY; LL.D. 1979, University of Puget Sound. — Ed. I am indebted to University of Michigan law students Jim Greiner, for his research assistance, and Marc Spindelman, for his helpful comments. I found two articles especially useful in furnishing "leads": Robert M. Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Cal. L. Rev. 579 (1968) and David A. Wollin, Policing the Police: Should Miranda Violations Bear Fruit?, 53 Ohio Sr. L.J. 805 (1992).
Professor Akhil Reed Amar and Ms. Renée B. Lettow have written a lively, provocative article that will keep many of us who teach constitutional-criminal procedure busy for years to come.1 They present a reconception of the “first principles” of the Fifth Amendment, and they suggest a dramatic reconstruction of criminal procedure. As a part of that reconstruction, they propose, inter alia, that at a pretrial hearing presided over by a judicial officer, the government should be empowered to compel a suspect, under penalty of contempt, to provide links in the chain of evidence needed to convict him.2

Under the Amar-Lettow proposal, a suspect brought to this pretrial hearing would only receive “testimonial immunity,” that is, protection against use of the specific testimony compelled from him. He would not, however, be provided any protection against derivative use — the use of his compelled testimony to search out other sources of information that might furnish the means of convicting him, such as the whereabouts of damaging physical evidence or the names and addresses of potential witnesses for the prosecution.

More than a hundred years ago, in Counselman v. Hitchcock,3 the Court struck down a federal immunity statute because, as Justice Frankfurter later explained, the immunity grant “merely forbade the use of the testimony given and failed to protect a witness from future prosecution based on knowledge and sources of information obtained from the compelled testimony.”4 If the Amar-Lettow view prevails, however, a witness in Counselman’s plight

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2. See id. at 858-59, 898-901, 908-09, 926-27.
3. 142 U.S. 547 (1892). The case is discussed at considerable length infra in text accompanying notes 237-63.
4. Ullmann v. United States, 350 U.S. 422, 437 (1956). Although the Counselman opinion went on to say that an immunity grant is valid only when it affords “absolute immunity against future prosecution for the offence to which the question relates,” 142 U.S. at 586, what may fairly be called the case’s intermediate holding — what a later Court called its “conceptual basis,” see Kastigar v. United States, 406 U.S. 441, 453 (1972) — was that the Fifth Amendment protects against the derivative use, as well as the use, of compelled utterances. See infra text accompanying notes 251-61.
would be held in contempt for refusing to reveal leads to extrinsic evidence that could be used to convict him.

A quarter-century ago, in *Kastigar v. United States*, the Court told us that protection against the use and derivative use of compelled testimony was coextensive with the scope of the privilege against compulsory self-incrimination. But Amar and Lettow tell us that "use and derivative use immunity" is excessive; protection against the use of the witness's own words is all that the Fifth Amendment requires.

Although Amar and Lettow's conception of the Fifth Amendment is noteworthy, a judicially supervised interrogation proceeding is "an idea which has been part of the body of legal literature for a long time."6 As I have discussed elsewhere,7 my former colleague, Paul Kauper, appears to have been the first commentator to discuss at any substantial length the need for, the desirability of, and the legal and practical problems raised by such a procedure. Writing more than thirty years later — and nearly thirty years before Amar and Lettow — Judges Walter Schaefer and Henry Friendly, two of the most eminent critics of the Warren Court's most controversial confession cases, *Escobedo v. Illinois*8 and * Miranda v. Arizona*,9 in effect returned to and built upon the 1932 Kauper proposal.10

What I have called the "Kauper-Schaefer-Friendly plan" differs in one important respect, however, from the Amar-Lettow proposal. Under the former proposal, the judicial officer could not hold a suspect who refused to respond to questioning in contempt: "[t]he only sanction" for a suspect's silence was "to permit the trier of the fact to consider that silence for whatever value it has in determining

5. 406 U.S. 441 (1972). The case is discussed at considerable length infra in text accompanying notes 268-79.
10. See SCHAEFER, supra note 6, at 76-81; Henry J. Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. CIN. L. REV. 671, 713 & n.180 (1968) ("endorsing" Justice Schaefer's proposal and noting "a rather similar proposal" by Professor Kauper); see also Kamisar, supra note 7, at 93-94.
guilt or innocence." Moreover, in order to permit comment at trial upon a suspect's silence during the judicially supervised interrogation, both Schaefer and Friendly assumed the need for, and proposed, a constitutional amendment.2

Although their proposal is not linked to a ban against the use of confessions obtained in the stationhouse, Amar and Lettow do say, in an apparent effort to sweeten their proposal, that with the advent of the judicially supervised interrogation procedure they favor, "courts might well choose" to establish "a prophylactic rule that no police-station confession by a defendant is ever allowed in, unless volunteered by a suspect in the presence of an on-duty defense lawyer or ombudsman in the police station."3 The courts might choose to create the prophylactic rule Amar and Lettow suggest, but they also might choose not to create such a rule.

Although I think it quite unlikely that an absolute prohibition against all police station confessions would ever go into effect, let us suppose that somehow it did. What then? "[T]his strict regime," Amar and Lettow assure us, "would create powerful incentives to conduct interrogation before magistrates rather than in police stations."4

I think not — at least not if Amar and Lettow's way of thinking about the Fifth Amendment were adopted. Amar and Lettow can't have it both ways. If, as they maintain, "[o]nly the defendant's compelled testimony should be protected by the [Fifth] Amendment"5 — a view upon which their proposal depends — then only the coerced or otherwise improperly obtained stationhouse confes-

11. Schaefer, supra note 6, at 80-81 (emphasis added); see also Kauper, supra note 7, at 1239, 1252, 1255.


13. Amar & Lettow, supra note 1, at 908-09. As for statements obtained by the police "before stationhouse custody commences — at the scene of the crime, on the street corner, in the squad car, and elsewhere," all that Amar and Lettow have to say is that "nice problems will arise." Id. at 909. They will indeed. As Judge Friendly noted, "A declaration that the privilege does not apply to questioning before arrival at the station obviously would not do; the route from the place of apprehension would too often rival that supposedly taken by the driver with a gullible foreigner in his cab." Friendly, supra note 10, at 715. But Friendly was uncertain about how to deal with "the intermediate area of post-arrest, pre-station house interrogation." Id. at 716.


15. Id. at 919.
sions or incriminating statements, not their "fruits," would be protected by the Fifth Amendment.\textsuperscript{16}

But how can we expect to discourage the police from proceeding in an irregular manner in the stationhouse when they know that any evidence their improper questioning brings to light will be admissible? Unless the courts bar the use of the often-valuable evidence derived from an inadmissible confession, as well as the confession itself, there will remain a strong incentive to resort to forbidden interrogation methods.\textsuperscript{17}

Implementing the Amar-Lettow judicially supervised interrogation plan would be no small undertaking. As Judge Friendly said of a similar proposal, “the system would be fully effective only if an adequate supply of magistrates and defenders was provided on a 24-hours-a-day, 7-days-a-week basis.”\textsuperscript{18}

I assume that the Amar-Lettow proposal, if implemented, would take the form of a statute. I assume, further, that at some point the Court would have to pass on the constitutionality of such a statute. If the mood of the country were such that the Amar-Lettow proposal were to be enacted into law, and if the attitude of the Court were such that it would uphold the statute, I very much doubt that the Supreme Court or any state court would choose to mitigate the impact of the statute by excluding all stationhouse confessions or incriminating statements, even those said to be volunteered in the absence of an on-duty defense lawyer.

Not even the otherwise-bold Miranda Court was bold enough to require law enforcement officers, whenever feasible, to make audio

\begin{itemize}
\item \textsuperscript{16} Judge Schaefer, on the other hand, would exclude the fruits of improperly obtained statements. After setting forth his proposal for judicially supervised interrogation, he adds: “An additional safeguard is desirable . . . which places upon the prosecution the burden of establishing that the evidence which it offers is not the product of any statement of the accused procured by improper means.” Schaefer, supra note 6, at 81 (emphasis added).

At this point, Judge Schaefer cites to a footnote in Murphy v. Waterfront Commission, 378 U.S. 52 (1964). This footnote informs us that in order to assure that the government does not make use of compelled testimony or its fruits, once a defendant demonstrates that he has testified under an immunity grant, the authorities “have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.” 378 U.S. at 79 n.18 (emphasis added).

\item \textsuperscript{17} Amar and Lettow do not question the “well-founded belief that . . . where the police use forbidden means to obtain confessions, they do so more for the purpose of discovering clues than for the purpose of manufacturing admissible evidence.” Model Code of Evidence Rule 505 cmt. c (1942), discussed in Austin W. Scott, Jr., Federal Control over Use of Coerced Confessions in State Criminal Cases — Some Unsettled Problems, 29 Ind. L.J. 151, 157 & n.32 (1954). For more recent observations to the same effect, see the quotations infra in text accompanying note 328 and infra in note 329. Indeed, Amar and Lettow acknowledge that “physical leads are often more important to law enforcement than getting statements for use in court.” Amar & Lettow, supra note 1, at 922 n.286 (footnote omitted).

\item \textsuperscript{18} Friendly, supra note 10, at 714-15.
\end{itemize}
or video recordings of how the now-familiar warnings are delivered, how the suspect responds, or how the questioning proceeds.¹⁹ No doubt the Warren Court was aware that such a requirement would have added fuel to the criticism that it was overstepping its institutional authority — that it was "legislating."

But what Amar and Lettow suggest might happen — a judicially imposed ban against the use of all confessions obtained in the police station, even those the police claim were "spontaneous" or "volunteered," even those the police tape-recorded — would constitute a more naked exercise of judicial control over police practices than the restrictions the Miranda Court declined to impose on the police for institutional reasons. Even a Justice who favored such a sweeping prohibition as a matter of policy would likely balk at imposing it as a matter of constitutional law.

If the political-legal climate were such that the Amar-Lettow proposal for a judicially supervised interrogation procedure — enforced by the contempt power — were enacted into law and found constitutional, legislatures and courts would most probably favor an alternative, back-up scheme suggested by Amar and Lettow, one the authors consider "compatible" with their general approach:

>[E]ach suspect in custody could be told that he must be brought before a magistrate and a lawyer within a short time (say, five hours) and that he has an absolute right to remain silent until then; but he should also understand that if he stands mute until then, a later jury can be told of his pre-magistrate, pre-lawyer silence, and might view more skeptically any story he later tries to offer at trial.²⁰

This does not look like "an absolute right to remain silent" to me. (Evidently some absolute rights are more absolute than others.) If I understand this proposal correctly, a suspect would be told he has an absolute right to remain silent, but also that if he exercises this right and his case goes to trial, his silence can be used against him. Can a police officer be trusted to explain to a suspect how he can have a right to remain silent and still have his silence used against him? And even if a police officer does his very best to explain this, can the average suspect be expected to understand it?²¹

¹⁹. Many commentators — and I am one of them — consider this a serious weakness in Miranda. See Yale Kamisar, Wayne R. LaFave & Jerold H. Israel, Modern Criminal Procedure 541-42 (8th ed. 1994) (discussing this issue and citing authorities).

²⁰. Amar & Lettow, supra note 1, at 909 (emphasis added).

²¹. The available empirical data indicate that a large number of police officers do not give the silence or counsel warnings at all, and many who do give them fail to do so in a meaningful way. Moreover, it appears that a significant percentage of suspects either misunderstand the existing warnings or fail to appreciate their significance. See Lawrence S.
When we put these two pieces of their proposal together, Amar and Lettow's conception of criminal procedure looks like this: (i) police tell the suspect, before they bring him to a magistrate, that if he does not speak to them, his silence may be used against him if his case goes to trial; and (ii) the suspect is told, when he gets to the magistrate, that if he does not provide answers, even though these answers may lead the police to extrinsic evidence that can be used to convict him, he will be held in contempt. That's quite a package — if you happen to be a police officer or a prosecutor.

I doubt that the practical problems involved in implementing their proposal would matter much to Amar and Lettow. Their article focuses less on the remaking of criminal procedure and more on the reconception of constitutional law. But even if their specific proposals are not implemented, the Amar-Lettow view of the narrow scope of the protection provided by the Fifth Amendment would still have far-reaching consequences for criminal procedure. It would enable the government to hold a witness in contempt for refusing to reveal leads that could, in turn, uncover evidence that could be used later to convict him. It would enable the police to make use of the often-valuable fruits of a coerced confession even though they extracted the confession for the very purpose of discovering the existence and location of damaging physical evidence. In short, the Amar-Lettow view would profoundly change the way in which the government can exert its power against criminal suspects.

As the basis for giving the government this enhanced power and as the foundation for their specific proposal for the judicially supervised compulsion of statements that would reveal sources of information that could later be used to convict a defendant, Amar and Lettow maintain that "a person's (perhaps unreliable) compelled pretrial statements can never be introduced against him in a criminal case but that reliable fruits of such statements virtually always

Leiken, Police Interrogation in Colorado: The Implementation of Miranda, 47 DENV. L.J. 1, 15-16, 33 (1970); Richard J. Medalie et al., Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda, 66 Mich. L. Rev. 1347, 1375 (1968); Project, Interrogations in New Haven: The Impact of Miranda, 76 Yale L.J. 1519, 1550-52, 1571-72, 1613-15 (1967). Against this background, how can anyone suggest that we make the Miranda warnings more complicated, yet continue to rely on the uncorroborated oral testimony of the police?

Actually, the Amar-Lettow proposal would lead not only to a revised Miranda warning but to a much shortened one. The suspect would not be told of his right to counsel — either his own or one provided by the government — before or during any questioning because he would not have such a right at the "pre-magistrate, pre-lawyer" stage. But he would be told that "he must be brought before a magistrate and a lawyer within a short time (say, five hours)." Amar & Lettow, supra note 1, at 909 (emphasis added).
In this essay, I shall examine and respond to this argument, paying special attention to Amar and Lettow’s claim that current doctrines or trends support their contention.

I. RELIABILITY AS A “FIRST PRINCIPLE”

At the center of Amar and Lettow’s argument is the idea that the privilege against self-incrimination is concerned with reliability. In arguing for the admissibility of “the physical fruits” of coerced confessions because they are “quite reliable and often highly probative,” Amar and Lettow observe:

[C]ourts and commentators have stressed that coerced statements are unreliable, and that the privilege therefore serves the goal of reliability. This is indeed a worthy goal, and courts have increasingly emphasized it over the past three decades. But if this is the touchstone, again the scope of immunity today is too broad.

I think it far more accurate to say that in recent decades courts and commentators have downplayed the unreliability of a coerced or “involuntary” confession as the reason for excluding it. I be-

22. Amar & Lettow, supra note 1, at 858; see also id. at 919 (“Schmerber was right to emphasize the distinction between testimony and physical evidence, but later decisions have failed to follow its logic to the end. Only the defendant’s compelled testimony should be protected by the [Fifth] Amendment.”). In Schmerber v. California, 384 U.S. 757 (1966), the Court upheld the taking of a blood sample of an injured person by a physician, at police direction, over the person’s objection. The case is discussed at considerable length infra in text accompanying notes 112-37.

23. Amar & Lettow, supra note 1, at 895.

24. Id. (footnote omitted).

25. Some twenty-eight pages after making the statement quoted above, Amar and Lettow tell us that Judge Friendly “noted that the main motivation behind extending the privilege [against self-incrimination] to informal proceedings must have been “the truly dreadful risk of the false confession.”” Id. at 923 (emphasis added). What Judge Friendly actually said was that “a prime motive for extending the privilege to out-of-court proceedings must have been the Court’s belief that the traditional due process approach did not sufficiently protect against the truly dreadful risk of the false confession.” HENRY J. FRIENDLY, A Postscript on Miranda, in BENCHMARKS 266, 281-82 (1967) (emphasis added). At this point, Judge Friendly specifically refers to n. 24 of the Miranda opinion, where Chief Justice Warren notes that then-current police interrogation practices — which the Court found to be at odds with the privilege against self-incrimination — “may even give rise to a false confession.” 384 U.S. at 455 n.24 (emphasis added). N. 24 then discusses People v. Whitmore, 257 N.Y.S.2d 787 (Sup. Ct. 1965), revd., 278 N.Y.S.2d 706 (App. Div. 1967), cert. denied, 405 U.S. 956 (1972), a New York case where a person of limited intelligence confessed to various crimes that he did not commit.

As Professor Schulhofer has pointed out, “the core of Miranda” is that informal pressure to speak can constitute compelled confession within the meaning of the privilege and that this element of informal compulsion is present in any custodial police interrogation. See Stephen J. Schulhofer, Reconsidering Miranda, 54 U. CHI. L. REV. 435, 436 (1987). The Miranda Court relegates to a footnote the point that this informal compulsion may also — “may even,” to use the Court’s words — produce a false confession. With all respect, I think Judge Friendly is making a mountain out of a footnote.

It may be true that the then-recent Whitmore case, which was a dreadful episode, gave the Court another reason or an extra incentive to extend the privilege to out-of-court proceed-
lieve that the various judicial opinions, books, and articles I shall quote from in the next few pages establish inescapably that this is so. Consequently, the "first principles" that courts have defined for the Fifth Amendment are quite different from the ones Amar and Lettow assert.

A. The Reasons for Excluding Coerced Confessions

To be sure, the "voluntariness" test started out as a rule protecting against the danger of untrustworthy confessions. It is also true that for a long time thereafter the rule that a confession was admissible so long as it was "voluntary" was more or less an alternative statement of the rule that a confession was admissible so long as it was free of influence that made it unreliable or "probably untrue."

During the period roughly extending to the 1950s, physical evidence uncovered as a result of an involuntary confession was, unsurprisingly, admissible — because the derivative evidence, unlike the confession, was reliable. Indeed, "it was generally held that if

26. See generally CHARLES T. McCORMICK, EVIDENCE 226 (1st ed. 1954); 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 822 (3d ed. 1940).


Amar and Lettow note that some thirty-five years ago I stated that when a coerced confession leads to the uncovering of physical evidence, the lower courts usually admit such evidence. See Amar & Lettow, supra note 1, at 917 n.265. I did say that. See Yale Kamisar, Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts, 43 Minn. L. Rev. 1083, 1115 n.109 (1959). But Amar and Lettow do not point out that I was criticizing the rule — that I was arguing that a rule admitting the fruits of a coerced confession could not be reconciled with the new rationale for excluding coerced confessions. See id. at 1115. As I wrote in the same footnote referred to by Amar and Lettow:

[If] one of the purposes of the confession doctrine is to protect individuals from "coercive" practices, regardless of the truth or falsity of the particular confession obtained as a result, then "not only would confessions resulting from such practices be excluded, but any evidence gained as a "fruit" of the confession [would be denied admission]. . . . Otherwise police and prosecuting authorities will be not inhibited from carrying on "coercive" practices."
the extrinsic evidence corroborated the confession . . . even the confession could be admitted.”

This practice may jolt modern students of criminal procedure. But the courts that followed it had a certain logic on their side. Amar and Lettow ask why we should exclude the physical fruits of a coerced confession when these fruits are quite reliable. But if, as they assert, reliability is the touchstone, why exclude the coerced confession itself when corroborating evidence produced by the confession dispels any doubts about the truth of what the defendant had confessed?

Untrustworthiness is no longer the sole, or even the principal, reason for excluding coerced or involuntary confessions. In the three decades between the time the Supreme Court decided its first Fourteenth Amendment due process coerced confession case, Brown v. Mississippi,29 and the time it handed down Miranda v. Arizona,30 the Court continued to talk of “voluntary” and “involuntary” confessions — but the meaning of these elusive terms changed quite significantly.31

As Roger Traynor, then Chief Justice of the California Supreme Court, asserted, “[e]ven the earliest [Fourteenth Amendment involuntary confession] cases adumbrate an enlarged test of due process transcending the simple one of untrustworthiness.”32 By the 1950s it had become fairly clear that the Court was applying two constitutional standards for the admissibility of confessions. Some commentators described these standards as “a privilege against evidence illegally obtained” and “an overlapping rule of incompetency.”33 Others referred to them as “a large element of official

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28. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 150.4 cmt. at 410 (Am. Law Inst., Proposed Official Draft 1975) (footnote omitted); JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT: RESTRICTIONS UPON ITS DISCOVERY OR COMPULSORY DISCLOSURE 126-27 & n.19 (1959) (noting that some state courts admit the entire confession or at least those parts specifically corroborated when the confession receives “circumstantial verification,” but questioning whether this rule could be squared with the rationale of recent Supreme Court cases); see also supra note 27 (citing authorities).

discipline” and a concern over “credibility risks.” Still others identified a “police methods” test and a “trustworthiness” test.

As the voluntariness test continued to evolve in the middle part of the twentieth century, the results reached by the Court seemed to reflect less a concern with the reliability of a particular confession than disapproval of police interrogation tactics considered offensive or subject to serious abuse. On the eve of *Miranda*, as Illinois Supreme Court Justice Walter Schaefer noted at the time, the concern about unreliability “still exert[ed] some influence in coerced confession cases . . . but it ha[d] ceased to be the dominant consideration.”

The most emphatic articulation of the view that untrustworthiness was no longer the principal reason for excluding a coerced or involuntary confession may be found in *Rogers v. Richmond*. In that case the defendant had confessed to a murder only after the police had threatened to bring his ailing wife to the stationhouse for questioning. The state trial judge took the position that a police stratagem “‘which has no tendency to produce a confession except one in accordance with the truth does not render the confession inadmissible,’ ” and the defendant’s confession was admitted.

In the course of overturning the conviction, the Supreme Court emphasized that “a legal standard which took into account the circumstances of [a confession’s] probable truth or falsity” did not satisfy the Due Process Clause. The Court held that the admissibility of a confession should be determined by focusing on whether the police interrogation methods were such “as to overbear petitioner’s will to resist and bring about confessions not freely self-determined — a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth.”

34. *Maguire*, supra note 28, at 127; see also id. at 109.


37. *Schaefer*, supra note 6, at 10 (based on a lecture delivered before *Miranda*). “Indeed,” added Justice Schaefer, “the Supreme Court has sometimes insisted upon the exclusion of confessions whose reliability was not at all in doubt.” *Id.* at 10-11.


39. 365 U.S. at 542.

