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Fifth Amendment--Will the Public Safety Exception Swallow the Miranda Exclusionary Rule

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FIFTH AMENDMENT—WILL THE PUBLIC SAFETY EXCEPTION SWALLOW THE *MIRANDA* EXCLUSIONARY RULE?

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

I. INTRODUCTION

In *New York v. Quarles*,[1] the United States Supreme Court created a significant exception to the rule prescribed in its historic decision in *Miranda v. Arizona*.[2] In *Quarles*, the Court held that police officers need not administer *Miranda* warnings prior to asking suspects questions that are "reasonably prompted by a concern for the public safety."[3] This decision clearly departs from *Miranda*. In *Miranda*, the Court applied the fifth amendment privilege against compulsory self-incrimination to protect suspects from the compelling pressures of police interrogation.[4] Reasoning that the *Miranda* warnings might deter a suspect from divulging information necessary to protect the public, the *Quarles* Court weighed the suspect's fifth amendment privilege against the need for information where the public safety is imperiled, and deemed that the added factor of "public safety" tilted the "scales of social utility"[5] toward society's need for information and away from the accused's fifth amendment rights.[6]

Quarles fits into a general trend of Burger Court decisions that have deviated from both the letter and the spirit of *Miranda*.[7] Before *Quarles*, the Burger Court's *Miranda* decisions had focused largely on the scope and application of *Miranda*, addressing issues such as what constitutes "custody" and "interrogation" under *Miranda*.[8] *Quarles* attacks the core of *Miranda*, however, representing

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1 104 S. Ct. 2626 (1984).

2 384 U.S. 436 (1966).

3 104 S. Ct. at 2632.

4 384 U.S. at 479.

5 104 S. Ct. at 2645 (Marshall, J., dissenting).

6 *Id.* at 2633.

7 For a comprehensive discussion of this trend, see Grossman and Lane, Miranda: *The Erosion of a Doctrine*, 62 CHI. B. REC. 250 (1981); Sonenshein, Miranda *and The Burger Court: Trends and Countertrends*, 13 LOY. U. CHI. L.J. 405 (1982); Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99.

8 In cases concerning the custody issue, the Warren Court extended *Miranda* to

the first time that the Court has allowed self-incriminating statements that were obtained without *Miranda* warnings to be used in the prosecution's case-in-chief. Furthermore, the *Quarles* Court continued a trend of obscuring *Miranda*'s per se test by applying a fact-based analysis that may confuse both lower courts and law enforcement agencies[9] over the proper use of the public safety exception. This Note will argue that the Court's public safety exception is unjustifiable in light of both the facts in *Quarles* and the legal precedent. In addition, this Note will examine the possible effects of the public safety exception on police departments, lower courts, and accused persons.

II. HISTORY

A. *MIRANDA V. ARIZONA*

In its landmark *Miranda* decision, the United States Supreme Court sought to eradicate coercive police interrogation practices that deprived suspects of their fifth amendment constitutional privilege to be free from self-incrimination.[10] The Court reviewed police manuals and past cases that evinced custodial interrogations involving beatings, deprivations of food, and tactics stressing interroga-

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cover compelling interrogations outside of the police custody context. *See* Orozco v. Texas, 394 U.S. 324 (1969) (custodial interrogation includes questioning defendant in his own home if defendant is "deprived of his freedom of action . . . in any significant way"); Mathis v. United States, 391 U.S. 1 (1968) (interrogation by IRS officials of incarcerated defendant in state correctional institution constitutes custodial interrogation). *Id.* at 327 (quoting *Miranda*, 384 U.S. at 477). The Burger Court decisions run counter to the Warren Court decisions, evincing a trend to restrict the scope of *Miranda* to in-custody police questioning. *See* Oregon v. Mathiason, 429 U.S. 492 (1977) (interrogation of a suspect at a police station is not "custodial" because the suspect was not under arrest); United States v. Mandujano, 425 U.S. 564 (1976) (grand jury questioning is not custodial because judicial inquiries are not equivalent to police custody interrogations); Beckwith v. United States, 425 U.S. 341 (1976) (IRS agent's interrogation of a defendant was not custodial interrogation because questioning took place in a relaxed atmosphere and the taxpayer was neither arrested nor detained against his will).

The case directly concerning "interrogation" is Rhode Island v. Innis, 446 U.S. 291 (1980). In *Innis*, the Burger Court defined interrogation as "[a] practice that the police should know is reasonably likely to evoke an incriminating response from a suspect." *Id.* at 301. The Court found that an officer's statement in the suspect's presence that a missing murder weapon might cause injury to a handicapped child was not interrogation because there was "nothing in the record to suggest that the officers were aware that respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children." *Id.* at 302.

9 For a discussion of this trend, see Note, *Fifth Amendment—Fifth Amendment Exclusionary Rule: The Assertion and Subsequent Waiver of the Right to Counsel*, 74 J. CRIM. L. & CRIMINOLOGY 1315 (1983).

10 *Miranda*, 384 U.S. at 444.

tion in isolation.[11] To curb the use of these tactics, the Court held that the "prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[12] The Court required the police to inform each suspect 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 an attorney, either retained or appointed."[13]

Before *Miranda*, courts used the traditional due process voluntariness test, a subjective analysis of the totality of the circumstances under which police elicited incriminating statements to determine whether the statement was the product of the suspect's free will.[14] *Miranda* relieved courts of having to consider the totality of the circumstances under the voluntariness standard.[15] The Court declared that custodial interrogation was inherently coercive and that any statements elicited without the prescribed warnings were not volunteered by the defendant and were inadmissible.[16] This presumption of compulsion could only be rebutted if the prosecution proved that the suspects "knowingly, and intelligently" waived their *Miranda* rights.[17] Thus, the Court issued a per se rule that was a

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[11] *Id.* at 446-49. The manuals that the Court relied on included F. INBAU & J. REID, CRIMINAL INTERROGATIONS AND CONFESSIONS (1962); F. INBAU & J. REID, LIE DETECTION AND CRIMINAL INTERROGATION (3d ed. 1953); C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (1956); IV NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931). To illustrate the coercive police interrogation practices, the Court cited Wakat v. Harib, 253 F.2d 59 (7th Cir. 1958) (police inflicted injuries including broken bones and multiple bruises requiring that the defendant receive medical care for eight months); Bruner v. People, 113 Colo. 194, 156 P.2d 11 (1945) (police kept defendant in custody for over two months, denied him food for 15 hours, and forced him to take a lie detector test when he asked to go to the bathroom); People v. Portelli, 15 N.Y.2d 235, 205 N.E.2d 857, 257 N.Y.S.2d 931 (1965) (police officers beat, kicked, and burned a potential witness' back with cigarette butts to obtain a statement implicating a third party).

[12] *Miranda*, 384 U.S. at 444.

[13] *Id.*

[14] *See, e.g.*, Haynes v. Washington, 373 U.S. 503 (1963); Payne v. Arkansas, 356 U.S. 560 (1958); White v. Texas, 310 U.S. 530 (1940); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

[15] *See Developments in the Law—Confessions*, 79 HARV. L. REV. 935 (1966).

One source of difficulty in applying the voluntariness test is the requirement that a suspect make a reasoned or "rational" choice to answer questions. This choice on the part of the suspect seems to involve abilities that the typical criminal suspect does not possess. One commentator noted that "[t]o the extent that this factor is important in the tests courts are to apply to a challenged confession, the application of that test becomes a formidable task indeed." *Id.* at 984. *See also* Sonenshein, *supra* note 7, at 413-14.

