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New York v. Quarles: Safety First?

Cynthia K. Fichera

Philip Quaranta

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Notes and Comments

New York v. Quarles: Safety First?

In *Miranda v. Arizona*,[1] the United States Supreme Court required police officers to advise suspects of their rights[2] during custodial interrogation.[3] Recently, in *New York v. Quarles*,[4] the Supreme Court announced a "public safety" exception to the landmark rule of *Miranda*. The Supreme Court in *Quarles* held that considerations of public safety excused a failure to provide

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

2. In *Miranda*, the Court required that: "Prior 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.* at 444.

3. Custodial situations include those in which an individual is "deprived of his freedom . . . in any significant way . . . ." *Id.* at 478.

Although the Court in *Miranda* provided this definition of "custodial interrogation" many subsequent cases interpret this definition. In Beckwith v. United States, 425 U.S. 341 (1976), the Supreme Court found that one was not in custody when he was interrogated in his home during the course of an internal revenue investigation. In Orozco v. Texas, 394 U.S. 324 (1969), on the other hand, the Supreme Court held that one was in custody when he was interrogated in his bedroom after being awaked by four police officers. In Mathis v. United States, 391 U.S. 1 (1968), the Supreme Court determined that one who was questioned in jail regarding a crime other than the one for which he was presently incarcerated was "in custody" within the meaning of *Miranda*. Some courts have found that one is in custody if he has a reasonable belief that he is not free to leave. *See, e.g.*, United States v. Bekowies, 432 F.2d 8 (9th Cir. 1970); People v. Shivers, 21 N.Y.2d 118, 233 N.E.2d 836, 286 N.Y.S.2d 827 (1976). Other courts require a showing of actual physical restraint of one's person. *See, e.g.*, United States v. Hall, 421 F.2d 540 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970).

In Rhode Island v. Innis, 446 U.S. 291 (1980), the United States Supreme Court defined interrogation to include "words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." Rhode Island v. Innis, 446 U.S. at 302 (emphasis in original). *See also*, Note, *The Meaning of "Interrogation" Under* Miranda v. Arizona: Rhode Island v. Innis; 12 TEX. TECH. L. REV. 725 (1981); Note, *The United States Supreme Court Redefines Interrogation for* Miranda *Purposes*, 3 WHITTER L. REV. 409 (1981).

4. 104 S. Ct. 2626 (1984).

Miranda warnings.[5] A police officer may now ask questions reasonably necessary to protect public safety.[6] The responses of the suspect will be admissible at trial even though the inquiry occurred before *Miranda* warnings were given.[7]

Quarles is significant because it establishes the first and only exception to the clear requirements of *Miranda*. *Quarles* represents a conflict between the fifth amendment's protection against self-incrimination and a concern for public safety. Part I of this Note provides background on the Burger Court's interpretation of the eighteen year-old *Miranda* rule. Part II discusses the facts of *Quarles* and analyzes the majority, concurring, and dissenting opinions in *Quarles*. Part III examines the rationale of *Quarles* in light of *Miranda* and discusses the practical impact of *Quarles*. This Note concludes that while the Supreme Court's desire to protect public safety is proper, the Court's characterization of *Miranda* threatens important fifth amendment values.

I. Background

A. *Legal Background*

The means by which police elicit confessions has concerned the Judiciary since the 1931 Wickersham Commission Report on police abuses.[8] Prior to *Miranda v. Arizona*,[9] however, courts viewed the fifth amendment as applicable only to courtroom proceedings. Police interrogations were scrutinized only under fourteenth amendment due process. The fourteenth amendment requires a showing that a statement was made voluntarily.[10] This fourteenth amendment scrutiny nevertheless reflected a desire to guard against police coercion.[11] It was recognized that co-

5. *Id.* at 2629.

6. *Id.*

7. *Id.*

8. *See* 4 NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931); Z. CHAFFEE, W. POLLAK & C. STERN, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 159 (1931).

9. 384 U.S. 436 (1966).

10. *See, e.g.*, Rogers v. Richmond, 365 U.S. 534 (1961). The test for voluntariness under *Rogers* is whether on the totality of the circumstances, the suspect's will was overborne. *Id.* at 537.

11. Chambers v. Florida, 309 U.S. 227 (1940).

ercion can be mental as well as physical and that "the blood of the accused is not the only hallmark of an unconstitutional inquisition."[12]

The Supreme Court attempted to guard against coercion by extending the sixth amendment right to counsel. In *Escobedo v. Illinois*,[13] the Supreme Court held that pretrial interrogation is a critical stage[14] and that the sixth amendment right to counsel attaches whenever a criminal investigation "focuses on" a particular suspect.[15]

Escobedo laid the groundwork and two years later, in *Miranda v. Arizona*,[16] the Supreme Court announced that custodial interrogation[17] was "inherently coercive."[18] In *Miranda* and its companion cases, the Supreme Court considered several different circumstances each of which shared several salient features. Each case involved an incommunicado interrogation in a police-dominated atmosphere.[19] In each case, the interrogation resulted in self-incriminating statements made by a suspect who had not been given full warning of his constitutional rights.[20] Recognizing the inherent coercion present in a police interrogation, the

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Under the fourteenth amendment, statements made by a criminal suspect are scrutinized for "voluntariness." *Id.* If the suspect's will was "overborne" by the behavior of the law enforcement officer, any statement obtained from the suspect is in violation of the fourteenth amendment. Rogers v. Richmond, 365 U.S. 534, 546-48 (1961). Courts will look to the "totality of the circumstances" to determine whether a suspect's statement was involuntary for the purposes of the fourteenth amendment. Davis v. North Carolina, 384 U.S. 737, 739 (1966).

12. Blackburn v. Alabama, 361 U.S. 199, 206 (1960). *See* Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968) (analyzing the effects of coercion on individual suspects); *See also* Griffiths & Ayres, *A Postscript to the Miranda Project: Interrogations of Draft Protestors*, 77 YALE L.J. 300 (1967).

The fifth amendment's self-incrimination clause was not formally applied to the states until Malloy v. Hogan, 378 U.S. 1,3 (1964). Prior to *Malloy* the self-incrimination clause was only applied in federal prosecutions. *Id., passim.*

13. 378 U.S. 478 (1964).

14. *Id.* at 490-91.

15. *Id. Escobedo* further held that admissions made by the accused without the presence of counsel are inadmissable unless the right to counsel is waived. *Id.*

16. 384 U.S. 436 (1966).

17. *See supra* note 3.

18. Miranda v. Arizona, 384 U.S. at 445-57.

19. *Id.* at 445.

20. *Id. Miranda* raised both fifth and sixth amendment issues. The Court reasoned that the sixth amendment right to counsel was essential to a realistic exercise of the fifth amendment right against self-incrimination. *Id.* at 460-62, 464-66.

Supreme Court created a constitutional presumption that statements made during custodial interrogation are compelled in violation of the fifth amendment.[21] To overcome this presumption, *Miranda* required that an individual held for interrogation must be informed that he has a right to remain silent; that any statements he chooses to make may be used as evidence against him; that he has the right to have an attorney, and that if he is unable to afford an attorney, an attorney will be appointed upon request.[22] The *Miranda* decision mandated that the required warnings are an absolute prerequisite to the admission of any statements derived from a custodial interrogation.[23] *Miranda*, therefore, represents a shift from the previous fourteenth amendment scrutiny. Under *Miranda*, evidence obtained in violation of its requirements may not be used against the suspect at trial.[24]

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21. *Id.* at 456-58, 467. *See also* Wan v. United States, 266 U.S. 1, 14-15 (1924) (citing Bram v. United States, 168 U.S. 532 (1897).

22. *Id.* at 444.

23. *Id.* Justice Brennan has described the privilege against self-incrimination as "one of the 'principles of a free government.'" Malloy v. Hogan, 378 U.S. 1, 9 (1964) (quoting Boyd v. United States, 116 U.S. 617, 632 (1886)). For illustrations of this characterization of the privilege in different contexts, see Tehan v. Shott, 382 U.S. 406, 415 (1966); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). *See also* Friendly, *The Fifth Amendment Tommorrow: The Case for Constitutional Change, 37* U. CIN. L. REV. 671, 679-94 (1968).