40. 365 U.S. at 543-44.
Writing for a 7-2 majority, in one of the last of his many opinions on the subject, Justice Frankfurter observed more generally:

Our decisions under [the Fourteenth] Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary . . . cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system . . . . [I]n 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.41

I share the view that Justice Frankfurter's opinion in Rogers "sound[ed] the death knell of the rule of 'trustworthiness.' "42 I agree, too, that Rogers "made certain what had been strongly intimated in several earlier cases . . . namely, that the due process exclusionary rule for confessions (in much the same way as the Fourth Amendment exclusionary rule for physical evidence) is also intended to deter improper police conduct."43

If courts permitted the use of physical evidence discovered by means of an involuntary confession as a corollary (I almost said "fruit") of the once-dominant view that involuntary confessions are excluded because of their presumed untrustworthiness — not because of any wrong done to the defendant or any lawlessness on the part of the police — it is hard to see how or why the rule permitting the use of such evidence should survive the repudiation of the trustworthiness rationale for excluding confessions. As the commentary to the American Law Institute's Model Code of Pre-Arraignment Procedure observed twenty years ago:

In recent years . . . the Supreme Court has made it clear that coerced confessions must be excluded not only because of their unreliability,

41. 365 U.S. at 540-41. For other emphatic statements of the police-methods rationale for excluding involuntary or coerced confessions, see Jackson v. Denno, 378 U.S. 368, 376-77, 385-86 (1964), and Lego v. Twomey, 404 U.S. 477, 485 (1972).


but also because the methods used to obtain such confessions are intolerable and involve compulsion prohibited by the Constitution. . . . In view of this expanded basis for excluding confessions, the justification for the automatic admission of all "fruits" becomes greatly attenuated. If the use of an illegally obtained confession constitutes compelled self-incrimination, so may the use of evidence derived from the confession. And, if the purpose of the exclusionary rule is to deter unacceptable police behavior, then the exclusion of fruits may also be necessary to achieve this deterrence. There would seem to be no rational basis for distinguishing between products of an illegal search as opposed to products of an illegally obtained statement in terms of applicability of the fruits doctrine.\textsuperscript{44}

Justice Frankfurter "often adjured us to attend well to the question: 'On the question you ask depends the answer you get.'" \textsuperscript{45} When Amar and Lettow assume that reliability is the touchstone for the admissibility of confessions and ask, "Why exclude the physical fruits of confessions, when these are quite reliable . . . ?" \textsuperscript{46} they get the answer they want — but only because they ask the wrong question. And they ask the wrong question because they start from the wrong premise.

What are the right questions? I submit they are questions such as these: If we prohibit the use of coerced confessions in large measure because the police who obtain such confessions "have engaged in forbidden conduct of a most serious kind and will not be permitted to keep the advantage of it," \textsuperscript{47} why should the government be allowed to keep the advantage of the often valuable physical evidence derived from such confessions? If condemnation and deterrence of offensive police interrogation methods constitute a principal reason for barring the resulting confessions — the so-called police methods test for excluding confessions — is disapproval or discouragement of objectionable police methods likely to be taken seriously by law enforcement officials or the public if physical evidence derived indirectly from such methods is used to convict a defendant?

\textsuperscript{44} Model Code of Pre-Arraignment Procedure § 150.4, cmt. at 410-11 (Am. Law Inst., Proposed Official Draft 1975).

\textsuperscript{45} Henry J. Friendly, Mr. Justice Frankfurter, in Benchmarks, supra note 25, at 318-19 (footnote omitted).

\textsuperscript{46} Amar & Lettow, supra note 1, at 895.

\textsuperscript{47} Paulsen, supra note 35, at 428. Professor Paulsen was among the first commentators to call attention to the emerging police methods rationale for the admissibility of confessions. See also Francis A. Allen, The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties, 45 Ill. L. Rev. 1, 26-29 (1950); Bernard D. Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U. Chi. L. Rev. 317, 343, 348 (1954).
Justice Frankfurter, the leading proponent of the police methods test for admitting confessions—a48 an approach that gained ascen-
dancy at least thirty-five years ago49—once remarked, "To remove
the inducement to resort to [interrogation methods that violate
'fundamental notions of fairness and justice'] this Court has repe-
etly denied use of the fruits of [such] illicit methods."50 Justice
Frankfurter was speaking of the "first generation" fruits of illicit
police interrogation methods (the coerced confessions themselves),
not the "second generation" fruits (the evidence derived from such
confessions).51 But why shouldn't the police methods rationale ap-
play to second generation fruits as well? Assuming that the secon-
dary fruits of intolerable police interrogation methods would not
have been discovered in any other way, why shouldn't they be
barred along with the primary fruits, or the confessions themselves?

As Amar and Lettow note, the admissibility of physical evi-
dence derived from a coerced confession is an issue that, surpris-
ingly, the Court has never explicitly addressed.52 But a year after
Rogers was handed down, the Supreme Court of California did ad-

48. See the quotations from Justice Frankfurter's opinions infra in note 54 and accompa-
nying text and infra in text accompanying note 104.
49. See supra text accompanying notes 37-44.
51. For use of this terminology, see Pitler, supra note *. Professors LaFave and Israel
explain:
  In the simplest of exclusionary rule cases, the challenged evidence is quite clearly “di-
rect” or “primary” in its relationship to the prior arrest, search, interrogation, [or] lineup
... Not infrequently, however, challenged evidence is “secondary” or “derivative” in
character. This occurs when, for example, a confession is obtained after an illegal arrest
[or] physical evidence is located after an illegally obtained confession ... In these
situations, it is necessary to determine whether the derivative evidence is “tainted” by
the prior constitutional or other violation.
1 LaFAVE & ISRAEL, supra note 43, § 9.3(a), at 734.
52. Amar and Lettow observe that there seems to be “no U.S. Supreme Court case ...
that actually excludes physical fruits of a coerced confession.” Amar & Lettow, supra note 1,
at 917 n.265. I agree. But Amar and Lettow might have added that there does not appear to
be any Supreme Court case actually admitting the physical fruits of a coerced confession
either.

Interestingly, in Kastigar v. United States, 406 U.S. 441 (1972), which upheld use and
derivative use immunity, as opposed to transactional immunity, the Court assumed that the
fruits of a coerced confession had to be excluded along with the confession itself. Indeed, in
upholding use and derivative use immunity, the Court drew an analogy to coerced confes-
sions. See infra text accompanying note 284. Eight years earlier, concurring in Murphy v.
Waterfront Commission, 378 U.S. 52 (1964), Justice White, joined by Justice Stewart, had
assumed the same thing. See 378 U.S. at 92 (White, J., concurring); see also infra text accom-
ppanying notes 170-72.

For a discussion of possible reasons why the Court never specifically addressed the ques-
tion whether the fruits of a coerced confession are admissible, see infra text accompanying
notes 289-304. It should be noted that the Court did apply the poisonous tree doctrine to
confessions inadmissible on grounds other than coercion. See infra text accompanying notes
318-50.
dress it — and concluded that "the reason for the common law rule permitting the introduction of real evidence discovered by means of an involuntary confession . . . must now be deemed constitutionally indefensible."53 The court explained:

It appears to us . . . that if it offends "the community's sense of fair play and decency" to convict a defendant by evidence extorted from him in the form of an involuntary confession, that sense of fair play and decency is no less offended when a defendant is convicted by real evidence which the police have discovered essentially by virtue of having extorted such a confession. If the one amounts to a denial of a fair trial and due process of law, so must the other. If the one is the inadmissible product of "police procedure which violates the basic notions of our accusatorial mode of prosecuting crime," so must the other be. It does not appear that we can draw a constitutionally valid distinction between the two.54

Amar and Lettow might retort that whatever the Supreme Court had to say about the "due process"—"totality of circumstances"—"voluntariness" test in the 1950s and early 1960s no longer matters because in the 1964 case of Malloy v. Hogan,55 performing "what might have seemed to some a shotgun wedding of the privilege [against self-incrimination] to the confessions rule,"56 the Court informed us that "wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by [the self-incrimination] portion of the Fifth Amendment."57

But if the privilege against self-incrimination, rather than general due process, controls the admissibility of the physical fruits of a coerced confession, this should provide no comfort to Amar and Lettow. Ever since the 100-year-old Counselman case was decided,

54. 369 P.2d at 727 (citation omitted). The first inner quote comes from Justice Frankfurter's opinion for the Court in Rochin v. California, 342 U.S. 165, 173 (1952), which is discussed at considerable length infra in text accompanying notes 84-89, 104. According to the Rochin Court, "Use of involuntary verbal confessions . . . is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency." 342 U.S at 173.
55. 378 U.S. at 55.
57. 378 U.S. at 7 (quoting Bram v. United States, 168 U.S. 532, 542 (1897)).
the Court has viewed the privilege against self-incrimination as prohibiting indirect or derivative use, as well as direct use, of compelled utterances.\textsuperscript{58} Thus, whether one views (i) a ban on the derivative use of coerced confessions as a corollary of the police methods rationale for excluding confessions; or (ii) the “fruit of the poisonous tree” doctrine as applying to violations of the Fifth Amendment as well as the Fourth; or (iii) the Fifth Amendment exclusionary rule as containing its own “built-in” poisonous tree doctrine — a plausible way, I think, of reading \textit{Counselman} and its progeny\textsuperscript{59} — the result is the same. The physical fruits of a coerced confession are, or should be, excluded.

General due process may still govern the admissibility of physical evidence derived from coerced confessions. As the Court pointed out two decades after \textit{Malloy} and \textit{Miranda}: “even after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogations and is binding on the States, the Court has continued to measure confessions against the requirements of due process.”\textsuperscript{60} In measuring confessions against the requirement of due process, moreover, the post-\textit{Miranda} Court has left little doubt that the primary consideration is not the reliability of the challenged confession but the legality and acceptability of the police interrogation methods that elicited it. The Burger and Rehnquist Courts may not have given the defense-minded a great deal to cheer about, but they have reaffirmed and reinvigorated the police methods rationale for excluding coerced or “involuntary” confessions.

\textit{Miller v. Fenton}\textsuperscript{61} rejected the argument that a state court determination of a confession’s voluntariness is a factual issue within the meaning of the rule providing that state courts’ findings of facts shall be presumed to be correct in federal habeas corpus proceedings. Whether the challenged confession was obtained “in \textit{a manner} that comports with due process,”\textsuperscript{62} is, rather, “a legal question requiring independent federal determination.”\textsuperscript{63} Justice O’Connor, who wrote the opinion of the Court, looked back on various cases

\begin{footnotes}
\footnote{58. See infra text accompanying notes 237-61.}
\footnote{59. See infra text accompanying notes 275-79.}
\footnote{60. Miller v. Fenton, 474 U.S. 104, 110 (1985) (citations omitted); see also Colorado v. Connelly, 479 U.S. 157, 163 (1986) ("The Court has retained this due process focus, even after holding, in \textit{Malloy v. Hogan}, that the Fifth Amendment privilege against compulsory self-incrimination applies to the States." (citation omitted)).}
\footnote{61. 474 U.S. 104 (1985).}
\footnote{62. 474 U.S. at 110 (emphasis added).}
\footnote{63. 474 U.S. at 110.}
\end{footnotes}
that had banned the use of coerced confessions and described them as holding that “certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment.”

Michigan v. Tucker dismayed supporters of Miranda because the Court sharply distinguished between the “procedural rules” or “prophylactic standards” laid down in Miranda and “genuine” or “actual” infringements of the Fifth Amendment — thus “clearly sever[ing Miranda] from the privilege against compelled self-incrimination.” But when then Justice Rehnquist, the author of the Tucker opinion, looked back at the pre-Miranda voluntariness doctrine and explained why coerced or involuntary confessions were excluded from evidence, he employed what I think it fair to call police methods rationale terminology:

64. 474 U.S. at 109 (emphasis added). Immediately after quoting Rogers v. Richmond with approval, Justice O'Connor added: “[A]ccordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment’s guarantee of fundamental fairness.” 474 U.S. at 110 (emphasis added).


66. See 417 U.S. at 440-46. Tucker upheld the admissibility of the testimony of a witness whose identity had been revealed by a statement obtained from the defendant in violation of Miranda. In rejecting the contention that the poisonous tree doctrine should bar the testimony because the police never would have learned of the witness’s existence but for their unlawful questioning, Justice Rehnquist implied that the doctrine applies only to constitutional violations: “[T]he police conduct at issue here did not abridge [the defendant’s] constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards laid down by this Court in Miranda to safeguard that privilege.” 417 U.S. at 445-46.

I share Professor (now Provost) Stone’s conclusion that the view that a violation of the Self-Incrimination Clause occurs only if a confession is “involuntary” under pre-Miranda standards “is an outright rejection of the core premises of Miranda” and “is flatly inconsistent with the Court’s declaration in Miranda that ‘[t]he requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege.’” Geoffrey R. Stone, The Miranda Doctrine in the Burger Court, 1977 Sup. Cr. Rev. 99, 118-19 (quoting Miranda v. Arizona, 384 U.S. 436, 476 (1966)). For additional criticism of Tucker, see Yale Kamisar, The “Police Practice” Phases of the Criminal Process and the Three Phases of the Burger Court, 106 U. CHI. L. REV. 143, 151-53 (Herman Schwartz ed., 1987); Larry J. Ritchie, Compulsion that Violates the Fifth Amendment: The Burger Court’s Definition, 61 MINN. L. REV. 383, 416-18 (1977); David Sonenshein, Miranda and the Burger Court: Trends and Counter trends, 13 LOY. U. CHI. L.J. 405, 423-429 (1982).

Although Justice Rehnquist’s opinion for the Court in Tucker has been strongly criticized, it is fairly clear that a majority of the present Court subscribes to Tucker’s way of thinking about Miranda. In both her concurring opinion in New York v. Quarles, 467 U.S. 649 (1984) and her majority opinion in Oregon v. Elstad, 470 U.S. 298 (1985), Justice O’Connor relied heavily on the distinction the Tucker Court drew between violations of Miranda’s prophylactic rules and actual infringements of the Fifth Amendment. See infra text accompanying notes 180-83, 187-89, 201.

67. Stone, supra note 66, at 123.
In state cases the Court applied the Due Process Clause of the Fourteenth Amendment, examining the circumstances of interrogation to determine whether the processes were so unfair or unreasonable as to render a subsequent confession involuntary. Where the state's actions offended the standards of fundamental fairness under the Due Process Clause, the State was then deprived of the right to use the resulting confessions in court.68

More recently, in Colorado v. Connelly,69 a case upholding the admissibility of a confession made by a suspect who was obeying the "voice of God," Chief Justice Rehnquist, again speaking for the Court, underscored the absence of police wrongdoing and dismissed the possibility that the respondent's confession might be "quite unreliable": "[T]he cases considered by this Court over the 50 years since Brown v. Mississippi have focused upon the crucial element of police overreaching."70

The Chief Justice added:

[S]uppressing respondent's statements would serve absolutely no purpose in enforcing constitutional guarantees. The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution. . . . A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum and not by the Due Process Clause of the Fourteenth Amendment. "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true of false."71

Although the Connelly Court's view of the due process voluntariness test strengthens my argument, I must say I believe the Court overstated the police methods rationale in that case. I share the view that "a total deconstitutionalization of traditionally important reliability issues is unjustified."72 Nevertheless, the Connelly case is striking evidence of the subordinate role reliability has come to have in the due process confession cases.

Amar and Lettow's argument for admitting the physical fruits of coerced confessions makes sense if, as they assert, the reliability or

68. 417 U.S. at 441 (emphasis added) (citations omitted).
70. 479 U.S. at 163.
71. 479 U.S. at 166-67 (quoting Lisenba v. California, 314 U.S. 219, 236 (1941)) (citation omitted).
unreliability of a confession is the touchstone for its admissibility. But how can they make that claim in light of the strong language to the contrary in the much-quoted Rogers case — a case they never mention? Amar and Lettow assert further that in recent decades the courts have "increasingly emphasized" the "reliability" rationale for the admissibility of confessions. How they can make that claim in the face of Connelly — another case they never mention — also escapes me.

At first glance, the Amar-Lettow approach to coerced confessions looks like a reasonable compromise: keep out the confession itself, but let in the valuable evidence the confession turns up. However, once we understand that the dominant consideration in coerced confession cases is not the exclusion of unreliable evidence but disapproval and discouragement of the unacceptable police methods that produced it, the Amar-Lettow "compromise" makes little sense.

According to Professors Dershowitz and Ely, "there is no reason to expect an exclusionary rule to deter deliberate violations unless it has eliminated all significant incentives toward that conduct." But if the Amar-Lettow approach were to prevail, the substantial chance that objectionable interrogation methods would lead to the discovery of valuable evidence would furnish police interrogators with a significant incentive to utilize such methods.

Amar and Lettow might dismiss this point as reflecting an overly cynical view of police decisionmaking. But, as Professors Dershowitz and Ely have noted, prohibitions against the use of illegally seized evidence and coerced confessions rest on the assumption that police officers "will act on the basis of a calculation of advantages rather than out of desire to follow the law." Otherwise, there would be little or no need for exclusionary rules.

Short of admitting coerced confessions in every case, there are two ways to encourage the police to resort to unconstitutional inter-

73. Amar & Lettow, supra note 1, at 895.
75. Cf. Brown v. Illinois, 422 U.S. 590 (1975) (excluding incriminating statements obtained from an illegally arrested suspect even though, before making the statements, the suspect had been given the Miranda warnings and had waived his Fifth and Sixth Amendment rights). The Brown Court pointed out that to admit the statements under the circumstances would motivate the police to make illegal arrests "encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings." 422 U.S. at 602 (footnote omitted).
76. Dershowitz & Ely, supra note 74, at 1221.
rogation methods: (i) let them know that if and when coerced confessions are corroborated by reliable physical evidence, the confessions themselves are rendered admissible; or (ii) let them know that even though the coerced confessions themselves cannot be admitted, the reliable evidence *these confessions bring to light* can be. Amar and Lettow reject the first alternative — or accept the fact that the Fifth Amendment requires rejection of the first alternative — yet they adopt the second. The second alternative, however, is almost as inconsistent with the police methods rationale for excluding confessions as the first. The second alternative enables the police to accomplish indirectly what they could not achieve directly. The second alternative puts police who engage in forbidden interrogation methods in a better position than they would have been in if they had obeyed the law.77

As noted earlier, there was a time when, if the reliable evidence brought to light by a coerced confession corroborated the confession, the courts admitted *both* the confession and the derivative evidence. Such an approach, at least, was internally consistent. Amar and Lettow’s approach is not.

If, as the Court has told us again and again, the touchstone for the admissibility of confessions is not unreliability78 but the offensiveness of the police methods that produced the confession, then *neither* the confession produced by such methods nor the evidence derived from the confession should be admitted. The reliability of the derivative evidence should no more bleach its stains of illegality than should the reliability of the confession.

We are not talking about violations of what the Court has called *Miranda’s* nonconstitutional prophylactic procedures.79 We are talking about confessions produced by police methods that “offend the community’s sense of fair play and decency”80 — about interrogation techniques “so offensive to a civilized system of justice that they must be condemned under the Due Process Clause.”81

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77. The justification for the “independent source” and “inevitable discovery” exceptions to the poisonous tree doctrine, on the other hand, is that if the derivative evidence “has been discovered by means wholly independent of any constitutional violation” or “inevitably would have been discovered by lawful means,” the government should be put “in the same, not a worse, position [than] they would have been if no police error or misconduct had occurred.” *Nix v. Williams* (*William's II*), 467 U.S. 431, 443-44 (1984).

78. See supra text accompanying notes 37-44, 62-64, 68-71.


Unfortunately, more than sixty years after the Wickersham Commission exposed the ugly facts of the "third degree,"82 well-documented evidence of interrogation violence... persists to this day.83 We should make every effort to stamp out such practices. We should formulate rules that maximize the possibility that such practices will become a thing of the past.

The Amar-Lettow proposal does not do that. What they offer is a half-hearted exclusionary rule — a rule that sends conflicting messages to law enforcement officers.

B. The Need To Bar the Physical Fruits of a Constitutional Violation: Variations on the Rochin Case

Although Rochin v. California,84 the famous (or infamous) "stomach pumping" case, did not involve any derivative evidence, I think it provides a useful point of departure for underscoring the need to exclude the physical fruits of a constitutional violation. The case arose as follows: Upon entering the defendant's home illegally and forcing open the door to his bedroom, police officers noticed two capsules lying on a bedside table. When asked about the capsules, the defendant placed them in his mouth. The police struggled to open the defendant's mouth and remove what was there, but the defendant managed to swallow the capsules. Frustrated by the defendant's attempts to thwart their efforts, the police handcuffed him and took him to a hospital, where an emetic solution was forced into his stomach against his will. This "stomach pumping" produced the two capsules, which contained morphine. Largely on the basis of this evidence, the defendant was convicted of a narcotics violation.85

Without a dissent,86 the Court held that the conviction "ha[d] been obtained by methods that offend the Due Process Clause."87

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84. 342 U.S. 165 (1952).
85. 342 U.S. at 166.
86. Justices Black and Douglas wrote separate concurring opinions, maintaining that the police had violated the defendant's privilege against compulsory self-incrimination. But the privilege had not yet been deemed applicable to the states and, in any event, the prevailing view was that the privilege did not afford direct protection against nontestimonial compulsion.
87. 342 U.S. at 174.
— by methods that disregard “certain decencies of civilized conduct” and “offend ‘a sense of justice.’”\footnote{342 U.S. at 173 (quoting Brown v. Mississippi, 297 U.S. 278, 286 (1936)).} To “sanction” the police misconduct that produced the morphine capsules that led to defendant’s conviction, observed Justice Frankfurter, who wrote the opinion of the Court, “would be to afford brutality the cloak of law.”\footnote{342 U.S. at 173.}

Let us change the facts of \textit{Rochin} as follows:

When the police illegally enter Rochin’s home and burst into his bedroom, they observe two keys lying on a bedside table. The defendant grabs the keys and puts them in his mouth. A struggle ensues, but the defendant manages to swallow the keys. The police ultimately retrieve them, however, by taking the defendant to a hospital, where an emetic is forced into his stomach.

The police spot the word \textit{Cessna} on each of the keys. One officer recalls that \textit{Cessna} is the name of a popular two-engine plane. This is the first inkling the police have that the defendant owns or flies an airplane. The police demand to know where the plane is located and whether it contains any drugs.