[16] *Miranda*, 384 U.S. at 467.

[17] *Id.* at 475, 479. Johnson v. Zerbst, 304 U.S. 458 (1938), often has been cited as the

clear constitutional directive to lower courts and law enforcement agencies: confessions obtained without informing suspects of their rights were presumed to be compelled from the inherently coercive interrogations and were inadmissible in a court of law.[18]

B. THE *MICHIGAN V. TUCKER* PRECEDENT

Following Warren Burger's appointment as Chief Justice, the Court decisively shifted its attitude toward *Miranda*. Whereas the Warren Court broadly applied *Miranda*,[19] the Burger Court quickly established a pattern of narrowing the original decision by consistently holding evidence admissible in an increasing number of circumstances.[20] From 1971 to 1981, the Court failed to hold in a single case that evidence should be excluded as a violation of *Miranda*.[21] A discussion of these cases is beyond the purview of this Note, but one case, *Michigan v. Tucker*,[22] provided the foundation for the Court's analysis in *Quarles* and deserves closer examination here.

In *Michigan v. Tucker*, the police interrogated Tucker without giving him adequate warnings. Although Tucker's arrest took place prior to *Miranda*, the Court retroactively applied the *Miranda*

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standard for determining when constitutional rights have been waived. The knowing and intelligent waiver standard has been applied to a variety of contexts including waiver of the right to confrontation, Barber v. Page, 390 U.S. 719 (1968), a speedy trial, Barker v. Wingo, 407 U.S. 514 (1972), the right to be free from double jeopardy, Green v. United States, 355 U.S. 184 (1957), waiver of counsel at trial, Carnley v. Cochran, 369 U.S. 506 (1962), and waiver of counsel before pleading guilty, Boyd v. Dutton, 405 U.S. 1 (1972), *cited in* Schneckloth v. Bustamonte, 412 U.S. 218, 237 (1973).

In *Johnson v. Zerbst*, the petitioner, an accused counterfeiter, was tried, convicted, and sentenced without the assistance of counsel. The Supreme Court remanded the case to the district court for a determination of whether "upon the particular facts and circumstances surrounding th[e] case, including the background, experience, and conduct of the accused, the petitioner has intelligently waived his constitutional right to counsel." 304 U.S. at 464.

18 384 U.S. at 444.

19 *See supra* note 8 and accompanying text.

20 *See* Grossman and Lane, *supra* note 7, at 254.

21 *Id.* This trend was interrupted by the decision in Edwards v. Arizona, 451 U.S. 477 (1981). In *Edwards*, the defendant was arrested on charges of robbery, burglary, and murder, and taken to the police station where he was given *Miranda* warnings. At the station, Edwards invoked his right to have counsel present during the interrogation. The police ceased questioning Edwards, but the next day, two police officers resumed questioning after again informing Edwards of his rights. Edwards then confessed. The Court held that the resumed interrogation violated the petitioner's *Miranda* rights because the right to have counsel, once invoked, protects the suspect from further questioning unless he initiates the conversation with the police officers. *Id.* at 484-5. For a detailed discussion of *Edwards*, see Note, *Fifth Amendment—Waiver of Previously Invoked Right to Counsel*, 72 J. CRIM. L. & CRIMINOLOGY 1288 (1981).

22 417 U.S. 433 (1974).

rules.[23] In *Tucker*, police had complied with most of the later *Miranda* requirements, but failed to inform Tucker of his right to appointed counsel.[24] While police interrogated Tucker about his involvement in an alleged rape and assault, he offered police the name of Robert Henderson, an alibi witness whom Tucker claimed he was with at the time of the crime.[25] When Henderson's statements served to discredit rather than support Tucker's story, the prosecution sought to admit both Tucker's statements and Henderson's conflicting testimony.[26] The trial judge excluded Tucker's statements but allowed Henderson to testify at Tucker's trial. Tucker was convicted of rape and sentenced to twenty to forty years in prison.[27]

On appeal, the United States Supreme Court held that Tucker's statements had been rightfully suppressed and Henderson's testimony correctly admitted, even though discovering Henderson's name was the product of a *Miranda* violation.[28] In so holding, Justice Rehnquist, writing for the majority, reasoned that *Miranda* proscribed a set of "protective guidelines" to help police officers "conduct interrogations without facing a continuous risk that valuable evidence would be lost."[29] These procedural safeguards, commonly referred to as the *Miranda* rules, "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected."[30]

Justice Rehnquist's distinction between constitutional rights and nonconstitutional prophylactic standards led him to conclude that the police conduct was not so flagrant as to violate Tucker's compulsory right against self-incrimination, but was merely a failure to provide Tucker with the "full measure of procedural safeguards associated with that right since *Miranda*."[31] Although the police had failed to comply with *Miranda*'s strictly proscribed warnings, the Court held that Tucker's fifth amendment privilege was preserved because "the interrogation in the case involved no compulsion suffi-

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[23] Johnson v. New Jersey, 384 U.S. 719 (1966), held that *Miranda* applies to cases where the arrest took place prior to *Miranda* and the trial commenced after *Miranda*.

[24] *Tucker*, 417 U.S. at 436.

[25] *Id.*

[26] *Id.* at 437.

[27] *Id.*

[28] *Id.* at 452.

[29] *Id.* at 443.

[30] *Id.* at 444. *See* Grossman and Lane, *supra* note 7, at 270 ("[t]he idea that *Miranda* rights were not synonymous with the Fifth Amendment privilege thus seems to have originated with Justice Rehnquist").

[31] *Tucker*, 417 U.S. at 444.

cient to breach the right against compulsory self-incrimination."[32] Thus, the Court held that the statements of Tucker's alibi witness were admissible because the rationale for the exclusionary rule was to deter police conduct that deprived suspects of their constitutional rights. In *Tucker*, Justice Rehnquist found that the police officers acted in "complete good faith" so "the deterrence rationale los(t) much of its force."[33]

Some commentators prophesied that *Tucker* sounded the deathknell of *Miranda*.[34] By distinguishing between constitutional violations and nonconstitutional prophylactic errors, the *Tucker* Court eviscerated the basic premise established in *Miranda*: custodial interrogations without the proscribed warnings are inherently coercive and any evidence obtained from such interrogations was compelled in violation of the fifth amendment and must be excluded from the prosecution's case-in-chief.[35] *Tucker* did not overrule *Miranda*, however. The Court left intact *Miranda*'s core by excluding Tucker's statements as evidence obtained without adequate warnings.[36] The *Tucker* Court recognized a large exception to *Miranda*'s broad exclusionary rule, holding that derivative evidence could be admissible despite the fact that the evidence was the fruit of a *Miranda* violation.[37] Thus, after *Tucker*, *Miranda*'s absolute prohibi-

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[32] *Id.* at 445.

[33] *Id.* at 447. The *Tucker* Court refused to resolve the "broad question of whether evidence derived from statements taken in violation of the *Miranda* rules must be excluded regardless of when the interrogation took place," holding only that the derivative evidence was admissible on the narrow facts of *Tucker*. *Id.* The compelling facts stressed by the Court included that the interrogation took place prior to *Miranda*, the police conduct was reasonable and noncoercive, and the statements of Tucker and Henderson were voluntary. *Id.* at 447-50. Justice White, concurring, agreed that the derivative evidence should be admitted, but stated that "[t]he same results would not necessarily obtain with respect to the fruits of involuntary confessions." *Id.* at 461 (White, J., concurring). By delving into the question of whether Tucker's confession was involuntary under traditional standards, the Court advocated a return to the pre-*Miranda* voluntariness standard. *See* Stone, *supra* note 7, at 118-19.