24. Miranda v. Arizona, 384 U.S. at 479. Weeks v. United States, 232 U.S. 383 (1914), introduced the exclusionary rule that prohibits the introduction of illegally obtained evidence in a federal criminal prosecution. In Mapp v. Ohio, 367 U.S. 643 (1961), the Supreme Court applied the exclusionary rule to the states. Subsequently, the Supreme Court recognized that in order for the exclusionary rule to be effective evidence obtained both directly and indirectly from an illegal intrusion must be excluded. Wong Sun v. United States, 371 U.S. 471 (1963). This stems from Justice Frankfurter's mandate that the Court must exclude the "tainted fruit of the poisonous tree." Nardone v. United States, 308 U.S. 338, (1939). The "fruits doctrine" has been applied in both the fourth and fifth amendment contexts. The Court has applied an attenuation test to determine whether evidence is the fruit of a prior illegality. *E.g.*, Wong Sun v. United States, 371 U.S. 471, 487 (1963).

Recently in Oregon v. Elstad, 53 U.S.L.W. 4244 (U.S Mar. 4, 1985) the Burger Court has demonstrated its willingness to erode the fruits doctrine as well as to diminish the bright-line rule of *Miranda*. Oregon v. Elstad confirmed the view that "a simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment." 53 U.S.L.W. at 4247 n.1. In *Elstad*, two police officers went to the home of eighteen year old Michael Elstad with a warrant for his arrest. Elstad was suspected of assisting in the burglary of a neighbor's home. After Elstad was "in custody" but prior to being given his *Miranda* warnings, he made incriminating statements. This occurred while Elstad was at

The *Miranda* decision evoked much criticism.[25] The principle concern was that set forth in Justice Harlan's dissenting opinion. Justice Harlan feared that *Miranda* would unduly hamper necessary police investigation by dissuading suspects from admitting pertinent information.[26] Despite this criticism, *Mi-*

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his home. He was subsequently taken to the police station where he was read his *Miranda* rights for the first time. Elstad then signed a written confession. The trial court allowed the confession into evidence in spite of the respondent's contention that the confession was the "tainted fruit of the poisionous tree." Wong Sun v. United States, 371 U.S. at 487.

The Oregon Court of Appeals reversed the conviction. It found that the warnings given before the second confession were insufficient to dissipate the taint of the earlier inculpatory statement. State v. Elstad, 61 Ore. App. 673,678, 658 P.2d 552, 555 (1983). The court explained that in light of the short intervening time period, "the cat was sufficiently out of the bag to exert a coercive impact on the defendant's later admissions." *Id.* at 678, 658 P.2d at 555.

After the Oregon Supreme Court declined review, the United States Supreme Court granted certiorari to determine whether "the self-incrimination clause of the fifth amendment requires the supression of a confession, made after proper *Miranda* warnings and a valid waiver of rights solely because the police had obtained an earlier voluntary but unwarned admission from the defendant." Oregon v. Elstad, 53 U.S.L.W. at 4246. The Supreme Court reversed the opinion of the Oregon Court of Appeals. In a decision written by Justice O'Connor, the majority adopted basically the same theory propounded by Justice O'Connor in *Quarles*. *See infra* text accompanying notes 81-88. "The *Miranda* presumption, though irrebutable for purposes of the prosecution's case-in-chief, does not require that the statements and their fruits be disgarded as inherently tainted." Oregon v. Elstad, 53 U.S.L.W. at 4247. The Court relies on *Quarles* and Michigan v. Tucker, 417 U.S. 433, 444 (1974), to conclude that a simple failure to administer the warnings in itself taints a suspect's subsequent voluntary and informed waiver. Oregon v. Elstad, 53 U.S.L.W. at 4247. The Court noted the absence of any coercion in obtaining the voluntary and informed waiver. *Id.* at 4247

25. *See generally* Caplan, *Miranda Revisited*, 93 YALE L.J. 1375 (1984); Lederer, *Miranda v. Arizona —The Law Today* 78 MIL. L. REV. 107 (1978); Robinson, *Police and Prosector Practices and Attitudes Relating to Interrogation as Revealed by Pre-and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply*, 1968 DUKE L.J. 425; Elsen & Rosett, *Protections for the Suspect Under Miranda*, 67 COLUM. L. REV. 645 (1967). *See also* Note, *The Supreme Court, 1965 Term* 80 HARV. L. REV. 91, 135-41 (1966).

26. Miranda v. Arizona, 384 U.S. at 516-18 (Harlan, J., dissenting). *See* Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99. *But see* Chase, *The Burger Court, the Individual, and the Criminal Process: Directions and Misdirections*, 52 N.Y.U. L. REV. 518, 531 (1977) (arguing that the primary intention of *Miranda* warnings is not to inform the suspect of his rights but to deter unlawful conduct).

"Among the experts, there is now general agreement that *Miranda* contained a central flaw, an internal contradiction, that greatly diluted its strength: The Court made the police its messenger . . . ." Caplan, *Miranda Revisited*, 93 YALE L.J. 1375, 1381 (1984). The police have both the duty of persuading the suspect to talk and the conflicting duty of persuading him to exercise his constitutional right to remain silent. Brief Amicus Cu-

randa became a basic tenet of criminal procedure.[27] The *Miranda* Court specifically rejected the idea that the need for eliciting pertinent information could outweigh the privilege against self-incrimination.

B. *Recent Interpretations of* Miranda

In cases interpreting and applying the *Miranda* rule, the Burger Court has exhibited concerns similar to those of Justice Harlan's dissent.[28] In *Beckwith v. United States*,[29] for example, the Supreme Court ruled that *Miranda* warnings were not a prerequisite to the admissibility of statements obtained during an interview conducted by Internal Revenue agents.[30] The Court in *Beckwith* reasoned that even though the suspect may have been the "focus" of the investigation, the interview was noncustodial.[31] Having characterized the interview as noncustodial,[32] the Court ruled that *Miranda* warnings were unnecessary despite the presence of any inherent coercion.[33] The Court did,

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riae, at 9, People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965) (No. 7468) (quoted in Caplan, *supra* at 1381).

It is interesting to note that Caplan claims there is a consensus among experts expressing concern over *Miranda's* alleged failure to adequately protect a criminal suspect's fifth amendment rights. Caplan, *supra* at 1381. Yet the majority in *Quarles* has further abrogated these rights.

27. *Miranda* has been successful in that it has "curbed the police in their historic excesses . . . . Suspects are no longer greatly abused but neither is the state losing that many cases for want of self-incriminating statements. Arguably, it is a reasonable compromise." Caplan, *supra* note 26 at 1383. *See also* Whitebread & Heilman, *Increasing Our Effectiveness Against Crime: Expanding the Limits of Law Enforcement*, 93 YALE L.J. 1399, 1409 (1984) (this article emphasizes the success of the clearly stated *Miranda* rules, pointing out that "the clarity of the *Miranda* rules allowed police to use the warnings routinely soon after the decision itself, and today few cases are lost as a result of noncompliance with *Miranda*.").

28. *E.g.* Rhode Island v. Innis, 446 U.S. 291 (1980) (defining interrogation); Orozco v. Texas, 394 U.S. 324 (1969) (interpreting the meaning of "in custody"); Mathis v. United States, 391 U.S. 1 (1967) (also interpreting the meaning of "in custody"). *See supra* note 26 and accompanying text.

29. 425 U.S. 341 (1976).

30. *Id.* at 347.

31. *Id.*

32. *Id.* This characterization was based on the Court's view that the Internal Revenue Service interview had not within the language of *Miranda* "deprived [the individual] of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444 (1966).

33. Beckwith v. United States, 425 U.S. 341, 347-48 (1976).

however, note that no coercion appeared to be present during the Internal Revenue Service interview.[34]

Another case that reflects the Burger Court's reluctance to strictly enforce *Miranda* is *Fare v. Michael C.*[35] There, the Supreme Court held that a post-*Miranda* warnings request by a minor to speak with his probation officer was not an invocation of his constitutional rights.[36] The Court relied on the attorney's unique role in the criminal justice system.[37] Although a probation officer occupies a trusted position, the Court differentiated that role from the role played by an attorney.[38]

The Burger Court has also limited *Miranda* to its direct application: use of a confession in the case-in-chief to establish guilt. The Burger Court has sanctioned the use of a confession that is inadmissible to establish guilt for other purposes. For instance, in *Harris v. New York*[39] and *Oregon v. Hass*,[40] the Court allowed the use of voluntary statements obtained in violation of *Miranda's* requirements to impeach a criminal defendant on cross-examination.[41] The Court reasoned that a *Miranda* violation is not a license for perjury.[42] In the Court's view, to prevent the use of the unlawfully obtained statements to impeach the defendant would grant the defendant a windfall.[43]

In *Fletcher v. Weir*,[44] the Supreme Court again evidenced a reluctance to strictly apply *Miranda*. In *Fletcher*, the Court per-

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34. *Id.* at 348.