Frightened by, and still shaken from, the “stomach pumping” and the rough tactics employed by the police earlier in his bedroom, the defendant reveals the location of the plane and admits that it contains a large quantity of drugs. On the basis of this information, the police obtain a warrant, search the plane, and find the drugs.\footnote{Cf. United States v. Downing, 665 F.2d 404 (1st Cir. 1981); see also infra note 97 (discussing \textit{Downing}).}

Are the drugs admissible in evidence against the defendant? I think it fairly clear that the Court would not admit the drugs obtained under the foregoing circumstances.\footnote{I am assuming that the prosecution could not establish that the evidence derived from the keys and questioning about the keys fell within one of the recognized exceptions to the poisonous tree doctrine — for example, that the airplane and its contents would inevitably have been discovered even if the police had not violated the defendant’s rights. In United States v. Crews, 445 U.S. 463 (1980), the Court referred to the “three commonly advanced exceptions” to the poisonous tree doctrine — where the government has learned of the derivative evidence from an “independent source,” where the evidence would “inevitably” have been discovered lawfully, and where the connection between the police violation and the derivative evidence has become so “attenuated” as to dissipate the taint. 445 U.S. at 470. \textit{See generally} 1 \textit{LaFave & Israel}, supra note 43, § 9.3 (c)-(e), at 736-42; Pitler, supra note *. For application of the inevitable discovery exception, see Nix v. Williams, 467 U.S. 431 (1984), discussed infra in text accompanying notes 330-54.}

In my two hypothetical variations on \textit{Rochin} (for the second hypothetical, see infra text accompanying notes 93-97), I do not think it can be said that the connection between the derivative evidence and the police misconduct has become so attenuated as to dissipate the taint.
lieve that a court that would exclude the evidence on the facts of *Rochin* would admit the derivative evidence on the facts of the hypothetical.

In the hypothetical case, no less than in the *Rochin* case itself, the conviction was brought about "by methods that offend 'a sense of justice.'" In the hypothetical case, no less than in *Rochin*, to admit the physical evidence would be to "sanction" the brutal conduct or afford it "the cloak of law." In the hypothetical case, no less than in *Rochin*, to admit the evidence found in the defendant's airplane would be to encourage the police to act the same way — or at least not discourage them from doing so — the next time the occasion arose "on the chance that all will end well." 92

Now, let us change the facts of *Rochin* one more time. Consider the following:

The police lawfully arrest the defendant and take him down to headquarters for questioning. The police inform the defendant that they have reason to believe that he is in possession of a large quantity of drugs — which is true — and they demand to know where he is keeping the drugs. The defendant denies any involvement in the drug trade. When he persists in his denial, a police officer puts a pistol to his head and threatens to pull the trigger unless he reveals the hiding place of the drugs. 93 Or the police strip off the defendant's clothes and keep him naked for several hours. 94 Or, aware that the defendant's wife is confined to a wheelchair, the police threaten to bring her down to the stationhouse for questioning unless he "cooperates." 95 Or relays of officers question the defendant for many hours without affording him an opportunity for sleep. 96

At this point, the defendant confesses that he is a drug dealer and that he has stored a large quantity of drugs in his Cessna airplane. He also reveals the location of the plane. On the basis of this information, the police obtain a warrant, search the plane, and find the drugs. 97 Are the drugs admissible in evidence against the defendant?

92. In Nueslein v. District of Columbia, 115 F.2d 690 (D.C. Cir. 1940), Judge (later Chief Justice) Vinson observed, "Officers should not be encouraged to proceed in an irregular manner on the chance that all will end well." 115 F.2d at 694. *Nueslein* excluded a voluntary incriminating statement because the officers were in a position to hear the defendant's remark only because they had entered his home illegally.


97. Consider *United States v. Downing*, 665 F.2d 404 (1st Cir. 1981). After he was taken into custody and advised of his *Miranda* rights, the defendant explicitly stated that he wished
How, if at all, is the second hypothetical case different from the first? In both hypotheticals, to admit the evidence would be to "sanction" police methods that "offend 'a sense of justice'" and to afford these methods "the cloak of law."

In the first hypothetical, constitutionally obnoxious police methods forced the defendant to vomit up the keys that led the government to his plane and to the incriminating evidence. In the second hypothetical, constitutionally obnoxious police methods forced the defendant to make the confession that, in effect, provided the government with "the keys" to his plane. Why shouldn't the evidentiary consequences that flow from the violation in the second hypothetical be the same as those that flow from the violation in the first?

In the first hypothetical, the police forcibly extracted the "direct" or "primary" evidence from the suspect's stomach, whereas in the second hypothetical, it might be said, they forcibly extracted it from the suspect's mind. Why should there be a constitutional distinction? Why should the "secondary" or "derivative" evidence be excluded in one case but not the other?

One might say that pumping a suspect's stomach is more shocking than putting a gun to a suspect's head to get him to confess or to see a lawyer before talking further. This request was disregarded. The drug enforcement agents then instructed the defendant to empty his pockets and surrender various articles, including some keys. When asked what the keys were for, the defendant told the agents that they belonged to his Cessna airplane. When asked by the police where the plane was located, defendant told them where it was parked. This was the first time any of the drug enforcement agents learned of the plane's existence.

On the basis of this information, law enforcement agents obtained a warrant and searched the plane. The search uncovered charts and other documents. The officers then questioned airport employees, who made certain statements implicating defendant in a drug conspiracy.

In an opinion by Chief Judge Coffin, joined by Judge (now Supreme Court Justice) Breyer and Judge Bonsal, the court held that unless the evidence would have been obtained independently of the defendant's statements to the agents — and the court of appeals remanded the case to the district court to determine this issue — the tangible and testimonial evidence gathered by searching the plane and questioning airport employees should be excluded, as well as the defendant's statements about the existence and location of his airplane: "[I]n order to deter the impermissible police conduct here we must exclude the evidentiary fruits of appellee's statements as well as the statements themselves." 665 F.2d at 409.

The government relied heavily on Michigan v. Tucker, 417 U.S. 433 (1974), see supra text accompanying notes 65-67, but the court distinguished Tucker in part on the ground that that case was "rooted in the distinction between a violation of the Fifth Amendment and a violation of 'the prophylactic rules developed to protect that right.'" 665 F.2d at 408 (quoting Tucker, 417 U.S. at 439). In the instant case, on the other hand, defendant had "asserted his Fifth Amendment right [to have counsel present at any interrogation] and the federal official violated that right by continuing interrogation." 665 F.2d at 408.

98. Cf. Rochin v. California, 342 U.S. 165, 173 (1952) ("It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.").
threatening to bring a suspect's ailing wife to the police station to get him to "cooperate." How so is not at all clear to me. But why bother to dwell on the point? In each instance the police violated a right protected by the Due Process Clause — a right "basic to a free society" and "therefore implicit 'in the concept of ordered liberty.'"99 That is about as bad a thing as can be said of police conduct. Surely we are not going to say that when the police coerce a suspect into confessing they violate rights "basic to a free society," but when they pump a suspect's stomach they violate rights "very basic to a free society."100

One might retort that not all coerced confessions involve brutality or physical violence. That is true. As the Court pointed out thirty-five years ago, "coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark"101 of a coerced confession. But what follows from this?

It is troubling enough, as Justice Stevens has noted, that the Court has attempted to distinguish between actual coercion and irrebuttably presumed coercion (Miranda violations).102 Are we now going to attempt to fashion a distinction between mildly coerced confessions and blatantly coerced ones? A coerced confession is a coerced confession is a coerced confession. Regrettably, a majority of the present Court has drawn a distinct line between what it calls "mere Miranda violations" and coerced confessions (or actual infringements of the Fifth Amendment itself).103 But all coerced confessions are constitutionally obnoxious, and all are violations of due process.

A final point about Rochin. To use that case as a basis for discussion of coerced confessions and the applicability of the poisonous tree doctrine to such confessions strikes me as only fitting and proper, because in excluding the evidence produced by the stomach pumping, the Court relied very heavily on the analogy to coerced confessions. Of course, if — as Amar and Lettow still maintain some forty years later — the reason for excluding coerced confes-

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100. At the very least, there is, as Professor Francis Allen once observed, "a certain inelgance in speaking of rights 'very basic to a free society' or in indulging in what appears to be almost a comparison of superlatives." Francis A. Allen, Federalism and the Fourth Amendment: A Requiem for Wolf, 1961 Sup. Ct. Rev. 1, 9 (footnote omitted); see also Kamisar, supra note 27, at 1123-24.


103. See infra text accompanying notes 180-87, 195-210.
sions is their unreliability, the *Rochin* Court's analogy to coerced confessions would have been badly flawed. After all, what could be more trustworthy than the evidence found in a person's stomach? It is worth recalling how the *Rochin* Court dealt with this point:

It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion. These decisions . . . are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. Due process of law . . . [means] that convictions cannot be brought about by methods that offend "a sense of justice . . . ."

To attempt in this case to distinguish between what lawyers call "real evidence" from verbal evidence is to ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency.104

II. CHALLENGING AMAR AND LETTOW'S CLAIM THAT CURRENT DOCTRINES AND TRENDS SUPPORT THEIR APPROACH TO THE FIFTH AMENDMENT

Amar and Lettow recognize that their approach to the Fifth Amendment "may at first glance seem like a startling break from current interpretations."105 They maintain, however, that their approach becomes much more plausible when viewed in light of various "current doctrines or trends."106 In this regard, they rely heavily on *Schmerber v. California*,107 which, they tell us, "emphasize[d] the distinction between testimony and physical evidence"108 and "gave rise to a sweeping assertion of the need to let in reliable physical evidence."109 They also contend that the Court is "now chipping away at use plus use-fruits immunity in the context of *Miranda* warnings"110 and that such immunity "should be brought into

104. 342 U.S. at 172-73.
106. *Id.* at 927-28.
109. *Id.* at 885.
110. *Id.* at 880.
line with Justice O’Connor’s suggested approach in Quarles for ‘mere’ Miranda violations.” Finally, they rely heavily on the writings of one of the greatest judges of our time, Henry Friendly, who urged the admissibility of physical evidence derived from Miranda violations. In the pages ahead, I shall argue that neither Amar and Lettow’s reliance on Schmerber, nor their reliance on Justice O’Connor’s views, nor their reliance on Judge Friendly’s writings is well founded.

A. Does Schmerber Support Amar and Lettow?

In urging the admissibility of physical evidence derived from compelled statements, Amar and Lettow place considerable reliance on Justice Brennan’s opinion for the Court in Schmerber v. California. I have great difficulty seeing why.

In Schmerber, the Court held that requiring a motorist suspected of drunken driving to submit to the withdrawal of blood for chemical analysis did not violate the privilege against compulsory self-incrimination. “The distinction which has emerged,” observed Justice Brennan, “is that the privilege is a bar against compelling ‘communications’ or ‘testimony,’ but that compulsion which makes a suspect or accused the source of ‘real or physical evidence’ does not violate it.” In the instant case, he emphasized, the withdrawal of blood did not implicate the defendant’s “testimonial capacities.”

As I read the Schmerber opinion, it holds — unremarkably — that the withdrawal of blood, and more generally the acquisition of

111. Id. at 911.
113. 384 U.S. at 764.
114. 384 U.S. at 765.
115. As a leading commentator on evidence observed twelve years before the Schmerber case was decided, according to the prevailing view — one “expounded by Wigmore and widely accepted in recent opinions” — the privilege furnishes protection only against “testimonial compulsion.” McCormick, supra note 26, at 264. In those jurisdictions that followed the prevailing view, continued Professor McCormick, “the accused without breach of this privilege may be... physically examined, may have his blood and other bodily fluids taken for tests without his consent, may be required to give a specimen of his handwriting... and may be forced to participate in a police ‘line up.’” Id. at 264-65 (emphasis added).

Under a second, and minority, view of the privilege, observed McCormick, “the line is drawn between enforced passivity on the part of the accused and enforced activity on his part.” Id. at 265. But even under this view, “the prisoner could, for example, be required to submit to finger-printing and the extraction of blood.” Id. (emphasis added).

Finally, under a third and distinctly minority view, “any evidence secured by compulsion from the prisoner, whether by requiring him to act or by his mere passive submission, is within the privilege.” Id. at 266. But, added McCormick, “Presumably no court today would carry out such a notion consistently, as to do so would prevent such established practices as
nontestimonial evidence, standing alone — that is, untainted by any antecedent Fifth Amendment violation — does not offend the privilege against self-incrimination. That’s all it holds.

The Schmerber Court did not write on a clean slate. It reaffirmed the approach taken in a 1910 Supreme Court case, Holt v. United States. In Holt, the Court was taken aback by the contention that compelling a person to put on a blouse to determine whether it fit him violated the privilege. It dismissed the argument as “based upon an extravagant extension of the Fifth Amendment.” The privilege against self-incrimination, explained Justice Holmes, “is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.”

1. The Limited Scope of Schmerber

Amar and Lettow highlight the distinction Schmerber and Holt drew between physical evidence and testimonial evidence in order to bolster their argument that only the defendant’s compelled utterances — but not their fruits — should be protected by the Fifth Amendment, and thus only his compelled utterances, not their fruits, should be excluded from a criminal case. They tell us, almost breathlessly, that Schmerber “gave rise to a sweeping assertion of the need to let in reliable physical evidence, via a definition of witness that drew a sharp distinction between words and physical evidence.” They maintain that Schmerber provides support for their view that only a person’s compelled utterances — a coerced confession or testimony obtained in exchange for a grant of immunity — should be excluded, not physical evidence derived from such utterances as well.

At one point, Amar and Lettow call Schmerber “an absolutely central case today — the rock on which a great many cases and a considerable amount of crime detection policy have been built.” One might say that it is also one of the rocks on which the Amar-Lettow argument is built.

compulsory finger-printing and requiring the accused at the trial to stand up for identification.” Id.

117. 218 U.S. at 252.
118. 218 U.S. at 252-53.
119. Amar & Lettow, supra note 1, at 885.
120. See id. at 919.
121. Id. at 892-93.
This may surprise Amar and Lettow, but I have no quarrel with Schmerber or Holt. Moreover, and I suspect that this will surprise Amar and Lettow even more, I do not think that Schmerber or Holt support their position — because those cases have nothing to say about the use of physical evidence derived from compelled testimony or coerced confessions.

Schmerber tells us that the privilege does not protect directly against nontestimonial compulsion. That’s all. It has nothing to say about whether the acquisition of blood tests or other physical evidence obtained as a result of compelled utterances should be excluded in order to put a curb on the indirect use of Fifth Amendment violations.122

Neither in Schmerber nor in Holt did the police violate a constitutional guarantee at any point along the way. Neither in Schmerber nor in Holt was the defendant compelled to disclose information that might lead to damaging physical evidence. Thus there was no need to determine whether any physical evidence was tainted by a prior constitutional violation. There was no derivative evidence or “fruit of the poisonous tree” to be considered, because there was no “poisonous tree.”

We would do well to read Justice Brennan’s opinion in Schmerber to mean exactly what he said:

Petitioner’s testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone. Since the blood test evidence . . . was neither petitioner’s testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.123

A quarter-century later, writing for a majority of the Court, Justice Brennan — the author of the Schmerber opinion — looked back on Schmerber as a case in which compelling a suspect to provide a blood sample “was outside of the Fifth Amendment’s protec-

122. In Nardone v. United States, 308 U.S. 338 (1939), the case that first used the phrase fruit of the poisonous tree, 308 U.S. at 341, the Court observed that “[t]o forbid the direct use of methods [in this instance, illegal wiretapping] . . . but to put no curb on their full indirect use would only invite the very methods deemed ‘inconsistent with ethical standards and destructive of personal liberty.’” 308 U.S. at 340.

123. Schmerber, 384 U.S. at 765 (emphasis added) (footnote omitted); see also Doe v. United States, 487 U.S. 201, 211 n.10 (1988) (“[The Schmerber] Court distinguished between the suspect’s being compelled himself to serve as evidence and the suspect’s being compelled to disclose or communicate information or facts that might serve as or lead to incriminating evidence.”); Oregon v. Elstad, 470 U.S. 298, 350 n.32 (1985) (Brennan, J., dissenting) (“Schmerber had nothing to do with the derivative-evidence rule, but held only that the evidence compelled in the first instance in that case — blood samples — was nontestimonial in nature.”).
tion, not simply because the evidence concerned the suspect's physical body, but rather because the evidence was obtained in a manner that did not entail any testimonial act on the part of the suspect.”\textsuperscript{124}

Suppose the Chief of Police informs a murder suspect that he will turn him over to a lynch mob unless he reveals where he hid the clothes he wore at the time of the crime,\textsuperscript{125} and the suspect then reveals the hiding place of his or his victim's blood-stained blouse. Or suppose that after being subjected to a lengthy interrogation while he is physically incapacitated in an intensive care unit, a seriously wounded suspect finally tells the police where he hid his or his victim's blood-stained blouse.\textsuperscript{126} In the hypotheticals I have posed, can the government compel the suspect to model his blouse? Can the government analyze the blood found on the victim's blouse, establish that it matches the defendant's blood, and offer these findings in evidence? These questions strike me as very different than the ones presented in \textit{Schmerber} and \textit{Holt}.

If Holmes were still on the Court and the defendant contended in either of the hypothetical cases that the blood-stained blouse or the blood test results should be excluded because they had been obtained by “exploitation” of a coerced confession,\textsuperscript{127} I very much doubt he would dismiss that argument as based on an extravagant extension of the Fifth Amendment. After all, it was Holmes who remarked, a decade after \textit{Holt}, that “[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.”\textsuperscript{128}

To be sure, Justice Holmes made that remark, for a majority of the Court, in a search and seizure case. But why is his reasoning any less applicable to a Fifth Amendment case? Are the fruits of a coerced confession any less stained with illegality than the fruits of a Fourth Amendment violation?

As Justice Brennan said for the Court sixty years after Holmes spoke about the essence of a provision forbidding the acquisition of evidence, “the exclusionary sanction applies to any ‘fruits’ of a constitutional violation — whether such evidence be . . . physical [evid-
ence or] . . . items observed or words overheard." And if, as Professors LaFave and Israel have put it, the coerced confession doctrine is, inter alia, intended to deter improper police conduct "in much the same way as the Fourth Amendment exclusionary rule for physical evidence," why should the Court not apply the poisonous tree doctrine to coerced confessions as it has done in search and seizure cases?

Moreover, the Fifth Amendment, which prohibits a person from being compelled to be a witness against himself, has its own exclusionary rule, which, in turn, has its own "built-in" poisonous tree doctrine. What else did Counselman mean when it told us — long before the "fruit of the poisonous tree" doctrine acquired its colorful name, and long before it emerged in the search and seizure context — that the Fifth Amendment protects a person "from being compelled to disclose the circumstances of his offence [or] the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained . . . without using his answers as direct admissions against him?"

Amar and Lettow tell us that "[w]itnesses testify" but "blood does not" and that "we do not usually conceive of blood as 'knowing' anything." This is a valid point when we deal with constitutionally uncontaminated blood test evidence, but whether blood "knows" or "speaks" is beside the point, I submit, when we talk about blood test evidence that owes its discovery to, and is tainted by, a prior violation of the Fifth Amendment.

As the foregoing hypotheticals illustrate, when we talk about the fruits of a Fifth Amendment violation, we are talking about cases where a person — if not his blood — did know something and where a person — if not his blood — was forced to tell what he knew. The prosecution would not have been able to offer a blood sample in evidence in these cases if the defendant had not been forced to incriminate himself.

When we talk about admitting physical evidence derived from compelled testimony or coerced confessions, we are talking about


130. 1 LAFAVE & ISRAEL, supra note 43, at 443.

131. See infra text accompanying notes 275-79.

132. Counselman v. Hitchcock, 142 U.S. 547, 585 (1892) (quoting Emery's Case, 107 Mass. 172, 182 (1871)). This view of the scope of the privilege against self-incrimination has been reaffirmed many times. See infra text accompanying notes 257-61.

133. See Amar & Lettow, supra note 1, at 889.
fact situations — unlike *Holt* or *Schmerber* — where (i) compulsion was used to extort communications from a defendant;\(^\text{134}\) (ii) the evidence did relate to some communicative act by the defendant;\(^\text{135}\) (iii) the defendant was forced “to reveal, directly or indirectly, his knowledge of facts relating him to the offense”;\(^\text{136}\) or (iv) the defendant was “compelled to disclose or communicate information or facts that might serve as or lead to incriminating evidence.”\(^\text{137}\)

2. The Need To Consider the Entire Chain of Events

In determining whether certain evidence is admissible we should not, as do Amar and Lettow, dwell on the nature of the evidence in the abstract or focus exclusively on the last step of a multistep course of action by the police. We should consider, instead, the entire course of police conduct from beginning to end. Indeed, such a consideration is what the principles of the Fifth Amendment demand.

It does not matter whether, looking only at the last phase of the police conduct, Evidence B was, or appears to have been, lawfully obtained if, taking into account the entire chain of events, Evidence B was the end-product of unconstitutional police conduct — if, for example, information as to the location of Evidence B was “compelled” within the meaning of the privilege. If this is the situation then the question is no longer whether Evidence B would be beyond the reach of a particular constitutional guarantee if its acquisition were viewed in a vacuum — no longer, for example, whether nontestimonial evidence would be admissible if its attainment were sealed off from prior acts of testimonial compulsion. The question instead is whether Evidence B was fatally tainted by a prior violation.

The first case that comes to mind is *Welsh v. Wisconsin*.\(^\text{138}\) Admission into evidence of one’s refusal to take a breathalyzer test — or one’s refusal to provide blood or urine samples for the purpose of determining the presence or quantity of alcohol — does not of-


\(^{136}\) Cf. *Doe v. United States*, 487 U.S. 201, 213 (1988) (“[T]he policies of the privilege are served when the privilege is asserted to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense . . . .”).

\(^{137}\) Cf. 487 U.S. at 211 n.10 (“[T]he *Schmerber* Court distinguished between the suspect’s being compelled himself to serve as evidence and the suspect’s being compelled to disclose or communicate information or facts that might serve as or lead to incriminating evidence.”).

fend the Fifth Amendment. Nevertheless, the Welsh Court overturned the revocation of a defendant’s driver’s license for refusing to take a breath-analysis test because before the defendant was taken to the police station where he refused to submit to the test, he had been unlawfully arrested in his own home. The opinion of the Court was written by Justice Brennan — and it was a long one. But the author of Schmerber saw no need to discuss that case. There wasn’t any need. Schmerber was not relevant.