[34] *See* Stone, *supra* note 7, at 169.

[35] Justice Rehnquist's distinction between constitutional violations and mere technical *Miranda* violations enabled him to avoid the precedent of Wong Sun v. United States, 371 U.S. 471 (1963). In *Wong Sun*, the Supreme Court suppressed both physical evidence (narcotics) and verbal evidence (incriminating statements of a third party) because the evidence was derived from an unreasonable search and seizure in violation of the fourth amendment. The *Wong Sun* doctrine, that evidence derived from police misconduct amounting to a constitutional violation must be suppressed, was not applied by the *Tucker* Court because it found that the police conduct was not egregious enough to infringe upon Tucker's constitutional rights. This same conclusion was made with respect to the police conduct in New York v. Quarles, 104 S. Ct. 2626, 2640 n.4 (O'Connor, J., dissenting in part and concurring in part).

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

[37] *Id.*

tion[38] against admitting evidence elicited from custodial interrogation without the proper warnings only restricted the use of illegally obtained suspect statements from the prosecution's case-in-chief. This remaining portion of *Miranda*'s exclusionary rule was further eroded by the Court's decision in *New York v. Quarles*.[39]

III. FACTS

At approximately 12:30 a.m. on September 11, 1980, while police officers Frank Kraft and Sal Scarring were on road patrol, a young woman approached their car and told the officers that she had just been raped.[40] The woman described her assailant as a black male approximately six feet tall, who was wearing a black jacket with "Big Ben" inscribed in yellow letters on the back. She further told the officers that her attacker had just entered a local supermarket and that he was armed with a gun.[41]

The officers drove the woman to the store, and Officer Kraft entered the market while his partner remained in the car and radioed for assistance.[42] Officer Kraft immediately noticed a man who fit the description at a nearby checkout counter. Upon seeing Kraft, the suspect, Benjamin Quarles, fled toward the back of the store. Officer Kraft drew his gun and chased Quarles, but temporarily lost sight of him. Upon relocating Quarles, Officer Kraft ordered him to stop and to raise his hands above his head.[43]

Officer Kraft, the first officer to reach Quarles, frisked Quarles and found that he was wearing an empty shoulder holster.[44] Kraft then handcuffed Quarles and asked him where he put the gun. Quarles nodded his head in the direction of an empty stack of cartons and stated, "the gun is over there."[45] Officer Kraft then reached into one of the cartons, found the loaded .38 revolver, and formally placed Quarles under arrest. Kraft read Quarles his *Miranda* rights from a printed card; Quarles waived his right to counsel

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[38] In his dissent in *Tucker*, Justice Douglas argued that *Miranda*'s exclusionary rule required suppression of all evidence obtained in the absence of the required warnings. Douglas cited *Miranda*'s strong prohibitory language for support: " 'no evidence obtained as a result of interrogation [not preceded by adequate warnings] can be used against an accused.' " *Id.* at 464 (Douglas, J., dissenting) (quoting *Miranda*, 384 U.S. at 479) (emphasis added by Justice Douglas).

[39] 104 S. Ct. 2626 (1984).

[40] *Id.* at 2629.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 2630.

[44] *Id.*

[45] *Id.*

and agreed to answer questions.[46]

In Quarles' subsequent prosecution for the criminal possession of a weapon,[47] the trial judge excluded the statement "the gun is over there" because it was elicited before Officer Kraft informed Quarles of his rights.[48] The Appellate Division of the Supreme Court of New York affirmed without opinion[49] and the New York Court of Appeals affirmed by a 4-3 margin, finding that Quarles was in police custody within the meaning of *Miranda*.[50] The court refused to recognize a public safety exception to *Miranda*, rejecting the State's argument that the exigencies of the situation allowed Officer Kraft to find the gun before reading the suspect his rights.[51] In declining to recognize the exception, the court of appeals stated that

> [e]ven if it be assumed that an emergency exception to the normal rule might be recognized if the purpose of the police inquiry had been to locate and to confiscate the gun for the protection of the public . . . there is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety or that police interrogation was prompted by any such concern.[52]

The court of appeals stressed that "neither of the courts below, with fact finding jurisdiction, made any factual determination that the police acted in the interest of public safety."[53] The United States Supreme Court granted certiorari[54] and held that the facts of *Quarles* mandated a public safety exception to *Miranda*.[55]

IV. Supreme Court Opinions

Writing for the majority, Justice Rehnquist found that the New York Court of Appeals erroneously excluded both Quarles' statement, "the gun is over there," and the gun.[56] In addition, the majority held that Quarles' subsequent statements concerning the ownership and place of purchase of the gun were not tainted by the

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46 *Id.* Officer Kraft then asked Quarles if he owned the gun and where he purchased it. Quarles answered that the gun was his and that he bought it in Miami, Florida. *Id.*

47 *Id.* The State decided not to prosecute the rape charge, but the record provides no information as to why the charge was dropped. *Id.* at 2630 n.2.

48 *Id.* The judge also suppressed the post-*Miranda* statements about the ownership and place of purchase of the gun as evidence tainted by the prior *Miranda* violation. *Id.*

49 85 A.D.2d 936, 447 N.Y.S.2d 84 (N.Y. App. Div. 1981).

50 104 S. Ct. 2630 (citing People v. Quarles, 58 N.Y.2d 664, 666, 444 N.E.2d 984, 985, 458 N.Y.S.2d 520, 521 (1981)).

51 *Id.*

52 *Quarles*, 58 N.Y.2d at 666, 444 N.E.2d at 985, 458 N.Y.S.2d at 521.

53 *Id.*

54 103 S. Ct. 2118 (1983).

55 104 S. Ct. 2626 (1984).

56 *Id.* at 2634.

prior violation and were thus admissible in court.[57] The Court adopted a public safety exception to *Miranda*, holding that where the exigencies of the situation pose a threat to public safety, a police officer may question suspects prior to advising them of their rights.[58]

Justice Rehnquist began his analysis with a brief history of the fifth amendment and the meaning of *Miranda*. Rehnquist quoted *Michigan v. Tucker* for the proposition 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."[59] Finding that the *Quarles* case presents "no claim that respondent's statements were actually compelled by police conduct which overcame his will to resist," Justice Rehnquist narrowed the issue before the Court to "whether Officer Kraft was justified in failing to make available to respondent the procedural safeguards associated with the privilege against compulsory self-incrimination since *Miranda*."[60]

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[57] *Id.*

[58] *Id.* at 2632, 2633. In a footnote, the majority analogized the new public safety exception to *Miranda* to the time-honored exigent circumstances exception to the warrant requirement in the fourth amendment context. *Id.* at 2630 n.3. This analogy is problematical. Two major differences distinguish the fourth amendment exclusionary rule from the fifth amendment exclusionary rule: (1) the fourth amendment rule, excluding evidence obtained as a result of an unreasonable search, was a judicially created rule, while the fifth amendment exclusionary rule against compulsory self-incrimination is constitutionally mandated; (2) there is little doubt about the reliability of evidence obtained through a fourth amendment violation because the evidence is usually physical evidence, while one of the rationales for the fifth amendment exclusionary rule is that "compelled testimony" induced under coercive conditions may be unreliable and therefore must be suppressed. These two differences lead some commentators to conclude that courts are less justified in creating exceptions to the fifth amendment. *See* Dershowitz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1214-15 (1971); Comment, *The Declining* Miranda *Doctrine: The Supreme Court's Development of* Miranda *Issues*, 36 WASH. & LEE L. REV. 259, 263-64 (1979).