35. 442 U.S. 707 (1979).

36. *Id.* at 719.

37. *Id.* at 721.

38. The Court noted that the probation officer, unlike an attorney would not be in a position to offer the suspect legal advice sufficient to protect his constitutional rights. *Id.* at 722.

39. 401 U.S. 222 (1971).

40. 420 U.S. 714 (1975).

41. Oregon v. Hass, 420 U.S. at 722; Harris v. New York, 401 U.S. at 224.

42. Oregon v. Hass, 420 U.S. at 722-23; Harris v. New York, 401 U.S. at 225-26.

43. Oregon v. Hass, 429 U.S. at 722-23; Harris v. New York, 420 U.S. at 226. However, the Court in both *Harris* and *Hass* ruled that the prior statements made by the defendant were voluntary. Oregon v. Hass, 420 U.S. at 722; Harris v. New York, 401 U.S. at 225. Under the rule of Mincey v. Arizona, 437 U.S. 385 (1978), statements obtained in violation of *Miranda* may be admissable to impeach the defendant only insofar as the statements were made voluntarily. *Id.* at 398. Any statements obtained involuntarily are violative of fifth amendment and fourteenth amendment due process and are inadmissible regardless of the rules of *Harris* and *Hass*. *Id.*

44. 455 U.S. 603 (1982) (per curiam).

mitted the use of post-arrest silence to impeach the credibility of a defendant's exculpatory statements at trial.[45] The Court permitted the impeachment through silence even though the defendant had not been given his *Miranda* warnings.[46] The Court reasoned that because *Miranda* warnings were not given, there was no inducement to rely on the right to remain silent and that any post-arrest silence would bear on the veracity of subsequent exculpatory statements.[47]

Of all the Burger Court's interpretations of *Miranda*, *Michigan v. Tucker*[48] is perhaps the most significant decision prior to *Quarles*. In *Tucker* an interrogation in violation of *Miranda* resulted in the defendant's identification of an incriminating witness.[49] The defendant claimed that the prosecution could not use the third party testimony because the defendant had not been given *Miranda* warnings.[50] The Supreme Court allowed the

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45. *Id.* at 607. *See also* Note, *The Fifth Amendment and a Defendant's Prearrest Failure to Come Forward: The Sounds of Silence*, 46 ALB. L. REV. 546 (1982); Note, *The Impeachment Use of Post-Arrest Silence which Preceeds the Reciept of Miranda Warnings*, 73 J. CRIM. L. & CRIMINOLOGY 1594 (1982).

46. Fletcher v. Weir, 445 U.S. at 604.

47. *Id.* at 606. This rationale is reminisent of the Supreme Court's rulings in Doyle v. Ohio, 426 U.S. 610 (1976), and United States v. Hale, 422 U.S. 171 (1975), where post-arrest silence in circumstances where *Miranda* warnings had been given was deemed to be a mere reliance on the right to silence. The silence which the government had induced could not, therefore, be used to impeach the credibility of the defendant. Doyle v. Ohio, 426 U.S. at 618; United States v. Hale, 422 U.S. at 177. In *Doyle*, the Court considered whether the prosecution could cross-examine a defendant who had remained silent until trial but at trail offered an alibi. Doyle v. Ohio, 426 U.S. at 611. The Court concluded that the use of the defendant's silence for impeachment violated due process. *Id.* at 618. The Court reasoned that it was unfair to use silence for impeachment because *Miranda* impliedly suggests that silence will not be used against the defendant. *Id.*

In *Hale*, the defendant, after being read his *Miranda* rights, refused to answer questions regarding cash which he was carrying. United States v. Hale, 422 U.S. at 174. The defendant chose to testify at trial. During cross-examination, he was questioned regarding the fact that he had not offered his alibi to the officers at the time of his arrest. *Id.* The Court held that the defendant's silence was not admissible for impeachment. *Id.* at 180. It reasoned that the defendant's silence was no more than a reliance on his *Miranda* rights. *Id.* at 177.

48. 417 U.S. 433 (1974).

49. *Id.* at 436.

50. *Id.* at 437. In *Tucker*, the defendant was arrested prior to the *Miranda* decision but tried subsequent to that decision. *Id.* at 435, 437. Before interrogating the defendant, the police asked him if he wanted an attorney and advised him that any statements he made could be used against him in court. *Id.* at 436. He was not advised that counsel would be appointed free of charge if he could not afford to hire counsel. *Id.* The narrow

testimony. It characterized *Miranda* as a guideline, rather than a hard and fast rule: "the police conduct at issue here did not abridge [defendant's] constitutional privilege against compulsory self-incrimination, but departed only from the *prophylactic* standards later laid down by this Court in *Miranda* to safeguard that privilege."[51] It is this characterization of *Miranda* that set the foundation for the "public safety" exception expounded in *New York v. Quarles*.[52]

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holding in *Tucker* was limited to the facts of the case and, therefore, it had little precedential effect. Nevertheless, the attitude reflected in the broad language of the opinion is resurfacing in the Court's recent opinions that quote Michigan v. Tucker with increasing frequency. *See, e.g.*, Oregon v. Elstad, 53 U.S.L.W. 4244, 4247 (U.S. Mar. 4, 1985); Minnesota v. Marshall, 104 S. Ct. 1136, 1148 (1984).

51. Michigan v. Tucker, 417 U.S. at 445-46 (emphasis added). *See* Beale, *Reconsidering Supervisory Power In Criminal Cases: Constitutional and Statutory Limits on the Authority of Federal Courts*, 84 COLUM. L. REV. 1433, 1495-96 (1984) (discussing the prophylactic nature of the *Miranda* rules).

52. 104 S. Ct. 2626 (1984). *Quarles* was decided in the midst of not only the Burger Court's hostility toward *Miranda*, but toward the exclusionary rule itself. In the fourth amendment context, a "good faith" exception to the exclusionary rule was recognized by the Supreme Court in Leon v. United States, 104 S. Ct. 3405, 3421 (1984), which was decided shortly after *Quarles*.

The "good faith" exception recognized in *Leon* exemplifies another area in which the Burger Court has determined that protection of a criminal suspect's constitutional rights can be outweighed by other interests. The Court confirmed the good faith exception in Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984). In that opinion, the Court held that "the exclusionary rule should not be applied when the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid . . . ." *Id.* at 3428. Chief Justice Burger and Justices White, Rehnquist, and Powell previously expressed support for creating an exception to the exclusionary rule. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 156 n.5 (1978) (Powell, J., concurring); Stone v. Powell, 428 U.S. 465, 501-02 (1976) (Burger, C.J., concurring); *Id.* at 538, 540-42 (White, J., dissenting); Brown v. Illinois, 422 U.S. 590, 611-12 (1975) (Powell, Rehnquist, J.J., concurring). *See* Burkoff, *Bad Faith Searches* 57 N.Y.U. L. REV. 70, 70 n.2 (1982). *See generally* Ball, *Good faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule* 69 J.CRIM. L.& CRIMINOLOGY 635 (1978).

In addition, several lower courts recognized a good faith exception prior to *Leon*. *See* United States v. Wilson, 528 F. Supp 1129, 1132 (S.D. Fla. 1982) (holding that the good faith exception barred supression of marijuana where a police officer "arrested" a suspect outside of his territorial jurisdiction); United States v. Nolan, 530 F. Supp. 386, 396-99 (W.D. Pa. 1981) (refusing to suppress evidence when federal agents made a technical violation of the "knock and announce" rule because the agents had acted in good faith); United States v. Ajlouny, 629 F.2d 830, 840-41 (2d Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981) (barring suppression of evidence obtained from illegal wiretap where agents acted in good faith).

II. *New York v. Quarles*

A. *Procedural Background*

On September 11, 1980, at approximately 12:30 a.m., Officers Frank Kraft and Sal Scarring were approached by a young woman who told them that she had just been raped.[53] The woman described her assailant and told the officers that the assailant was carrying a gun and that he had just entered a nearby supermarket.[54] While Officer Scarring called for assistance Officer Kraft entered the supermarket and observed Benjamin Quarles near the checkout counter. Quarles matched the young woman's description.[55] Officer Kraft pursued Quarles to the rear of the supermarket, frisked Quarles and discovered an empty shoulder holster.[56] Without reading Quarles his *Miranda* warnings, Officer Kraft handcuffed Quarles and asked him where the gun was.[57] Quarles nodded in the direction of some empty cartons and answered "the gun is over there."[58] Officer Kraft found a revolver in one of the empty cartons and then read Quarles his *Miranda* rights.[59] Quarles stated that he was willing to answer further questions without an attorney present and admitted that he owned the revolver.[60]

Quarles was tried for criminal possession of a weapon.[61] The trial judge excluded the gun and Quarles' statements about ownership because Officer Kraft did not give Quarles his *Miranda* warnings before asking where the gun was located.[62] The appellate division[63] and the New York Court of Appeals affirmed.[64]

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53. New York v. Quarles, 104 S. Ct 2626, 2629 (1984).