Welsh is hardly unique. There are many other cases illustrating the same point.

If the procedure is viewed in isolation, an on-the-spot chemical test of white powder that would reveal only whether the substance was cocaine is beyond the reach of the Fourth Amendment because it is not a “search,” just as, standing alone, the withdrawal and chemical analysis of blood is beyond the reach of the Fifth Amendment because it does not constitute testimonial compulsion. But if drug agents come upon a package unlawfully — attain dominion and control over it by means of an unreasonable search and seizure — the results of a chemical test of the package’s contents might well be barred by the Fourth Amendment. Similarly, although the use of a narcotics-detecting dog is not a “search” or “seizure” in and of itself, a search based on the alert of a drug detecting dog may nevertheless run afoul of the Fourth Amendment if illegally obtained knowledge formed the impetus for the use of the detector dog.

As a general proposition, the Fourth Amendment does not offer any protection to a person who voluntarily consents to a search. But it may furnish protection if the consent search is the fruit of prior police misconduct — if, for example, an otherwise valid cons-

140. See 466 U.S. at 754. The parties agreed that if a person were unlawfully arrested, his refusal to take a breath test would be reasonable and therefore could not be grounds for the revocation of a driver’s license. See 466 U.S. at 744.
142. See Jacobsen, 466 U.S. at 117. In Jacobsen, the results of the chemical test of a trace amount of white powder were held admissible because the initial invasions of the package containing the powder were occasioned by the acts of a private freight carrier. After opening the package pursuant to a written company policy regarding insurance claims and after noticing a white powdery substance, originally concealed under many layers of wrappings, employees of the freight carrier notified the Drug Enforcement Administration of their discovery. Under the circumstances, “the federal agents did not infringe any constitutionally protected privacy interest that had not already been frustrated as the result of private conduct.” 466 U.S. at 126.
sent is preceded by, and tainted by, an illegal arrest. In such a situation the fruit of the poisonous tree doctrine "extends to invalidate consents which are voluntary."

Ordinarily, objects stuffed in a garbage can are beyond the protection of the Fourth Amendment, just as ordinarily nontestimonial evidence is beyond the protection of the Fifth. But a different constitutional result obtains if the police enter a person's home illegally and the homeowner rushes out the door, followed closely by the police, and tries to hide the incriminating evidence in a nearby garbage can. Under such circumstances, the evidence removed from the trash receptacle is excluded on the ground that its seizure was "a direct consequence" of a lawless entry into a private dwelling.

In *Olmstead v. United States*, in the course of holding, over the famous dissents of Holmes and Brandeis, that the wiretapping that occurred in that case did not violate the Fourth Amendment, the Court emphasized that conversations were not *things*:

> The Amendment itself shows that the search is to be of material things — the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized.


... The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only.

Although some years later a federal statute was enacted prohibiting the use of wiretapping by law enforcement officials as well as private citizens, *Olmstead* governed the law of nontelephonic

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144. *See 3 id. § 8.2(d).*

145. *Id.* at 190. In such instances, some courts say that the consent was not voluntary, but as Professor LaFave emphasizes, "the evidence obtained by the purported consent should be held admissible only if it is determined that the consent was both voluntary and not an exploitation of the prior illegality." *Id.*

146. *See Work v. United States, 243 F.2d 660, 662 (D.C. Cir. 1957).* The court did call attention to the fact that the trash receptacle was under the stone porch of the house, not beyond the curtilage, but I think the main reasoning of the court — and standard application of the poisonous tree doctrine — would have led to the same result even if the trash receptacle had been at the curb in front of the defendant's house.

147. 277 U.S. 438 (1928).

148. 277 U.S. at 464. But as was to become most significant later, in *Olmstead* no violation of the Fourth Amendment had preceded the use of the sense of hearing.

electronic surveillance for the next four decades.\textsuperscript{150} Nevertheless, during that time the Court made plain that the Fourth Amendment \textit{did} furnish some protection against the seizure of oral statements — if the police who listened were able to do so only because they had committed a \textit{prior} violation of the Fourth Amendment.

In \textit{Silverman v. United States},\textsuperscript{151} the police utilized a so-called spike mike to listen to what was going on within the defendant's house. The police pushed this device through the party wall of an adjoining house until it touched the heating ducts in defendant's home, converting the entire heating system into a conductor of sound.\textsuperscript{152}

Troubled by language in \textit{Olmstead} and other cases to the effect that the Fourth Amendment protects against the acquisition of \textit{things}, not conversations, Silverman urged the Court to reexamine the rationale of these decisions. But the Court saw no need to do so:

[T]he circumstances here [do not] make necessary a re-examination of the Court's previous decisions in this area. For a fair reading of the record in this case shows that the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by [the defendant] . . .

Eavesdropping accomplished by means of such a physical intrusion is beyond the pale of even those decisions in which [the] Court has held that eavesdropping accomplished by other electronic means did not amount to an invasion of Fourth Amendment rights.\textsuperscript{153}

Two years later, still during the reign of \textit{Olmstead}, the Court demonstrated once again that despite the \textit{Olmstead} view that the Fourth Amendment does not \textit{directly} prohibit the use of evidence secured by the sense of hearing, the Fourth Amendment does play a role if the oral statements were the fruits of an independent violation of the amendment. In the famous \textit{Wong Sun} case,\textsuperscript{154} the Court threw out a defendant's voluntary statements because they were the products of a prior unreasonable search and seizure:

\begin{itemize}
  \item \textsuperscript{150} \textit{Olmstead} was finally overruled by \textit{Katz} v. United States, 389 U.S. 347 (1967). In \textit{Katz}, Justice Stewart, uttering the famous line “the Fourth Amendment protects people, not places,” wrote for the Court that “the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.” 389 U.S. at 351, 353.
  \item \textsuperscript{151} 365 U.S. 505 (1961).
  \item \textsuperscript{152} 365 U.S. at 506-07.
  \item \textsuperscript{153} 365 U.S. at 509-10.
  \item \textsuperscript{154} \textit{Wong Sun} v. United States, 371 U.S. 471 (1963); \textit{see also infra} text accompanying notes 305-17 (discussing \textit{Wong Sun}).
\end{itemize}
The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in Silverman that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of "papers and effects." Similarly, testimony as to matters observed during an unlawful invasion has been excluded to enforce the basic constitutional policies. Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion.155

It bears repeating that although the Court decided Silverman and Wong Sun at a time when the prevailing view was that the Fourth Amendment only protected against the acquisition of material things, that way of thinking about the amendment did not matter when the entire chain of events called for the exclusion of oral statements. Such statements were still excluded if they were the fruits of a Fourth Amendment violation.

Amar and Lettow dwell on the fact that reliable physical evidence— for example, a bloody knife or the defendant's own blood—is not "testimonial." But that should not matter if the totality of the circumstances calls for the exclusion of the physical evidence because it was derived from and fatally tainted by a prior Fifth Amendment violation.

The fact that the evidence ultimately "found" or "seized" in Silverman and Wong Sun was neither a "paper" nor an "effect" did not insulate it from the impact of a prior violation of the Fourth Amendment. Similarly, the fact that evidence ultimately acquired is not "testimonial" should not insulate it from the effects of a prior Fifth Amendment violation.

3. Protection Against "Use and Derivative Use"

Given their understanding of the Fifth Amendment's animating principles, Amar and Lettow maintain that the Amendment requires only a relatively narrow kind of immunity. I believe they are mistaken both about what the Fifth Amendment stands for and about what kind of immunity it requires.

Nothing in the Schmerber opinion suggests that the withdrawal and chemical analysis of blood— or, more generally, the acquisition of nontestimonial evidence— has a special immunity that protects it against a constitutional challenge stemming from an antecedent Fifth Amendment violation. Nothing in the opinion

155. 371 U.S. at 485 (citations omitted).
suggests that if a coerced confession led the police to a blood-stained garment — "furnish[ed] a link in the chain of evidence"\textsuperscript{156} — the blood analysis would still be admissible because blood does not "speak." Indeed, if, on the day after the case had been decided, anyone had claimed that Schmerber did have that implication, I think the Justices who composed the majority — especially Justice Brennan, who wrote the opinion of the Court — would have been astounded. After all, only two years earlier in Malloy v. Hogan,\textsuperscript{157} the Court, again speaking through Justice Brennan, had upheld the invocation of the privilege by a defendant who refused to answer questions relating to the identity of a certain individual because "disclosure of [the individual's] name might furnish a link in a chain of evidence sufficient to connect [the defendant] with a more recent crime for which he might still be prosecuted."\textsuperscript{158}

Moreover, the same day the Court handed down its opinion in Malloy, it decided another important Fifth Amendment case, Murphy v. Waterfront Commission.\textsuperscript{159} I think Murphy, too, makes evident why Schmerber should be read narrowly — why it cannot plausibly be read as insulating the taking of a blood sample or the acquisition of any other physical evidence from the effects of an antecedent Fifth Amendment violation.

Although Murphy held that a grant of immunity in one jurisdiction is binding on other jurisdictions as well, it also held that at least in situations in which the prosecuting jurisdiction differs from the one that granted the immunity, the privilege against self-incrimination requires use and derivative use immunity.\textsuperscript{160} Until Murphy, it was generally assumed that an individual could not be compelled to testify unless she was given transactional immunity, under which the government was prohibited from prosecuting a person for any transaction or offense about which she had testified.\textsuperscript{161}


\textsuperscript{157} 378 U.S. 1 (1964). Malloy held that the privilege against self-incrimination applied to the state via the Fourteenth Amendment and that under the applicable federal standard, the state court had erred in ruling that the privilege was not properly invoked. 378 U.S. at 3.

\textsuperscript{158} 378 U.S. at 13 (footnote omitted).

\textsuperscript{159} 378 U.S. 52 (1964).

\textsuperscript{160} See, e.g., 378 U.S. at 79 ("[A] state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." (emphasis added)).

\textsuperscript{161} See, e.g., Edward J. Imwinkelried et al., Courtroom Criminal Evidence § 1733 (1993); 1 LaFave & Israel, supra note 43, § 8.11(b), at 685-90; Charles H. Whitebread & Christopher Slobogin, Criminal Procedure § 15.04(b)(1) (3d ed. 1993);
But no member of the *Murphy* Court suggested that the Fifth Amendment permitted *anything less* than use and derivative use immunity; no Justice challenged the view first set forth in *Counselman v. Hitchcock*\(^\text{162}\) that, as Justice White described it, "the coverage of the privilege extend[s] to not only a confession of the offense but also disclosures leading to discovery of incriminating evidence."\(^\text{163}\)

As Amar and Lettow point out,\(^\text{164}\) in a concurring opinion Justice White, joined by Justice Stewart, underscored the need for a narrower standard of protection than transactional immunity in all situations,\(^\text{165}\) not just in interjurisdictional settings — a viewpoint that has since prevailed.\(^\text{166}\) But the concurring Justices made plain their agreement with the majority that the Fifth Amendment required *nothing less* than protection against use and derivative use of compelled testimony.\(^\text{167}\)

One of the arguments Justice White made for limiting the scope of immunity is worth flagging. In maintaining that the privilege requires *no more than* protection against the use and derivative use of compelled testimony, White drew an analogy to coerced confessions. He likened the plight of an individual who had given testimony in exchange for immunity to that of a defendant who had had a confession extracted from him by lawless police.\(^\text{168}\)

Why not make such a comparison? After all, "[a] coerced confession is as revealing of leads as testimony given in exchange for immunity and indeed is excluded in part because it is compelled incrimination in violation of the privilege."\(^\text{169}\)

Justice White *assumed* that the poisonous tree doctrine applies to coerced confessions as well as to unreasonable searches and

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162. 142 U.S. 547 (1892). *Counselman* is discussed in considerable detail *infra* in text accompanying notes 237-61.

163. 378 U.S. at 105 (White, J., concurring).


165. 378 U.S. at 106-07 (White, J., concurring).

166. "Following *Murphy*, Congress adopted a new immunity provision for federal witnesses, replacing transactional immunity with a prohibition against use and derivative use as to both federal and state prosecutions." 1 *LaFave & Israel*, *supra* note 43, at 686. The new federal provision was upheld in *Kastigar v. United States*, 406 U.S. 441 (1972), which quoted portions of Justice White's concurring opinion in *Murphy* with approval. *Kastigar* is discussed in considerable detail *infra* in text accompanying notes 268-79.

167. See 378 U.S. at 92-93, 101-03, 106 (White, J., concurring).

168. See 378 U.S. at 102-03 (White, J., concurring).

169. 378 U.S. at 103 (White, J., concurring).
seizures. Even so, the victim of a coerced confession does not receive transactional immunity. As Justice White assumed, he may keep out evidence derived from and tainted by the confession, but not evidence that "had an independent, legitimate source." Why, asked Justice White, should a person who gives testimony in exchange for immunity be in a better position? Why should such an individual — but not the person whose constitutional rights were violated by police interrogators — be entitled to "absolute immunity from prosecution?"

Justice White’s argument, in short, was that so long as the government does not make use of compelled testimony or its fruits in a criminal prosecution, the Fifth Amendment ought to be satisfied — just as it is when the government uses neither a coerced confession nor its fruits in a criminal prosecution.

I realize that Amar and Lettow are unhappy with use and derivative use immunity — what they and some other commentators call "use plus use-fruits immunity" — and that they believe only compelled testimony should be excluded from a criminal prosecution, not the fruits of such testimony as well. But in reflecting on whether the Schmerber Court would have reached a different result had an independent Fifth Amendment violation preceded and

170. I say that Justice White assumed this because although he evidently thought it obvious that the fruits of a coerced confession would have to be excluded, as well as the confession itself — unless the government came within a recognized exception to the poisonous tree doctrine — as Amar and Lettow note, there seems to be no Supreme Court case precisely on point. See supra note 52.

171. 378 U.S. at 103 (White, J., concurring).

172. 378 U.S. at 102 (White, J., concurring).

173. When the Court adopted Justice White’s views on the appropriate scope of immunity eight years later in Kastigar v. United States, 406 U.S. 441 (1972), it also relied on an analogy to coerced confessions, and it also assumed that the fruits of a confession had to be excluded along with the confession itself. In Kastigar the Court observed:

A coerced confession, as revealing of leads as testimony given in exchange for immunity, is inadmissible in a criminal trial, but it does not bar prosecution. Moreover, a defendant against whom incriminating evidence has been obtained through a grant of immunity may be in a stronger position at trial than a defendant who asserts a Fifth Amendment coerced-confession claim. One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources. On the other hand, a defendant raising a coerced-confession claim under the Fifth Amendment must first prevail in a voluntariness hearing before his confession and evidence derived from it become inadmissible.

406 U.S. at 461-62 (emphasis added) (footnotes omitted).

For an elaboration of the point that either the general poisonous tree doctrine itself or Counselman and its view that the Fifth Amendment exclusionary rule has what might be called a "built-in" poisonous tree doctrine was the basis for the federal immunity statute at issue in Kastigar as well as for the Court’s view that a ban on the use and derivative use of compelled testimony was necessary and sufficient to satisfy the Fifth Amendment, see infra text accompanying notes 275-79.

174. See Amar & Lettow, supra note 1, at 858, 880, 911.
tainted the taking of the blood sample — and more generally, in considering how narrowly or broadly the case may plausibly be read — I hope I may be allowed to take into account relevant and related cases on the books at the time, even though Amar and Lettow wish those cases did not exist.

B. Does Justice O'Connor — or the Court — Support Amar and Lettow?

In *New York v Quarles*, the police caught up with a rape suspect in the rear of a supermarket. Having heard from the victim that the person who raped her was carrying a gun, the police asked the cornered suspect where the gun was. He nodded in the direction of some empty cartons and responded, "The gun is over there." The officer reached into one of the cartons and retrieved a loaded revolver.

Although the police had failed to give the defendant the *Miranda* warnings, a majority of the Court ruled that his statement was admissible under a "public safety" exception to *Miranda*. In her concurrence, Justice O'Connor disagreed. She would have excluded the defendant's statement but not the gun itself — because "nothing in *Miranda* or the privilege itself requires exclusion of nontestimonial evidence derived from informal custodial interrogation." Amar and Lettow contend that Justice O'Connor's concurring opinion furnishes support for their view that physical evidence derived from coerced confessions or compelled testimony should be admissible. I think not.

The snippets of Justice O'Connor's opinion quoted by Amar and Lettow do seem to support their thesis, but when her opinion is read in its entirety, it is clear that O'Connor is urging a special rule for the fruits of *Miranda* violations. Again and again, she em-

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176. 467 U.S. at 652.
177. 467 U.S. at 655.
178. 467 U.S. at 660 (O'Connor, J., concurring in part and dissenting in part).
179. See Amar & Lettow, supra note 1, at 881-82, 911, 928.
180. When Justice O'Connor speaks of "nontestimonial evidence derived from informal custodial interrogation," 467 U.S. at 660, it is clear, at least when one reads her opinion in its entirety, that she means evidence derived from an interrogation that violates the *Miranda* rule, but not the coerced confession rule. See 467 U.S. at 661 (O'Connor, J., concurring in part and dissenting in part) ("The *Miranda* Court for the first time made the Self-Incrimination Clause applicable to responses induced by informal custodial police interrogation, thereby requiring suppression of many admissions that, under traditional due process principles, would have been admissible." (emphasis added)); see also 467 U.S. at 668 (O'Connor, J.,
phasizes that the defendant was not “subject[ed] to abusive police practices” or “actually or overtly coerced” and that the gun “derived not from actual compulsion but from a statement taken in the absence of Miranda warnings.”

Justice Marshall, who dissented in *Quarles*, directed most of his fire at Justice Rehnquist for adopting a public safety exception to *Miranda*, but he did aim one passage at concurring Justice O’Connor. If the defendant’s statement was inadmissible (and he contended it was), then, maintained Marshall, so was the gun — for it was the “direct product” of the improper question. At this point Justice Marshall referred to two of the most famous Fourth Amendment poisonous tree cases — *Silverthorne Lumber* and *Wong Sun*. If Justice O’Connor had shared Amar and Lettow’s view, the quickest and most obvious way to respond to Marshall would have been (i) to assert that neither the Fifth Amendment nor the coerced confession rule requires the suppression of derivative physical evidence, or (ii) to maintain that the poisonous tree doctrine only applies to Fourth Amendment violations. But Justice O’Connor did neither. Instead, she retorted, “*Wong Sun* and its ‘fruit of the poisonous tree’ analysis leads to exclusion of derivative evidence only where the underlying police misconduct infringes a

181. 467 U.S. at 672 (O’Connor, J., concurring in part and dissenting in part).
182. 467 U.S. at 670 (O’Connor, J., concurring in part and dissenting in part).
183. 467 U.S. at 671 (O’Connor, J., concurring in part and dissenting in part) (emphasis added). The United States, which filed an amicus brief in the *Quarles* case supporting the State of New York, conceded that a gun or other nontestimonial evidence derived from a compelled statement — rather than a violation of *Miranda*’s “prophylactic rules” — should be excluded:

*Counselman* involved a statement compelled by the threat of punishment for contempt, but we would agree that nontestimonial evidence derived from a statement that has been compelled by police interrogation practices that overbear the will of a suspect should also not be admitted into evidence.

... [In this case, the] gun is nontestimonial evidence derived not from a statement shown to be compelled but from a statement obtained (we assume arguendo) in violation of the prophylactic rules of *Miranda* — rules that preclude the use of many statements that are not themselves in fact compelled. When nontestimonial evidence is directly linked to compelled statements, it is plausible to say that the values underlying the Self-Incrimination Clause would be offended by the use of nontestimonial evidence

184. 467 U.S. at 688 (Marshall, J., dissenting).

‘core’ constitutional right. Failure to administer *Miranda* warnings violates only a nonconstitutional prophylactic."\(^{187}\)

I must say I disagree with Justice O’Connor’s view of *Miranda*. I would not denigrate that rule, as I believe she does. But one may reject someone’s reasoning and still understand it. I think I understand Justice O’Connor.

Admittedly, it will not always be easy to apply her test; it will not always be clear what is or is not “a ‘core’ constitutional right.” But this much is plain: A failure to administer the *Miranda* warnings *does not* violate a core constitutional right. (According to a majority of the present Court, it does not seem to violate a constitutional right at all.) But a coerced confession *does* violate a core constitutional right. If not, it would be hard to imagine what police conduct would.

I am sure that Justice O’Connor would be quick to agree that a coerced confession constitutes an infringement of a core constitutional right. As she wrote for the Court only a year after she concurred in *Quarles*, police interrogation techniques that produce involuntary or coerced confessions “are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment.”\(^{188}\)

Evidently, Amar and Lettow believe that emanations from Justice O’Connor’s concurring opinion in *Quarles* support their view that physical evidence derived from compelled testimony and coerced confessions should be admissible. I think not. I think Justice O’Connor took considerable pains to cut off just such emanations:

> [W]hen the *Miranda* violation consists of a deliberate and flagrant abuse of the accused’s constitutional rights, amounting to a denial of due process, application of a broader exclusionary rule is warranted. Of course, “a defendant raising [such] a coerced-confession claim . . . must first prevail in a voluntariness hearing before his confession and evidence derived from it [will] become inadmissible.”\(^{189}\)

Even if the distinction Justice O’Connor drew in *Quarles* between mere *Miranda* violations and coerced confessions had been less forceful, I would still maintain that her opinion does not provide support for the Amar-Lettow thesis. In ascertaining the meaning and scope of an opinion, one should read it — unless there are

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187. *467 U.S. at 671 n.4* (O’Connor, J., concurring in part and dissenting in part) (citation omitted).
189. *467 U.S. at 672* (O’Connor, J., concurring in part and dissenting in part) (quoting *Kastigar v. United States*, 406 U.S. 441, 462 (1972)) (emphasis added); *see also supra* note 173 (discussing *Kastigar*); *infra* text accompanying notes 268-79 (same).
definite statements to the contrary — as "limited by the neighborhood of principles . . . which become strong enough to hold their own when a certain point is reached." Reading Justice O'Connor's opinion as "pointing the way" for the admissibility of the fruits of compelled testimony or coerced confessions would run smack into the well-established rule that the Fifth Amendment requires protection against use and derivative use.

As noted earlier, I am well aware that Amar and Lettow would like to overrule Kastigar and other cases standing for this rule. But the more relevant question is whether Justice O'Connor would like to do so. So far as I am aware, there is no evidence that she would.

