CONSTITUTIONAL LAW—THE SOAP BOX EXCEPTION TO THE *MIRANDA* RULE: FIFTH AMENDMENT PROTECTIONS SLIP DOWN THE DRAIN—*New York v. Quarles*, 104 S. Ct. 2626 (1984).

Ever since the United States Supreme Court set forth its famous *Miranda v. Arizona*[1] decision, police have been prohibited from questioning criminal suspects in custody without first informing them of their right to remain silent and to have an attorney present.[2] These warnings, which are based on the fifth amendment,[3] were designed by the Court as a prophylactic measure to protect an individual from compelled self-incrimination during custodial interrogation. Statements obtained in violation of *Miranda* thus are not admissible as evidence.[4] In *New York v. Quarles*[5] the Supreme Court significantly departed from *Miranda*'s clear strictures by creating a "public safety" exception, which permits police officers to interrogate suspects without giving the *Miranda* warnings when prompted by a concern for public safety.[6]

On September 11, 1980, at approximately 12:30 a.m., a young woman approached police officers Kraft and Scarring, who were on road patrol in Queens, New York.[7] She told them that she had just been raped, that her attacker was carrying a gun, and that he had just entered a local supermarket.[8] Officer Kraft pursued the suspect, Quarles, into the supermarket while Officer Scarring radioed for back-up.[9]

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1 384 U.S. 436 (1966).

2 *Id.* at 444. The *Miranda* warnings specifically require that "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.*

3 U.S. CONST. amend. V provides in part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." The purpose of the fifth amendment privilege is to protect an individual from being compelled to give testimony that could subsequently be used against him at trial. *See* Kastigar v. United States, 406 U.S. 441 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Ullmann v. United States, 350 U.S. 422 (1956); Counselman v. Hitchcock, 142 U.S. 547 (1892).

4 *See Miranda*, 384 U.S. at 476.

5 104 S. Ct. 2626 (1984) (5-4 decision).

6 *Id.* at 2632. The "public safety" exception to the *Miranda* rule may be triggered by circumstances posing a reasonable threat of danger to the police or public. *Id.* In the event the police are prompted by such a concern, they may conduct custodial interrogations and dispense with *Miranda* warnings to the extent necessary to neutralize the dangerous situation. *Id.* at 2632-33.

7 *Id.* at 2629.

8 *Id.*

9 *Id.*

After briefly losing sight of Quarles in the supermarket, Officer Kraft found and subdued him in the rear of the store.[10] When more than three officers had arrived at the scene, Officer Kraft frisked him and discovered an empty shoulder holster.[11] Officer Kraft then handcuffed the suspect.[12] Before informing Quarles of his *Miranda* rights, Officer Kraft asked him, "Where is the gun?"[13] Quarles nodded toward a stack of soap cartons a few feet away, and stated, "The gun is over there."[14]

Officer Kraft recovered a loaded revolver from one of the cartons and placed Quarles under arrest.[15] At that point, the officer read him his *Miranda* rights.[16] Quarles then agreed to answer some questions without the presence of an attorney and admitted that he owned the gun and had purchased it in Miami, Florida.[17]

Quarles subsequently was prosecuted for criminal possession of a weapon.[18] The trial court excluded both his statement pertaining to the location of the weapon, and the gun itself, because he had not first been warned of his right to remain silent.[19] The judge also suppressed Quarles's other statements concerning ownership of the gun as evidence tainted by the officer's prior

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10 *Id.* at 2629-30.

11 *Id.* at 2630.

12 *Id.*

13 *Id.*

14 *Id.* Interestingly, the dissent's portrayal of the events leading to the arrest differed from that of the majority. Justice Marshall, writing for the dissent, asserted that the majority had ignored the factual findings of the New York Court of Appeals and characterized the majority's treatment of the facts as abusive. *Id.* at 2643 (Marshall, J., dissenting). Specifically, Justice Marshall maintained that as Officer Kraft frisked Quarles, "the *other officers trained their guns on the suspect.*" *Id.* at 2642 (Marshall, J., dissenting) (emphasis supplied). According to the dissent, Quarles may have been under greater duress and, therefore, intrinsically may have felt greater compulsion to speak. *See id.* Indeed, Justice Marshall maintained that under the facts of this case, there was no possibility that Quarles presented a threat of danger to the police or public safety. *Id.* at 2643 (Marshall, J., dissenting).

15 *Id.* at 2630.

16 *Id.*

17 *Id.*

18 *Id.* Although Quarles initially was charged with rape, the record failed to state why that charge was not pursued by the prosecution. *Id.* at 2630 n.2.

19 *Id.* at 2630. Nine months after *Quarles* was decided, the Supreme Court ruled, in *Oregon v. Elstad*, that subsequent statements given after an initial violation of *Miranda* are admissible so long as there was no known coercion involved in the first unwarned statement made by the defendant. *Elstad*, 53 U.S.L.W. 4244, 4250 (U.S. Mar. 4, 1985). Therefore, had the *Quarles* decision been decided after *Elstad*, Quarles's second statement concerning ownership of the gun would probably have been admissible.

failure to administer preinterrogation warnings.[20] The suppression order was affirmed by both the Appellate Division of the Supreme Court of New York[21] and the New York Court of Appeals.[22] In its opinion, the court of appeals rejected the state's claim that exigent circumstances existed and thus it found no basis for the officer's failure to provide the *Miranda* warnings.[23] The United States Supreme Court reversed[24] and held that "overriding considerations of public safety"[25] justified an exception to the rule that "*Miranda* warnings be given before a suspect's answers may be admitted into evidence."[26] The Court thus concluded that concern for "public safety" outweighs the prophylactic *Miranda* rules, which were designed to protect an individual's fifth amendment privilege against self-incrimination.[27]

The privilege against self-incrimination was developed to combat the inquisitorial methods of interrogation that were used in England during the early seventeenth century.[28] Although in England the privilege merely evolved into an unwritten rule of evidence,[29] in this country it was incorporated into the Bill of Rights as part of the fifth amendment to the Constitution.[30] Nev-

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20 *Quarles*, 104 S. Ct. at 2630.

21 People v. Quarles, 85 A.D.2d 936, 447 N.Y.S.2d 84 (1981) (mem.), *aff'd*, 58 N.Y.2d 664, 444 N.E.2d 984, 458 N.Y.S.2d 520 (1982), *rev'd sub nom.* New York v. Quarles, 104 S. Ct. 2626 (1984).

22 People v. Quarles, 58 N.Y.2d 664, 444 N.E.2d 984, 458 N.Y.S.2d 520 (1982), *rev'd sub nom.* New York v. Quarles, 104 S. Ct. 2626 (1984).

23 *Id.* at 666, 444 N.E.2d at 985, 458 N.Y.S.2d at 521.

24 *Quarles*, 104 S. Ct. at 2630.

25 *Id.* at 2629.