The argument that the fourth amendment exclusionary rule is judicially created while the fifth amendment exclusionary rule is constitutionally compelled has lost some significance in light of *Michigan v. Tucker*. Prior to *Tucker*, reading a suspect his rights had been a constitutional requirement, and the failure to do so led to the exclusion of evidence obtained thereafter. *Tucker*, however, essentially reduced *Miranda* warnings to nonconstitutional prophylactic measures, holding that derivative evidence obtained as a result of a *Miranda* prophylactic error could be admitted at trial. 417 U.S. at 450.

The argument for more stringent application of the fifth amendment exclusionary rule, to insure the reliability of evidence, still remains a viable argument. The *Quarles* majority's failure to show that questioning about public safety issues will be less coercive than other custodial interrogation leaves open the possibility that unreliable statements will be used to convict suspects.

[59] *Id.* at 2631 (citing *Tucker*, 417 U.S. at 444).

[60] *Id.*

Justice Rehnquist agreed with the New York Court of Appeals' finding that because Quarles was handcuffed and surrounded by four police officers, he was "in custody" within the ambit of *Miranda*.[61] Justice Rehnquist then stated that the New York Court of Appeals had declined to issue an opinion on the public safety exception "because the lower courts in New York had made no factual determination that the police had acted with that motive."[62] Justice Rehnquist asserted that a public safety exception should not depend on an officer's subjective motivations for interrogating a suspect, but it should apply "to a situation in which police officers ask questions reasonably prompted by a concern for public safety."[63]

Next, Justice Rehnquist recounted the judicial balancing test undertaken by the Court in *Miranda*. According to Justice Rehnquist, the *Miranda* majority was willing to accept that *Miranda* warnings may deter suspects from responding to police interrogation because suspects would be given added protection for their fifth amendment rights.[64] By plugging the facts of *Quarles* into the judicial balancing equation, Justice Rehnquist concluded that the cost of reciting *Miranda* warnings was increased significantly by the added factor of public safety. Not only might the warnings have cost the officers the use of incriminating statements and evidence, but they also might hamper the officers in their duty "to insure that further danger to the public did not result from the concealment of the gun in a public area."[65] This possibility of public endangerment led Justice Rehnquist to conclude "that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the fifth amendment's privilege against self-incrimination."[66]

The *Quarles* majority acknowledged that the public safety exception would obscure the relatively clear state of the law in *Miranda* cases.[67] Justice Rehnquist, however, believed that the police officers would have little difficulty determining when to apply the exception. The following facts from *Quarles* supported his faith in the ability of police officers to intuitively distinguish between questions necessary to preserve the public safety and questions asked to elicit incriminat-

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61 *Id.*

62 *Id.* at 2631-32.

63 *Id.* at 2632.

64 *Id.* Justice Rehnquist cited Justice Harlan's dissent in *Miranda*, 384 U.S. 436, 504, 516-17, for the proposition that *Miranda* would likely deter suspects from answering questions. *Quarles*, 104 S. Ct. at 2632.

65 104 S. Ct. at 2633.

66 *Id.*

67 *Id.*

ing evidence from suspects: "Officer Kraft asked only the question necessary to locate the missing gun before advising respondent of his rights. It was only after securing the loaded revolver and giving the warnings that he continued with investigatory questions about the ownership and place of purchase of the gun."[68] Rather than "complicating the thought processes and the on-the-scene judgments of police officers," Justice Rehnquist felt that the Court's decision would simply "free them to follow their legitimate instincts when confronting situations presenting a danger to the public safety."[69]

Justice O'Connor, concurring in the judgment that the gun was admissible, dissented from the Court's ruling that the statement "the gun is over there" was admissible.[70] Justice O'Connor stated that the Court's focus on balancing public safety concerns against an individual's fifth amendment privilege missed the critical question to be decided.[71] According to Justice O'Connor, *Miranda* focused upon the question of "who shall bear the cost of securing the public safety when such questions are asked and answered: the defendant or the State."[72] The *Miranda* Court clearly placed the burden on the state. Justice O'Connor stated that when police interrogate suspects in custody without reading them their rights, "*Miranda* quite clearly requires that answers received be presumed compelled and that they be excluded from evidence at trial."[73] In Justice O'Connor's view, "since there is nothing about an exigency that makes custodial interrogation any less compelling, a principled application of *Miranda* requires that respondent's statement be suppressed."[74]

In the second part of her opinion, Justice O'Connor tackled the

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68 *Id.*

69 *Id.* In a footnote, Justice Rehnquist implicitly assumed that because there was no *Miranda* violation in *Quarles*, the pre-*Miranda* statements, the gun, and the post-*Miranda* "tainted fruits" were admissible in court. Furthermore, by holding that there was no violation, the Court could disregard the State's arguments that the gun was admissible either because it was nontestimonial evidence or because it inevitably would have been discovered. *Id.* at 2634 n.9.

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

71 *Id.* at 2636 (O'Connor, J., concurring in part and dissenting in part).

72 *Id.*

73 *Id.* Justice O'Connor's recognition that failure to administer *Miranda* warnings raises a presumption of compulsion contradicts Justice Rehnquist's explicit rejection of this argument. *Id.* at 2631 n.5 (O'Connor, J., concurring in part and dissenting in part).

74 *Id.* at 2636 (O'Connor, J., concurring in part and dissenting in part). This statement unites Justice O'Connor with Justice Marshall, who claimed that "[w]ithout establishing that interrogations concerning the public's safety are less likely to be coercive than other interrogations, the majority cannot endorse the 'public-safety' exception and remain faithful to the logic of *Miranda v. Arizona*." *Id.* at 2647 (Marshall, J., dissenting).

question of whether the gun also must be suppressed.[75] Justice O'Connor distinguished *Miranda* on the ground that the fifth amendment protection against self-incrimination covers only testimonial evidence and does not protect the accused from being compelled to surrender self-incriminating nontestimonial evidence.[76] This distinction enabled Justice O'Connor to maintain that Quarles' statements were inadmissible, but that the gun must not be suppressed.[77]

To substantiate her assertion, Justice O'Connor first confronted adverse precedent which suggested that the privilege against self-incrimination required suppression of all evidence derived from an encroachment on a fifth amendment privilege.[78] Justice O'Connor distinguished these cases by comparing the compelling pressures forced upon the individual in both the precedent and in *Quarles*. In all of the cases cited, a court or tribunal compelled witnesses to testify against their wills "without any showing of probable cause to believe they ha[d] committed an offense or that they ha[d] relevant information to convey."[79] By contrast, suspects like Quarles who undergo "informal custodial interrogation" are not faced with the same " 'cruel trilemma of self-accusation, perjury, or contempt' " as witnesses required to appear before a court.[80]

Furthermore, Justice O'Connor argued that Quarles did not claim abridgement of his fifth amendment rights, but showed only that the police failed to provide him with *Miranda* warnings. This error was a mere nonconstitutional prophylactic error.[81] The re-

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75 *Id.* at 2637 (O'Connor, J., concurring in part and dissenting in part).