54. *Id.* The suspect was described as a Black male, wearing a dark jacket with the words "Big Ben" emblazoned in yellow letters on the back. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 2630.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* The state originally charged Quarles with rape but failed to pursue that charge. The record provides no explanation why the prosecution did not pursue this charge. *Id.* at 2630 n.2.

62. *Id.* at 2630. *See also* note 23 *supra*.

63. People v. Quarles, 85 A.D.2d 936, 447 N.Y.S. 2d 84 (2d Dep't, 1981) (mem.), *aff'd*, 58 N.Y.2d 664, 444 N.E. 2d 984, 458 N.Y.S.2d 520 (1982), *vacated*, 104 S. Ct. 2626 (1984).

The United States Supreme Court granted certiorari and reversed the court of appeals.[65] The Court held that the need for public safety outweighed the need for strict adherence to the rule of *Miranda*.[66]

III. The Supreme Court's Decision in *Quarles*.

A. *The Majority*

The United States Supreme Court reversed the New York Court of Appeals and held that the "concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*."[67]

To justify the creation of the public safety exception, Justice Rehnquist applied the following analysis. He began by relying on *Michigan v. Tucker's*[68] characterization of *Miranda* warnings as procedural guidelines.[69] Justice Rehnquist, quoting from *Tucker* stated that *Miranda* warnings are " 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.' "[70]

Proceeding from this characterization of *Miranda* warnings as "prophylactic," Justice Rehnquist made several observations about the benefits of *Miranda* warnings. In Justice Rehnquist's

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64. People v. Quarles, 58 N.Y.2d 664, 444 N.E.2d 984, 458 N.Y.S.2d 520 (1982), *vacated*, 104 S. Ct. 2626 (1984). The New York Court of Appeals reasoned that Quarles was "in custody" within the meaning of *Miranda*, and that *Miranda* warnings were a prerequisite to any questioning. *Id.* at 666, 444 N.E.2d at 985, 458 N.Y.S.2d at 521. The court of appeals rejected the prosecution's contention that public safety excused Officer Kraft's failure to give *Miranda* warnings until the gun was located. *Id.* at 666-67, 444 N.E.2d at 985-86, 458 N.Y.S.2d at 521-22. When the court of appeals examined Officer Kraft's testimony given at the suppression hearing, it found no indication that Officer Kraft's subjective motivation was to protect his own safety or the safety of the public. *Id.* at 666, 444 N.E.2d at 985, 459 N.Y.S.2d at 522.

65. *Quarles*, 104 S. Ct. at 2629.

66. *Id.* at 2633.

67. New York v. Quarles, 104 S.Ct. 2626, 2634 (1984). Chief Justice Burger and Justices White, Blackmun, and Powell joined in the majority decision.

68. 417 U.S. 433 (1974). For a brief discussion of this case, see *supra* notes 48-53 and accompanying text.

69. *Id.* at 444. *See also* Edwards v. Arizona, 451 U.S. 477, 492 (1981) (Powell, J., concurring) (refering to *Miranda* warnings as imposing a "general prophylactic rule that is not manifestly required by anything in the text of the Constitution.).

70. *Quarles*, 104 S. Ct at 2631 (quoting Michigan v. Tucker, 417 U.S. at 444).

view, they prevent coercion, provide clear guidelines, and protect constitutional rights.[71] In explaining the costs of the *Miranda* rule, Justice Rehnquist echoed the concerns expressed in Justice Harlan's dissent in *Miranda*. *Miranda* warnings might deter suspects from answering police interrogation. As a result, it is feared that there will be fewer convictions of the guilty.[72] The cost of *Miranda* warnings becomes greater when the warnings might deter a suspect from answering questions that are necessary to protect the public safety.[73] Therefore, Justice Rehnquist concluded that the costs to public safety outweighed the benefits of a strict application of *Miranda*.[74]

The application of the public safety exception does not depend upon the subjective motivation of the police officers involved.[75] Justice Rehnquist expressly held that: "There is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved."[76]

Turning to the facts of the case, Justice Rehnquist concluded that it was appropriate to apply the public safety exception in *Quarles*. He noted that there was no claim that the police compelled Quarles' statements or that Quarles' will to resist had been overborne.[77] Moreover, the police did not act out of a concern for their own physical safety.[78] Nevertheless, the police are

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71. *Id.* at 2633.

72. *Id.* at 2632. For a discussion of the percieved problems with *Miranda* see *supra* notes 24-25 and accompanying text.

73. *Quarles*, 104 U.S. at 2632-35.

74. *Id.* at 2633

75. *Id.* at 2632.

76. *Id.* The Court states that 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.* at 2633 n.6 (citing Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (officer's subjective intent to incriminate not determinative of whether "interrogation" occurred)). *See* United States v. Mendenhall, 446 U.S. 544, 554 and n.6 (1980) (Stewart, J., concurring) (officer's subjective intent to deter not determinative of whether a "seizure" occurred); United States v. Robinson, 414 U.S. 218, 236 and n.7 (1973) (officer's subjective fear not determinative of necessity for "search incident to arrest" exception to the warrant requirement of the fourth amendment).

77. *Id* at 2631

78. *Id.* at 2631. At the time Officer Kraft asked Quarles about the location of the gun, Quarles was handcuffed and surrounded by at least four officers. *Id.*

often confronted with "kaleidoscopic situations" that require spontaneous reaction.[79] When a police officer is confronted with such a situation, he acts instinctively. In *Quarles*, Officer Kraft's instinctive reaction was to ask the only question necessary to locate the missing gun. As long as the gun was hidden in the supermarket, Justice Rehnquist concluded that it posed a danger to public safety: someone might come across it or an accomplice might use it.[80] This possibility justified applying the new public safety exception in this case.

B. *Justice O'Connor's opinion*

Justice O'Connor concurred in the part of the decision to admit the revolver into evidence, but dissented from the holding to admit Quarles' statements into evidence.[81] Justice O'Connor would permit admission of Quarles' revolver into evidence.[82] In her view, nothing in *Miranda* or the privilege against self-incrimination requires exclusion of nontestimonial evidence acquired during custodial interrogation.[83]

Justice O'Connor criticized the creation of a public safety exception to *Miranda*. Although she indicated that she might not agree wholeheartedly with a strict application of *Miranda*, Justice O'Connor stated that it was the law of the land.[84] Thus, Justice O'Connor found no justification for the Court's refusal to apply *Miranda*. Indeed, she stated that the public safety exception would obfuscate the bright-line rule of *Miranda* and produce "hair-splitting distinctions" that will make the rule more difficult to understand.[85]In Justice O'Connor's view, the Court missed the critical question to be decided. According to Justice O'Connor, *Miranda* does not prohibit the police from asking

79. *Id.* at 2632.

80. *Id.*

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

82. *Id.* at 2637-38.

83. *Id.* The Supreme Court has held that the fifth amendment does not exclude nontestimonial, physical evidence. Schmerber v. California, 384 U.S. 757 (1966) (holding that blood samples are nontestimonial evidence). *See also* United States v. Dioniso, 410 U.S. 1 (1973) (holding that voice examplars are physical rather than testimonial evidence).

84. *Id.* at 2634 ("Were the Court writing from a clean slate, I could agree with its holding. But *Miranda* is now the law . . . .")

85. *Id.* at 2636.

questions that are intended to protect public safety.[86] Instead, by rejecting the idea that society's need for interrogation could outweigh the privilege against self-incrimination, *Miranda*, placed the burden for asking custodial questions on the state.[87] Therefore, Justice O'Connor concluded that when the police ask these questions without giving the required warnings, they do so at the risk of losing probative evidence.[88]

C. *The Dissent*

In a dissent, Justice Marshall viewed the creation of a public safety exception as inconsistent with the rule of *Miranda*.[89] He maintained that *Miranda* guards against the coercion inherent in custodial interrogation.[90] Justice Marshall characterized *Miranda* as a "constitutional presumption" that statements given during custodial interrogations are coerced.[91] *Miranda's* application, therefore, does not depend upon a cost-benefit analysis.[92] Because questions intended to protect public safety are "no less inherently coercive" than typical investigative questions, the dissent refused to accept any public safety exception to *Miranda*.[93]

Justice Marshall continued his sharp criticism of the public safety exception by characterizing it as a license for police to deliberately withhold *Miranda* warnings.[94] The public safety exception allows police to elicit information from suspects who, if they had been advised of their *Miranda* rights, might otherwise

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86. *Id.* at 2636.