26 *Id.* at 2632. Because the Court found no *Miranda* violation, it concluded that the statements obtained from Quarles after the administration of *Miranda* warnings were not tainted. *Id.* at 2634. Additionally, the Court reasoned that its holding made it unnecessary to address the state's argument that the gun was admissible either because it inevitably would have been discovered or because it was non-testimonial evidence. *Id.* at 2634 n.9.

27 *Id.* at 2633.

28 Brown v. Walker, 161 U.S. 591, 596-97 (1896). The *Miranda* Court observed, however, that the privilege can be traced to much earlier origins, and noted that " '[t]hirteenth century commentators found an analogue to the privilege grounded in the Bible. To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree.' " *Miranda*, 384 U.S. at 459 n.27 (quoting *Maimonides*, Mishneh Torah (Code of Jewish Law), Book of Judges, Law of the Sanhedrin, ch. 18, ¶ 6, III YALE JUDAICA SERIES 52-53).

29 *See* Brown v. Walker, 161 U.S. 591, 596-97 (1896).

30 *See Miranda*, 384 U.S. at 459-60. The privilege against self-incrimination has been recognized as a fundamental right. Bram v. United States, 168 U.S. 532, 544-45 (1897). The *Miranda* Court interpreted this privilege as a " 'right to a private enclave where [an individual] may lead a private life. That right is the hallmark of our democracy.' " *Miranda*, 384 U.S. at 460 (quoting United States v. Grunewald,

ertheless, prior to 1897, the United States Supreme Court rarely relied on the fifth amendment privilege in excluding a criminal suspect's coerced confession.[31] Instead, the Court tested admissibility of confessions under prevailing common law rules of evidence.[32]

The first time the Supreme Court utilized the fifth amendment privilege against self-incrimination to ban admission of a confession occurred in 1897 in *Bram v. United States*.[33] In *Bram*, a case which involved the admissibility of a confession in Federal court, the Court utilized a "voluntariness test" vis-a-vis the fifth amendment in order to determine admissibility.[34] Confessions under that test were not admissible at trial if they were obtained through forms of coercion, such as threats or promises of leniency.[35] *Bram* supplied the standard for assessing admissibility of confessions in Federal courts[36] until it was supplanted by Rule 5(a) of the Federal Rules of Criminal Procedure, which requires an arresting officer to bring an arrestee, "without unnecessary delay,"[37] before the nearest available magistrate, and by the *Mc-*

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233 F.2d 556, 579, 581-82 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957). For a discussion of the development of the law of confessions prior to *Miranda*, see *Developments in the Law—Confessions*, 79 HARV. L. REV. 935 (1966).

31 Bram v. United States, 168 U.S. 532, 542 (1897). *See generally* Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 462-81 (1964) (discussing development of fifth amendment privilege as applied to police interrogation).

32 *See, e.g.*, Wilson v. United States, 162 U.S. 613, 623 (1896); Pierce v. United States, 160 U.S. 355 (1896) (same); Sparf v. United States, 156 U.S. 51 (1895); *cf.* Hopt v. Utah, 110 U.S. 574, 585 (1884) (suggesting that confession obtained through threats loses its reliability and trustworthiness). *See generally* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 147 (E. Cleary 2d ed. 1972).

33 168 U.S. 532 (1897).

34 *Id.* at 542-43. The Court stated:

> The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent.

Id. at 549. See *infra* notes 40-53 and accompanying text for a discussion of Federal and state confession cases reviewed under a voluntary test. *See generally* Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 926-27 (1979).

35 *See Bram*, 168 U.S. at 542-43, 558, 562-63; *see also* Lisenba v. California, 314 U.S. 219, 236-37 (1941) (asserting belief that promises induce false confessions).

36 FED. R. CRIM. P. 5(a).

37 The *McNabb-Mallory* rule was a rule of statutory interpretation utilized by the Supreme Court to exercise its supervisory power over the Federal courts. *See Mi-*

Nabb-Mallory rule, which bars admission of any confession obtained in violation of Rule 5(a).[38]

Similarly, prior to *Miranda*, in testing the admissibility of confessions in state courts, the Supreme Court employed the "voluntariness" standard.[39] Because the fifth amendment was not made applicable to the states until 1964,[40] however, the Court identified the due process clause of the fourteenth amendment as the constitutional source for the state's voluntariness requirement.[41]

Under its due process analysis, the Court examined the totality of the circumstances under which a defendant's confession was obtained and barred statements that it deemed to have been coerced.[42] Coerced statements were viewed as being inadmissible

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randa, 384 U.S. at 463. The rule precluded the admissibility of confessions obtained when an arrestee was detained unnecessarily in violation of FED. R. CRIM. P. 5(a). *Miranda*, 384 U.S. at 463 (citing Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943)). Shortly after *Miranda*, Congress passed legislation which substantially nullified the *McNabb-Mallory* rule. *See* Omnibus Crime Control & Safe Streets Act of 1968, Pub. L. No. 90-351, tit. II, § 701(a), 82 Stat. 210 (codified at 18 U.S.C. § 3501 (1984)). *But see Grano, supra* note 34, at 900 n.205 (suggesting that Act is unconstitutional "unless *Miranda* can be considered a sublevel of constitutional law").

38 *See* United States v. Carignan, 342 U.S. 36, 41 nn.3-5 (1951).

39 *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 285-86 (1936); *see* Malloy v. Hogan, 378 U.S. 1, 6 (1964) (stating that *Brown v. Mississippi* was first state confession case to apply voluntariness test under due process clause of fourteenth amendment).

40 Malloy v. Hogan, 378 U.S. 1 (1964).

41 *See, e.g.*, Culombe v. Connecticut, 367 U.S. 568 (1961); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Brown v. Mississippi, 297 U.S. 278 (1936). For a classic description of the due process voluntariness test see *Culombe*, 367 U.S. at 620-25; *see also* Grano, *supra* note 34, at 929 n.358 (state voluntariness test similar to test applied in Federal cases). In the 30 years preceding *Miranda*, the Court decided almost 40 state confession cases using a due process voluntariness analysis. *See* Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59, 62, 102 & n.184 (1966).