76 *Id.* Justice O'Connor placed great reliance on Schmerber v. California, 384 U.S. 757 (1966), for the proposition that the state may compel an individual to surrender self-incriminating nontestimonial evidence. In *Schmerber*, the Court held that "[s]ince the blood test evidence [showing that the petitioner was intoxicated], although an incriminating product of compulsion was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds." *Id.* at 765.

77 104 S. Ct. at 2638 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor's holding that the gun should be admissible and that the statements should be suppressed is more faithful to the logic of *Tucker* than the *Quarles* majority opinion. *Tucker*'s limited holding allowed only derivative evidence, the incriminating testimony of a third-party alibi witness, to be used in the prosecution's case-in-chief. *Tucker* upheld the lower court's decision that Tucker's statements were not to be used against him in court. 417 U.S. at 445.

78 104 S. Ct. at 2639 (O'Connor, J., concurring in part and dissenting in part). The precedent cited by Justice O'Connor included Maness v. Meyers, 419 U.S. 449 (1975); Kastigar v. United States, 406 U.S. 441 (1972); McCarthy v. Arndstein, 266 U.S. 34 (1924); Counselman v. Hitchcock, 142 U.S. 547 (1892). 104 S. Ct. at 2639.

79 104 S. Ct. at 2639.

80 *Id.* (citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).

81 *Id.* at 2640 n.4 (O'Connor, J., concurring in part and dissenting in part).

spondent's complaint that full warnings were not provided "invokes only an irrebutable presumption that the interrogation was coercive [and] . . . does not show that . . . the police actually or overtly coerced him to provide testimony and other evidence to be used against him at trial."[82] In conclusion, Justice O'Connor held that where a suspect fails to show "actual compulsion"[83] amounting to a violation of a fundamental constitutional right, only the suspect's self-incriminating statement will be excluded.[84]

Justice Marshall's dissenting opinion attacked both the factual and legal analyses of the majority. Disputing the majority's factual finding that the public safety was imperiled, Justice Marshall pointed to the New York Court of Appeals finding "that there was no evidence that the interrogation was prompted by the arresting officers' concern for the public's safety."[85] In response to the majority's attempt to slip away from these unambiguous findings "by proposing

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82 *Id.* at 2639 (O'Connor, J., concurring in part and dissenting in part).

83 *Id.* at 2641 n.5 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor's distinction between "actual compulsion" amounting to a constitutional violation and presumed compulsion amounting only to a violation of *Miranda*'s nonconstitutional prophylaxis restates the argument first announced in *Michigan v. Tucker* and relied on in Justice Rehnquist's majority opinion in *Quarles*. *See supra* notes 19-39 & 59-60.

84 *Id.* at 2641 (O'Connor, J., concurring in part and dissenting in part). In a footnote, Justice O'Connor distinguished *Wong Sun v. United States* from *Quarles* in exactly the same way that Justice Rehnquist dismissed *Wong Sun* in Michigan v. Tucker, 417 U.S. 433, 446 (1974). Both Justices O'Connor and Rehnquist interpreted *Wong Sun* to hold that the Court must suppress evidence derived from a constitutional violation, although it must admit evidence emanating from the mere failure to recite nonconstitutional protective *Miranda* warnings. Justice O'Connor's analysis employs a bifurcated standard for testimonial and nontestimonial evidence. Although Justice O'Connor concluded in the first part of her opinion that statements elicited in violation of *Miranda* were presumed compelled and hence, inadmissible, Justice O'Connor's adherence to *Tucker* required her to hold that the respondent must show that this statement was "blatantly coerced" and not only *"presumptively* compelled" to suppress the admission of the gun. 104 S. Ct. at 2640-41 n.4-5 (O'Connor, J., concurring in part and dissenting in part) (emphasis in original).

This bifurcated standard invites police misconduct and deliberate disregard of *Miranda* because physical evidence is arguably more important to the prosecution's case than testimonial evidence. For a discussion of the prospect of police misconduct in a similar context, see Dershowitz and Ely, *supra* note 58, at 1215 n.71.

85 104 S. Ct. at 2642 (Marshall, J., dissenting). Justice Marshall's characterization of the New York Court of Appeals' holding seems to be a fairer representation than Justice Rehnquist's interpretation. Justice Rehnquist chastized the New York Court of Appeals for basing its denial of the public safety exception on the "subjective motivation" of the arresting officer. *Id.* at 2632. Actually, the New York Court reviewed both the "subjective intentions," the personal motives prompting the arresting officer to question the suspect without warnings, and "objective" facts, the specific nature of the circumstances surrounding Quarles' arrest, and found that neither a "subjective" nor an "objective" justification existed for creating the exception: "there is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety [objec-

that danger be measured by objective facts rather than the subjective intentions of arresting officers," Justice Marshall replied that the New York Court of Appeals holding, that "there is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety,"[86] was an objective evaluation of the situation.[87] In his most scathing assault on the majority's factual review, Justice Marshall cited a recent Supreme Court decision, *Rushen v. Spain*,[88] an opinion joined by four members of the *Quarles* majority, which stated that federal courts should defer to state court findings of fact in the absence of convincing evidence suggesting a contrary result.[89] Finding that the majority ignored "almost overwhelming evidence to support the New York court's conclusion," Justice Marshall stated that "[m]ore cynical observers might well conclude" that the policy of deferring to state court findings of fact is observed "only when deference works against the interests of a criminal defendant."[90]

After criticizing the majority's "abuse" of the facts, Justice Marshall illustrated the chaos that a public safety exception may wreak on the "eighteen years of doctrinal tranquility" since *Miranda* enunciated the rules governing custodial interrogation.[91] Because the uncontested facts of *Quarles* led the New York courts and the Supreme Court to reach opposite results, Justice Marshall questioned "how law enforcement officers will respond to the majority's new rule in the confusion and haste of the real world."[92] Citing Justice O'Connor's opinion, Justice Marshall shared her fears that disagreements over the scope and application of the public safety exception likely will confuse both courts and police officers.[93]

In the third stage of his analysis, Justice Marshall attacked the majority's interpretation of *Miranda*. According to Justice Marshall,

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tive] or that the police interrogation was prompted by any such concern [subjective]." 58 N.Y.2d 664, 666, 444 N.E.2d 984, 985, 458 N.Y.S.2d 520, 521 (1981).

86 104 S. Ct. 2642 (Marshall, J., dissenting) (citing 58 N.Y.2d 664, 666, 444 N.E.2d 984, 985, 2 N.Y.S.2d 520, 521 (1981)).

87 104 S. Ct. 2642 (Marshall, J., dissenting).

88 *Id.* at 2643 (Marshall, J., dissenting) (citing Rushen v. Spain, 104 S. Ct. 453, 456 (1983)).

89 *Id.*

90 *Id.*

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

92 *Id.*

93 *Id.* at 2645 (Marshall, J., dissenting). Justice Marshall cited Justice O'Connor's prediction that the "end result . . . will be 'a finespun new doctrine of public safety exigencies incident to custodial interrogation, complete with the hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence.' " *Id.* (quoting 104 S. Ct. at 2636 (O'Connor, J., concurring in part and dissenting in part)).