I cannot resist noting that in the passage from Quarles set forth above, Justice O'Connor quotes from the Kastigar opinion with apparent approval. Moreover, she quotes from the portion of the opinion that likens compelled testimony, which requires protection against use and derivative use, to a coerced confession.

As Justice O'Connor observed, in the main the Court "has refused to extend the [Miranda] decision or to increase its strictures on law enforcement agencies in almost any way." In keeping with that general attitude, she would not extend Miranda or increase its strictures on the police by suppressing physical evidence derived from statements obtained in violation of that rule; she would only exclude the statements themselves. On the other hand, when police interrogation methods do produce a coerced confession, when police misconduct does amount to a denial of due process, then, to use Justice O'Connor's words, "application of a broader exclusionary rule is warranted."

The key to Justice O'Connor's Quarles opinion, I submit, is not the Amar-Lettow thesis that the reliable fruits of a Fifth Amendment violation should always be admissible. Rather, it is that — as hard as it is for some of us to accept — a "mere" Miranda violation,

191. Amar & Lettow, supra note 1, at 928 ("Justice O'Connor has pointed the way [to the Amar-Lettow view that the physical fruits of compelled testimony and coerced confessions should be admissible] in Quarles, where she suggested always allowing fruits in for mere Miranda violations."); see also id. at 881-82, 911.
192. See infra text accompanying notes 237-79.
193. For the full setting in which this quotation appears, see infra text accompanying note 284.
195. 467 U.S. at 672 (O'Connor, J., concurring in part and dissenting in part).
unlike a coerced confession or compelled testimony, does not constitute a violation of the Fifth Amendment itself.

This becomes even clearer when one examines the second opinion Justice O'Connor wrote on the general subject. In *Oregon v. Elstad*, this time speaking for the Court, Justice O'Connor underscored the lowly position *Miranda* currently occupies in the hierarchy of rights. She described a defendant whose *Miranda* rights have been violated as one "who has suffered no identifiable constitutional harm." And she characterized a breach of the *Miranda* rule as an occurrence that involves "no actual compulsion" and "no actual infringement of the suspect's constitutional rights."

In *Elstad*, the fruits of the *Miranda* violation were incriminating statements made by the defendant during a second meeting with the police, at which time, unlike in his first session, the defendant's *Miranda* rights were honored. The Court held that the fact that the police had obtained a statement from the defendant in violation of his *Miranda* rights when they questioned him earlier at his home did not bar the admissibility of the second statement, made at the station house, when, this time, the police had complied with *Miranda*.

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197. 470 U.S. at 307.
198. 470 U.S. at 308.
199. *Elstad* may be read very narrowly or quite broadly.

The narrow reading: The record is bereft of any factual support for the conclusion that the defendant's incriminating statement at his first meeting with the police caused him to confess, after he was fully advised of his rights and waived them, at the second meeting. Moreover, the confession made at the second meeting was not the product of intentional exploitation of the prior improper conduct by the police. There is no evidence that the police took advantage of the prior illegality in any way, for example, by confronting the defendant with, or reminding him of, his earlier statement. If, for example, the police had told the defendant that because he had admitted his presence at the scene of the burglary when he was first questioned, he might as well give them a full account of his involvement in the crime now that he was being questioned again, the result might have been different. Finally, the failure to advise the defendant of his *Miranda* rights at the first meeting was arguably inadvertent or only a borderline *Miranda* violation. If, for example, the defendant had asserted his right to counsel at the first meeting and the police had refused to honor that right, the result might have been different. Such a violation of *Miranda* might have been viewed as deliberate police misconduct calculated or likely to undermine the defendant's powers of resistance. At one point Justice O'Connor distinguished cases such as *Elstad*, where the police failed to advise a suspect of his *Miranda* rights at their first meeting, from cases "concerning suspects whose invocation of their rights to remain silent and to have counsel present were flatly ignored while police subjected them to continued interrogation." 470 U.S. at 313 n.3.

Thus, there is some support in the majority opinion for dissenting Justice Stevens's view that "the Court intends its holding to apply only to a narrow category of cases in which the initial questioning of the suspect was made in a totally uncoercive setting and in which the first confession obviously had no influence on the second." 470 U.S. at 364 (Stevens, J., dissenting) (footnote omitted).
Justice O'Connor's opinion in *Elstad* is much more elaborate and more carefully and clearly written than her earlier concurring opinion in *Quarles*. Moreover, because her *Elstad* opinion is the opinion of the Court, not just the viewpoint of a single justice, the *Elstad* opinion is more important.

Because Amar and Lettow maintain that Justice O'Connor's approach to the fruits of *Miranda* violations supports their view that the fruits of compelled testimony and coerced confessions should be admitted as well — and I read her comments very differently — I feel the need to quote from Justice O'Connor's *Elstad* opinion at considerable length and let the reader decide for herself:

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Even if *Elstad* applies to all *Miranda* violations that fall short of actual coercion, the case may not apply to all types of derivative evidence. *Elstad* does not deal specifically with the admissibility of physical or nontestimonial evidence derived from a *Miranda* violation; the Court has never explicitly addressed that issue. See *Massachusetts v. White*, 439 U.S. 280 (1978), affg. by an equally divided Court *Commonwealth v. White*, 371 N.E.2d 777 (Mass. 1977) (holding that physical evidence obtained from a *Miranda* violation must be excluded). See also *Patterson v. United States*, 485 U.S. 922 (1988), where Justice White, joined by Justice Brennan in dissenting from the denial of certiorari, observed that *Elstad* "did not squarely address the question [whether physical evidence derived from a *Miranda* violation is admissible]... and in fact, left the matter open." 485 U.S. at 923 (White, J., dissenting).

Dissenting in *Elstad*, Justice Brennan, joined by Justice Marshall, maintained that "[n]otwithstanding the sweep of the Court's language, [the majority] opinion surely ought not to be read as also foreclosing application of the traditional derivative-evidence presumption to physical evidence obtained as a proximate result of a *Miranda* violation," noting that the majority "relies heavily on individual 'volition' as an insulating factor in successive-confession cases" — a factor "altogether missing in the context of inanimate evidence." 470 U.S. at 347 n.29 (Brennan, J., dissenting). Justice Brennan also noted that "most courts considering the issue have recognized that physical evidence proximately derived from a *Miranda* violation is presumptively inadmissible." 470 U.S. at 347 n.29 (Brennan, J., dissenting). According to David A. Wollin, however, "[f]ollowing *Elstad*, federal and state courts have almost uniformly ruled that the prosecution can introduce nontestimonial fruits of a *Miranda* violation in a criminal trial. The poisonous tree doctrine will be applicable only if there is evidence of actual coercion or other circumstances designed to overbear the suspect's will." Wollin, supra note *, at 835-36 (footnotes omitted).

The broad reading: At several places in her opinion for the Court, Justice O'Connor tells us that the poisonous tree doctrine assumes the existence of an underlying constitutional violation — for example, a violation of the Fourth Amendment or "police infringement of the Fifth Amendment itself." 470 U.S. at 309; see also 470 U.S. at 304-05, 308. Because it is plain that, according to a majority of the Court, a *Miranda* violation does not qualify as a "constitutional violation," one may conclude that the poisonous tree doctrine does not apply to *Miranda* violations at all — whether the fruit is a second confession or the testimony of a government witness or physical evidence. Moreover, at one point Justice O'Connor writes as if the Court had already decided that the tangible fruits of a *Miranda* violation are admissible. Thus, after discussing *Michigan v. Tucker*, 417 U.S. 433 (1974), which upheld the admissibility of the testimony of a government witness who was discovered as a result of a *Miranda* violation because, inter alia, the third-party witness's testimony did not violate the defendant's Fifth Amendment rights, she adds: "We believe that [the reasoning of *Tucker*] applies with equal force when the alleged 'fruit' of a noncoercive *Miranda* violation is neither a witness nor an article of evidence but [as in the instant case] the accused's own voluntary testimony." 470 U.S. at 308 (emphasis added).

For purposes of this essay, I shall assume that the poisonous tree doctrine does not apply to noncoercive *Miranda* violations at all.

[The defendant's] contention that his confession was tainted by the earlier failure of the police to provide *Miranda* warnings and must be excluded as "fruit of the poisonous tree" assumes the existence of a constitutional violation. . . . 

. . . . As in [the instant] case, the breach of the *Miranda* procedures in *Tucker* involved no actual compulsion. . . . Since there was no actual infringement of the suspect's constitutional rights, the [*Tucker*] case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed. 

. . . . If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion . . . so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.201

As I read her two opinions on the admissibility of the fruits of a *Miranda* violation, Justice O'Connor drew the same distinct line between "mere" *Miranda* violations and actual "infringements of the Fifth Amendment itself" that the Court had drawn earlier in the so-called impeachment cases. In that setting too, the Court painted a bright line between *Miranda* violations, which may be used to impeach a defendant who testifies in his own defense,202 and a coerced confession or compelled testimony, which cannot be used for impeachment purposes.203

Although *Harris v. New York*204 held that statements obtained in violation of *Miranda* may be used to impeach a defendant who takes the stand in his own defense, the Court declared peremptorily in *Mincey v. Arizona*205 that "any criminal trial use against a de-

201. 470 U.S. at 305, 308 (emphasis added). Justice O'Connor refers to Michigan v. Tucker, 417 U.S. 433 (1974), a case that dealt with the admissibility of the testimony of a witness whose identity had been learned by questioning the defendant without giving him full *Miranda* warnings. In holding that the witness's testimony was admissible, the Court viewed the *Miranda* warnings as "not themselves rights protected by the Constitution" but only "prophylactic standards" designed to "safeguard" or to "provide practical reinforcement for the right against compulsory self-incrimination." 417 U.S. at 444-46. *Tucker* is discussed supra in note 66.


204. 401 U.S. 222 (1971); see also Oregon v. Hass, 420 U.S. 714 (1975) (presenting a variation of the factual situation in *Harris*). For powerful criticism of *Harris*, see Dershowitz & Ely, supra note 74.

fendant of his involuntary statement is a denial of due process of law." When, a year later in New Jersey v. Portash, the prosecution contended that immunized grand jury testimony could be used for impeachment purposes, the Court retorted in effect that Mincey had already resolved that issue against the government:

As we reaffirmed last Term, a defendant's compelled statements, as opposed to statements taken in violation of Miranda, may not be put to any testimonial use whatever against him in a criminal trial. . . . Testimony given in response to a grant of legislative immunity is the essence of coerced testimony. . . . The information given in response to a grant of immunity may well be more reliable than information beaten from a helpless defendant, but it is no less compelled. The Fifth and Fourteenth Amendments provide a privilege against compelled self-incrimination, not merely against unreliable self-incrimination. Balancing of interests was thought to be necessary in [the Miranda impeachment cases] when the attempt to deter unlawful police conduct collided with the need to prevent perjury. Here, by contrast, we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible.

In Portash, the defendant had received use and derivative use immunity — what the Court called "the necessary constitutional scope of testimonial immunity." It is hard to believe that the victim of a coerced confession is entitled to any less protection. Testimony in response to an immunity grant may be no less compelled than a confession extracted from a helpless defendant, but surely it is no more compelled. If testimony in exchange for immunity implicates the privilege "in its most pristine form," so does a coerced confession. If compelled testimony is "the essence of coerced testimony," so is a coerced confession.

In relying on the Miranda impeachment cases, the Portash Court pointed out, "the State has overlooked a crucial distinction between those cases and this one" the defendants in those cases had made no claim that their statements were coerced or involuntary. Amar and Lettow overlook the same crucial distinction, I submit, when they look upon the statements Justice O'Connor made in the special context of Miranda as support for their general thesis.

206. 437 U.S. at 398; see also 437 U.S. at 402 ("Due process of law requires that statements obtained as these were cannot be used in any way against a defendant at his trial.").
208. 440 U.S. at 459.
209. 440 U.S. at 458 (emphasis added).
210. 440 U.S. at 458.
C. Does Judge Friendly Support Amar and Lettow?

Because Judge Henry Friendly, probably the most formidable critic of *Miranda*,¹¹¹ may have been the first commentator to argue that the fruits of *Miranda* violations should be admitted into evidence, and because both Justice O'Connor¹²¹ and Amar and Lettow¹³ quote him with approval, a close look at what Friendly had to say about the fruits of inadmissible confessions seems warranted.

First of all, Judge Friendly recognized that his proposal to admit the fruits of *Miranda* violations posed substantial dangers: "The more serious question is how far admission of fruits would perpetuate the police abuses at which the *Miranda* opinion was partly aimed; the police, it can be forcefully argued, would invariably exercise the option to sacrifice the statements themselves rather than follow the frustrating *Miranda* code."¹⁴ Friendly had reason to be concerned. As he noted, "It has been said that 'what data there are' suggest that the obtaining of leads with which to obtain real or demonstrative evidence or prosecution witnesses is more important to law enforcement than getting statements for use in court."³¹⁵

Amar and Lettow cite Judge Friendly for the proposition that "physical leads are often more important to law enforcement than getting statements for use in court,"¹° but they do so in a way that would lead many a reader to believe that Friendly considered this an argument for admitting physical leads into evidence. I think it fairly clear, however, that he viewed this as an argument for not doing so. He concluded nevertheless that the fruits of a *Miranda* violation should be admissible, evidently because he thought the

²¹¹. See generally FRIENDLY, supra note 25.
²¹³. See Amar & Lettow, supra note 1, at 889.
²¹⁴. FRIENDLY, supra note 25, at 282. A year later, when he delivered the Robert S. Marx Lectures at the College of Law at the University of Cincinnati, Judge Friendly reiterated this concern: Yet it can be argued against [the proposal to admit the fruits of *Miranda* violations] that anything short of extending the *Miranda* code to fruits and leads will fail to end the "third degree." Faced with the alternatives of obeying the code, with its dampening effect on the giving of answers, and using coercive methods in the hope of obtaining unusable answers that will yield usable fruits, the police, it will be asserted, will invariably opt for the latter. Friendly, supra note 10, at 712 (footnote omitted).
²¹⁵. Id. at 712 n.176; see also Wollin, supra note *, at 845 (pointing out that "[e]xpert interrogators have long recognized, and continue to instruct, that a confession is a primary source for determining the existence and whereabouts of the fruits of a crime, such as documents or weapons") (footnote omitted). In a footnote, Wollin quotes from or refers to various interrogation manuals. See id. at 845 n.202.
²¹⁶. Amar & Lettow, supra note 1, at 922 n.286.
need to use such fruits outweighed the risk that their admissibility would have an adverse effect on police behavior.\textsuperscript{217}

I have read and reread Judge Friendly's arguments for admitting the fruits of \textit{Miranda} violations. I am able to follow most of his arguments, but not, I confess, all of them. It may be my shortcoming, but I find one argument — one quoted by Justice O'Connor and by Amar and Lettow as well\textsuperscript{218} — especially puzzling: "[A]lthough a suspect's answers are indeed 'testimonial' insofar as they implicate him and would be banned as such, their use merely to find other evidence establishing his connection with the crime differs only by a shade from the permitted use for that purpose of his body or his blood."\textsuperscript{219}

Judge Friendly cites two cases in support of this statement: \textit{Schmerber v. California},\textsuperscript{220} which I have already discussed at considerable length,\textsuperscript{221} and \textit{Holt v. United States},\textsuperscript{222} a 1910 case.\textsuperscript{223} In \textit{Holt}, the question arose whether a blouse belonged to the defendant, and the Court upheld the admissibility of a witness's testimony that the defendant put on the blouse and it fit him.\textsuperscript{224} I fail to see the relevance of either case to the issue we are debating. In neither case was the disputed evidence the fruit of a constitutional violation. In neither case did the defendant's answers lead the government to the disputed evidence.

Although some have argued to the contrary, I am perfectly willing to concede that physical evidence differs only by a shade from the "permitted use" of a person's body or his blood. But that only leads to other questions: Under what circumstances should the use of a person's body or his blood be permitted? Should the use of a person's blood, or physical evidence generally, be permitted \textit{regardless} of the police misconduct that led to its acquisition? Clearly not, I believe. As I have argued at length, it should be permitted — and, I believe, it \textit{is} permitted — only when, as in \textit{Schmerber} and \textit{Holt}, the physical evidence was not derived from and tainted by an

\begin{itemize}
\item \textsuperscript{217} See infra text accompanying notes 230-36.
\item \textsuperscript{218} See \textit{Quarles}, 467 U.S. at 671 (O'Connor, J., concurring in part and dissenting in part); Amar & Lettow, supra note 1, at 887.
\item \textsuperscript{219} FRIENDLY, supra note 25, at 280 (footnote omitted).
\item \textsuperscript{220} 384 U.S. 757 (1966).
\item \textsuperscript{221} See supra section II.A.
\item \textsuperscript{222} 218 U.S. 245 (1910).
\item \textsuperscript{223} See FRIENDLY, supra note 25, at 280 n.67.
\item \textsuperscript{224} 218 U.S. at 252-53. For further discussion of \textit{Holt}, see supra text accompanying notes 116-18.
\end{itemize}
The statement by Judge Friendly quoted above should be read in light of everything he had to say about the admissibility of the fruits of confessions. When so read, all he meant, I am convinced, is that although a suspect’s answers to questions asked by police officers who fail to administer the Miranda warnings are “indeed testimonial,” the use of answers to such questions to find other evidence of crime should still be permitted. To give his statement a more expansive reading than that would conflict with what Judge Friendly had to say a year later in his Marx Lectures:

[T]he involuntary confession rule reflected a belief that there was an area where government might legitimately inquire before the criminal process began; only when its agents overpassed the boundaries of decent conduct [i.e., obtained a coerced confession] did the answers and their fruits have to be excluded.

. . . .

One solution to [the problems posed by Miranda] would be to go along with the majority’s holding that answers obtained in violation of the Miranda rules may not be used but to admit the fruits where the questioning had not violated basic concepts of decency.225

In any event, when Friendly actually formulated his proposal, he was quite guarded. He called for “an intermediate rule whereby although [the state] cannot require the suspect to speak by punishment or force, the non-testimonial fruits of speech that is excludable only for failure to comply with the Miranda code could still be used.”226

This formulation, too, is not free from doubt. I maintain that Judge Friendly’s proposal drew a line between situations in which the police failed to administer the Miranda warnings and those instances in which the police “require[d] the suspect to speak by punishment or force.”227 I contend that he was not calling for a revision of the rule (or what he assumed to be the rule) governing coerced confessions — a rule he thought required the fruits of such

225. Friendly, supra note 10, at 709, 712 (emphasis added) (footnote omitted). Thus, although there appears to be no Supreme Court case precisely on point, see supra note 52, Judge Friendly assumed that the poisonous tree doctrine applied to coerced confessions and barred the use of physical evidence derived from such confessions. The Court assumed the same thing in Kastigar. See infra text accompanying note 284. So did Justices White and Stewart, concurring in Murphy v. Waterfront Commission, 378 U.S. 52, 103 (1964). See supra text accompanying notes 170-72. So did Justice Blackmun, concurring in Pillsbury Co. v. Conboy, 459 U.S. 248, 278 (1983). See infra notes 283, 286.

226. FRIENDLY, supra note 25, at 280 (emphasis added).

227. Id.
confessions as well as the confessions themselves to be excluded — but only proposing that an exception to the general rule be carved out for "mere" *Miranda* violations, that is, for confessions inadmissible "only for failure to comply with the *Miranda* code." But no doubt others would read Friendly's proposal differently. They would argue, for example, that the "logic" of his proposals or the "emanations" from his reasoning applied to the fruits of coerced confessions as well as to the fruits of *Miranda* violations.

On the basis of this passage alone, we would not know for sure what Judge Friendly meant. But we *do* know for sure — because he *told us*. Two pages later — in a statement that, astonishingly, Amar and Lettow completely ignore — he wound up his discussion of the admissibility of a confession's fruits as follows: "Certainly any rule allowing the admission of fruits would have to be limited, as was the *Johnson* ruling with respect to retroactive application, to interrogation not violating due process standards; fruits of confessions obtained by physical brutality or other abhorrent means should clearly be excluded."

A flat, emphatic statement trumps all implications and emanations to the contrary. And it is hard to see how Friendly could have been any clearer or more emphatic.

If, as Amar and Lettow stress, the physical fruits of confessions "are quite reliable and often highly probative pieces of evidence," why did Judge Friendly, for whom they evidently have a high regard, balk at admitting the physical fruits of coerced confessions?

One can't be sure. Perhaps Judge Friendly did not believe that he had the same room to maneuver when it came to coerced confessions as he did when he dealt with "mere" *Miranda* violations. (We know he assumed that the poisonous tree doctrine applied to

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228. See *supra* note 225 and accompanying text.
230. FRIENDLY, *supra* note 25, at 282. The reference is to Johnson v. New Jersey, 384 U.S. 719 (1966), which held that *Miranda* only applied to cases in which the trial began after the date of that decision.
231. Amar & Lettow, *supra* note 1, at 895; *see also id.* at 922-23.
232. *See id.* at 901 (referring to Judge Friendly's "wise and influential lectures on the Self-Incrimination Clause"). Perhaps I should add that I share Amar and Lettow's high regard for Judge Friendly. I served with him — and some thirty others — on the Advisory Committee to the American Law Institute's Model Code of Pre-Arraignment Procedure project for nine eventful years and came away with the impression that he was the wisest adviser of all.
233. Recall that when the Court held in New Jersey v. Portash, 440 U.S. 450 (1979), that coerced or compelled utterances — as opposed to statements obtained in violation of *Miranda* — could not be used for impeachment purposes, it remarked that when dealing with a
the fruits of coerced confessions. Perhaps he believed that the Fifth Amendment protected against the use and derivative use of a confession compelled by the police no less than it did testimony compelled by a grant of immunity. But even if he believed he were free to compose and propose on a clean slate, I believe Judge Friendly would have arrived at the same conclusion he did with respect to the fruits of a coerced confession.

He drew a sharp line — as I think the Court did in Elstad — between “mere” Miranda violations and confessions that Justice O’Connor later identified as “offensive to a civilized system of justice.” I think he was determined to condemn in the strongest way possible police interrogation methods that “violate[ ] basic concepts of decency.” I also believe he feared that if the prosecution were allowed to use the often-valuable leads produced by coerced confessions, the police would have a significant incentive to resort to unacceptable interrogation techniques.