42 *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 513-15 (1963); Culombe v. Connecticut, 367 U.S. 568, 602 (1961); Blackburn v. Alabama, 361 U.S. 199, 206 (1960). The factors the Court reviewed to determine whether a defendant's confession was given freely included: (1) length of interrogation, *e.g.*, Haynes v. Washington, 373 U.S. 503 (1963); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Chambers v. Florida, 309 U.S. 227 (1940); *but cf.* Thomas v. Arizona, 356 U.S. 390, 395, 400 (1958) (although defendant was lassoed around neck on two occasions, Court determined confession was not induced by fear); Stein v. New York, 346 U.S. 156 (1953) (defendant confessed after two days of incommunicado detention, but Court rejected claim of coercion because he attempted to negotiate terms under which he would confess); (2) use of threats or physical abuse, *e.g.*, Lynumn v. Illinois, 372 U.S. 529, 531 (1963); Payne v. Arkansas, 356 U.S. 560, 564 (1958); Brown v. Mississippi, 297 U.S. 278 (1936); (3) defendant's age and health, *e.g.*, Jackson v. Denno, 378 U.S. 368 (1964); Gallegos v. Colorado, 370 U.S. 49 (1962); Blackburn v. Ala-

not only because they lacked the fundamental requisites of trustworthiness and reliability, but also because of "the deep-rooted feeling that the police must obey the law while enforcing the law."[43] The determinative question in each case was whether the defendant's free choice or will was significantly impaired.[44] The voluntariness test, however, was criticized for affording defendants insufficient protection, and the Court was urged to abandon it altogether.[45]

Dissatisfaction with the test led to a series of three cases that were decided in 1964.[46] In those cases, the Supreme Court reexamined the constitutional issues with respect to the procedural standards of police interrogation practices and the admissibility of confessions that were obtained thereby.[47] In attempting to re-

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bama, 361 U.S. 199 (1960) (defendant's insanity and incompetency rendered confession involuntary); (4) lack of education, *e.g.*, Culombe v. Connecticut, 367 U.S. 568 (1961) (mental incapacity coupled with illiteracy rendered confession inadmissible); (5) police tactics, *e.g.*, Rogers v. Richmond, 365 U.S. 534 (1961); Spano v. New York, 360 U.S. 315 (1959) (trickery coupled with defendant's emotional instability led to involuntary confession); Watts v. Indiana, 338 U.S. 49 (1949).

43 Spano v. New York, 360 U.S. 315, 320-21 (1959); *cf.* Rogers v. Richmond, 365 U.S. 534, 534-44 (1961) (discussing whether "behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined"). *See generally* Comment, *The Coerced Confession Cases in Search of a Rationale*, 31 U. CHI. L. REV. 313 (1964).

44 Lynumn v. Illinois, 372 U.S. 528, 534 (1963); *see* Davis v. North Carolina, 384 U.S. 737, 739 (1966).

45 Since the admissibility of a confession under the voluntariness test was determined on a case-by-case basis, the Court was unable to articulate precise guidelines. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L REV. 581, 598 (1979). Consequently, trial judges were left with wide discretion, and decisions regarding the voluntariness of a confession varied greatly. *See id.* at 598-99. *See generally* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 263, 268-69 (1985) (discussing drawbacks of pre-*Miranda* voluntariness test); Kamisar, *supra* note 41, at 62, 94-104 (same).

46 *See* Massiah v. United States, 377 U.S. 201 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964). One commentator has observed that:

> Given the Court's inability to articulate a clear and predictable definition of "voluntariness," the apparent persistence of state courts in utilizing the ambiguity of the concept to validate confessions of doubtful constitutionality, and the resultant burden on its own workload, it seemed inevitable that the Court would seek "some automatic device by which the potential evils of incommunicado interrogation [could] be controlled."

Stone, *The Miranda Doctrine in the Burger Court*, in 1977 THE SUPREME COURT REVIEW 102-03 (P. Kurland & G. Casper eds. 1977) (quoting S. SCHAEFER, THE SUSPECT AND SOCIETY 10 (1967)).

47 Massiah v. United States, 377 U.S. 201 (1964) (sixth amendment right to counsel barred admissibility of *post*-indictment confession obtained in absence of counsel); Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment privilege against

solve the coerced confession issue, the Court appeared to vascillate between utilizing a "new" fifth amendment voluntariness test and employing an analysis based upon the sixth amendment right to counsel.[48]

In *Massiah v. United States*,[49] the Court held that the Federal government violated the defendant's sixth amendment right to counsel[50] when Federal agents had "deliberately elicited" self-incriminating statements from him after his indictment and in the absence of counsel.[51] In an opinion by Justice Stewart, the Court determined that because the defendant's confession had been given at a critical stage of the proceedings, he was entitled to the assistance of counsel.[52] Thus, the Court did not consider absence of counsel as a factor in a due process voluntariness analysis, but rather it created a procedural safeguard against self-incrimination, specifically on sixth amendment grounds.[53]

Shortly after its decision in *Massiah*, the Supreme Court, in *Malloy v. Hogan*,[54] made the fifth amendment privilege against self-incrimination binding on the states through the fourteenth amendment.[55] In *Malloy*, the Court tested the admissibility of a confession in a state criminal proceeding by the same "voluntari-

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compulsory self-incrimination applied to states through fourteenth amendment; admissibility of confessions in state cases determined by same voluntariness standards that applied in Federal cases); Escobedo v. Illinois, 378 U.S. 478 (1964) (sixth amendment right to counsel barred admissibility of *pre*-indictment confession obtained in absence of counsel).

48 *Compare* Malloy v. Hogan, 378 U.S. 1, 7-11 (1964) *with* Escobedo v. Illinois, 378 U.S. 478 (1964) *and* Massiah v. United States, 377 U.S. 201 (1964).

49 377 U.S. 201 (1964).

50 The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

51 *Massiah*, 377 U.S. at 204-06. The *Massiah* Court recognized the need for counsel when a person is interrogated *after* indictment, because questioning at this stage is an integral part of the state's proceeding against him. *Id*; *see* Spano v. New York, 360 U.S. 315, 327 (1959) (Stewart, J., concurring); *see also* McLeod v. Ohio, 381 U.S. 356 (1965) (sixth amendment right to counsel made applicable in post-indictment state confession cases).

52 *See Massiah*, 377 U.S. at 204-05 (citing Spano v. New York, 360 U.S. 315, 327 (1959) (Stewart, J., concurring)).

53 *Id. But see id.* at 208-13 (White, J., dissenting). Justice White argued that the test for admissibility for confessions should continue to be governed under the voluntariness standard. *Id.* at 210 (White, J., dissenting). According to Justice White, the Court had presented "no facts, no objective evidence, no reason to warrant scrapping the voluntary-involuntary test for admissibility in this area. Without such evidence I would retain it in its present form." *Id.*

54 378 U.S. 1 (1964).

55 *Id.* at 6-8.

ness" standard that applied in Federal prosecutions.[56] Justice Brennan, writing for the plurality, stated that the shift to the Federal standard in state cases "reflected [a] recognition [by the Court] that the American system of criminal prosecution is accusatorial, not inquisitorial, and the Fifth Amendment privilege is its essential mainstay."[57]

One week after *Malloy* was decided, the Court held in *Escobedo v. Illinois*[58] that the sixth amendment right to counsel also barred confessions made by a defendant during preindictment interrogation without the presence of an attorney.[59] In *Escobedo*, the defendant was arrested on suspicion of murder.[60] During the course of a fifteen-hour interrogation, the police denied the defendant's repeated requests to consult with his lawyer.[61] Moreover, the police actually encouraged the defendant to make a statement without advising him of his right to remain silent.[62]

In determining that preindictment interrogation was a critical stage in criminal proceedings, the Court reasoned that "no meaningful distinction [could be] drawn between an interrogation of an accused before and after formal indictment."[63] The Court found that because police suspicion had focused on Escobedo and the police were attempting to elicit a confession from him, an adversarial situation had arisen and the defendant's need

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56 *Id.*

57 *Id.* at 7. For a brief historical perspective on the applicability of the fifth amendment to police station interrogation, see Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 466 n.95 (1964).