87. *Id.*

88. *Id.*

89. *Id.* at 2642 (Marshall, J., dissenting). Justices Brennan and Stevens joined in the dissent authored by Justice Marshall.

90. *Id.* at 2644. Justice Marshall characterized *Miranda* as a "century-long inquiry into how this court should deal with confessions made during custodial interrogations." *Id.* at 2646.

91. *Id.* at 2646. Justice Marshall's corollary to the constitutional presumption is that a statement made during a custodial interrogation is admissible only if the prosecution can demonstrate that the defendant knowingly and intelligently waived his constitutional rights before making a statement. *Id.* at 2646. Note that Justice O'Connor has a similar viewpoint. *See id* at 2634-37 (O'Connor, J., concurring in part and dissenting in part).

92. *Id.* at 2647-48.

93. *Id.* at 2647.

94. *Id.*

have refused to respond.[95] Justice Marshall warned that to permit the introduction of statements obtained in response to public safety questions would, in fact, invite police coercion.[96]

Turning to the facts of the case, Justice Marshall argued that there was no threat to public safety.[97] At the time of the interrogation, Quarles was handcuffed and surrounded by four armed police officers.[98] The interrogation took place in the early morning hours and in an empty supermarket.[99] The New York courts determined that, at the time of the interrogation, Officer Kraft was aware " 'with a high degree of certainty' " that the gun was in the immediate area.[100] In these circumstances, Justice Marshall noted that Officer Kraft undoubtedly could have cordoned off the supermarket and searched for the gun without interference.[101]

Having rejected the application of the public safety exception, Justice Marshall would remand the case[102] for reconsideration in light of the "inevitable discovery" rule of *Nix v. Williams*.[103]

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95. *Id.* To argue that *Miranda* warnings will discourage responses is tantamount to an argument that *Miranda* warnings should be withheld because of the possibility that they might be invoked.

96. *Id.* at 2648. The dissent points out that previously coerced confessions were simply inadmissible in criminal prosecutions. *Id.* at 2646. Justice Marshall expresses his disagreement with the majority in strong terms, stating:

> [T]he "public-safety" exception departs from this principle by expressly inviting police officers to coerce defendants into making incriminating statements, and then permitting prosecutors to introduce those statements at trial. Though the majority's opinion is cloaked in the beguiling language of utilitarianism, the Court has sanctioned *sub silentio* criminal prosecutions based on compelled self-incriminating statements I find this result in direct conflict with the Fifth Amendment's dictate that "no person . . . shall be compelled in any criminal case to be a witness against himself."

Id. (quoting U.S. CONST. amend. V).

97. *Id.* at 2644.

98. *Id.* at 2642.

99. *Id.*

100. *Id.* at 2643 (quoting Brief for Appellent at 11, People v. Quarles, 58 N.Y.2d 664, 444 N.E.2d 984, 458 N.Y.S.2d 520 (1982) (No. 2512-80).

101. *Id.*

102. *Id.* at 2650.

103. 104 S. Ct. 2501 (1984). Nix v. Williams permits the introduction of unlawfully obtained evidence if it is shown that the evidence would have been discovered by other means. *Id.* at 2509. The rationale of the "inevitable discovery" doctrine is that the police should not be put in a worse position than they would have been but for the illegality. *Id.* For a discussion of the inevitable discovery doctrine see, Note, Nix v. Williams: *Con-*

IV. Analysis

New York v. Quarles[104] represents the Supreme Court's struggle with linked but opposed principles. On one hand, there is a desire to guard the public from those involved in criminal activity. On the other hand, there is a desire to preserve fifth and sixth amendment interests. *Quarles* announces that in certain circumstances the price of protecting civil liberties is too great. In a typical *Miranda* situation, the price of enforcement of fifth amendment rights is that a guilty person may go free. In a *Quarles* situation, not only might the guilty go free but an identifiable threat to public safety remains unabated. In earlier cases, the Burger Court has manifested its hostility toward the potential of a guilty suspect going free. In *Harris v. New York*[105] and *Oregon v. Hass*,[106] the Court feared that a defendant would be given a windfall because of the "constable's blunder."[107] Yet, until *Quarles*, the Supreme Court did not carve out an exception to *Miranda*. The simplest explanation of *Quarles* is that the rights of society need greater protection. A concern for public safety, coupled with the fear that the guilty may go free, inspires hostility to *Miranda*. *Quarles* demonstrates compassion to the potential victims of crime yet apathy to the rights of criminal suspects. *Quarles* should be praised for its concern for the public welfare but criticized for its disregard of *Miranda's* fundamental principles.

A. *The Dilemma of Police Officers*

Justice Rehnquist correctly recognizes that when a threat to public safety exists, the police officer is faced with a dilemma.[108] If an officer withholds *Miranda* warnings in order to elicit information to protect the public safety, he violates *Miranda* and

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jecture Enters the Exclusionary Rule, 5 PACE L. REV. 657 (1985).

Justice Marshall did not comment on Justice O'Connor's "novel" concurring opinion. *Quarles*, 104 S. Ct. at 2649 n.11 (Marshall, J., dissenting).

104. 104 S. Ct. 2626 (1984).

105. 401 U.S. 222 (1971).

106. 420 U.S. 714 (1975).

107. People v. DeFore, 242 N.Y. 13, 150 N.E. 585, *cert. denied* 270 U.S. 657 (1926). "The criminal is to go free because the constable has blundered." *Id.* at 21, 150 N.E. at 587.

108. *See Quarles*, 104 S. Ct. at 2633.

probative evidence will be unavailable.[109] If, however, an officer advises a criminal suspect of his *Miranda* rights, the probability that the suspect will invoke his right to silence increases. This, in turn, increases the probability that a threat to public safety will remain.[110] This dilemma represents a conflict between the fifth amendment and public safety. In a larger sense it represents a general conflict between civil liberties and crime prevention.[111]

The public safety exception is an attempt to extricate the police from this dilemma.[112] Without giving *Miranda* warnings, a police officer may now conduct a limited public safety inquiry without jeopardizing the admissibility of probative evidence. The public safety exception, therefore, is credible in that it protects two police interests. First, it protects the interest in adequate preservation of public safety. Second, it protects the procurement of probative evidence in criminal investigations.

What is troubling about the public safety exception is that it resolves the police officer's dilemma by formulating a rule that is weighted entirely in the police officer's favor. The public safety exception protects the police interests at the expense of the criminal suspect's *Miranda* rights. It abridges the rights of the accused during this custodial interrogation. It is in this light that Justice O'Connor's novel approach[113] is laudatory.

Justice O'Connor and Justice Marshall correctly criticize

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109. *Id.*

110. *Id.*

111. Justice Marshall is not troubled by this dilemma because he does not view the privilege against self-incrimination as an obstacle to protecting public safety.

> The irony of the majority's decision is that the public's safety can be perfectly well protected without abridging the Fifth Amendment. If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. Such uncontested questioning may take place not only when police officers act on instinct but also when higher faculties lead them to believe that advising a suspect of his constitutional rights might decrease the likelihood that the suspect would reveal life-saving information. If trickery is necessary to protect the public, then the police may trick a suspect into confessing. While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment or our decision in *Miranda v. Arizona* proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial.

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

112. *Quarles*, 104 S. Ct. 2633.

113. *See supra* text accompanying notes 104-107.

the majority for imposing the cost of ensuring public safety on the suspect.[114] Justice O'Connor's view of *Miranda* as imposing on the police rather than the suspect the cost of ensuring public safety[115] finds support in the rationale of *Miranda*. The *Miranda* warnings put an affirmative obligation on the police. The public safety exception now weakens that obligation. Although Justice Marshall's dissent, characterizes Justice O'Connor's opinion as "novel,"[116] the dissent's characterization of *Miranda* as a "constitutional presumption"[117] is entirely consistent with Justice O'Connor"s approach. Both Justice O'Connor's theory and Justice Marshall's "constitutional presumption" theory impose the burden of preserving safety on the police. The *Miranda* rights of the criminal suspect are not balanced away. In contrast, the majority by creating a public safety exception permits the preservation of public safety at the expense of the criminal suspect.[118]

In light of the *Miranda* precedent, the opinions of Justice O'Connor and Justice Marshall appear to be more credible. The majority carves out an exception to *Miranda* based on a fear that the rights given under *Miranda* will actually be invoked.[119] A suspect who received *Miranda* warnings is more likely to invoke his right to silence and perhaps prevent the police from eliminating a threat to public safety.[120] To argue that *Miranda* warnings threaten safety because they may be invoked, flouts the rationale of the *Miranda* decision. In those situations in

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114. *Id.*

115. *See supra* note 105 and accompanying text.