Miranda sought to replace the voluntariness test with "a constitutional presumption that statements made during custodial interrogations are compelled in violation of the Fifth Amendment and are thus inadmissible in criminal prosecutions."[94] Any statements elicited during custodial interrogations are inadmissible unless the prosecution can prove that the suspect had knowingly and intelligently waived his rights.[95] Justice Marshall argued that the majority's creation of a public safety exception had ignored the constitutional presumption of coerciveness established by *Miranda*. In Marshall's view, the majority was unfaithful to the logic of *Miranda* because it failed to prove that custodial interrogations concerning public safety issues were any less coercive than other types of questioning.[96]

Justice Marshall also questioned whether a public safety exception would enhance police officers' ability to protect the public. Justice Marshall found that the "crux of this argument is that, by deliberately withholding *Miranda* warnings, the police can get information out of suspects who would refuse to respond to police questioning were they advised of their constitutional rights."[97] Thus, Justice Marshall argued that the public safety exception may encourage police interrogation tactics aimed to coerce suspects into divulging incriminating information.[98]

Finally, Justice Marshall contended that precedent indicated that the gun also is inadmissible.[99] Relying primarily on *Wong Sun v. United States*,[100] Justice Marshall claimed that the New York courts correctly "decid[ed] that Quarles' gun was the tainted fruit of a non-

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94 *Id.* at 2646 (Marshall, J., dissenting).

95 *Id.*

96 *Id.* at 2647 (Marshall, J., dissenting).

97 *Id.*

98 *Id.* at 2648 (Marshall, J., dissenting). Justice Marshall acknowledged that the fifth amendment bar against the admission of coerced self-incriminating statements would hinder the state in prosecuting defendants where suspects retract their statements and then police have insufficient evidence to convict them. But Justice Marshall noted that a defendant's recantation does not always result in the loss of incriminating evidence. In some cases, defendants may be willing to repeat their statements in exchange for favorable plea bargains or lighter sentences. *Id.* at 2648 n.9 (Marshall, J., dissenting). Furthermore, the Supreme Court holding in Harris v. New York, 401 U.S. 222 (1971), allowed the prosecution to make use of a suspect's illegally obtained incriminating statements to impeach the suspect's in-court testimony. Thus, Justice Marshall correctly concluded that the majority overstated its case by contending that police officers were faced with the difficult choice between public safety and admissibility. 104 S. Ct. at 2648 n. 9 (Marshall, J., dissenting).

99 104 S. Ct. at 2649 (Marshall, J., dissenting).

100 371 U.S. 471 (1963). *Wong Sun* is the modern day articulation of the "fruit of the poisonous tree" doctrine first articulated in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). The phrase "fruit of the poisonous tree" was first coined in Nar-

consensual interrogation."[101] Justice Marshall acknowledged, however, that the scope of the *Wong Sun* doctrine has changed.[102] The Supreme Court's decision in *Nix v. Williams*[103] had expanded *Wong Sun* to allow evidence obtained through a constitutional violation to be admissible if the prosecution showed that the police inevitably would have discovered the evidence. On the basis of *Nix*, Justice Marshall refrained from holding on the illegal fruits issue, believing that the proper course for the Court was to vacate the order of the New York Court of Appeals "to the extent that it suppressed Quarles' gun, and . . . remand the matter [to the New York Court of Appeals] for reconsideration in light of *Nix v. Williams*."[104]

V. ANALYSIS

In *New York v. Quarles*,[105] the Court created an unprecedented exception to the decision in *Miranda v. Arizona*,[106] marking the first time that the Court has held admissible primary self-incriminating statements obtained without the prescribed warnings. The majority's decision in *Quarles* is flawed by its reliance on *Michigan v. Tucker*. In *Tucker*, the Court confined its holding to *Tucker*'s unique facts and refused to admit Tucker's self-incriminating statements.[107] The *Quarles* Court, however, cannot justify stretching *Tucker*'s narrow holding to encompass the factual situation in *Quarles* and to serve as the instrumental precedent for creating a public safety exception. In fact, a comparison of *Tucker* and *Quarles* shows that the Court manipulated *Quarles* to fit within the *Tucker* precedent, and took a significant step towards overruling *Miranda*.

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done v. United States, 308 U.S. 338 (1939), to apply to evidence obtained as a result of a violation of a constitutional right.

101 104 S. Ct. at 2649 (Marshall, J., dissenting).

102 *Id.*

103 104 S. Ct. 2501 (1984). In *Nix*, the Court allowed the admission of evidence obtained as a result of a violation of a defendant's sixth amendment right to counsel to be used against the defendant where the prosecution showed that the incriminating evidence inevitably would have been discovered notwithstanding the violation. In *Quarles*, both the respondent and the petitioner briefed the inevitable discovery issue with regard to the gun. Justice Rehnquist's opinion mentioned this in a footnote, but claimed that because there was no *Miranda* violation in *Quarles*, the Court did not have to reach the inevitable discovery question. 104 S. Ct. at 2634 n.9.

104 104 S. Ct. at 2649 (Marshall, J., dissenting).

105 104 S. Ct. 2626 (1984).

106 384 U.S. 436 (1966).

107 This interpretation is borne out by Justice Rehnquist's statement of the narrowness of the *Tucker* holding: "Although we have been urged to resolve the broad question of whether evidence derived from statements taken in violation of the *Miranda* rules must be excluded regardless of when the interrogation took place, we instead place our holding on a narrower ground." 417 U.S. 433, 447 (1974).

In *Michigan v. Tucker*,[108] Justice Rehnquist concluded that *Miranda* warnings were not constitutional rights but were nonconstitutional prophylactic rules designed to protect a suspect's fifth amendment right against self-incrimination.[109] In distancing *Miranda* from its constitutional roots, Justice Rehnquist solved a troubling factual situation by holding that failure to provide a suspect with full procedural safeguards, a mere technical *Miranda* violation, did not constitute "compulsion sufficient to breach the [suspect's] right against compulsory self-incrimination."[110] Thus, Justice Rehnquist distinguished *Tucker* from *Miranda* on the basis of the different police conduct in the two cases, holding that the less coercive police interrogation in *Tucker* did not bear "any resemblance to the historical practice at which the right against compulsory self-incrimination was aimed."[111]

In casting *Quarles* within the *Tucker* mold, the majority did not compare the facts in the two cases to determine if the police conduct in each case was similarly noncompelling. Such a comparison would have exposed the Court's misreliance on *Tucker*. In *Tucker*, the Court characterized the police conduct as an "inadvertent disregard of the procedural rules later established in *Miranda*."[112] The police conduct in *Quarles*, however, cannot be so easily excused. The arresting officer was "fully familiar with the requirements established in the *Miranda* decision,"[113] yet he still neglected to inform Quarles of the *Miranda* rights specifically designed to protect the suspect from self-incrimination during questioning. Unlike *Tucker*, where the *Miranda* violation was merely technical and the Court could be fairly sure that the interrogation was noncoercive,[114] the absence of *Miranda* warnings in *Quarles* raises doubts about whether Quarles' statements were of his own free will.

Instead of keeping with the spirit of *Tucker* and *Miranda* by addressing the coercion issue directly, the *Quarles* Court failed to examine the compelling nature of the custodial interrogation, stating "we have before us no claim that respondent's statements were actually compelled by police conduct which overcame his will to re-

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108 417 U.S. 433 (1974).

109 *Id.* at 444. *See supra* notes 23-38 and accompanying text.