58 378 U.S. 478 (1964).

59 *Id.* at 490-91.

60 *Id.* at 482.

61 *Id.* at 480-82.

62 *Id.*

63 *Id.* at 486. The Court stated that to make the right to counsel depend on whether the defendant had been formally indicted "would exalt form over substance." *Id.* Justice Stewart, who authored *Massiah*, saw a significant distinction between that case and *Escobedo* in that once there was an indictment formal judicial proceedings began against the defendant, resulting in an end to the general investigation and the start of adversarial proceedings. Consequently, in *Massiah* the defendant was entitled to constitutional safeguards. *Id.* at 493-94 (Stewart, J., dissenting). Preindictment questioning, in Justice Stewart's view, did not trigger formal judicial proceedings but only represented routine police investigation of an unsolved crime. Therefore, constitutional safeguards under the sixth amendment should not have been invoked in *Escobedo*. *Id.*; *see also id.* at 496-98 (White, J., dissenting) (admissibility of defendant's confession should have been governed under fifth amendment to determine if it was voluntarily given; sixth amendment was inappropriate since formal judicial proceedings had not begun). For a brief discussion tracing Justice Stewart's sixth amendment philosophy, see Grano, *supra* note 34, at 941 n.430.

for counsel was crucial.[64] The *Escobedo* Court thus avoided a totality of the circumstances analysis and instead relied on the sixth amendment right to counsel to exclude a coerced confession.

Unfortunately, these three decisions added to the confusion and uncertainty over which amendment and what procedures protected an individual against coerced, self-incriminating statements.[65] In 1966, this confusion was substantially dispelled by the *Miranda* decision.[66]

In an opinion authored by Chief Justice Warren, the *Miranda* Court reaffirmed the fifth amendment as the constitutional

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64 *Massiah*, 378 U.S. at 486.

65 *See Miranda*, 384 U.S. at 440 ("[*Escobedo*] has been the subject of judicial interpretation and spirited legal debate since it was decided two years ago. Both state and federal courts, in assessing its implications, have arrived at varying conclusions."); *Quarles*, 104 S. Ct. at 2646 n.5 (Marshall, J., dissenting) (prior to *Miranda*, there existed "considerable confusion over whether the Sixth Amendment or the Fifth Amendment provided the basis for [the] prohibition [against coerced self-incriminating statements]"); *cf.* Kirby v. Illinois, 402 U.S. 682, 689 (1972) (prime purpose of *Escobedo* was not to uphold sixth amendment right to counsel but to protect defendant's fifth amendment privilege).

Because *Miranda* only applies to cases tried after its date, the precise meaning of *Escobedo* still retains a degree of importance. *See* Johnson v. New Jersey, 384 U.S. 719, 732 (1966) (*Escobedo* and *Miranda* should not be applied retroactively). Voluntariness still governs pre-*Miranda* cases. *See* Greenwald v. Wisconsin, 390 U.S. 519, 521 (1968); Davis v. North Carolina, 384 U.S. 737, 740 (1966). Additionally, the right-to-counsel cases maintain their importance because they can be relied on to exclude incriminating statements not necessarily inadmissible under *Miranda*. *See, e.g.*, Brewer v. Williams, 430 U.S. 387 (1977).

66 *Miranda* involved four consolidated cases in which the defendants in each case were sequestered in a police station — "cut off from the outside world" — and questioned either by the police or a prosecuting attorney. *Miranda*, 384 U.S. at 456-57, 491-99.

Specifically, in *Miranda*, the petitioner Ernesto Miranda was arrested at his home and then taken to a Phoenix, Arizona police station for interrogation. *Id.* at 491. After two hours of police questioning, Miranda signed a written confession. *Id.* at 491-92. Additionally, a paragraph was typed above this confession which stated "that the confession was made voluntarily, without threats or promises of immunity and 'with full knowledge of [his] legal rights, understanding [that] any statement [he made] may be used against him.' " *Id.* at 492. Over the objection of his lawyers, Miranda's written confession along with other oral statements he made were introduced at his trial. *Id.*

Miranda was convicted of kidnapping and rape and sentenced to 20-30 years imprisonment on each count. *Id.* The Arizona Supreme Court affirmed the lower court's decision, relying heavily on "the fact that Miranda did not specifically request counsel." *Id.* The United States Supreme Court reversed, finding that Miranda's fifth amendment privilege against self-incrimination had been violated. *Id.* Although the Court overturned his convictions because he had not been informed of his rights, Miranda was later retried and found guilty of rape and sentenced to a maximum of 30 years in an Arizona prison. Thomas, *Court at the Crossroads*, TIME MAG., Oct. 8, 1984, at 33. Ironically, in 1972 Miranda was paroled, and, in 1976, he was stabbed to death in a Phoenix bar. *Id.*

source that protected an individual against being compelled to make self-incriminating statements during custodial interrogation.[67] In rendering its decision, the Court implied that the traditional standards of voluntariness used in determining admissibility of confessions did not adequately safeguard an individual's fifth amendment privilege against compulsory self-incrimination.[68] To dispel the confusion that arose from application of the nebulous voluntariness test, Chief Justice Warren both defined the circumstances that triggered that constitutional privilege[69] and formulated procedural guidelines to be used by police during custodial interrogations.[70]

The *Miranda* Court observed that the process of in-custody interrogation generated "inherently compelling pressures," which effectively overcame a person's will and compelled him to speak.[71] Accordingly, the Court created a presumption that statements made by a defendant, in the absence of full warnings of his constitutional rights, were coerced,[72] and hence, inadmissible because they violated the fifth amendment privilege against self-incrimination.[73] In effect, *Miranda* strongly suggested a per se test for excluding compelled, self-incriminating statements:[74] failure either to inform the accused of his constitutional rights[75] or to obtain a knowing and intelligent waiver from him prior to in-custody questioning could destroy the admissibility of any such statements at trial.[76]

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67 *Miranda*, 384 U.S. at 467.

68 *See id.* at 457.

69 *Id.* at 444-45, 467-69, 478-79. See *supra* note 45 and accompanying text for a discussion of the criticism of the voluntariness test.

70 *Miranda*, 384 U.S. at 444. See *supra* note 2 for a recitation of the warnings which must be administered to a defendant prior to any custodial interrogation.

71 *Miranda*, 384 U.S. at 467. The Court observed that "compelling pressures" are limited not only to physical coercion but also to psychological coercion. *Id.* at 448.

72 *Id.* at 467. The Court stated that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." *Id.* at 458.