116. *Quarles*, 104 S. Ct. at 2649, n. 11 (Marshall, J., dissenting).

117. *See supra* text accompanying notes 119-26. Statements obtained as a result of custodial interrogation are, under *Miranda*, presumed coerced and held violative of the fifth amendment. *Quarles*, 104 S. Ct. at 2646-47; Miranda v. Arizona, 384 U.S. at 478.

118. *Quarles*, 104 S. Ct. at 2636 (O'Connor, J., concurring in part and dissenting in part); *Id.* at 2645-46 (Marshall, J., dissenting).

119. *Id.* at 2647.

120. *Id.* For studies regarding the practical impact of *Miranda*, see Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of Miranda on Police Effectuality*, 64 J. CRIM. L. & CRIMINOLOGY 320 (1973); Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DEN. L.J. 1 (1970); MEDALIE, FEITZ & ALEZANDER, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968); Seeburger & Wettick, *Miranda in Pittsburgh — A Statistical Study*, 29 U. PITT. L.REV. 1 (1967); Special Project, *Interrogation in New Haven: The Impact of Miranda* 76 YALE L.J. 1519 (1967).

which there is a need to act quickly to preserve the public safety, Justice O'Connor and Justice Marshall would impose the burden of public safety on the police. This imposition is no greater than that already imposed by *Miranda*. Sometimes a criminal suspect may go free in order to protect the right against self-incrimination, a right that is fundamental to our constitutional system. If it is also necessary to release a criminal suspect in order to ensure that a threat to public safety is eliminated, this would pose no greater burden on the police than *Miranda* already imposes.

Nevertheless, if one examines *Quarles* in light of social and moral concerns, rather than a specific *Miranda* analysis, the basis of the majority opinion is evident. Society is more able to accept that any costs of preserving public safety be imposed on criminals and criminal suspects rather than on law enforcement officials. Social compassion favors law-abiding citizens and often ignores criminals and criminal suspects. This is not to argue that there are no social and moral concerns reflected in *Miranda*.[121] Indeed, our view is quite the contrary. *Miranda* warnings are necessary to protect the interests of a criminal suspect. Prevailing social concerns might demonstrate, however, that a law-abiding citizen has nothing to lose from the minimal intrusion of a public safety inquiry.[122] Indeed, if the benefit of allowing such an intrusion is to ensure public safety and prevent crime, then one can see the basis of the majority's opinion.

This justification, however, is outweighed by Justice O'Connor's and Justice Marshall's criticism. This criticism of

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121. *Miranda* seeks to dispel the compulsion inherent in custodial surroundings. In this regard *Miranda* reflects a concern for the preservation of free choice. *Miranda* 384 U.S. at 446-48. By requiring that interrogation must cease when an individual indicates that he wishes to remain silent, *Miranda* also reflects a concern that an individual's choice should be enforced. *Miranda* at 473-74.

122. That a "minimal intrusion" may be accepted at the expense of constitutional rights has been accepted in fourth amendment cases. *E.g.* Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk cases); Delaware v. Prouse, 440 U.S. 648 (1979) (automobile stops); Camaera v. Municipal Court, 387 U.S. 523 (1967) (administrative searches); United States v. Edwards, 498 F.2d 496 (2d Cir. 1974) (airport searches).

The imposition of airport searches including the use of metal detectors best exemplifies the social concerns underlying *Quarles*. Passengers are willing to accept this intrusion in order to guard against the possibility of a skyjacking or an act of terrorism. A vast majority of travelers would undergo these intrusions rather than forego them and board an airplane where no safety precautions have been taken.

Quarles is anchored in a strict application of *Miranda*. The majority's creation of a public safety exception, sounds in more general social and moral concerns. This exemplifies the fundamental conflict between public safety and fifth amendment interests and explains why some of the justices differ over the resolution of the police officer's dilemma. The best example of this conflict is found in Justice O'Connor's opinion. If the Court were writing on a "clean slate," she would concur in the creation of a public safety exception.[123] However, *Miranda* is the law and Justice O'Connor felt constrained by the protection it affords fifth amendment interests.[124]

B. *The Characterization of* Miranda *Warnings as Procedural Guidelines*

The majority in *New York v. Quarles*[125] relied heavily on *Michigan v. Tucker's*[126] pronunciation that *Miranda* warnings are only prophylactic, procedural guidelines.[127] The majority maintained that *Miranda* warnings are not themselves constitutionally protected rights.[128] Instead, the majority maintained that *Miranda* warnings are measures to ensure that constitutional rights are protected.[129] This characterization is the most disturbing aspect of the *Quarles* decision.

To characterize *Miranda* warnings as merely "procedural" separates constitutional rights from their means of enforcement. The substantive entitlements of the fifth and sixth amendments are only as valuable as their method of enforcement. Fifth and sixth amendment rights could not be adequately protected if their enforcement was dependent on whether a criminal suspect had the foresight to invoke them. This is a principal reason why the *Miranda* court required the police to issue warnings.[130] The invocation of constitutional rights should not depend on the age,

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123. *Quarles*, 104 Sup. Ct. at 2636 (O'Connor, J., concurring in part and dissenting in part).
124. *Id.*
125. 104 S. Ct. 2626 (1984).
126. 417 U.S. 433 (1974).
127. *See supra* text accompanying notes 67-74.
128. *Id.*
129. *Id.*
130. Miranda v. Arizona, 384 U.S. at 460-62.

experience, education or social status of the criminal suspect.[131] Implicit in the holding of *Miranda*, therefore, is a determination that substantive fifth and sixth amendment rights are inextricably interwoven with their means of enforcement. The procedural guidelines theory of *Michigan v. Tucker* and of the *Quarles* majority disregards this rationale of *Miranda*.

The majority in *Quarles* purports to leave fifth and sixth amendment substantive entitlements unscathed. It is only the procedural guidelines that the majority claims to narrow.[132] Nevertheless, to subtract from the means of enforcement of any substantive right, is to weaken the substantive entitlement itself. A substantive right without a means for enforcement is rendered meaningless. Indeed, if *Miranda* warnings are not constitutional safeguards then they have no other genesis.[133] The "procedural guidelines" characterization is not based on a strict *Miranda* analysis but is better explained as a reflection of the Burger Court's hostility toward *Miranda*.

The Burger Court has repeatedly expressed a dissatisfaction with the fact that in certain circumstances, *Miranda* may require that a guilty person goes free. In *Beckwith v. United States*,[134] the Court expressed its hostility toward *Miranda* by narrowing the definition of the "custodial interrogations" to which *Miranda* applies.[135] In *Fare v. Michael C.*,[136] the Court expressed its hostility toward *Miranda* by limiting the types of

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131. *Id.* at 468.

132. *Quarles*, 104 S. Ct. at 2630-31.

133. Michigan v. Tucker, 417 U.S. 433, 462 (1974) (Douglas, J., dissenting). "The Court is not free to prescribe preferred modes of interrogation absent a constitutional basis." *Id.*

134. 425 U.S. 341 (1976).

135. *Id.* at 347 (defining an Internal Revenue Service interview as non-custodial). *See supra* text accompanying notes 29-34. Within the language of *Miranda*, a suspect was " in custody" when he has "been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. at 444. *Beckwith* narrowed this definition by holding that an Internal Revenue Service interview which focused on the suspect was noncustodial. Under *Beckwith* in order to determine whether one is in custody a detailed assessment of the "nature and setting of [the] in custody interrogation" is required. Beckwith v. United States, 425 U.S. at 346 (quoting Miranda v. Arizona, 384 U.S. at 445). For a discussion of what constitutes a custodial interrogation see *supra* note 3.