110 417 U.S. at 445.

111 *Id.* at 444.

112 *Id.* at 445.

113 Brief for Respondent at 65, New York v. Quarles, 104 S. Ct. 2626 (1984).

114 417 U.S. at 436. The police officers in *Tucker* read to the respondent all of his rights except his right to appointed counsel. Prior to the interrogation, the respondent informed police that he understood the crime with which he was charged, that he did not wish to speak to an attorney, and that he understood his constitutional rights. *Id.*

sist."[115] The Court drew a distinction between "actual compulsion" and "presumed compulsion," holding that "[t]oday we merely reject the only argument that respondent has raised to support the exclusion of his statement, that the statement must be *presumed* compelled because of Officer Kraft's failure to read him his *Miranda* warnings."[116] By finding that there was no claim of actual compulsion, the Court classified *Quarles* as a case like *Tucker*, involving police conduct that merely violated *Miranda*'s nonconstitutional safeguards, instead of a *Miranda*-type case where the police action rose to the level of a constitutional violation.

The Court's dismissal of the coercion issue, by stating that the respondent failed to argue that the statements were actually compelled, disregards contrary arguments in the respondent's brief. In the brief, the respondent's counsel argued on at least two occasions that Quarles actually was compelled against his will to make self-incriminating statements:

> [i]t cannot be said on the basis of the record herein that the respondent's will was not, in fact, overborne when he was by at least four officers with weapons drawn, handcuffed, frisked and interrogated as to the location of the evidence.[117]

and,

> In view of the unchallenged compulsion and the substantial likelihood that the admissions and evidence obtained thereof were not the product of respondent's free will, the suppression of such admissions should be affirmed.[118]

Although it is debatable whether the police conduct in *Quarles* was so coercive as to make the respondent speak against his will, there can be no doubt that the respondent's counsel argued that Quarles' statements were the product of "actual compulsion."

Even if the respondent's counsel failed to argue that Quarles' statements actually were compelled, a principled application of *Miranda* required that the Court presume that Quarles' statements were compelled.[119] *Miranda* was based on the premise that custodial interrogations without reading a suspect his rights are inherently coercive. Any statements elicited from such coercive questioning were presumed compelled and could not be used against a suspect at trial.[120] Thus, *Miranda* rules were designed to remove the coercion

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115 104 S. Ct. at 2631.

116 *Id.* at 2631 n.5 (emphasis in original).

117 Brief for Respondent at 64-65, New York v. Quarles, 104 S. Ct. 2626 (1984).

118 *Id.* at 67.

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

120 *Miranda*, 384 U.S. at 479.

inherent in custodial interrogation and to ensure that a suspect's statements were volunteered.[121]

Furthermore, *Michigan v. Tucker* provides no justification for the Court's dismissal of the coercion issue. In *Tucker*, the Court did not dismiss the respondent's complaint because his counsel failed to allege that the interrogation was actually coercive.[122] Rather, the Court undertook an extensive examination of the circumstances of the interrogation. The Court then based its decision to admit derivative evidence obtained as a result of a *Miranda* violation on its finding that the interrogation "involved no compulsion sufficient to breach the right against compulsory self-incrimination."[123]

Before *Quarles*, the Court's post-*Miranda* decisions had kept *Miranda*'s presumption of compulsion intact, never requiring that the defendant allege that his statements actually were compelled. Unfortunately for Quarles, the Court chose to narrow *Miranda*'s exclusionary rule at his expense. In the name of "public safety," the Court resurrected the pre-*Miranda* due process voluntariness test that required the defense to argue that the conditions of the interrogation were so coercive that the suspect's ability to decide whether to answer questions was impaired.[124] The Court thus erased *Miranda*'s presumption of coercion and placed the burden on the defense to argue that "his statement was coerced under traditional due process standards."[125] In making this radical shift from precedent, the majority effectively penalized Quarles for failing to make an argument that he could not have known was necessary.[126]

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121 *Id.* at 467. *See supra* notes 10-18 and accompanying text.

122 *See* Sonenshein, *supra* note 7, at 424.

123 *Tucker*, 417 U.S. at 445.

124 The Court provided a clear articulation of the meaning of "voluntary" in Watts v. Indiana, 338 U.S. 49 (1949). In *Watts*, the Supreme Court reversed the petitioner's murder conviction, finding that the petitioner's confession was involuntary when he was held without arraignment and without the aid of counsel. In addition, the petitioner was interrogated in solitary confinement by teams of police officers until he confessed. The Court stated,

> [a] confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary . . . . To turn the detention of the accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process.

Id. at 53-54.

125 104 S. Ct. at 2631 n.5.

126 *Id.* at 2647 n.8 (Marshall, J., dissenting).

VI. IMPLICATIONS

In *Miranda*, the Court sought to protect a suspect's right against compulsory self-incrimination by creating a per se rule that prohibited the admission of statements elicited from suspects during inherently coercive interrogations. *Miranda*'s per se test had "the virtue of informing police officers and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogations are not admissible."[127] Unfortunately, the *Quarles* Court's public safety exception replaces *Miranda*'s per se rule with a rule providing little guidance to lower courts and law enforcement agencies. Furthermore, the *Quarles* decision retreats from *Miranda* by giving arresting officers near absolute discretion[128] to

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127 *Id.* at 2644 (Marshall, J., dissenting) (quoting Fare v. Michael C., 442 U.S. 707, 718 (1979)).

128 Police officers do not have unfettered discretion because their decisions to invoke the public safety exception ultimately will be subject to a reviewing court's determination of whether the exigency justified waiving the suspect's *Miranda* rights. But the Court's statements that the exception will "free officers to follow their legitimate instincts when confronting situations presenting a danger to public safety," 104 S. Ct. at 2633, and that "we think that police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect," *id.*, when combined with the Court's action in overturning the factual determination of two lower courts that the exigencies of Quarles' arrest posed no threat to public safety, strongly suggests a judicial policy of deferring to police decisions.

While interpreting the fourth amendment, the Court refused to grant police officers "unbridled discretion" to conduct warrantless searches of the scene of a homicide. Mincey v. Arizona, 437 U.S. 385, 395 (1978). In *Mincey*, police officers investigating the scene of a murder conducted a warrantless search of the petitioner's apartment and seized over 200 objects to be used against the petitioner at his trial on murder, assault and narcotics charges. The Arizona Supreme Court held that a

> reasonable, warrantless search of the scene of a homicide—or of a serious personal injury with likelihood of death where there is reason to suspect foul play—does not violate the Fourth Amendment to the United States Constitution where the law enforcement officers were legally on the premises in the first instance.

Id. at 390 (quoting State v. Mincey, 115 Ariz. 472, 482, 566 P.2d 273, 283 (1977)). The Arizona Supreme Court applied the murder-scene exception and affirmed the petitioner's narcotics convictions.

On a writ of certiorari, the Supreme Court of the United States refused to recognize a "murder-scene exception" to add to the list of exigent circumstances that may obviate the fourth amendment's warrant requirement. The Court "decline[d] to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." *Id.* at 394. The Court refused to place the interpretation of such terms as 'reasonable . . . search,' 'serious personal injury with likelihood of death where there is reason to suspect foul play' and 'reasonable period' within the discretion of police officers when the warrant requirement bestows these judgmental determinations upon an objective and neutral magistrate. *Id.* at 395.