73 *Id.* at 444. Significantly, *Miranda* safeguards were applicable to all custodial interrogations, even if they had taken place outside the police station house. Orozco v. Texas, 394 U.S. 324, 327 (1969) (citing *Miranda*, 384 U.S. at 477).

74 *See Miranda*, 384 U.S. at 458, 461.

75 *See id.* at 478-79.

76 *Id.* at 444, 467, 475-76. The Court declared that a waiver will not be presumed from the defendant's silence. *Id.* at 475. Statements obtained in violation of *Miranda*, however, may be used for impeachment purposes, provided they are voluntarily given. *See* Harris v. New York, 401 U.S. 222 (1971) (voluntary statement obtained in violation of *Miranda* was admissible for impeachment purposes). *But see*

By requiring police to administer warnings before commencing custodial interrogation, *Miranda* clearly established procedural safeguards to protect a defendant's fifth amendment privilege against self-incrimination.[77] The decision, however, failed to delineate satisfactorily what constituted either "custody" or "interrogation" for purposes of triggering those warnings. Thus, post-*Miranda* cases focused on factual determinations of custody and interrogation in order to ascertain whether the right to *Miranda* warnings had attached.[78]

In 1969, in *Orozco v. Texas*,[79] the Court extended the *Miranda* rule to all custodial interrogations, including those taking place outside the police station.[80] In that case, police officers had questioned the petitioner in his room, without giving him any *Miranda* warnings.[81] The state of Texas argued that because the questioning had taken place in familiar surroundings, the petitioner was not "in custody" and thus *Miranda* was inapposite.[82] According to the Court, the site of the interrogation was not the focal point for determining whether someone was "in custody" for purposes of triggering application of *Miranda*.[83] Rather, it asserted, the central edict of *Miranda* was that warnings had to be given whenever the suspect being interrogated was " 'deprived of his freedom . . . in any significant way,' " regardless of the place of interrogation.[84]

The Supreme Court attempted to resolve the question of what constituted custodial interrogation in the 1980 case of *Rhode Island v. Innis*.[85] The defendant in *Innis* was picked up by police for allegedly shooting a taxicab driver with a sawed-off shot gun.[86] After advising the defendant of his *Miranda* rights, the police transported him in a squad car to a police station.[87] While traveling in the car, the defendant made several incriminating statements after one officer, in conversation with another, re-

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Mincey v. Arizona, 437 U.S. 385 (1978) (coerced statements obtained in violation of *Miranda* held not admissible for impeachment purposes).

77 *See Miranda*, 384 U.S. at 467-69.

78 *See, e.g.*, Rhode Island v. Innis, 446 U.S. 291 (1980); Orozco v. Texas, 394 U.S. 324 (1969).

79 394 U.S. 324 (1969).

80 *Id.* at 326-27.

81 *Id.* at 325-26.

82 *Id.* at 326.

83 *Id.*

84 *Id.* at 327 (quoting *Miranda*, 384 U.S. at 477).

85 446 U.S. 291 (1980).

86 *Id.* at 293-94.

87 *Id.* at 294.

marked that some children in a nearby school for the handicapped might be injured if they were to discover the gun.[88] Justice Stewart, writing for the Court, determined that the *Miranda* safeguards were applicable "whenever a person in custody is subjected to either express questioning or its functional equivalent."[89] The *Innis* Court, therefore, concluded that express questioning or its "functional equivalent" constituted interrogation.[90]

Until 1984, the *Miranda* warnings were triggered automatically when a suspect came under custodial interrogation.[91] In *Quarles*, the Supreme Court departed from the principles that were enunciated in *Miranda* and held that police officers may dispense with *Miranda* warnings when "overriding considerations of public safety" are at stake.[92] The "public safety" exception created by the Court permits police to interrogate a suspect before giving *Miranda* warnings where there is an imminent threat of danger to either the police or the public.[93]

To support the Court's creation of a "public safety" exception, Justice Rehnquist, writing for the majority,[94] asserted that *Miranda* warnings are not constitutional rights per se, but rather they are merely procedural safeguards to protect the right against compulsory self-incrimination.[95] He also noted that the

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88 *Id.* at 294-95.

89 *Id.* at 300-01.

90 *Id.* Therefore, interrogation under *Miranda* applies not only to express questioning, "but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301. These measures were designed to provide a suspect with added protection "against coercive police practices, without regard to objective proof of the underlying intent of the police." *Id.* Nevertheless, the *Innis* Court held that the defendant's statements were admissible at trial because the police officers had no reason to know that their conversation would elicit self-incriminating statements from the defendant. *Id.* at 301-02.

91 *See Quarles*, 104 S. Ct. at 2644 (Marshall, J., dissenting) ("[I]n *Quarles*, the majority has abandoned the [*Miranda*] rule that brought eighteen years of doctrinal tranquility to the field of custodial interrogations.").

92 *Id.* at 2629. The Court concluded "that [*Quarles*] present[ed] a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*." *Id.* at 2630.

93 *See id.* at 2632.

94 Justice Rehnquist's opinion was joined by Chief Justice Burger, and Justices White, Blackmun, and Powell.

95 *Quarles*, 104 S. Ct. at 2631. Recognizing that there has been an exception for "exigencies" under the fourth amendment, Justice Rehnquist reasoned that a similar exception should be available under the fifth amendment. *Id.* at 2630 n.3. *But cf. id.* at 2648 n.10 (Marshall, J., dissenting) ("The Fourth Amendment . . . should have no analogy in the Fifth Amendment context.").

fifth amendment prohibition against self-incrimination does not apply to all incriminating statements but only to those which actually are coerced.[96]

Ignoring the constitutional presumption created in *Miranda* — that statements obtained in violation of *Miranda* are compelled[97] — the majority pointed out that Quarles made no claim that his statements actually were coerced by the police or that his will was overborne.[98] The Court thus rejected Quarles's argument that statements made without *Miranda* warnings are presumptively compelled.[99] The majority concluded that the only issue to be determined was whether the officer was justified in failing to administer the warnings to Quarles.[100]

While it acknowledged that the lower courts had made no factual finding that exigent circumstances had existed, the majority concluded that a "public safety" exception to *Miranda* nevertheless was justified.[101] Because police officers in "kaleidoscopic situations" often act on myriad unverifiable motives, such as their own safety, the public's safety, and their desire to obtain evidence,[102] the Court insisted that availability of the exception should not depend upon the officer's subjective motives.[103]

The *Quarles* Court next considered the social cost that its newly created exception imposes upon the public.[104] Justice Rehnquist viewed the *Miranda* rules as acceptable protections of the fifth amendment privilege where fewer convictions of guilty suspects is the only resultant cost to society.[105] The majority, however, was unwilling to require that *Miranda*'s procedural safeguards be invoked to protect an individual's fifth amendment privilege at the expense of public safety.[106] In the Court's view,

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96 *Id.* at 2631.