136. 442 U.S. 707 (1979) (a request to speak to one's probation officer is not an invocation of one's sixth amendment rights). *See supra* text accompanying notes 35-38.

requests which would invoke a suspect's *Miranda* rights.[137] In addition, in *Harris v. New York*[138] and *Oregon v. Hass*[139] the Court permitted the indirect use of evidence obtained in violation of *Miranda* by allowing the use of such evidence to impeach the defendant's credibility at trial.[140] Finally, in *Fletcher v. Weir*,[141] the Court allowed the use of post-arrest silence to impeach a defendant who had never been informed of his *Miranda* rights.[142] This pattern of resentment to the *Miranda* rule, including the *Tucker* "procedural guidelines" theory, blazed the path for the first exception to the *Miranda* rule. The *Quarles* public safety exception caps the Burger Court's contempt with the rule of *Miranda*. This contempt explains *Quarles* failure to recognize *Miranda* as a constitutional privilege.[143]

The opinion in *Michigan v. Tucker*,[144] however, suggests that the "procedural guidelines" theory was not intended to be

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137. Fare v. Michael C., 442 U.S. at 727-28.

138. 401 U.S. 222 (1971). In *Harris* the defendant's statement was taken in violation of *Miranda*. *Id.* at 222. The prosecution conceded that these statements were inadmissible in its case-in-chief. *Id.* However, the defendant chose to testify in his own behalf and during his testimony the defendant denied any criminal conduct. *Id.* at 273. On cross examination, the prosecution asked the defendant about his prior inconsistent statement. *Id.* The Supreme Court allowed the use of the statement to impeach the defendant even though those statements were obtained in violation of *Miranda*. *Id.* at 225-26.

139. 420 U.S. 714 (1975). In *Hass*, the defendant's request for an attorney was not honored. *Id.* at 716. The defendant then made inculpatory statements. *Id.* Later the defendant chose to testify in his own behalf. *Id.* Because the inculpatory statements were concededly inadmissable on the prosecutions case-in-chief, the defendant on direct examination denied these statements. *Id.* The Supreme Court allowed the use of these statements to impeach the defendant even though here, as in *Harris*, the statements were obtained in violation of *Miranda*. *Id.* at 722-24

140. Oregon v. Hass, 420 U.S. at 722; Harris v. New York,401 U.S. at 224.

141. 455 U.S. 603 (1982) (per curiam). In *Weir*, the defendant was charged with murder. *Id.* at 663. These charges arose out of a fight which occurred in a nightclub parking lot between the defendant, Weir and one Ronnie Buchanan. *Id.* During the course of the fight, Buchanan pinned Weir to the ground. *Id.* Buchanan suddenly jumped up shouting that he had been stabbed. *Id.* He ultimately died from the stab wounds. *Id.* Weir left the scene and never reported the incident. *Id.* At the time of his arrest, Weir, who was not given his *Miranda* warnings, did not offer any exculpating information. At trial, Weir testified in his own behalf and offered an alibi. The prosecutor cross-examined Weir with regard to his failure to offer his alibi at the time of his arrest. *Id.* The Supreme Court permitted this use of Weir's post-arrest silence. *Id.* at 607. The Court reasoned that the police had not induced Weir's silence. *Id.* at 606.

142. *Id.* at 604-05.

143. 104 S. Ct. 2626, 2645-47 (1984) (Marshall, J., dissenting).

144. 417 U.S. 433 (1974).

extended. In *Tucker* the defendant was informed of his *Miranda* rights except for his right to have counsel appointed in the event that he could not afford counsel.[145] The defendant in *Tucker* expressly stated that he was willing to answer questions in the absence of counsel, and therefore the failure to inform him of his right to appointed counsel was not viewed as an egregious error.[146] This situation can be readily distinguished from *Quarles* where the public safety interrogation took place in the absence of any *Miranda* warnings. Furthermore, the interrogation in *Tucker* occurred prior to the *Miranda* decision. The officers clearly complied with *Escobedo v. Illinois*,[147] the prevailing standard at the time. The very facts of *Tucker*, therefore, suggest that its procedural guidelines theory was created as a result of an ad hoc desire to prevent a guilty suspect from going free. It should not have been extended.

Beckwith, *Fare*, *Tucker*, *Harris*, and *Hass* all reflect the Court's hostility to the burden *Miranda* places on law enforcement. In a particular case, a guilty defendant may go free even if the purpose and flagrancy of the *Miranda* violation was not substantial. The hostility evidenced in these cases might have led one to predict the result in *Quarles* but does not serve as a justification of the result in *Quarles*.

C. *The Facts and Circumstances in* Quarles

In creating its public safety exception, the *Quarles* majority stressed the necessity of finding the missing revolver.[148] Nevertheless, a close analysis of the facts and circumstances present in *Quarles* suggests that the threat to public safety was not sufficient to warrant the creation of the public safety exception. More specifically, the public was not in danger at the time Quarles was interrogated.

At the time of the questioning, Quarles was handcuffed and surrounded by four police officers.[149] Quarles had been "reduced

145. *Id.* at 438.
146. *Id.* at 436.
147. 378 U.S. 478 (1964).
148. *Quarles*, 104 S. Ct. at 2632. *See supra* text accompanying notes 54-60.
149. *Quarles*, 104 S. Ct. at 2630.

to a condition of physical powerlessness."[150] The officers had no subjective or objective belief that Quarles had an accomplice.[151] The officers had enough confidence to put their guns in their holsters.[152] As Officer Kraft acknowledged: "[t]he situation was under control."[153] Those facts suggest that the officers were in no apprehension of danger to their own safety.

Turning to the officers' concern for the public's safety, the missing gun again posed no threat. Though the supermarket was open to the public, Quarles' arrest took place at 12:30 a.m. when the store was deserted.[154] No employees or customers were wandering about the store; there was no danger of anyone discovering the missing gun.[155] The officers could have easily conducted a search for the gun.[156] Because the officers were aware with a "high degree of certainty that the defendant's gun was within the immediate vicinity of the encounter,"[157] the officers harbored a reasonable belief that a search could uncover the gun before any customers or employees would. Most significant, it was not likely that anyone would have been injured during the few seconds that it would have taken to inform Quarles of his *Miranda* rights. Furthermore, it is possible that Quarles would have responded to questions regarding the location of the gun even after he was issued his *Miranda* warnings. If Quarles was indeed dissuaded from responding, the store could have been cleared and searched.

Quarles exemplifies a situation in which there was a possibility of harm to the public. Nevertheless, the probability that any harm would result was minute. *Quarles*, therefore, sanctions a public safety exception when the danger to the public is indeed tenuous. *Quarles* also neglects to consider the degree to which *Miranda* warnings would actually effect the threat to public safety.[158] In addition, uncomplicated and feasible police pro-

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150. People v. Quarles, 58 N.Y.2d 664, 667, 458 N.Y.S.2d 520, 522, 444 N.E.2d 984, 986 (quoted in *Quarles*, 104 S. Ct. at 2642 (Marshall, J., dissenting)).

151. *Quarles*, 104 S. Ct. at 2642 (Marshall, J., dissenting).

152. *Id.*

153. People v. Quarles, 58 N.Y.2d at 666, 444 N.E.2d at 986, 458 N.Y.S.2d at 521.

154. *Quarles*, 104 S. Ct. at 2629; *id* at 2643 (Marshall, J., dissenting).

155. *Quarles*, 104 S. Ct. at 2648 (Marshall, J., dissenting).

156. *Id.*

157. *Id.* (emphasis omitted).

158. In fact, Quarles did waive his right to silence and continued to answer the of-

cedures could have eliminated the chance of harm to the public. The facts and circumstances present in *Quarles* did not indicate a threat to public safety that was so immediate or unavoidable as to warrant creating a public safety exception.

D. *The Motivation of the Police Officers*

The majority in *Quarles* concluded that the creation of a public safety exception did not require consideration of the motivation of the police officer.[159] The majority maintained that police officers effectuating arrests were confronted with "kaleidoscopic" situations[160] and that the application of a public safety exception should not depend upon a post hoc examination of the officer's subjective motivation.[161] The majority put faith in the police officer's ability to act instinctively when effectuating an arrest.[162] This reliance on the officer's instinctive conduct does not give adequate consideration to the officer's subjective motivation. The Court is suggesting that an officer on the beat will instinctively be able to determine when the public safety is at risk. But even the Supreme Court, with the advantage of hindsight, could not agree whether public safety was significantly threatened in *Quarles*. The Court's reliance on the individuals officer's instinct seems unrealistic and impractible.

The majority sets forth an objective test for the motivation of the police officer. The public safety exception is available when police officers ask questions "reasonably prompted by a

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ficer's questions after he was given his *Miranda* rights. *Quarles*, 104 S. Ct. at 2630. Surprisingly, there is a very high incidence of waiver of the right to remain silent and the right to counsel. *See* Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347, 1395-96 (1968); Special Project, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L. J. 1519, 1570-71 (1967).