To put it another way, I think that even if Judge Friendly believed he was free to weigh the costs and benefits of preventing the use of evidence derived from coerced confessions — and perhaps he did feel free to do so — he would have concluded — and perhaps he did conclude — that the need to disapprove and to discourage interrogation methods that violate minimum standards of due process outweighed the costs of exclusion.

III. Counselman v. Hitchcock, Kastigar v. United States, and the Poisonous Tree Doctrine

Counselman v. Hitchcock marked the first time the Supreme Court considered a challenge to an immunity statute. When questioned by a grand jury about possible criminal violations of the Interstate Commerce Act, Counselman invoked the privilege against self-incrimination. Although he was granted testimonial immunity — protection only against the use of the specific testimony

Fifth Amendment violation “in its most pristine form,” the balancing of competing interests “is impermissible.” 440 U.S. at 459.

234. See supra note 225 and accompanying text.

235. Miller v. Fenton, 474 U.S. 104, 109 (1985). As Justice O’Connor observed for the majority in Miller, the Court “has long held that certain interrogation techniques . . . are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment.” 474 U.S. at 109.

236. Friendly, supra note 10, at 712.

237. 142 U.S. 547 (1892).

compelled from him — Counselman persisted in his refusal to answer. As a consequence, he was adjudged in contempt of court. On appeal, the Supreme Court upheld Counselman’s refusal to answer, pointing out that the statute furnishing immunity failed to protect him against the derivative use of his testimony. This was a fatal deficiency that the Court repeatedly emphasized:

[The statute] could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding . . . . It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.

... [The statute] does not supply a complete protection from all the perils against which the constitutional prohibition [against compulsory self-incrimination] was designed to guard, and is not a full substitute for that prohibition. . . . [The statute] affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party.239

The Counselman Court was well aware that a number of the state constitutional counterparts to the Fifth Amendment prohibited a person from being compelled to “give evidence” or to “furnish evidence” against himself and thus contained more expansive language than the Fifth Amendment itself.240 But the Court believed that the state and U.S. constitutional provisions, “however differently worded, should have as far as possible the same interpretation.”241

What should that interpretation be? It should include, the Court told us — quoting from Emery’s Case,242 a Massachusetts case — protecting a person “‘from being compelled to disclose . . . the sources from which, or the means by which, evidence of [his crime] . . . or of his connection with it, may be obtained . . . without using his answers as direct admissions against him.’”243

239. 142 U.S. at 564, 585-86.
240. See 142 U.S. at 584.
241. 142 U.S. at 585.
243. 142 U.S. at 585 (quoting Emery’s Case, 107 Mass. at 182).
In *Counselman*, the appellee argued — as do Amar and Let-tow\(^2\)\(^4\) — that *Emery’s Case* is easily distinguishable because it in-volved the construction of a state provision declaring that “[n]o subject shall be . . . compelled to accuse or furnish evidence against himself.”\(^2\)\(^4\)\(^5\) But the Court did not think the difference in wording was important: “[H]owever this difference [in the wording of the Massachusetts and similar state provisions] may have been commented on in some of the [state] decisions, there is really, in spirit and principle, no distinction arising out of such difference of language.”\(^2\)\(^4\)\(^6\)

Once it held that the Fifth Amendment furnished protection against the *derivative use* of one’s compelled testimony, the *Coun-selman* Court could have ended its opinion. It sufficed that (i) at the very least, the Fifth Amendment required protection against the use and *derivative use* of compelled utterances, and (ii) the challenged immunity statute failed to satisfy even this minimal stan-dard. There was no need to say any more.

But the *Counselman* court did say more. At the very end of a long opinion, it added a statement — one that a later Court called “dictum”\(^2\)\(^4\)\(^7\) — that “a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates.”\(^2\)\(^4\)\(^8\)

Why the *Counselman* Court felt the need to add this statement is unclear. Perhaps it thought that use and derivative use immunity, as a practical matter, could not furnish a person sufficient protection against such subtle uses of compelled testimony as the identifi-cation of witnesses.\(^2\)\(^4\)\(^9\) Or perhaps the Court was not “aware of the

\(^{244}\) See Amar & Lettow, *supra* note 1, at 915-16.
\(^{245}\) 142 U.S. at 557-58, 586.
\(^{246}\) 142 U.S. at 586.
\(^{247}\) See Kastigar v. United States, 406 U.S. 441, 454-55 (1972). After stating that the “broad language in *Counselman* [about the need for a valid statute to provide ‘absolute immu-nity’] . . . was unnecessary to the Court’s decision, and cannot be considered binding authority,” the Court noted that “[l]anguage similar to the *Counselman* dictum can be found in” two other cases. 406 U.S. at 454-55 & n.39.

Consider also Murphy v. Waterfront Commission, 378 U.S. 52 (1964): The *Counselman* Court established for the first time that the coverage of the privilege extended to not only a confession of the offense but also disclosures leading to discovery of incriminating evidence, a matter of considerable doubt at the time, . . . In a dictum indicating that some immunity statutes are valid, the Court added that “a statutory en-actment, to be valid, must afford absolute immunity . . . .” 378 U.S. at 105-06 (White, J., concurring).
\(^{248}\) 142 U.S. at 586.
\(^{249}\) This was the argument that petitioners made unsuccessfully in Kastigar v. United States, 406 U.S. 441, 459-62 (1972), discussed *infra* in text accompanying notes 268-79. Although use and derivative use immunity was upheld in *Kastigar*, various organizations,
middleground afforded by use and derivative use immunity, but rather conceived of transactional immunity as the only alternative to use immunity." 250

In any event, I share the view that "the essence of Counselman" is its determination that the privilege protects against the derivative use, as well as the use, of compelled utterances: 251 it prevents the government from using compelled testimony to gain "knowledge of . . . sources of information which may supply other means of convicting" 252 a defendant. At the very least, this portion of the opinion is, as the Court later called it, "the conceptual basis of Counselman." 253

I find it odd that Amar and Lettow never refer to this portion of Counselman — a portion that constitutes the bulk of the opinion. I have no desire to get entangled in a discussion of "holding" versus "dictum." I am willing to avoid the term "dictum" and say that (i) the "primary," or perhaps even the "intermediate," holding of Counselman was the determination that the immunity statute at issue had to fall because it failed to provide protection against the derivative use of compelled testimony, and (ii) the "secondary," or perhaps even the "ultimate," holding was the view that an immunity statute must provide "absolute immunity," or what has come to be known as "transactional immunity." But why do Amar and Lettow never allude to what may be called the primary holding — or at least the intermediate holding — of the case? Why is Counselman

“including the American Bar Association and the Commissioners on Uniform State Laws, [have] urged retention of transactional immunity, and a majority of states continue to provide the broader immunity.” 1 LAFAVÉ & ISRAEL, supra note 43, § 8.11(b), at 687-88 (footnote omitted). For a useful summary of the debate between the proponents of the two types of immunity, see 1 id. § 8.11(b), at 688-90.

250. Koontz & Stodel, supra note 238, at 361 n.78. The state courts were split between those upholding the constitutionality of testimonial immunity statutes and those requiring immunity statutes to provide complete immunity from prosecution for the crimes disclosed by the compelled testimony. See id. After noting this division in the state courts, the Counselman Court explicitly chose to follow the state cases requiring complete, or transactional, immunity. See id.

251. See Robert G. Dixon, Jr., Comment on Immunity Provisions, in 2 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 1405, 1430-31 (1970) ("[T]he essence of Counselman is its use restriction language, and not the additional loose statement from which the absolute immunity has been derived. It would seem, therefore, that the traditionally broader language used in Federal immunity statutes, which raises a question concerning the use of independent evidence, is unneeded."). For the significance of Professor Dixon's comprehensive immunity study, see infra text accompanying note 280.

252. 142 U.S. at 586.

described only as a case that "established an extraordinarily sweeping form of immunity" and as an "1892 chestnut".

According to the dictionaries I have consulted, one of the secondary definitions of chestnut, and the one I assume Amar and Lettow had in mind, is "an old and stale joke." The *Counselman* case may be old, but its primary or intermediate holding is hardly stale. In the hundred years since *Counselman* was decided, the Court has never deviated from the view that the minimal form of immunity required by the Fifth Amendment is protection against the use and derivative use of compelled testimony.

Again and again, the Court has told us that the privilege "not only extends to answers that would in themselves support a conviction... but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant..."; that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him"; that the privilege protects a witness compelled to testify against any governmental "use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying"; that "a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant"; and that the "policies [of the privilege] are served when the privilege is asserted to spare

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[In *Counselman*, a unanimous Court had found [an immunity statute] constitutionally inadequate... because the immunity granted was incomplete, in that it merely forbade the use of the testimony given and failed to protect a witness from future prosecution based on knowledge and sources of information obtained from the compelled testimony. 350 U.S. at 436-37 (citation omitted); see also *Pillsbury Co. v. Conboy*, 459 U.S. 248, 274 (1983) (Blackmun, J., concurring) ("In *Counselman v. Hitchcock* this Court held that [a statute only providing testimonial immunity] could not be used to compel a witness to testify against himself, because it did not provide protection coextensive with the Fifth Amendment." (citation omitted)).

255. *See Amar & Lettow, *supra* note 1, at 858.


the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense . . . .”

Whether regarded as a holding or as dictum, the broad language at the end of the Counselman opinion "was taken as indicating that a valid immunity grant must absolutely bar prosecution for any transaction noted in the witness' testimony." Accordingly, the "transactional immunity statute became the basic form for the numerous federal immunity statutes until 1970."

However, language in a 1964 case, Murphy v. Waterfront Commission, indicated that use and derivative use immunity would be constitutionally sufficient to compel testimony over a claim of the privilege. Thus encouraged, Congress began considering a new type of immunity statute. Finally, it enacted section 6002 of the Crime Control Act of 1970, which replaced transactional immunity with a prohibition against use and derivative use. The new immunity statute provided:

[N]o testimony or other information compelled under the [court] order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

In Kastigar v. United States, a 5-2 majority upheld the new federal provision against the contention that use and derivative use immunity did not adequately protect a witness and thus was insufficient to supplant the privilege. The Court held that because the challenged provision "prohibits the prosecutorial authorities from

262. 1 LAFAVE & ISRAEL, supra note 43, § 8.11(b), at 685.
265. See 378 U.S. at 79. There is language to the same effect in Gardner v. Broderick, 392 U.S. 273, 276 (1968). See also People v. La Bello, 249 N.E.2d 412, 414 (N.Y. 1969) (viewing Counselman as not barring use and derivative use immunity).


267. 18 U.S.C. § 6002 (1988 & Supp. 1994) (emphasis added). As Justice Blackmun pointed out a decade later, the legislative history demonstrates that "Congress intended to incorporate the 'fruit[ ] of the poisonous tree' doctrine into the statute by use of the phrase 'directly or indirectly.'" Pillsbury Co., 459 U.S. at 278 (Blackmun, J., concurring); see also infra notes 281, 283.
using the compelled testimony in any respect,”269 the scope of the immunity provided was coextensive with the scope of the privilege. And it maintained that “[this] holding is consistent with the conceptual basis of Counselman.”270

Amar and Lettow have harsh words for Kastigar and for its double conclusion that use and derivative use immunity is both constitutionally sufficient and constitutionally necessary. They assert that Kastigar “provided no persuasive basis for stopping where it did in fashioning its new rule”271 and that it “failed to explain persuasively where its new rule came from.”272

These comments are likely to leave Amar and Lettow’s readers at a loss. Amar and Lettow do not bother to tell us why they think the Kastigar Court’s explanations are unpersuasive. Nor is the reader in any position to decide for herself, because Amar and Lettow do not even tell us what reason (persuasive or otherwise) the Court gave for stopping where it did or what explanation (persuasive or otherwise) it offered for the genesis of its new rule. Indeed, at one point Amar and Lettow indicate that they cannot fathom what led the Kastigar Court to adopt the rule it did: “[W]hat, precisely, was the source of Kastigar’s ‘rational accommodation’?”273

I find the question baffling. All one need do to discover the source of the Kastigar rule and to learn why the Court stopped where it did is to read the Kastigar opinion.

The basis for the immunity provision at issue in Kastigar and the source of the Court’s holding that use and derivative use immunity provides all the protection the Fifth Amendment requires is either (i) “the conceptual basis of Counselman . . . namely, that immunity from the use of compelled testimony and evidence derived therefrom is coextensive with the scope of the privilege,”274 or (ii) the poisonous tree doctrine, as it applies to the Fifth Amendment. To put it somewhat differently, the genesis of what Amar and Lettow call Kastigar’s “new rule” is either an old case or an old doctrine — either Counselman, which regarded the prohibition against the derivative use of compelled statements an essential part of the Fifth Amendment or Counselman, which regarded the prohibition against the derivative use of compelled statements an essential part of the Fifth Amendment.

269. 406 U.S. at 453.
270. 406 U.S. at 453.
271. Amar & Lettow, supra note 1, at 858 (emphasis added).
272. Id. at 878 (emphasis added).
273. Id. The phrase rational accommodation is a reference to the Kastigar Court’s statement that immunity statutes “seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify.” 406 U.S. at 446.
274. 406 U.S. at 452-53 (footnote omitted).
Amendment and considered this prohibition built into the Amendment’s exclusionary rule, or the poisonous tree doctrine, which on the eve of Kastigar was thought to apply in the Fifth Amendment context as well as in the Fourth.

When the Counselman Court held that the Fifth Amendment protected a witness against the derivative use of his testimony, did it not, in effect, invoke what has come to be known as the poisonous tree doctrine? If, as the search and seizure cases seem to say, the poisonous tree doctrine is the corollary of an exclusionary rule, why shouldn’t the Fifth Amendment have its own poisonous tree doctrine? After all, the Fifth Amendment’s prohibition against compelled self-incrimination “is an exclusionary rule — and a constitutionally created one.” Moreover, “unlike the Fourth Amendment, the Fifth Amendment is directly concerned with the introduction of tainted evidence at trial; it is in fact the introduction of such evidence that constitutes the primary violation of the Amendment.”

In any event, whether the poisonous tree doctrine is regarded as an intrinsic part of the Fifth Amendment itself or as a doctrine that

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275. Consider People v. Robinson, 210 N.W.2d 372 (Mich. Ct. App. 1973). Relying on various search and seizure cases, the defendant argued that physical evidence derived from his coerced confession should be excluded as the fruit of the poisonous tree. Relying on Counselman and Kastigar, the court responded: “[W]hile the defendant’s position is well taken, his reasoning is erroneous. Instead of urging us to establish a Fifth Amendment branch of the ‘fruit of the poisonous tree’ doctrine, he should have been arguing that such a branch was always present as an essential element of the Fifth Amendment guarantee.” 210 N.W.2d at 376 (footnote omitted).

276. See infra text accompanying notes 281-87.

277. See infra text accompanying notes 297-304 (discussing Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) and Nardone v. United States, 308 U.S. 338 (1939)).

278. Dershowitz & Ely, supra note 74, at 1214 (footnote omitted); see also Stone, supra note 66, at 111 (noting that the Self-Incrimination Clause “by its own terms seems to dictate the exclusion of evidence obtained in violation of its commands” (footnote omitted)); The Supreme Court, 1967 Term, 82 HARV. L. REV. 63, 222 (1968) (noting that “the fifth amendment exclusionary rule is an essential element of the constitutional right, not just a means of enforcing the right”).

279. Note, supra note 161, at 178. Thus, “[e]ven if the exclusion of evidence derived from a coerced confession is unlikely to have a deterrent effect on the police, its introduction will still represent an infringement on the individual’s privilege against self-incrimination.” Id. (footnote omitted); see also Koontz & Stodel, supra note 238, at 378 n.164 (“It is the preclusion of incriminating uses that is the essence of the privilege; the exclusion is not just a method to implement some other constitutional right.”); Howard R. Shapiro, Note, Miranda Without Warning: Derivative Evidence as Forbidden Fruit, 41 BROOK. L. REV. 325, 348 (1974) (“[A]dmission of evidence derived from compelled self-witness does, in effect, work anew a compelled testimony by the accused against himself.”); Note, Scope of Taint under the Exclusionary Rule of the Fifth Amendment Privilege Against Self-Incrimination, 114 U. PA. L. REV. 570, 575 (1966) (“Because the fifth amendment exclusionary rule is more closely linked to the rights of the particular defendant and is a more integral part of the privilege than is the fourth amendment exclusionary rule, courts should not have the same flexibility in applying it.”).
originated in the search and seizure cases and spilled over into the
Fifth Amendment area, or whether, as was said on the eve of Kasti-
gar, the poisonous tree doctrine and Murphy v. Waterfront Commiss-
ion (and other then-recent Fifth Amendment cases) "seem to
coalesce in result," it is clear that both the Congress that enacted
the 1970 immunity statute and the Court that upheld it operated on
the premise that the poisonous tree doctrine applied to compelled
statements.

As the Court noted, the recommendation of the National Com-
mission on Reform of Federal Criminal Laws "served as the model"
for the immunity statute at issue in the Kastigar case. In a special
report to the President, the Chairman of the National Commission
expressed confidence that the Commission's proposal for use and
derivative use immunity would satisfy constitutional requirements
because it provided the same protection required in cases of coer-
ced confessions or evidence otherwise unconstitutionally
obtained:

Immunity from use is the only consequence flowing from a violation
of the individual's constitutional right to be protected from unreason-
able searches and seizures, his constitutional right to counsel, and his
constitutional right not to be coerced into confessing. The proposed
immunity is thus of the same scope as that frequently, even though

280. Dixon, supra note 251, at 1424. After noting that what he calls "unintentional im-
munity" is "frequently conferred" on defendants by excluding "illegally seized evidence and
the fruits thereof," id. at 1419, and after calling the immunity rule suggested in Murphy —
barring prosecutorial use of compelled testimony and its fruits — "an exclusionary rule . . .
based on the fifth amendment . . . parallel to the judicially announced and judicially policed
[search and seizure] exclusionary rule," id. at 1423-24, Professor Dixon continues: "Thus,
under recent fifth amendment jurisprudence . . . the due process 'coerced confession' line of
cases, the fourth amendment cases, and the fifth amendment line of cases seem to coalesce in
result, even though there may be underlying doctrinal differences." Id. at 1424.

As the Kastigar Court noted, the recommendation of the National Commission on Re-
f orm of Federal Criminal Laws "served as the model" for the federal immunity statute at
issue in Kastigar, and the Commission's recommendation "was based in large part" on the
comprehensive study of immunity by Dixon quoted above. Kastigar, 406 U.S. 441, 452 n.36
(1972).

281. As for the Court, see Kastigar, 406 U.S. at 461-62. As for Congress, see the discus-
sion of the legislative history of § 6002 in Pillsbury Co. v. Conboy, 459 U.S. 248, 276-78
(1983) (Blackmun, J., concurring). As Justice Blackmun points out:

Section 6002's prohibition against the use of compelled testimony or "any information
directly or indirectly derived from such testimony" reflected Congress' view of the
extent of the Fifth Amendment privilege. According to the House and Senate Reports,
the phrase was chosen to conform to "present law" on the "use of evidence derivatively
obtained." The Reports then cite Wong Sun v. United States, 371 U.S. 471 (1963), the
seminal case on what is commonly known as the "fruits" doctrine, as representing "present
law."

459 U.S. at 276-77; see also infra note 283.

282. 406 U.S. at 452 n.36; see also supra note 280.
unintentionally, conferred as the result of constitutional violations by law enforcement officers.283

When the immunity provision at issue in Kastigar was attacked on the ground that a statute had to grant full transactional immunity in order for it to be coextensive with the scope of the privilege, the Court responded — as had the Congress and the National Commission earlier — by pointing to the poisonous tree doctrine:

The statutory proscription is analogous to the Fifth Amendment requirement in cases of coerced confessions. A coerced confession, as revealing of leads as testimony given in exchange for immunity, is inadmissible in a criminal trial, but it does not bar prosecution. Moreover, a defendant against whom incriminating evidence has been obtained through a grant of immunity may be in a stronger position at trial than a defendant who asserts a Fifth Amendment coerced-confession claim. . . . [The latter defendant] must first prevail in a voluntariness hearing before his confession and evidence derived from it become inadmissible.

There can be no justification in reason or policy for holding that the Constitution requires an amnesty grant where . . . testimony is compelled in exchange for immunity from use and derivative use when no such amnesty is required where the government, acting without colorable right, coerces a defendant into incriminating himself.284

There is no mystery about why the Congress that enacted the 1970 immunity statute and the Court that upheld it went as far as they did but no further. Congress and the Court went as far as they did in protecting a witness compelled to testify in exchange for immunity because they believed they had to go that far in order to "leave[ ] the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege."285 — just as they thought the poisonous tree doctrine left a defendant who had been the victim of unconstitutional police conduct in substantially the same position as if the police had not violated his rights.

Congress and the Court went as far as they did because the poisonous tree doctrine went that far. To use Amar and Lettow’s lan-

283. This portion of the special report to the President is quoted by the Kastigar Court. See 406 U.S. at 452 n.36. For the full text of this document, see 2 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 1445-47 (1970).

A decade later, Justice Blackmun noted that when it enacted the immunity statute sustained in Kastigar, "Congress understood" that the Fifth Amendment prohibited the use of a coerced confession or its fruits, and, "as the legislative history demonstrates, Congress intended to incorporate the 'fruits' doctrine into the statute by use of the phrase 'directly or indirectly derived.'" Pillsbury Co., 459 U.S. at 278 (Blackmun, J., concurring); see also supra notes 267, 281.


285. 406 U.S. at 462.
guage, Congress and the Court "stopped" where they did because that was where the poisonous tree doctrine "stopped." Neither Congress nor the Court could see any reason to give a witness who was compelled to testify absolute or transactional immunity "when no such amnesty is required where the government . . . coerces a defendant into incriminating himself." 

IV. INADMISSIBLE CONFESSIONS AND THE POISONOUS TREE DOCTRINE

As noted earlier, it does not appear that the Supreme Court has ever specifically addressed the question whether or under what circumstances physical evidence derived from a coerced confession is admissible. At first blush the Court's failure to do so seems astonishing. But on reflection the failure becomes more understandable.