In *Quarles*, both the majority, 104 S. Ct. at 2630 n.3, and the dissent, *id.* at 2648

determine when to invoke the public safety exception. This combination of judicial uncertainty and increased discretion in the hands of local authorities harkens back to the pre-*Miranda* period and forbodes potentially destructive consequences to a suspect's fifth amendment rights.

Paradoxically, the *Quarles* majority cited a policy of judicial reluctance to expand *Miranda* to preserve the clarity of *Miranda*'s per se rule, but then chose to sacrifice this clarity to carve an exception to *Miranda*.[129] The majority justified its willingness to erode *Miranda*'s per se rule by claiming that the new public safety exception provides a workable rule to guide the conduct of police officers.[130] The majority felt that the standard for applying the public safety exception would be easy for police officers to ascertain "because in each case it will be circumscribed by the exigency which justifies it."[131]

Quarles, however, stands as a testament to the confusion that the public safety exception may wreak on the *Miranda* doctrine. As Justice Marshall noted, the majority's faith in the clarity of the exigency standard is undermined by the fact that the New York courts and the *Quarles* majority disagreed over whether the exigencies of Quarles' arrest justified creating a public safety exception.[132] *Quarles* aptly illustrates that the exigency standard for the public safety exception may be manipulated to reach a desired outcome simply by placing greater emphasis on certain facts. Thus, the vagueness of the exigency standard enabled the majority to hold that the threat of a loaded gun to an unsuspecting customer or employee mandated dis-

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n.10, cite Fisher v. United States, 425 U.S. 391, 400 (1975), for the proposition that "the Fifth Amendment's strictures, unlike the Fourth's, are not removed by a showing of reasonableness." Ironically, the majority's public safety exception places the ultimate discretion to determine when to invoke the public safety exception in the hands of arresting officers. By providing police with this discretion, the Court blurs this distinction between the fourth and fifth amendment contexts and allows for a determination of "reasonableness" to pervade the fifth amendment doctrine. *See* 104 S. Ct. at 2632 (*Miranda* rules should not be applied to situations "when police officers ask questions that are *reasonably* prompted by a concern for the public safety" (emphasis added)). By introducing a "reasonableness" analysis into the fifth amendment doctrine, the majority substantially weakened the more stringent application of the fifth amendment exclusionary rule.

129 104 S. Ct. at 2633.

130 *Id.*

131 *Id.*

132 *Id.* at 2632 (Marshall, J., dissenting). Justice Marshall stated,

> [i]f after plenary review two appellate courts so fundamentally differ over the threat to public safety presented by the simple and uncontested facts of this case, one must seriously question how law enforcement officers will respond to the majority's new rule in the confusion and haste of the real world.

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

posing with the suspect's *Miranda* rights.[133] In contrast, the dissent used the exigency standard to make an equally compelling argument against creating an exception based on the likelihood that the officers would have found the gun with a cursory search[134] and the fact that the arresting officer testified that the situation was "under control."[135]

Quarles replaces *Miranda*'s presumption of compulsion with the due process voluntariness test by requiring defense counsel to argue that the circumstances of the interrogation compelled the suspect to make incriminating statements. The resurrection of the voluntariness test brings back all of the vagaries of a case-by-case totality of the circumstances determination of whether the nature of the interrogation was so "blatantly coerc[ive]"[136] as to deprive suspects of their right to choose not to speak. Once again, trial courts will have to face the difficult assessment of the credibility of the testimony of suspects and police officers, and appellate courts will have to choose sides in a "swearing contest" between the two parties.[137] The pre-*Miranda* history of this case-by-case approach shows that police officers are more than likely to emerge victorious as "inchoate notions of propriety concerning local police conduct guide [court] decisions."[138]

Quarles endangers the suspect's right against self-incrimination by placing the discretion to invoke the public safety exception in the hands of arresting officers. Faced with the choice of reading *Miranda* rights and risking the loss of incriminating evidence or waiving the rights in the name of protecting the public, law enforcement officials are likely to pursue the latter course to test the bounds of the exception. Furthermore, the majority's vague standard that application of the public safety exception "will be circumscribed by the exigency which justifies it"[139] may permit widespread abuse by arresting officers. Police officers may claim that the mere fact that a potentially dangerous suspect was on the loose sufficiently threatened the public safety to justify waiving the suspect's *Miranda*

133 *Id.* at 2632.

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

135 *Id.* at 2642 (Marshall, J., dissenting) (citing Joint Appendix at 35a, New York v. Quarles, 104 S. Ct. 2626 (1984)).

136 *Id.* at 2641 n.5 (O'Connor, J., concurring in part and dissenting in part).

137 For a discussion of the problems faced by courts in applying the voluntariness test, see Sonenshein, *supra* note 7, at 413-15.

138 Irvine v. California, 347 U.S. 128, 138-39 (1954) (Clark, J., concurring). Ironically, these words were written by Justice Clark, a vehement *Miranda* dissenter, as he described the pitfalls of a case-by-case approach to due process in a fourth amendment context.

139 104 S. Ct. at 2633.

warnings. If upheld, this use of the public safety exception would effectively overrule *Miranda* and enable police officers to freely interrogate suspects under the guise of public safety. Even if *Miranda* is not overruled, *Quarles'* vague standard of application does nothing to prevent "well intentioned but mistakenly over-zealous [sic] executive officers"[140] from trampling upon the constitutional rights of suspects.

Finally, failure of the Court in *Quarles* to show that custodial interrogation about public safety matters is any less coercive than other lines of questioning deals perhaps the most devastating blow to a suspect's fifth amendment protection from compulsory self-incrimination. The *Miranda* Court specifically created the *Miranda* rules to protect suspects from the compelling pressures of custodial interrogation. Yet, the *Quarles* Court's public safety exception does nothing to ensure the uncoerced nature of a suspect's statements. In fact, the interrogation might be more coercive when police officers sense that the public is endangered. Thus, *Quarles* increases the likelihood that a suspect's conviction will be based on coerced self-incriminating statements.

VII. CONCLUSION

In *New York v. Quarles*,[141] the United States Supreme Court created a public safety exception to the once mandatory reading of *Miranda* rights, permitting police officers to freely interrogate suspects when they instinctively feel that the public safety is imperiled. The Court found that the decision freed police from the split-second determination of whether to "ask the necessary questions without the *Miranda* warnings" and risk losing any evidence discovered, or to issue the warnings and risk impairing their "ability to obtain that evidence and neutralize the volatile situation confronting them."[142] The majority acknowledged that the exception lessened the clarity of the *Miranda* doctrine, but nonetheless felt that their decision would enable police officers to better protect the public.[143]

The majority's statement that the decision may obscure the state of the *Miranda* law fails to consider the grave consequences of such confusion for the rights of accused persons. By creating an exception that requires a fact-specific, case-by-case review, the Court has eroded *Miranda*'s bright-line test and provided little gui-

[140] Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971) (quoting Gouled v. United States, 255 U.S. 298, 304 (1921)).
[141] 104 S. Ct. 2626 (1984).
[142] *Id.* at 2633.
[143] *Id.*

dance to law enforcement officials and lower courts. The effect of this public safety exception on the future of *Miranda* is now to be fought in the streets and in the courts as police officers and judges battle over the scope and application of the exception. Certainly, the *Miranda* majority did not intend that the precious constitutional right against self-incrimination would be subjected to such a pernicious game of tug of war.

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