97 *See id.* at 2647 (Marshall, J., dissenting). The *Miranda* Court asserted that, absent preinterrogation warnings, the constitutional presumption of coercion operates independently of the particular facts in each case. *See Miranda*, 384 U.S. at 468-69.

98 *Quarles*, 104 S. Ct. at 2631.

99 *Id.* at 2631 n.5.

100 *Id.* at 2631.

101 *Id.* at 2631-32.

102 *Id.* The Court maintained that the application of the public safety exception "should not be made to depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer." *Id.*

103 *Id.* at 2632.

104 *See id.*

105 *Id.*

106 *Id.*

such a cost would be too great for society to bear.[107] Maintaining that in exigent circumstances the need for answers to questions outweighs the need for the prophylactic *Miranda* rule, the Court concluded that police officers should not be forced to choose between preserving potential evidence and protecting the public from potential danger.[108]

The Court acknowledged that to some extent the "public safety" exception to the *Miranda* rule diminishes the rule's clarity,[109] but it postulated that "public safety" is more important.[110] The majority maintained, however, that a "workable rule" is necessary in order to minimize the need for police officers to balance "the social and individual interests involved in the specific circumstances they confront."[111] Justice Rehnquist further asserted that the exception will not be difficult for police to administer.[112] Reasoning that each case will be "circumscribed" by the exigency immediately facing the police, the Court opined that officers can "distinguish almost instinctively between questions necessary to secure . . . the safety of the public and questions designed solely to elicit testimonial evidence."[113] The Court therefore determined that allowing officers "to follow their legitimate instincts," would simplify police procedures during on-the-scene investiga-

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107 *See id.* Justice Rehnquist maintained that a recitation of *Miranda* warnings may have deterred Quarles from responding to police questioning, which would have resulted in a potential threat to public safety. *Id.* The majority noted that had Officer Kraft first given *Miranda* warnings to Quarles, the suspect may have not confessed to the location of the gun. *Id.* Therefore, according to the Court, Officer Kraft needed Quarles's answer not only to make a case against him, but more importantly, to protect the public from danger; an accomplice, customer, or store employee might discover and use the gun. *Id. But see id.* at 2642-43 (Marshall, J., dissenting). The dissent maintained that because the area in the store was deserted at the time Quarles was apprehended, and because the police could have cordoned off that area, it was highly unlikely that other persons would have found the gun. *Id.*

108 *Id.* at 2633.

109 *Id.*

110 *See id.*

111 *Id.*

112 *Id.*

113 *Id.* Justice Rehnquist believed that the facts of the case demonstrated the ability of police officers to accurately apply the exception. *See id.* He maintained that Officer Kraft asked only as many questions as were necessary to secure the public's safety. *Id.* The majority noted that once the gun was retrieved and the danger to the public dispelled, the officer read the defendant his *Miranda* warnings before continuing with his investigation. *Id.* It is interesting to note that Chief Justice Burger, who joined in the majority's opinion in *Quarles*, had previously insisted just four years earlier in *Innis* that "[f]ew, if any, police officers are competent to make the kind of evaluation seemingly contemplated." *Innis*, 446 U.S. at 305 (Burger, C.J., concurring).

tions where public safety was imperiled.[114]

Justice O'Connor joined in the part of the Court's opinion that admitted the gun into evidence,[115] but she dissented from the Court's reversal of the suppression of Quarles's initial statement concerning the gun's location.[116] She explained that she might have joined the majority's full opinion if it was writing on a "clean slate."[117] She asserted, however, that "*Miranda* is now the law," and opined that the Court had not provided "sufficient justification for departing from it or for blurring its now clear strictures."[118] Insisting that the public safety exception will create confusion, Justice O'Connor cautioned that "[t]he end result will be a finespun new doctrine on public safety exigencies . . . complete with the hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence."[119]

Justice O'Connor further believed that in creating the exception, the majority had misconstrued the critical issue that had

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114 *Quarles*, 104 S. Ct. at 2633. The majority attempted to distinguish *Quarles* from *Orozco*, which had involved similar facts. *See id.* at 2633 n.8. The *Quarles* Court noted that in *Orozco*, unlike *Quarles*,

> the questions about the gun were clearly investigatory; they did not in any way relate to an objectively reasonable need to protect the police or the public from any immediate danger associated with the weapon. In short there was no exigency requiring immediate action by the officers beyond the normal need expeditiously to solve a serious crime.

Id.

115 *Id.* at 2634 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor's reason for finding the gun admissible differed from the majority's. *See id.* In Justice O'Connor's view, the gun was nontestimonial evidence. *Id.* Maintaining that "nothing in Miranda or the [fifth amendment] privilege itself requires exclusion of nontestimonial evidence derived from informal custodial interrogation," *id.*, Justice O'Connor insisted that a defendant may be compelled to relinquish such evidence against himself. *Id.* at 2637 (O'Connor, J., concurring in part and dissenting in part). For a discussion analyzing Justice O'Conner's view of the gun as nontestimonial evidence, see *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 87, 143 & n.21, 148 n.51 (1984).

116 *Quarles*, 104 S. Ct. at 2637 (O'Connor, J., concurring in part and dissenting in part).

117 *Id.* at 2634 (O'Connor, J., concurring in part and dissenting in part).

118 *Id.*

119 *Id.* at 2636 (O'Connor, J., concurring in part and dissenting in part); *cf.* Berkemer v. McCarty, 104 S. Ct. 3138, 3145 (1984) (principal advantage of *Miranda* doctrine is its clarity). In *Quarles*, Justice O'Connor pointed out that Justice Rehnquist had previously referred to the rigidity of the *Miranda* rule as its " 'core virtue' " because " '[i]t . . . afforded police and courts clear guidance on the manner in which to conduct a custodial interrogation.' " *Quarles*, 104 S. Ct. at 2636 (O'Connor, J., concurring in part and dissenting in part) (quoting Fare v. Michael C., 439 U.S. 1310, 1314 (1978) (Rehnquist, J., in chambers on application for stay)).

been addressed by the *Miranda* Court.[120] The *Miranda* decision, she explained, has never prevented police from interrogating suspects in order to secure the public safety.[121] In her view, *Miranda* requires only that when incriminating statements are elicited in the absence of preinterrogation warnings, the act of protecting the public be borne by the state, rather than the defendant.[122] That result, she maintained, was found by the *Miranda* Court to be implicit, "for better or worse," in the fifth amendment privilege against self-incrimination.[123]

In a dissenting opinion, Justice Marshall criticized the majority for discarding the procedural safeguards that were clearly set forth in *Miranda*.[124] He felt that by creating an exception to *Miranda* the majority had endorsed admissibility at trial of coerced statements in direct contravention of the "Court's longstanding interpretation of the Fifth Amendment."[125] The dissent further criticized the majority for distorting the facts before it in order to justify creation of an exception to *Miranda*.[126] Justice Marshall disputed the majority's characterization of the facts surrounding Quarles's arrest as posing a threat to public safety.[127] He maintained that the majority's focus on objective facts — rather than on the subjective perceptions of the arresting officers — to measure a public danger was merely a "ploy."[128] To support that view, Justice Marshall observed that on the same facts the New York Court of Appeals concluded that no exigent circumstances had presented a danger to the public.[129]

Justice Marshall next questioned the majority's wisdom in departing from the clear strictures of *Miranda* and its progeny.[130] According to the dissent, *Miranda* had "the virtue of informing

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120 *Quarles*, 104 S. Ct. at 2636 (O'Connor, J., concurring in part and dissenting in part).