A. The Rule of Automatic Reversal

For most of the life of the due process coerced confession doctrine, the "rule of automatic reversal" governed — that is, the erroneous admission of a coerced confession necessitated reversal regardless of how much evidence, tainted or untainted, remained to support the conviction. Not until 1991 did a closely divided Court hold for the first time that the admission of a coerced confession is subject to harmless error analysis.

286. A decade later, after canvassing the House and Senate Reports and other evidence of legislative intent, Justice Blackmun concluded:

It seems to me that Congress made its intent clear. First, it intended to grant only the minimum protection required by the Constitution. Second, it believed that the protection constitutionally required in cases of compelled testimony was identical to the protection required in cases of coerced statements or evidence otherwise illegally obtained. Pillsbury Co.; 459 U.S. at 278 (Blackmun, J., concurring).

287. 406 U.S. at 461-62.

288. See supra note 52.

289. The rule of automatic reversal held sway in the coerced confessions area "[a]t least since Malinski v. New York [324 U.S. 401, 404 (1945)]." Allen, supra note 100, at 45; see also Kamisar, supra note 31, at 7-8.

Moreover, the rule of automatic reversal may have applied to coerced confessions even before the 1945 Malinski case: "Prior to the 1960s, it was generally assumed that constitutional violations could never be regarded as harmless error." 3 LAFAVE & ISRAEL, supra note 43, § 26.6, at 270; see also Charles J. Ogletree, Jr., Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions, 105 HARV. L. REV. 152, 157 (1991) ("[P]rior to 1967, the Supreme Court routinely reversed convictions upon a finding of constitutional error." (footnote omitted)).

During the long reign of the rule of automatic reversal, whenever a defendant claimed that her coerced confession had been erroneously admitted, there was, of course, no need to determine whether the physical evidence in the case was derived from or independent of the coerced confession. If the confession fell, so did the conviction.

Consider, for example, *Culombe v. Connecticut*. After admitting his involvement in a felony murder, the defendant led the police to a place where certain weapons were concealed, to a swampy area where the defendant and a confederate had disposed of another weapon, and to another swampy area where a raincoat said to have been worn on the night of the crime was recovered. But there was no need for the Court to consider whether these items were the inadmissible fruits of the confession. And it did not do so. Justice Frankfurter, who announced the judgment of the Court, pointed out: "If [the confessions] were coerced [and they were], Culombe's conviction, however convincingly supported by other evidence, cannot stand."

To be sure, the rule of automatic reversal does not explain why the Supreme Court has never addressed the question of the admissibility of physical evidence in a case where the police extracted a coerced confession from the defendant but the prosecution did not offer the confession in evidence. But I know of no Supreme Court case fitting that description. Nor does the rule of automatic reversal explain why the Court never dealt with the admissibility of derivative evidence in a case where a defendant whose confession was overturned the first time around was tried again and reconvicted without the confession. But I know of only one such case that reached the Court a second time, and it turned out to be an embarrassment for the prosecution.

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292. 367 U.S. at 615-16.
293. 367 U.S. at 621. However, at the outset of his long opinion — perhaps as a warning to the prosecution that a retrial would be pointless — Justice Frankfurter made the pregnant comment that at the trial of Culombe and his co-defendant, "no evidence of any importance was presented by the State that did not derive, directly or indirectly, from the confessions and disclosures obtained from the two men." 367 U.S. at 569 n.1.
294. In the first *Ashcraft* case, *Ashcraft v. Tennessee*, 322 U.S. 143 (1944), the defendant's conviction was reversed because his written confession had been obtained after some thirty-six hours of almost continuous interrogation. The defendant was later retried and reconvicted. Again the Supreme Court reversed. See *Ashcraft v. Tennessee*, 327 U.S. 274 (1946). The second conviction rested in large part on oral statements the defendant had made disclosing that he had deliberately concealed the identity of his wife's murderer for ten days. The Court saw "no relevant distinction" between these statements and the written confession struck down the first time the case had reached the Supreme Court. See 327 U.S. at 278.
Once an appellate court has ruled that a confession introduced at trial was coerced, the victim of such a confession is apparently not retried very often. Why not? Many times, the prosecution may not have enough evidence to obtain a conviction without the confession. Moreover, aware that an appellate court would probably take a long, hard look at a conviction obtained without a confession when the confession had previously been found to be the product of serious police misconduct, the prosecution will not be eager to subject the case — and other police conduct in the case — to further appellate court scrutiny.

B. The Prosecutor's Reluctance To Withhold a Confession

Let us put retrials aside. If a confession is arguably coerced, why not decline to offer it in evidence and prosecute the case without it? It seems that rarely, if ever, will a prosecutor feel confident

Thus "[a]ll the reasons given for reversal of the judgment against Ashcraft in the first case, which we need not repeat, apply with equal force here." 327 U.S. at 279.

Cf. Nix v. Williams (Williams II), 467 U.S. 431 (1984); see also infra text accompanying notes 330-54 (discussing Williams II). In Williams II, the Supreme Court overturned the defendant's first murder conviction because it rested in part on statements obtained in violation of the Sixth Amendment right to counsel. At the retrial, the body of the victim was admitted into evidence, but not the defendant's statements nor the fact that he had led the police to the body. The state established that a search party would have found the body in a short time even if the defendant had not disclosed its whereabouts. This time the Supreme Court upheld the conviction on the ground that the discovery of the body came within the inevitable discovery exception to the poisonous tree doctrine. 467 U.S. at 448-50. But the Court operated on the premise that the poisonous tree doctrine did apply to physical evidence derived from statements obtained in violation of the Sixth Amendment right to counsel.

Consider, too, Harrison v. United States, 392 U.S. 219 (1968), discussed infra in text accompanying notes 318-20. The Court held that the defendant's testimony at his first trial — a case that did not reach the Supreme Court — could not be used against him at his retrial because it was the fruit of wrongfully obtained confessions improperly admitted into evidence at his first trial. 392 U.S. at 225-26.

Ernest Miranda, the defendant in the most famous confession case of all, was retried and reconvicted without the confession the Supreme Court had held inadmissible in Miranda. But his second conviction was not reviewed by the Supreme Court and, of course, his confession to the police had not been coerced. Miranda's second conviction was based largely on an oral confession he had made to a woman with whom he was living at the time (Mrs. Hoffman), and he contended that this confession was the fruit of the confession invalidated by the U.S. Supreme Court. Interestingly, the Supreme Court of Arizona, which affirmed Miranda's second conviction, proceeded on the premise that the poisonous tree doctrine did apply to the fruits of inadmissible confessions. But it concluded that "there was a sufficient 'break in the stream of events' between the confession to the police and the confession to Mrs. Hoffman" to allow her testimony. State v. Miranda, 450 P.2d 364, 373 (Ariz. 1969).

Interestingly, too, the Arizona Supreme Court's opinion foreshadowed developments in the U.S. Supreme Court:

Certainly the nature of the illegality which gives rise to the "fruits" must be considered in determining whether the evidence obtained is "tainted." Here, the violation was a failure to warn of constitutional rights which did not exist until sometime subsequent to the conduct. Certainly such a "taint" should be more easily "attenuated" than conduct more clearly proscribed by our Constitution.

450 P.2d at 373 (citation omitted).
that her case is so strong that she can afford to keep out the confession or other incriminating statements. She may remember the time when a seemingly overwhelming case for the State resulted in an acquittal or "hung jury." She may remember the time, after she lost a case in which there were no confessions or incriminating statements, when the jury clustered around her or the judge and asked whether the defendant ever admitted his guilt. She may be convinced that "in the absence of a confession, seeds of doubt are likely to remain in the minds of the public and of jurors despite overwhelming evidence."  

C. Nardone

I think there is another reason why the Supreme Court never had occasion to determine the admissibility of physical evidence derived from a coerced confession. For much of the life of the doctrine, many (perhaps most) prosecutors and many (perhaps most) lower court judges probably assumed that the poisonous tree doctrine barred the use of such evidence and acted accordingly.

After all, only three years after it had handed down its first Fourteenth Amendment due process coerced confession case, the Court decided Nardone v. United States, the case that coined the phrase fruit of the poisonous tree. The Nardone Court refused to

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295. As Richard Kuh, a former prosecuting attorney and a well-known commentator on criminal procedure, remarked shortly after Miranda was decided:

The prosecutor's duty is to present all the legally admissible evidence that can be fairly collected and presented and that he believes to be necessary and helpful in sustaining his considerable burden. Prosecutors may then be put in an impossible position when they have a confession in an otherwise weak case. It is all very well to suggest that, despite the rulings of a trial court sustaining the use of a defendant's statements, the prosecutor should play it safe and not use the confession. However, when, so doing, he finds himself with an acquittal that might have been avoided had he used the admissions, has he done his job? To those who believe that, in many cases, prosecutors probably could obtain convictions without confessions and are "overtrying" their cases, I would suggest reading trial records in cases in which there have been acquittals or "hung juries." It is a revelation to observe the apparently overwhelming evidence and yet the seemingly "wrong" result at which the jury will sometimes arrive. It is much easier to fall into the habit of saying that certain evidence was not necessary if, as do the appellate courts, one reads only records of convictions.

I suggest, moreover, that it is human nature . . . to want to know if a defendant has "owned up to his crime." After the trial of cases in which there were no confessions, I have seen jurors cluster around the judge or counsel and ask whether the defendant ever admitted his guilt.


296. Id. at 240.


298. 308 U.S. 338 (1939).

299. See 308 U.S. at 341.
permit the government to avoid an inquiry into its use of information gained by illegal wiretapping, observing that to forbid the direct use of methods prohibited by the federal wiretap statute "but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' "300

At no point in his opinion for the Court did Justice Frankfurter suggest that the Court was invoking its supervisory powers over federal criminal justice. Nor at any point did Frankfurter suggest that there was anything special or peculiar about the wording or the legislative history of the antiwiretapping statute.

The doctrine applied in Nardone — and given the name by which it has ever since been known — had its genesis in a 1920 search and seizure case, Silverthorne Lumber Co. v. United States.301 Justice Frankfurter deemed what was said in Silverthorne "pertinent" and quoted it: "'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all.' "302 "Here, as in the Silverthorne case," added Frankfurter, improperly obtained facts may still be used "'[i]f knowledge of them is gained from an independent source . . . but the knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively."303

Taken together, Silverthorne and Nardone seem to stand for the general proposition that when the police obtain evidence by committing a constitutional or federal statutory violation, they cannot use knowledge acquired by their wrongful conduct simply because it is used derivatively. The Silverthorne-Nardone doctrine — and until the 1960s these were the only two Supreme Court cases to apply or discuss the poisonous tree doctrine — "is a response to the realization that if police officers are permitted to use knowledge gained from unlawfully obtained evidence to obtain the same or

300. 308 U.S. at 340 (quoting Nardone v. United States, 302 U.S. 379, 383 (1937)). Nardone also established the "attenuation" doctrine, being the first case to recognize that even where the challenged derivative evidence did not have an independent source, it might still be admissible. See 308 U.S. at 341 ("Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.").

301. 251 U.S. 385 (1920).

302. 308 U.S. at 340-41 (quoting Silverthorne, 251 U.S. at 392) (emphasis added).

303. 308 U.S. at 341 (quoting Silverthorne, 251 U.S. at 392) (emphasis added).
other valuable evidence legally, an inducement to commit such unlawful practices continues to exist."304

D. Wong Sun

Perhaps the Nardone rationale explains the result in Wong Sun v. United States.305 Although for many years "it ha[d] been hornbook law that the illegality of an arrest does not operate to exclude an otherwise admissible confession or incriminating statement,"306 the government in Wong Sun conceded that if the statements the defendant had made to federal narcotics agents in his bedroom were held to be the fruits of his illegal arrest, the statements had to be excluded.307 Justice Brennan, who wrote the opinion of the Court, recognized that the exclusionary rule "has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion"308 but held that "verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers’ action in the present case is no less the ‘fruit’ of official illegality than the more common tangible fruits of the unwarranted intrusion."309

Although Wong Sun is best known as the case that applied the poisonous tree doctrine to verbal evidence derived from a Fourth Amendment violation, another aspect of the case is noteworthy: The Court also applied the poisonous tree doctrine to bar the use of physical evidence derived from the defendant’s inadmissible statements.

When apprehended by the agents, the defendant told them about a third party who had been selling drugs and told them where he lived. When confronted by the agents shortly thereafter, the third party surrendered some heroin and told the agents that the narcotics had been provided by the defendant.310 The Court held that the narcotics as well as the defendant’s statements had to be

306. Yale Kamisar, Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure, 1961 U. ILL. L.F. 78, 84. Balbo v. People, 80 N.Y. 484 (1880), was the first and, for many decades, the leading American case on the lack of effect of a wrongful arrest on the admissibility of a contemporaneous or subsequent incriminating statement. See Kamisar, supra, at 106-15.
307. 371 U.S. at 484.
308. 371 U.S. at 485.
309. 371 U.S. at 485 (footnote omitted).
310. 371 U.S. at 474-75.
excluded because "the narcotics were 'come at by the exploitation of [the primary] illegality.'"\textsuperscript{311}

Evidently the Court regarded the narcotics turned over to the agents by the third party as the somewhat distant fruits of the unconstitutional arrest. The narcotics may also be viewed as the more immediate fruits of the unconstitutionally obtained statements.\textsuperscript{312} But why should it matter which way the situation is viewed?\textsuperscript{313}

Let us change the facts of \textit{Wong Sun}. Suppose the federal agents had \textit{lawfully} arrested the defendant. Suppose further that they then had extracted a coerced confession from him and that this confession had led them to a third party who surrendered narcotics and implicated the defendant. It is hard to believe that the Court would have upheld the admissibility of the narcotics on these changed facts, just because the acquisition of the narcotics was contaminated by a due process or Fifth Amendment violation rather than by a Fourth Amendment violation.

When Justice Brennan observed in \textit{Wong Sun} that "the policies underlying the exclusionary rule [do not] invite any logical distinction between physical and verbal evidence,"\textsuperscript{314} he was speaking of the fruits of the poisonous tree, not the poisonous tree itself. But why shouldn't this observation apply to the poisonous tree as well? Once it is kept in mind that a principal — if not the dominant — rationale for barring the use of coerced confessions is condemnation and discouragement of the lawless police methods that brought about the confession,\textsuperscript{315} how can it be said that the policies underlying the confession and search or seizure exclusionary rules invite a logical distinction?

As Justice Brennan told us in \textit{Wong Sun}, "[e]ither in terms of deterring lawless [police] conduct . . . or of closing the [courtroom] doors . . . to any use of evidence unconstitutionally obtained, the

\textsuperscript{311} 371 U.S. at 488.

\textsuperscript{312} As the Court pointed out in Oregon \textit{v. Elstad}, 470 U.S. 298 (1985), "It is settled law that 'a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is "sufficiently an act of free will to purge the primary taint."'" 470 U.S. at 306 (quoting \textit{Taylor v. Alabama}, 457 U.S. 687, 690 (1982) (quoting \textit{Brown v. Illinois}, 422 U.S. 590, 602 (1975))).

\textsuperscript{313} Interestingly, Professor Pitler, author of one of the leading articles on the poisonous tree doctrine, describes \textit{Wong Sun} both ways. At one point he states that "[t]he Court held that the narcotics were the 'fruit of the poisonous tree' — A's illegal arrest." Pitler, \textit{supra} note *, at 593. A page later, he describes \textit{Wong Sun} as a case holding that "the narcotics seized from B could not be used as evidence against A" because "[t]hey were fruit of the illegally obtained statement of A." \textit{Id.} at 594.

\textsuperscript{314} 371 U.S. at 486.

\textsuperscript{315} See \textit{supra} text accompanying notes 37-44, 62-64, 68-71.
danger in relaxing the exclusionary rules in the case of verbal evidence [as opposed to physical, tangible fruits] would seem too great to warrant introducing such a distinction. 316 But when we remember that for more than three decades the police methods test has been the primary rationale for excluding coerced confessions, 317 the danger in relaxing the exclusionary rule in the case of a coerced confession rather than an unlawful search would also seem too great to warrant a distinction.

E. Harrison v. United States

Five years after Wong Sun, in Harrison v. United States, 318 the Court invoked the poisonous tree doctrine again. The Court did not view the doctrine as limited to the search and seizure setting in which it was born, nor did it apply the doctrine sparingly. Justice Stewart, writing for a 6-3 majority, held that the petitioner's former trial testimony should not have been used at his second trial because he had testified in his own defense at his first trial only in an effort to minimize the impact of three confessions that were improperly admitted. It is indisputable that the Court read the Silverthorne-Nardone-Wong Sun line of cases broadly as standing for the general proposition that the government cannot introduce evidence acquired as a result of police misconduct simply because it is used derivatively.

Harrison arose as follows: At the petitioner's first trial, the prosecution introduced three confessions in which he allegedly admitted the shotgun slaying of a robbery victim. Following the admission of these confessions, the petitioner took the witness stand and testified to his own version of events. In the course of his testimony, he admitted that he had been at the scene of the killing, weapon in hand. The court of appeals reversed his conviction on the ground that the confessions should have been excluded because they were obtained in violation of the McNabb-Mallory rule. 319 On

316. 371 U.S. at 486 (citations omitted).
317. See supra text accompanying notes 37-44.
319. 392 U.S. at 220-21. In McNabb v. United States, 318 U.S. 332 (1943), the Court held, in the exercise of its supervisory authority over the administration of federal criminal justice, that voluntary confessions should be excluded from evidence if they were obtained while the suspect was being held in violation of federal requirements that he be promptly taken before a committing magistrate. Some years later, the Court revived and reaffirmed McNabb, first in Upshaw v. United States, 335 U.S. 410 (1948), and then in Mallory v. United States, 354 U.S. 449 (1957). From 1957 on, the rule was often called the McNabb-Mallory rule or simply the Mallory rule. But the storm of controversy over the rule never subsided. See James E. Hogan & Joseph M. Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47

retrial, the petitioner's previous trial testimony was used against him over his objection that he had been induced to testify at his first trial only because of the government's use of his inadmissible confessions. The petitioner was again convicted, and the court of appeals affirmed the conviction.

The Supreme Court reversed the petitioner's second conviction on the ground that his previous testimony was the inadmissible fruit of the illegally procured confessions. The fact that the original "contaminated" source consisted of three wrongfully obtained confessions — rather than an illegal arrest or unlawfully seized physical evidence — was not deemed worthy of discussion. Writing for the Court, Justice Stewart quickly, and without analytical hesitation, invoked what he obviously considered a general principle:

[P]etitioner testified only after the Government had illegally introduced into evidence three confessions, all wrongfully obtained, and the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby — the fruit of the poisonous tree, to invoke a time-worn metaphor. For the "essence of a provision forbidding the acquisition of evidence in a certain way is that . . . it shall not be used at all." Silverthorne . . . .

. . . If [the petitioner testified at his first trial] in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible.320

Harrison demonstrates that the basic principles underlying Silverthorne, Nardone, and Wong Sun have not been and should not be limited to unconstitutional searches and illegal taps.321 Nevertheless, considering the case's particular facts, it must be said that

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Geo. L.J. 1, 5, 17 (1958); see also Fred E. Inbau, The Confession Dilemma in the United States Supreme Court, 43 ILL. L. REV. 442 (1948). Many bills were introduced to repeal or at least soften the rule, and in 1968, a law was finally enacted that severely cut back on it. See Pub. L. No. 90-351, 82 Stat. 210 (codified as amended at 18 U.S.C. § 3501 (a), (c) (1988)). Some aspects of the 1968 law are discussed in United States v. Alvarez-Sanchez, 114 S. Ct. 1599 (1994).

At no point in his opinion for the Court in Harrison did Justice Stewart suggest that the Court was barring the fruits of the McNabb-Mallory violations in the exercise of its supervisory power over federal criminal justice.

320. 392 U.S. at 222-23 (footnotes omitted). In a footnote, the Court bolstered the reference to Silverthorne with citations to Nardone and Wong Sun. See 392 U.S. at 222-23 n.7.


[T]he basic principles underlying Silverthorne and Nardone cannot justifiably be limited to illegal searches and wiretaps. It is hard to see why the "fruits" doctrine should apply to the products of an illegal search and yet be totally inapplicable to the products of police violations, such as confessions obtained by physical abuse, which may be fully as abhorrent and in need of deterrence.

Id. § 9.09 cmt. at 216 (footnote omitted).
Harrison would probably be decided differently today — for reasons that provide no comfort to Amar and Lettow.

The poisonous tree in Harrison consisted of mere McNabb-McNabb violations, not coerced confessions, and in Elstad the Court indicated that nowadays the poisonous tree doctrine only applies to evidence stemming from constitutional violations. The Elstad Court repeatedly compared and contrasted violations of the "prophylactic Miranda procedures" unaccompanied by "actual coercion" with "police infringement[s] of the Fifth Amendment itself."

Secondly, Harrison was a case in which the fruits hung a considerable distance from the trunk of the poisonous tree. More specifically, I think a majority of the present Court would conclude — as the dissenters maintained in Harrison — that the exclusion of the derivative evidence would have little or no deterrent value, because it was highly unlikely that the police officers who violated the petitioner's rights foresaw his testimony at his first trial as a product of their illegality. According to dissenting Justice White:

[I]t cannot realistically be supposed that the police are spurred on to greater illegality by any rational supposition that success in that illicit endeavor will make it more likely that the defendant will make incriminatory admissions on the witness stand. If this is the case . . .

322. In some respects, the McNabb Court tried to do for the federal courts what, a quarter-century later, Miranda was designed to do for state as well as federal courts: bypass the frustrating "swearing contests" over the nature of the secret interrogation and reduce, if not eliminate, both police temptation and opportunity to coerce incriminating statements. The McNabb doctrine sought to do so by focusing on a relatively objective factor — the length of time a suspect was held by the police before being brought to a judicial officer to be advised of his rights.

323. See supra text accompanying notes 196-203. Interestingly, the Elstad Court apparently viewed Harrison as a coerced confession case, and, as such, still good law. See Oregon v. Elstad, 470 U.S. 298, 316-17 (1985) ("If the prosecution has actually violated the defendant's Fifth Amendment rights by introducing an inadmissible confession at trial, compelling the defendant to testify in rebuttal, the rule announced in Harrison v. United States precludes use of that testimony on retrial." (citation omitted)).