Various theories have been advanced to explain why so many criminal suspects act contrary to their own self-interest by waiving the constitutional protections afforded them. First, it has been suggested that suspects may confess as a remedial act to placate their moral conscience. *See* Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455, 477-78 (1984). Second, suspects may not understand their rights. *See* Medalie, Zeitz & Alexander, *supra*, at 1394-95. Concedely this theory is less persuasive because *Miranda* has become a household word.

159. *Quarles*, 104 S. Ct. at 2632. *See supra* text accompanying notes 75-76.

160. *Quarles*, 104 S. Ct. at 2632. *See supra* text accompanying notes 75-79.

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

162. *Id.* at 2633.

concern for the public safety."[163] In adopting this objective test, the majority expressly precludes consideration of the police officer's subjective motivation.[164] The objective standard avoids the need for an examination of subjective motivation but permits potential abuse of the public safety exception.

A post hoc scrutiny of a police officer's subjective motivation would inherently be speculative and inconclusive. On review, a court could not adequately assess an officer's experiences, biases and prejudices or any other factors that might determine his motivation. Consequently a subjective standard might cause the public safety exception to be applied on the basis of conjecture. Nevertheless, even under the objective standard, a post hoc scrutiny is not entirely avoided. A reviewing court will need to assess the facts and circumstances in order to determine whether the threat to public safety warranted a limited inquiry in the absence of *Miranda* warnings. The crucial distinction here is that a court may more readily determine the objective perception of a public danger than it may determine an officer's subjective motivation. It seems, however, that some type of subjective standard is necessary in order to prevent abuse of the public safety exception.

Conceivably, there may be situations in which police officers will act in bad faith in order to take advantage of the public safety exception. Police officers might wait for a criminal suspect to act so that he poses a public danger rather than apprehend the suspect immediately. If, in anticipation of a limited inquiry without *Miranda* warnings, the police postpone the immediate apprehension of a criminal suspect, the public safety exception becomes a vehicle for those acting in bad faith to circumvent *Miranda*. Furthermore, if the public safety exception actually encourages delay in apprehension, the exception may foster a danger to public safety. Immediate apprehension of the criminal suspect minimizes any potential threat to public safety. If, however, an officer hopes to take advantage of an interrogation without *Miranda* warnings, he might allow a threat to public safety to materialize. Thus, in the absence of any inquiry into the subjective motivation of the police officer, the *Quarles* exception

163. *Id.* at 2632.
164. *Id.*

could conceivably lead to a threat to public safety.

The possibility of abuse of the *Quarles* exception by those attempting to circumvent *Miranda* could be prevented by predicating the exception on a showing that the police officer acted in good faith. The *Quarles* exception only permits a limited inquiry into the purpose of preserving public safety. Nevertheless, even such a limited inquiry is likely to uncover probative evidence of a criminal suspect's guilt. The narrow scope of the inquiry, therefore, is not sufficient in itself to deter bad faith abuses of the *Quarles* exception. The objective standard imposed by the majority already requires some post hoc scrutiny of the facts and circumstances. An additional requirement of good faith would not significantly add to the burden of a reviewing court. A court would need only to weigh the facts and circumstances to determine a threshold requirement of good faith. A court would not need to examine all possible experiences, biases and prejudices of an individual police officer. Therefore, the need to resort to speculation or conjecture would not arise. The imposition of a good faith threshold would not unduly burden a reviewing court and would more fully protect against abuse of the public safety exception.

E. *The Impact of* Quarles

The majority's holding in *New York v. Quarles*[165] sacrifices clarity and guidance in favor of enhanced protection of public safety. The majority opinion noted that the exception would lessen "desirable clarity"[166] and that the scope of the exception will be determined by the "exigency which justifies it."[167] Because the public safety exception turns on an examination of the facts and circumstances at the time of the interrogation it fails to provide adequate guidance to the lower courts or to police officers. Justice O'Connor's observation that *Quarles* will result in "hair-splitting" ad hoc determinations is correct.[168]

First, *Quarles* will result in "hair-splitting" determinations regarding whether an actual threat to public safety exists. In

165. 104 S. Ct. 2626 (1984).
166. *Id.* at 2633.
167. *Id.*
168. *Id.* at 2636 (O'Connor, J., concurring in part and dissenting in part).

Quarles the danger to public safety was equated with the existence of an undiscovered revolver. It remains to be seen what other situations will also be deemed a threat to public safety. *Quarles* does not suggest whether or to what extent the severity of the threat to public safety is a factor. Under *Quarles* an unaccounted for deadly weapon constitutes a threat to public safety.[169] The existence of other contraband, however, may not pose a similar threat. Perhaps, a quantity of drugs or narcotics might, if unaccounted for, pose a public danger.[170] The probability of discovery by another criminal, a child, or an unwitting citizen may be a factor.[171] Perhaps the mere existence of an unapprehended accomplice to a violent crime or a repetitive pattern of violent crimes may constitute a threat to public safety. It is apparent that, under the *Quarles* test, tenuous ad hoc distinctions are unavoidable.

Second, *Quarles* will result in hairsplitting determinations regarding whether the interrogation is coercive. The majority in *Quarles* rested its decision in part upon a finding that there was no coercion in fact.[172] A showing of actual coercion would, even

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169. Although the Court states that it is "recognizing a narrow exception to Miranda," *id.* at 2633, the Court has in fact created a broad exception by selecting this fact pattern upon which to recognize a public safety exception. Nothing in the case indicates that the police, or any other person, were in imminent danger. The New York Court of Appeals decision points out the lack of foundation for finding that the public's safety was at risk:

> There is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety or that the police interrogation was prompted by any such concern. Nor, so far as it appears from the record, was any such theory advanced by the People at the suppression hearing. Undeniably, neither of the courts below, with fact-finding jurisdiction, made any factual determination that the police acted in the interest of public safety.

People v. Quarles, 58 N.Y.2d at 666, 444 N.E.2d at 985, 458 N.Y.S.2d at 521-22.

170. By creating a public safety exception in this instance, the Court is opening the door for lower courts to interpret this decision to mean the public safety exception may be invoked whenever there is a *possibility* of danger to the public.

171. Analysis of the facts and circumstances of *Quarles*, however, seems to negate the probability of public discovery from significant consideration. *See supra* text accompanying notes 154-57.

172. *Quarles*, 104 S. Ct. at 2631. All statements given in response to police interrogation must satisfy the fourteenth amendment requirement of voluntariness. *E.g.* Mincey v. Arizona, 437 U.S. 385 (1978); Davis v. North Carolina, 384 U.S. 737 (1966). *Miranda* specifically addressed the inherent coercion in custodial interrogation. *See supra* text accompanying notes 16-27. The question remains, however, whether courts will tolerate a degree of coercion in order to protect public safety. When necessary to protect public

under the majority's view, warrant exclusion of the evidence.[173] Thus, *Quarles* requires that lower courts also resort to ad hoc determinations of whether there had been coercion in fact. The Supreme Court was well aware that the decision in *Quarles* provided little in the way of clarity and guidance.[174] The Court was, however, willing to accept this result in order to protect public safety.

V. Conclusion

If the Supreme Court had not been bound by the rule of *Miranda v. Arizona*,[175] social and moral concerns might warrant the creation of a public safety exception. However, in light of *Miranda*, the public safety exception announced in *New York v. Quarles*[176] is unwarranted. Particularly disturbing is the Court's characterization of *Miranda* warnings as "guidelines" rather than constitutional rights. Furthermore, assuming the propriety of a public safety exception, it does not follow that the facts and circumstances present in *Quarles* necessitated the creation of such an exception.

Specifically addressing the public safety exception as created in *Quarles*, any such exception must consider the subjective motivation of the police officers. A threshold showing that the police acted in good faith would help to protect against abuse of the *Quarles* exception.

Cynthia K. Fichera

Philip Quaranta

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safety, the *Quarles* exception acquiesces in the inherent coercion identified in *Miranda*. Nevertheless, the majority in *Quarles* stated that a showing of actual coercion would warrant exclusion of evidence. *Quarles* 104 S. Ct. at 2631 n.5, 2633 n.7.

173. *Quarles*, 104 S. Ct. at 2631 n.5, 2633 n.7.

174. *Id.* at 2633.

175. 384 U.S. 436 (1966).

176. 104 S. Ct. 2626 (1984).