121 *Id.*

122 *Id.*

123 *Id.*

124 *See id.* at 2641 (Marshall, J., dissenting). Justice Marshall was joined in his dissent by Justices Brennan and Stevens.

125 *Id.* at 2641-42 (Marshall, J., dissenting).

126 *Id.* at 2642-43 (Marshall, J., dissenting).

127 *Id.* at 2642 (Marshall, J., dissenting).

128 *Id.*

129 *Id.*

130 *Id.* at 2643-44 (Marshall, J., dissenting). Justice Marshall noted that in both *Orozco* and *Innis*, the Court had insisted that, during custodial interrogation, police officers inform suspects of their rights before eliciting answers concerning the location of incriminating weapons. *Id.* at 2643 (Marshall, J., dissenting). For a discussion of the holdings of *Orozco* and *Innis*, see *supra* notes 79-90 and accompanying text.

police and prosecutors with specificity" as to the procedures they had to follow when interrogating defendants in custody, as well as the virtue of providing courts with a test for determining admissibility of self-incriminating statements.[131] Justice Marshall argued that the majority's "chimerical quest for public safety" not only would end "eighteen years of doctrinal tranquility [in] the field of custodial interrogations," but would also result in chaos.[132]

The dissent expressed doubt that police officers could "instinctively" distinguish between questions designed to protect the public safety and questions designed to preserve testimonial evidence.[133] Justice Marshall cautioned that the public safety exception would inevitably lead to uncertainty and mistakes in its application.[134] Thus, he postulated that law enforcement agencies would again have to endure a "period of constitutional uncertainty."[135]

Justice Marshall asserted, however, that the greatest flaw in the majority's opinion was its misunderstanding of *Miranda*'s implementation of the fifth amendment privilege against self-incrimination.[136] He posited that the majority, in reaching its conclusion, had "turn[ed] its back on these constitutional considerations, and invit[ed] the government to prosecute through the use of what necessarily are coerced statements."[137] In the dissent's view, the Court had incorrectly perceived *Miranda* as a judicial balance between the protections afforded criminal defendants by the fifth amendment and "the cost to society in terms of fewer convictions of guilty suspects."[138] Asserting that the fifth amendment restrictions are absolute, Justice Marshall opined that the majority should not be able to circumvent them "simply by calculating special costs . . . when the public's safety

131 *Quarles*, 104 S. Ct. at 2644 (Marshall, J., dissenting).

132 *Id.* To support its position, the dissent noted the opposite conclusions reached by both the New York Court of Appeals and the majority of the Supreme Court after reviewing the same set of facts in *Quarles*. *Id.* The New York Court of Appeals had concluded " 'that there was no evidence in the record . . . that there were exigent circumstances posing a risk to the public safety.' " *Id.* (citation omitted). In contrast, the majority in the Supreme Court found that "[s]o long as the gun was concealed somewhere . . . with its actual whereabouts unknown, it obviously posed more than one danger to the public safety." *Id.* (quoting *id.* at 2632).

133 *See id.* at 2644 n.4 (Marshall, J., dissenting).

134 *Id.* at 2644 (Marshall, J., dissenting).

135 *Id.* at 2645 (Marshall, J., dissenting).

136 *Id.*

137 *Id.*

138 *Id.*

is at issue."[139]

The dissent further chastised the Court for ignoring the presumption of compulsion that was raised in *Miranda*.[140] He asserted that under *Miranda*, *any* statements made by a defendant during custodial interrogation, prior to the recital of the required warnings, are presumptively compelled.[141] Maintaining that exigent circumstances make custodial interrogation no less compelling, Justice Marshall would therefore have excluded Quarles's statement from evidence at trial.[142]

In creating the public safety exception, the *Quarles* Court has significantly retreated from the fundamental principles that guided Chief Justice Warren when he wrote the *Miranda* opinion eighteen years ago. According to the *Miranda* Court, the fifth amendment privilege is "fundamental to our system of constitutional rule"[143] and cannot be "abridged."[144] The *Miranda* Court believed that society's need for convictions of guilty defendants must be subordinate to an individual's privilege against self-incrimination,[145] and it established objective procedural safeguards to protect diligently that privilege.[146]

In creating the now famous warnings, the *Miranda* Court emphasized the need to protect the rights of individuals from the often pernicious and unscrupulous methods employed by police officers in eliciting testimonial evidence.[147] Because the *Miranda* Court recognized that it is impossible to measure objectively the inherent psychological coercion that is exerted upon a defendant

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139 *Id.* at 2648 (Marshall, J., dissenting).

140 *Id.* at 2647 (Marshall, J., dissenting); *cf.* Oregon v. Elstad, 53 U.S.L.W. 4244, 4258 (U.S. Mar. 4, 1985) (Brennan, J., dissenting) (*Elstad* rejects *Quarles* Court's assertion that confessions obtained in violation of *Miranda* are not presumed compelled).

141 *Quarles*, 104 S. Ct. at 2647 n.8 (Marshall, J., dissenting).

142 *See id.* at 2647 (Marshall, J., dissenting). Justice O'Connor also maintained that questions asked in exigent circumstances are no less coercive than any other kinds of questions asked in custodial situations. *Id.* at 2636 (O'Connor, J., concurring in part and dissenting in part). Therefore, in her view, answers elicited in violation of *Miranda* must be presumed compelled and be excluded from evidence at a defendant's trial. *Id.*

143 *Miranda*, 384 U.S. at 468.

144 *Id.* at 479.

145 *See id.*

146 *See id.* at 444-45, 467.

147 *See id.* at 445-58. The *Miranda* Court referred at length to police manuals, which instructed officers in interrogation techniques that were designed to psychologically coerce suspects to confess. *Id.* For representative examples of these techniques, see *id.*

during custodial interrogation,[148] it created a constitutional presumption of coercion.[149] That presumption is triggered when statements are elicited in the absence of specific, pre-interrogation warnings.[150]

The *Quarles* majority has weakened the constitutional presumption by maintaining that under circumstances posing a threat to public safety the Court will not presume coercion, even absent a recital of the *Miranda* warnings.[151] Thus, rather than placing the cost of securing the public safety upon the state, the *Quarles* Court has departed from the philosophical underpinnings of *Miranda* and has for the first time imposed upon a defendant the burden of proving affirmatively that his statements were prompted by actual compulsion.[152]

The ramifications of the Court's public safety exception are far-reaching. In departing from the presumption enunciated in *Miranda*, the *Quarles* Court has created several unresolved ambiguities. Because Quarles asserted no claim of actual compulsion, the Court declined to review whether his testimony was coerced merely because *Miranda* warnings had not been given.[153] Under a broad reading of *Quarles*, compelled testimony could now be admissible in evidence. The Court did indicate, however, that proof of actual coercion would warrant suppression of self-incriminating statements, even if those statements were elicited in "public safety" interrogations.[154]

The Court's requirement of a showing of "actual coercion" is particularly troublesome because the Court failed to provide a functional definition. Clearly, a showing of physical coercion will meet the burden.[155] The Court, however, historically has been unable to define objective standards to measure psychological

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148 *See id.* at 467.