324. See supra text accompanying note 201. In a sense, Justice White, who dissented in Harrison, foreshadowed later developments, such as Elstad. He observed: "[T]he prosecution's statements were wrongfully admitted, not because they were involuntary or in any way coerced, but because they violated Mallory . . ." 392 U.S. at 229. He continued:

Even if it were true that the rule adopted by the Court served some minimal deterrent function, I would not be able to join the Court. Marginal considerations such as these, especially when one is dealing with confessions excludable because of violation of the technical requirements of cases like Mallory . . . and Miranda[ ] are insufficient to override the interest in presenting all evidence which is relevant and probative.

325. But see Stanley Hirtle, Inadmissible Confessions and Their Fruits: A Comment on Harrison v. United States, 60 J. CRM. L. & CRIMINOLOGY 58, 63 (1969) (arguing that the prosecutors in Harrison were intentionally exploiting an illegality by using "the testimony caused by the confessions . . . as a substitute for" the confessions, and that such behavior might influence future police conduct).
then suppression of the petitioner's testimony, even if it was in fact induced by the wrongful admission into evidence of an illegal confession, does not remove a source of further temptation to the police to act lawlessly.\footnote{326}

But this argument has no application to the cases Amar and Lettow have in mind — cases in which the police coerce a suspect into revealing the location of the murder weapon or the proceeds of a bank robbery or the wallet of a mugging victim. In these instances the connection between the fruits and the primary illegality has not "become so attenuated as to dissipate the taint."\footnote{327} The derivative evidence, rather, is the probable and foreseeable product of the primary illegality — and a motivating force behind it. As one commentator recently observed, in reliance on four different interrogation manuals: "Expert interrogators have long recognized, and continue to instruct, that a confession is a primary source for determining the existence and whereabouts of the fruits of a crime, such as documents or weapons."\footnote{328}

Amar and Lettow do not challenge the view that a principal purpose — if not the primary purpose — of interrogation is to obtain information such as the location of physical evidence. Indeed, they agree, evidently regarding this as a reason for admitting evidence derived from coerced confessions. "[P]hysical leads," they note at one point, "are often more important to law enforcement than getting statements for use in court."\footnote{329}

\section*{F. Nix v. Williams (Williams II)}

One Supreme Court confession case, \textit{Nix v. Williams (Williams II)},\footnote{330} remains to be considered. Although this case did not involve the fruits of a coerced confession, it comes close.

\footnote{326. 392 U.S. at 232.}

\footnote{327. As Justice Frankfurter noted in \textit{Nardone}, at some point the connection between the original contaminated source and the information derived from it "may have become so attenuated as to dissipate the taint." 308 U.S. at 341; see also Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).}

\footnote{328. Wollin, \textit{supra} note *, at 845 (footnote omitted).}

\footnote{329. Amar & Lettow, \textit{supra} note 1, at 922 n.286 (citing Friendly, \textit{supra} note 10, at 712 n.176 (citing B. James George, Jr., \textit{An Unsettled Question, in A New Look at Confessions} 115, 121 (B. James George, Jr., ed., 1967))). Professor George states: Police can question suspects either (1) to obtain statements that they can later present in court as evidence, or (2) to obtain leads from a suspect on the basis of which they can discover real or demonstrative evidence, or identify prosecution witnesses . . . . What data there are suggest that the latter objective is usually more important to law enforcement than the former. George, \textit{supra}, at 121.}

\footnote{330. 467 U.S. 431 (1984).}
Williams, an Iowa defendant, was suspected of murdering a ten-year-old girl. He made incriminating statements to the police and led them to the ditch where the body was hidden. The first time the case reached the Court, in Brewer v. Williams (Williams I), the conviction was reversed on the ground that the defendant’s statements had been obtained in violation of his Sixth Amendment right to counsel or, more specifically, the Massiah doctrine. But the Court noted that if Williams were retried, “evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams.”

Williams was retried and reconvicted. At the second trial neither his statements nor the fact that he had directed the police to the child’s body was offered in evidence. However, when the state established by a preponderance of the evidence that a large search party would have discovered the body within a short time in essentially the same condition as it was actually found even if no statements had been obtained from Williams, evidence concerning the body’s location and condition was admitted.

In Williams II, the Court affirmed the defendant’s second conviction, adopting an “inevitable discovery” exception to the poisonous tree doctrine. Earlier Supreme Court cases had recognized an “independent source” exception, admitting derivative evidence if knowledge of it had been obtained from a legitimate source independent of the police misconduct. The Court viewed the inevi-

331. 467 U.S. at 436.
333. 430 U.S. at 406. Massiah v. United States, 377 U.S. 201 (1964), as clarified and arguably expanded in Williams I, establishes that once adversary proceedings have commenced against an individual — for example, once he has been indicted or arraigned — government efforts to “deliberately elicit” incriminating statements from him, whether done openly by uniformed police officers or surreptitiously by secret agents, violate the individual’s right to counsel. 430 U.S. at 398-401.
334. 430 U.S. at 407 n.12.
336. See 467 U.S. at 448. Although Williams II marked the first time the Court recognized the inevitable discovery exception, as the Court noted, the vast majority of lower courts had already done so. See 467 U.S. at 440.
337. 467 U.S. at 441-44.
table discovery exception — sometimes called the "hypothetical independent source" rule — as only a slight variation on the independent source exception.338

Although Williams II held that the discovery of the body came within the inevitable discovery exception, the case should provide no comfort to Amar and Lettow. Neither the State of Iowa nor any member of the Court thought it noteworthy that physical evidence does not "testify" or that corpses do not "speak."339 Although the physical evidence included "the results of post mortem medical and chemical tests on the body,"340 neither the State nor any Justice thought Schmerber relevant. Neither the Court nor any of the briefs cited Schmerber at all.

Nobody suggested, as Amar and Lettow contend, that the law should "simply presume — irrebuttable — that somehow, some way, the truth and the fruit might have to come to light anyway."341 Every member of the Court, as well as the State, operated on the premise that unless the linkage between Williams's inadmissible statements and the physical evidence were severed, the evidence would have to be excluded.

Early in his opinion for the Court, Chief Justice Burger made plain that he viewed the Silverthorne-Wong Sun line of cases as representing a capacious principle:

The doctrine requiring courts to suppress evidence as the tainted "fruit" of unlawful governmental conduct had its genesis in Silverthorne . . . .

Wong Sun extended the exclusionary rule to evidence that was the indirect product or "fruit" of unlawful police conduct, but there again the Court emphasized that evidence that has been illegally obtained need not always be suppressed . . . .

338. See 467 U.S. at 443-44. A number of commentators would sharply disagree with this rather benign characterization of the inevitable discovery exception. For strong criticism of this exception, especially if it is applied loosely, see Pitler, supra note *, at 627-30; Jeffrey M. Bain & Michael K. Kelly, Comment, Fruit of the Poisonous Tree: Recent Developments as Viewed Through Its Exceptions, 31 U. MIAMI L. REV. 615, 625-29 (1977); and The Supreme Court, 1983 Term—Leading Cases, 98 HARV. L. REV. 87, 124-30 (1984).


340. 467 U.S. at 437.

341. Amar & Lettow, supra note 1, at 880. Elsewhere, Amar asks:

[S]hould not the law strongly presume that somehow, some way, sometime, the truth would come out? Criminals get careless or cocky; conspirators rat; neighbors come forward; cops get lucky; the truth out; and justice reigns — or so our courts should presume, and any party seeking to suppress truth and thwart justice should bear a heavy burden of proof.

Although Silverthorne and Wong Sun involved violations of the Fourth Amendment, the "fruit of the poisonous tree" doctrine has not been limited to cases in which there has been a Fourth Amendment violation. The Court has applied the doctrine where the violations were of the Sixth Amendment as well as of the Fifth Amendment.342

Williams II cites Murphy and Kastigar, not only as cases illustrating the application of the poisonous tree doctrine, but also as cases adopting the independent source exception.343 In rejecting the contention that use and derivative use immunity inadequately protects a witness from various possible incriminating uses of the compelled testimony, the Kastigar Court had pointed out that the prohibition on derivative use "barr[ed] the use of compelled testimony as an 'investigatory lead' "344 and that once a defendant demonstrates that he has testified under an immunity grant, the authorities must show that "their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence."345 This, the Kastigar Court told us, "is very substantial protection, commensurate with that resulting from ... the privilege itself."346

The Court's references to Murphy and Kastigar are not surprising. In successfully urging the Court to adopt an inevitable discovery exception and to use it to admit the disputed evidence, the State of Iowa relied on Kastigar — the case Amar and Lettow dislike so much — and quoted language from that case to assure the Court that neither an independent source nor an inevitable discovery exception would "eviscerate the exclusionary rule":347

The State is still required to show what amounts to an "independent, legitimate source" for disputed evidence, a requirement which this Court, in a similar context, has characterized as "a substantial protection" against abuse. See Kastigar .... Any evidence that has been obtained by illegal means which would not inevitably or independently have been discovered is still subject to its bite.348

But Amar and Lettow would admit physical evidence derived from a coerced confession even though the evidence would not have been discovered inevitably or independently. Williams II empha-

343. See 467 U.S. at 442 n.3.
344. 406 U.S. at 460 (footnote omitted).
345. 406 U.S. at 460 (quoting Murphy, 378 U.S. at 79 n.18).
346. 406 U.S. at 461 (footnote omitted).
348. Id. (emphasis added).
sized that the independent source and inevitable discovery exceptions are not inconsistent with the rationale behind the exclusionary rule, because the rationale is that "the prosecution is not to be put in a better position than it would have been in if no illegality had transpired,"\(^{349}\) and the independent source and inevitable discovery exceptions do not really do that. If the evidence would have been lawfully obtained in any event, the exceptions only put the prosecution "in the same, not a worse, position than[n] they would have been in if no police . . . misconduct had occurred."\(^{350}\) However, because Amar and Lettow would admit the tangible fruits of a coerced confession regardless of whether they would have been discovered in any event, their approach would often place the government in a better position than it would have enjoyed if no unconstitutional police action had taken place.

I realize that the disputed evidence in *Williams II* grew out of a *Massiah* violation\(^{351}\) rather than a coerced confession. But why should that matter? The Court told us in *Williams II* that the poisonous tree doctrine applies to violations of the Fifth Amendment as well as those of the Fourth and Sixth.\(^{352}\) And it considered the Fifth Amendment immunity cases relevant in discussing the issues raised by that case. Why would it disregard these Fifth Amendment cases when confronted by the tangible fruits of a coerced confession — a Fifth Amendment violation in its most pristine form?

Moreover, a coerced confession will almost always constitute more purposeful and more flagrant police misconduct than a *Massiah* violation.\(^{353}\) The more serious the police lawlessness, the wider the sweep of the poisonous tree doctrine should be.\(^{354}\)

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350. 406 U.S. at 443.
351. See supra note 333.
352. See supra text accompanying note 342.
353. Cf Brown v. Illinois, 422 U.S. 590, 603-04 (1975) (holding that under certain circumstances, especially if the initial illegality is "purpose[ful] and flagran[t]," not even *Miranda* warnings may break the causal connection between an unlawful arrest and a resulting confession).
354. Justice O'Connor's view that a *Miranda* violation should not beget the same "fruits" consequences as an infringement of the Fifth Amendment itself, see supra text accompanying note 201, brings to mind the comments of the Model Code Reporters when they first "attempt[ed] to formulate standards with respect to exclusion of the 'fruits of the poisonous tree' as it relates to extrinsic evidence derived from inadmissible statements":

\[\text{[E]specially in the context of a code containing many rigid rules of varying importance, some by no means of constitutional dimension, it is relevant to the question whether the "fruits" of a statement should be excluded to inquire whether the underlying violation which rendered the statement inadmissible involved a grave infringement of the defendant's rights. The more outrageous the violation, the stronger deterrent we need, and consequently the wider the sweep of the "fruits" doctrine should be. If, on the other hand, the}\]
V. SOME FINAL COMMENTS

Amar and Lettow miss things in the Supreme Court’s decisions that are there and see things that are not.355

Amar and Lettow seem to be unaware that, for more than thirty years, the dominant rationale for excluding coerced confessions has been the Court’s disapproval of and attempts to discourage the offensive police methods that produce such confessions, regardless of their reliability. They do not even cite, let alone discuss, such leading police methods confession cases as Rogers v. Richmond,356 Jackson v. Denno,357 and Colorado v. Connelly.358 As a result, one unfamiliar with the law and literature of coerced confessions would never know, after reading the Amar-Lettow article, that there is such a thing as a police methods test for considering the admissibility of confessions.

As we have seen, in Kastigar v. United States359 the Court adopted the view that protection against the use and derivative use of compelled utterances and the scope of the privilege are coterminal. Amar and Lettow leave their readers with the impression that what they label the Court’s “newfangled immunity rule”360 sprang fullgrown from the head of Zeus. They seem unable or unwilling to grasp that this newfangled rule may be regarded as either (i) a reaffirmation of Counselman’s intermediate holding that the privilege against self-incrimination prohibits the use of evidence derived from compelled testimony as well as the testimony itself, or (ii) a specific application of the poisonous tree doctrine.

Nowhere do they discuss Counselman’s intermediate holding. Nor do they discuss the poisonous tree doctrine. They do not tell their readers that the national commission that recommended use and derivative use immunity and the Congress that enacted it into law and the Court that approved it in Kastigar all operated on the premise that the poisonous tree doctrine applies to coerced confes-
sions and compelled testimony. Amar and Lettow seem either unable or unwilling to grasp that both Congress and the Kastigar Court went as far as they did — protection against derivative use — because the poisonous tree doctrine went that far, and stopped where they did — short of absolute immunity against prosecution — because that is where the poisonous tree doctrine stopped.

Kastigar stands squarely in Amar and Lettow's path. I do not see how that case can be explained or appraised without discussing the poisonous tree doctrine. Yet Amar and Lettow do just that; remarkably, they fail to discuss the American poisonous tree doctrine anywhere in their article.361

Amar and Lettow are contending, in essence, either that the poisonous tree doctrine should not be an intrinsic part of the Fifth Amendment exclusionary rule, or that the poisonous tree doctrine should not apply to Fifth Amendment violations as it applies to other constitutional violations, or both. Yet they never tell their readers what the rationale is for the poisonous tree doctrine, or why or how or when the doctrine came about, or what its scope is. At no point in their article do they cite, let alone discuss, two of the leading, and the two oldest, poisonous tree cases, Silverthorne362 and Nardone.363

As noted earlier, Amar and Lettow rely heavily on Schmerber v. California.364 But this time they see things that are not there. They view Schmerber as drawing a sharp line, or at least furnishing support for the drawing of such a line, between compelled words and their reliable physical fruits. But no evidence in that case was derived from compelled words, because there were no compelled words. No fruits of police misconduct were involved in Schmerber, because there was no misconduct.

Schmerber tells us that — absent any antecedent Fifth Amendment violation that enables the government to acquire the evidence

361. The Amar-Lettow article refers to the independent source and inevitable discovery doctrines, Amar & Lettow, supra note 1, at 880, 908 n.227, 918-19, 928, but never discusses how these doctrines came to be, or whether they ought to be, exceptions to the more general poisonous tree doctrine.

362. Silverthorne Lumber Co. v. United States, 251 U.S. 471 (1963); see supra notes 301-03 and accompanying text.

363. Nardone v. United States, 308 U.S. 338 (1939); see supra section IV.C. Amar and Lettow do refer to another leading poisonous tree case, Wong Sun v. United States, 371 U.S. 471 (1963), one time (a "But cf." citation in a footnote, Amar & Lettow, supra note 1, at 917 n.265), but fail to point out that Wong Sun applied the doctrine to exclude two types of "fruits": (a) statements the defendant made immediately after being illegally arrested and (b) physical evidence derived from those inadmissible statements. See supra notes 308-13 and accompanying text.

— the acquisition of real or physical evidence does not violate the privilege. *Schmerber* does not tell us, and it cannot plausibly be read as telling us, that the *nontestimonial* nature of *derivative* evidence, like some sorcerer's amulet, creates a bubble that envelops the evidence and shields it from the contamination of unconstitutional police action.

The blood test evidence was admitted in *Schmerber*, Justice Brennan was careful to tell us, because it was neither the defendant's "testimony nor evidence relating to some communicative act" by him.\(^{365}\) But, relying in part on *Schmerber*, Amar and Lettow would admit physical evidence that is derived from a defendant's *compelled* "communicative act."

Justice Brennan, who wrote the majority opinion in *Schmerber*, spent six pages discussing whether the chemical analysis of the defendant's blood should be excluded "as the product of an unreasonable search and seizure."\(^{366}\) Why would he have bothered if the withdrawal of blood — or the acquisition of nontestimonial evidence generally — enjoyed a special immunity from the poisonous tree doctrine?

One might argue that although an antecedent Fourth Amendment violation may fatally taint the acquisition of nontestimonial evidence, an antecedent Fifth Amendment violation cannot. But why not? After all, the poisonous tree doctrine applies to violations of the Fifth Amendment, as well as the Fourth.

A year after he wrote the majority opinion in *Schmerber*, Justice Brennan, again writing for the Court, applied the poisonous tree doctrine to a violation of defendant's Sixth Amendment right to counsel at a pretrial lineup.\(^{367}\) He told us that a courtroom identification by a government witness would be allowed if the prosecution could establish that it was based upon observations of the defendant independent of those at the illegal lineup identification — citing for authority the Fifth Amendment immunity grant case, *Murphy v. Waterfront Commission*.\(^{368}\) This is further evidence that the Court views the poisonous tree doctrine as a general principle applicable

\(^{365}\) 384 U.S. at 765; see also *supra* text accompanying note 123.

\(^{366}\) 384 U.S. at 767. The Court upheld the admissibility of the chemical analysis only after concluding that defendant had not been arrested illegally and that it was impractical for the police to seek a warrant before obtaining a sample of his blood. There is little doubt that if defendant's Fourth Amendment rights had been violated, the chemical analysis would have been excluded "as the product of an unconstitutional search and seizure."


\(^{368}\) *See 388 U.S. at 240 (citing Murphy v. Waterfront Commn., 378 U.S. 52 (1964)).*
to various constitutional violations, not a rule limited to the search and seizure setting.

More recently, the Court applied the poisonous tree doctrine, and its exceptions, to the fruits of statements obtained in violation of the Sixth Amendment right to counsel. Once again, the Court pointed out that the poisonous tree doctrine had not been limited to violations of the Fourth Amendment. It had, the Court reminded us, been applied as well to violations of the Fifth. For authority, the Court cited two immunity grant cases, Murphy and Kastigar.

As we have seen, Amar and Lettow gain much comfort from the Miranda derivative evidence cases. Here, too, I venture to say, they see things that are not there. In Michigan v. Tucker and, a decade later, in Oregon v. Elstad, the Court did admit the verbal fruits of Miranda violations. But both Tucker and Elstad are Miranda cases, not cases "deal[ing] with the constitutional privilege against compulsory self-incrimination in its most pristine form." Thus "[t]he question for decision" presented in Tucker was "how sweeping the judicially imposed consequences of [a] disregard" of Miranda's "procedural rules" — and "an inadvertent disregard," to boot — should be.

Elstad relied heavily on the reasoning in Tucker. "Since there was no actual infringement of the suspect's constitutional rights" in Tucker, recalled the Elstad Court, that case "was not controlled by the doctrine expressed in Wong Sun that fruits of a constitutional violation must be suppressed." The Elstad Court felt that it was not bound by the poisonous tree doctrine because, as it perceived

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369. See Nix v. Williams (Williams II), 467 U.S. 431 (1984); see also supra text accompanying notes 330-48.
370. See supra text accompanying note 342.
373. New Jersey v. Portash, 440 U.S. 450, 459 (1979); see also supra text accompanying note 208. Moreover, for reasons I have discussed at length, I believe Justice O'Connor's concurring opinion in Quarles is also an argument for a special rule admitting the physical fruits of Miranda violations. See supra text accompanying notes 180-89.
374. 417 U.S. at 446; see also supra note 66. For other language in the Tucker opinion to the same effect, see supra note 201.
375. 417 U.S. at 445.
376. 470 U.S. at 308.
the matter, a victim of a *Miranda* violation "has suffered no identifiable constitutional harm."\(^{377}\) Added the Court: "If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself."\(^{378}\)

Amar and Lettow maintain that the Court has been "chipping away" at *Kastigar* "in the context of *Miranda* warnings."\(^{379}\) This is like saying the courts have been chipping away at *Roe v. Wade*\(^ {380}\) in the contexts of physician-assisted suicide and active voluntary euthanasia. The more relevant question is whether the Court has been chipping away at *Kastigar* in its own bailiwick — in a "pure" (not "prophylactic") Fifth Amendment context. Amar and Lettow point to no cases in which the Supreme Court has.

Finally, Amar and Lettow point out that their goal can be achieved by "an extension of the inevitable discovery doctrine"\(^ {381}\) — by "simply presum[ing] — irrebuttably — that somehow, some way, the truth and the fruit might have come to light anyway."\(^ {382}\)

This is not an argument, only a conclusion. This is analogous to saying that abolition of the search and seizure exclusionary rule can be brought about (i) by *simply expanding* the doctrine permitting the use of illegally seized evidence for impeachment purposes until it engulfs the exclusionary rule itself, or (ii) by *simply expanding* the "standing" requirement so that nobody has standing to challenge the admissibility of evidence seized in violation of the Constitution, or (iii) by *simply extending* the so-called good faith exception to the exclusionary rule until it applies to all illegal searches and seizures.

Amar and Lettow recognize that "at first glance" their approach may "seem like a startling break from current interpretations,"\(^ {383}\) but they quickly add, "[I]t is merely an extension of [several] current doctrines or trends."\(^ {384}\) I have given the Amar-Lettow ap-

\(^{377}\) 470 U.S. at 307.

\(^{378}\) 470 U.S. at 309.

\(^{379}\) Amar & Lettow, *supra* note 1, at 880; see also *id.* at 858.

\(^{380}\) 410 U.S. 113 (1973).

\(^{381}\) Amar & Lettow, *supra* note 1, at 928.

\(^{382}\) *Id.* at 980.

\(^{383}\) *Id.* at 927.

\(^{384}\) *Id.*
proach a second glance — and a third and a fourth. It still looks like “a startling break from current interpretations” to me.**

** When Professor Kamisar accepted the Law Review’s invitation to respond to the Amar-Lettow article, he understood that he would not be able to reply to Amar and Lettow’s rejoinder to his response.