149 *See id.* at 468-69. This presumption of coercion was recognized in each of the *Quarles* opinions. *See Quarles*, 104 S. Ct. at 2631; *id.* at 2636 (O'Connor, J., concurring in part and dissenting in part); *id.* at 2647 (Marshall, J., dissenting).

150 *See Quarles*, 104 S. Ct. at 2631; *id.* at 2636 (O'Connor, J., concurring in part and dissenting in part); *id.* at 2647 (Marshall, J., dissenting).

151 *See id.* at 2631 n.5.

152 *See id.* The Court stated that Quarles "is certainly free on remand to argue that his statement was coerced under traditional due process standards." *Id.* It should be noted that the "traditional due process standards" referred to by the Court is equivalent to the voluntariness test historically applied in pre-*Miranda* cases. *See supra* notes 39-44 and accompanying text.

153 *Quarles*, 104 S. Ct. at 2631 n.5.

154 *See id.* at 2631, 2633 n.7.

155 Police brutality has long been condemned by the Supreme Court. *See Miranda*, 384 U.S. at 446-48.

coercion.[156] Consequently, courts will be faced with the task of discerning the subtleties of interrogation practices and of reviewing the facts of each custodial interrogation to determine whether the defendant has been psychologically coerced. Such inquiries inevitably will lead to "swearing contests" between police officers and defendants[157] and will result in conflicting findings by courts reviewing the same sets of facts.[158] Therefore, the *Quarles* decision will likely result in increased litigation, which will be time-consuming and costly to the judicial system, as well as disruptive to law enforcement practice. It can be anticipated that the end result will be the creation, by subsequent courts, of a detailed set of guidelines, incorporating even more exceptions and subtle distinctions.

Although the *Quarles* Court conceded that the subjective state of mind of police officers acting in "kaleidoscopic" situations is impossible to verify,[159] it ignored the *Miranda* Court's premise that a defendant's state of mind is also unverifiable.[160] Because coercion will not be presumed under the public safety exception, the defendant now faces a difficult burden of proving subjective coercion.

The public safety exception is predicated upon the *Quarles* majority's belief in the honesty and good faith of police officers conducting custodial interrogation in situations that pose a threat of danger to the public. As the Court conceded, however, one of the "unverifiable motives" that may prompt a police officer to interrogate a suspect before administering the *Miranda* warnings may be "the desire to obtain incriminating evidence."[161] The Court's refusal both to examine the motives of police officers and to delineate interrogation guidelines to be used under such circumstances opens the door to unbridled police discretion and places a premium on police ingenuity.

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156 *See Quarles*, 104 S. Ct. at 2646 (Marshall, J., dissenting).

157 *See* W. LAFAVE & J. ISRAEL, *supra* note 45, at 269.

158 The *Quarles* decision exemplifies the problems that courts will encounter in future "public safety" exception cases. A divided court in *Quarles* reached opposite conclusions as to whether Quarles was actually coerced. While the majority's decision indicated that there was no actual coercion, the dissent found that such coercion did in fact occur. *See Quarles*, 104 S. Ct. at 2647 & n.8 (Marshall, J., dissenting).

159 *See id.* at 2632.

160 *Cf. Miranda*, 384 U.S. at 468-69 ("[W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation. . . .").

161 *Quarles*, 104 S. Ct. at 2632.

In disminishing the clarity of the *Miranda* rule, the Court may have opened a "Pandora's box," leading to the erosion of "absolute" constitutional rights that are protected by the fifth amendment privilege against self-incrimination. In *Berkemer v. McCarty*,[162] which was decided three weeks after *Quarles*, the petitioner, a police sheriff, asked the Supreme Court to carve another exception out of *Miranda*.[163] The Court, in refusing to recognize a new exception, held that individuals who are subject to custodial interrogation are "entitled to the full panoply of protections prescribed by *Miranda*," irrespective "of the nature or severity of the offense."[164] More recently, however, the Court in *Oregon v. Elstad*,[165] further weakened *Miranda* by holding that statements elicited from a suspect after an initial violation of the *Miranda* rule are admissible at trial if the subsequent statements are given voluntarily.[166] Thus, it is likely that in light of *Quarles* additional exceptions to the *Miranda* rule will emerge.

Finally, the *Quarles* opinion fails to recognize that testimony acquired during custodial interrogations, without *Miranda* protections, may be inherently untrustworthy. The Court's acceptance of testimony under the public safety exception without reviewing its voluntariness may cause a defendant falsely to accuse himself.[167] Failure to review the reliability of self-incriminating statements may culminate in the admission of evidence that is prohibited under the fifth amendment privilege. Therefore, the Court should place upon the state the burden of proving that any testimony obtained under the public safety exception is reliable and trustworthy before admitting it into evidence.

To mitigate some of the problems and ambiguities created by the public safety exception, subsequent reviewing courts will invariably attempt to create guidelines and procedures. It can be expected that those courts will identify objective standards in order to help law enforcement agencies implement the new exception. In addition, courts may find it necessary to revive the pre-*Miranda* voluntariness test in order to retain some protection

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162 104 S. Ct. 3138 (1984).

163 *Id.* at 3145. The petitioner argued that answers that were elicited in the absence of *Miranda* warnings from individuals arrested for misdemeanor traffic offenses should be admissible in evidence. *Id.*

164 *Id.* at 3148, 3151.

165 53 U.S.L.W. 4244 (U.S. Mar. 4, 1985).

166 *See id.* at 4250.

167 *Cf. Miranda*, 384 U.S. at 455 n.24 ("Interrogation procedures may . . . give rise to a false confession.").

against compelled testimony. Although the voluntariness test may be fraught with the same inherent difficulties that plagued it prior to *Miranda*,[168] it may be necessary to support use of the test in the limited context of the public safety exception.

The public safety exception effectively reinstates the imbalance between police officer and suspect that existed prior to the creation of the *Miranda* warnings. Therefore, if the rationale for developing prophylactic rules that protect the fifth amendment privilege is to be respected, police should not be permitted to interrogate suspects *under any circumstances* before the appropriate warnings are given.

Howard K. Uniman

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168 *See supra* note 45.